10-1919

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THERESA M. ELLIS, ET AL.,

Plaintiff-Appellee,

v.

ETHICON INC., ET AL.,

Defendant-Appellant.

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

JOINT APPENDIX, VOLUME ONE (JA0001-JA0130)

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, **Plaintiffs,** **v.** **ETHICON, INC., JOHNSON & JOHNSON, and JOHN DOE(S), jointly, severally and/or in the alternative,** **Defendants.**	**Civil Action No. 05-726(FLW)** **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that defendant, Ethicon, Inc. ("Defendant"), hereby appeals to the United States Court of Appeals for the Third Circuit from the 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. Defendant appeals from all provisions of these Orders and Judgments adverse to it, including without limitation the entry of judgment in favor of Plaintiff against Defendant, Ethicon, Inc., and award of back pay and reinstatement to Plaintiff; the denial of Defendant's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59; the award of attorneys' fees and costs and expenses to Plaintiff; and rulings or orders at trial and during pre-trial proceedings that were adverse to Defendant.

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Dated: March 29, 2010

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, **Plaintiffs,** **v.** **ETHICON, INC., JOHNSON & JOHNSON, and JOHN DOE(S), jointly, severally and/or in the alternative,** **Defendants.**	**Civil Action No. 05-726(FLW)** **CERTIFICATE OF SERVICE**

I certify that the within Notice of Appeal is being served today on:

By Federal Express
Theresa Ellis
51 North First Street,
Bangor, PA 18103

I certify under penalty of perjury that the foregoing is true and correct.

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Attorneys for Defendant, Ethicon, Inc

____
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Dated: March 29, 2010

*NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S) Defendants.	Civil Action No. 05-726(FLW) **OPINION**

WOLFSON, District Judge:

Plaintiffs, Theresa M. Ellis ("Ellis" or "Plaintiff") and Scott A. Zukowski, wife and husband respectively, filed suit against Defendants, Ethicon, Inc. ("Ethicon" or "Defendant"), Johnson & Johnson ("J&J"), asserting claims arising under the Americans with Disabilities Act ("ADA") and other state common law claims.[1] Specifically, Ellis alleges race and disability discrimination claims for failure to accommodate; retaliation; and a breach of contract claim based upon the polices and procedures and customary practices of Ethicon. Zukowski also pled a lack-of-consortium claim. After the commencement of the litigation, Zukowski withdrew his claim and Ellis' claim of race discrimination was also voluntarily dismissed (Counts V, VI and IX of the Complaint). In the instant matter, Defendants move for summary judgment on all counts, and Ellis moves for partial summary

[1] Plaintiff has not named any other parties other than Ethicon and J&J as defendants. As a result, the John Does are dismissed.

judgment on the issue of whether she is "disabled" within the definition of the ADA and whether Ethicon engaged in the interactive process. For the reasons set forth herein, summary judgment is denied as to all parties with respect to Plaintiff's failure to accommodate claim under the ADA; specifically, the issue of whether Ellis is "actually disabled" pursuant to the ADA. However, the Court finds that Ethicon failed to engage in the interactive process. In addition, summary judgment is granted to J&J because Plaintiff failed to exhaust her administrative remedies with respect to her claims against J&J. Summary judgment is also granted to Ethicon on Plaintiff's breach of contract claim, breach of implied covenant of good faith and fair dealing claim and retaliation claim.

BACKGROUND

Plaintiff Ellis comes from a stellar academic background, having received her B.S. in industrial engineering from Stanford University. She began employment with defendant Ethicon, a J&J company, in September 1997 as a Senior Quality Assurance Engineer. Defendants' Statement of Uncontested Facts ("Defendants' Statements") at ¶ 1. In January 1999, Plaintiff was involved in an automobile accident on her way to work. Id. at ¶ 7. Immediately after the accident, Ellis complained of dizziness and consistent pain on the right side of her body. Id. at ¶ 8. She was diagnosed with cervical strain and placed on disability by her doctor as of January 7, 1999. Id.; see Dr. Fracis DeLuca's Letter dated April 13, 1999.

On March 29, 1999, Kemper Insurance, the third Party Administrator that managed Ethicon's short term disability ("STD") plan, requested an independent evaluation because of Ellis' continued absence from work. Defendants' Statements at ¶ 9; Plaintiff's Statement of Uncontested Facts ("Plaintiffs' Statements") at ¶ 9. Thereafter, on April 13, 1999, Dr.

Francis DeLuca, an independent physician assigned by Kemper Insurance, evaluated Ellis and reported that there were no objective medical reasons preventing Ellis from returning to work. Defendants' Statement at ¶ 9; see Dr. DeLuca's Letter dated April 13, 1999 at p. 3. Because of Dr. DeLuca's medical findings, Kemper Insurance recommended that Ellis return to work. Defendants' Statement at ¶ 10.

After receiving notice from Kemper, Ellis contacted her orthopedist, Dr. Evan Reese, who, with the agreement of Dr. Janet Cole, J&J's medical doctor, recommended a gradual return to work plan beginning in June 1999, with three hours per day and no business travel. Defendants' Statement at ¶ 11; see J&J's Health & Wellness Progress Notes ("Progress Notes") at 4, Encounter 21. Ellis returned to work on June 2, 1999, with a limited schedule of three hours per day, which would increase to four hours per day on June 16, 1999. Defendants' Statement at ¶ 13; see J&J's Medical Disposition dated May 28, 1999. However, on June 17, 1999, because of complaints of pain, Ellis was out of work again. The following day, Ellis met with Dr. Cole and indicated she was not doing well because of pain from excessive walking. Progress Notes at p.5, Encounter 25. Ellis also indicated that she had a hard time concentrating and her right eye's vision was impaired due to pain. Id. Due to these complaints, Ellis informed Dr. Cole that her orthopedist did not want her to increase her work schedule to four hours per day as previously planned. Id.; Plaintiffs' Statements at ¶ 14. While Dr. Cole agreed to keep her work schedule at three hours per day for the next week or two, on June 25, 1999, Ellis' work schedule was increased to four hours per day, but the travel restrictions were maintained. Defendants' Statements at ¶¶ 15-16.

On July 7, 1999, Ellis' six month STD plan period ended, and because Ellis had elected to subscribe to Long Term Disability with income replacement, she was not eligible

to receive any income replacement if she did not return to work full time. Ellis would only be paid for any actual time worked. Defendants' Statements at ¶ 17; see Ellis' Dep. at p.119 (Ellis indicated during her deposition that she didn't understand the terms of the long-term disability plan; she never paid attention to the election on the enrollment form). On or about July 1, 1999, Ellis presented a revision to an earlier return to work memo in which she devised a plan to phase back into a full-time schedule with no restrictions. Plaintiffs' Statements at ¶ 18; see Ellis' email to Liz Timmons dated July 1, 1999. According to Ellis' plan, she would return to work full time as of July 7, 1999, work at home three days a week, and gradually return to work with no restrictions. Id. The plan was apparently agreed to by Ms. Timmons, Ethicon's occupational health nurse; however, Ms. Timmons indicated that Dr. Reese would have to provide documentation for the revisions. Id.

On or about July 6, 1999, Ellis presented Ethicon with a note from Dr. Reese approving her plan. Plaintiffs' Statements at ¶ 20. At that time, she was informed that Dr. Cole did not agree with the revisions proposed by Ellis and that she felt Ellis should gradually return to work for six hours a day, but no more. Progress Notes at p. 5, Encounter 26. Dr. Cole spoke to Dr. Reese and met in person with Ellis on July, 7 1999, when she returned to work from her leave. Progress Notes at p. 6, Encounter 27; see Plaintiffs' Statements at ¶¶ 20-21. Dr. Cole advised Ellis that, despite the approval from Dr. Reese, she would only allow Ellis to return to work for six hours a day with travel restrictions. Defendants' Statements at ¶¶ 21-22; Progress Notes at p. 6, Encounter 27. Ellis' manager was made aware of the recommendations to Ellis' work schedule, and he agreed to accommodate them. Id. Nevertheless, Ellis felt badgered and afraid because she didn't understand why the changes were made just before she was scheduled to return to work.

Ellis' Dep. at p. 17. Ultimately, on August 2, 1999, Dr. Reese released Ellis for a return to full time duty with travel restrictions; those restrictions were lifted as of September 1, 1999. Progress Notes at p. 7, Encounters 30-31.

Ellis worked without any restrictions or accommodations and without event from September 1999 until September 2000, when she was promoted to Staff Quality Engineer. Compl. at ¶ 14. In February 2001, Lesley Traver ("Traver") became the Director of Ellis' department. Traver had not been in Ellis' department or in her management chain of command prior to this time and she had no involvement with Ellis during her 1999 short-term disability period. Ms. Traver's Dep. at p. 8, 11-12, 86. Between 200 and 2001, the main and primary focus of the "Corporate Quality Engineering" group was changed to "New Product Development Quality Engineering." Prior to this change, the role of a quality engineer was to provide routine support to corporate and manufacturing initiatives. The change in 2001 created an environment where quality engineers, like Ellis, were dedicated to support specific new products in development. Defendants' Statements at ¶¶ 28-29; Plaintiffs' Statements at ¶¶ 28-29.

In April 2001, on the recommendation of her family doctor, Ellis was seen by a neurologist, Dr. John Mahon, because she was still complaining of dizziness, pain and inability to concentrate. See Dr. Mahon's Letter dated April 6, 2001. Dr. Mahon diagnosed Ellis with post concussion syndrome and a mild traumatic brain injury stemming from the 1999 car accident. Id. at p. 2. The doctor also referred Ellis to a neuropsychiatrist, Dr. Barbara Watson, for an evaluation. Id. Due to the severe post concussion syndrom, Dr. Watson tested Ellis to evaluate her cognitive status, and reported the following:

> What is clear . . . from her self-report and performance on this

> evaluation is that cognitive problems compatible with mild traumatic brain injury persist. Mild deficits in high-level problem solving requiring sustained attention, mental flexibility and integrative thinking were noted. On a function level, this deficit corresponds to her complaints of inefficient and slow cognitive processing. High-level attention was stressful and required significant effort, showing impairment on one sensitive test of divided attention to auditory material. Deficits in high level attention often correspond to every day problems with "multi-tasking," Relative areas of weakness were noted in a number of areas. In understanding these relative weaknesses it is important to appreciate that average scores do not necessarily accurately represent Ms. [Ellis'] pre-injury cognitive potential. For her, average is not normal and some of her average scores are judged to represent decline in pre-injury ability . . . Ability to learn new information presented just once was low average, and is also judged to represent a decline in functioning. . . . Declines in word retrieval and reading comprehension, which are low average and average respectively, are also noted and compatible with self-reported post accident changes.
>
> . . . While Ms. [Ellis'] pain, cognitive fatigue and depression were all controlled and managed in the testing situation, they are likely major contributors to sub-optimal functioning in daily life. Environmental demands also contribute to sub-optimal, inconsistent cognitive functioning. Ms. [Ellis'] work environment, in particular, is not conducive to continued recovery. She wears many "hats" at work, labors in a cubicle with minimal privacy, and must work longer to accomplish what tasks previously performed with less effort. I do not believe it is in her interests, physically, cognitively or emotionally, to continue at the pace she has been working.

See Dr. Watson's Letter to Dr. Mahon dated May 1, 2001 at p. 5. Ultimately, Dr. Watson recommended that Dr. Mahon suggest other work options for Ellis, e.g., "short-term disability, reduction of hours and responsibilities, and/or an accommodated work environment." Id. at p. 6. Based on Dr. Watson's report and Dr. Mahon's recommendation, Ellis began a second period of short-term disability on April 23, 2001. Defendants' Statements at ¶ 36; Plaintiffs' Statements at ¶ 36. She also began cognitive rehabilitation therapy at Good Shepard Hospital in Pennsylvania. See Dr. Mahon's Letter dated April 23, 2001.

On August 30, 2001, Kemper Insurance sent Ellis and her husband an email to inform them that Ellis' six-month STD period would expire on October 21, 2001. Because she had not elected for income-replacement benefits for Long Term Disability, Ellis' income would cease at that time.[2] See Kemper's Letter dated July 23, 2001. Subsequently, Ellis' husband sent an email massage to Kemper stating that Ellis was feeling better, was ready to return to work and would visit Dr. Mahon in mid-September to discuss return to work restrictions. See Zukowski's Email dated August 31, 2001. However, on October 1, 2001, a cognitive therapist from Good Shepard Hospital strongly recommended, inter alia, that Ellis should work from home for a three month period, after which she should slowly transition into the work setting. See Debra Dudeck-Sparta Letter dated October 1, 2001.

On October 2, 2001, Ellis called the nurse case manager to ascertain what type of paperwork was needed to extend STD. The case manager explained that STD could not be extended and that, without a return to work plan, she would be placed on LTD on October 22, 2001. See Kemper's Heath Care Comments for case 733561; Defendants' Statements at ¶ 42. In response, Ellis informed the case manager that she would be meeting with Dr. Mahon who would most likely be recommending a long-term rehabilitation program when Ellis returned to work. Plaintiffs' Statements at ¶ 43. After speaking with Ellis, the case manager advised Ellis' supervisor, Traver, that Ellis would most likely transition into some type of LTD rehabilitation program and asked that she contact Kemper to discuss the ability

[2]Ellis disputes the fact that she choose not to elect for the income-replacement benefits for Long Term Disability. Rather, she testified that to elect for the benefits, she had to certify that she was healthy at the time of the election, and because she felt that she was not healthy, she was under the impression that she was barred from those benefits. Ellis' Dep. at p. 119-120.

to accommodate Ellis. Defendants' Statements at ¶ 44; Plaintiffs' Statements at ¶ 44. Kemper also advised Ethicon's Occupational Health Nurse, Joan Greenhalgh, that Ellis might be returning to work through an LTD rehabilitation program and asked Ms. Greenhalgh to speak to Human Resources ("HR") about eligibility. Id. at ¶ 45. Kemper contacted Dr. Mahon and Dr. Watson for updated medical information and requested that they be involved in any return to work plan, reminding them that any arrangements for LTD rehabilitation must be made prior to October 22, 2001. Id. at ¶ 46. The doctors were also given a Release to Return to Work and a Physician's Report form to be completed. Id.

On October 3, 2001, Ms. Greenhalgh began the process for Ellis to return to work. She sent an email to Ellis advising that she was aware that Ellis wanted to return to work and stressing that any return to work plan needed to be received as quickly as possible so that a return to work meeting could be scheduled with Dr. Cole. See Ms. Greenhalgh's Email dated October 3, 2001. At that time, Ellis believed that this return to work appointment with Dr. Cole would follow the same procedure as in 1999. She expected that Dr. Cole would speak to her doctors and adjust any return to work plan submitted. See Ellis' Dep. at pp. 112-113.

On October 5, 2001, Dr. Watson left a message with Kemper's nurse case manager confirming that she understood the urgency for written medicals and a return to work plan. Dr. Watson also informed the case manager that if Ellis did return to work, she would need to work from home three days per week and two days at the site. She said that Ellis did not have the stamina to withstand the pressures and distractions at the worksite and that allowance for a job coach would be critical. Defendants' Statements at ¶ 50; see Kemper Health Care Comments for case 733561 dated October 5, 2001. On October 8, 2001, the

case manager advised Traver about the conversation with Dr. Watson. Traver then voiced concerns about Ellis' ability to do the job as she was going to be out of the office three days a week. She stated that there was no meaningful work for Ellis that would fit into the restrictions. Defendants' Statements at ¶ 51.

Pursuant to Kemper's request, on October 9, 2001, Dr. Watson faxed her return to work recommendations to Kemper along with the advice that Dr. Mahon was the treating physician and he would release Ellis to return to work. See Dr. Watson's Faxed Letter dated October 9, 2001. Dr. Watson specifically recommended certain accommodations and provided a detailed gradual return to work plan. See Id. In addition, Kemper received a letter and a Return to Work release from Dr. Mahon which also enclosed the evaluation from Dr. Watson. See Dr. Mahon's Letter dated October 11, 2001. In the letter, Dr. Mahon stated that the limitations listed in Dr. Watson's recommendations would need to be maintained permanently and indefinitely.[3] Id.

After being advised of the restrictions and their permanent nature, Traver informed Kemper that she would not accommodate a permanent requirement of working at home three days per week because Ellis would not be able to fulfill the essential functions of a Staff Quality Engineer.[4] Ms. Traver's Dep. at pp. 27-35. On October 15, 2001, Kemper

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[3]The parties dispute Dr. Mahon's restrictions in his letter dated October 11, 2001. Ethicon argues that Dr. Mahon's letter meant that the restrictions were permanent and that it would have to be in place indefinitely. Defendants' Statements at ¶ 56. On the other hand, Plaintiffs argue that Dr. Mahon meant that Ellis' brain damage was permanent and that the restrictions, which according to Dr. Mahon's letter would be indefinite, were not permanent. Plaintiffs' Statements at ¶ 56.

[4]Traver, however, did candidly suggest that had there been an opportunity for continuous revisiting of the situation and had there been an opportunity to have an ongoing conversation rather than just the restrictions from Dr. Mahon, then she would

advised Ellis that Ethicon could not accommodate the permanent restrictions and that she would be rolled over to LTD on October 22, 2001. See Kemper's Email dated October 15, 2001.

On October 18, 2001, Ellis' attorney contacted Ethicon's in-house counsel, Lisbeth Warren, and faxed a letter to Ms. Warren the next day informing her that Ethicon had rejected Ellis' proposed accommodations without discussion and without any attempt to work with Ellis in facilitating a return to her position. See Attorney Letter dated October 19, 2001 at p. 2. During the course of the discussion between Ms. Warren and Ellis' Attorney, Ms. Warren mentioned the possibility of part-time work, for which Ellis could maintain her medical benefits and her salary would remain the same, prorated for the reduced hours. Warren Decl. at ¶ 5; Plaintiffs' Statements at ¶ 64. However, Ellis was not interested in the part-time position, and no other alternative was suggested. Id.

Meanwhile, Ellis applied for a position as a statistician at another company, Aventis-Pasteur ("Aventis"), in August 2001, and on October 23, 2001, she was offered the job. Ellis turned the position down because she was concerned about how her medical condition would affect her performance at the new job, and the implications of taking the new position while filing a complaint against Ethicon. On December, 7, 2001, Ellis received a second job offer from Aventis and, on December 17, 2001, she began full time employment at Aventis. Defendants' Statements at ¶ 65; Plaintiffs' Statements at ¶ 65.

In April 2002, Ellis filed a discrimination charge against Ethicon with the New Jersey Division on Civil Rights ("DCR") alleging that Ethicon failed to accommodate her

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have been able to consider some accommodations. Ms. Traver's Dep. at p. 31.

disability. That claim was dismissed with a finding of "no cause" in 2004. In December 2004, the Equal Employment Opportunity Commission adopted the findings of the DCR and issued a "Right to Sue" letter to Ellis. Thereafter, in February 2005, Ellis filed the instant suit.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. (56)(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. Id. The burden of establishing that no "genuine issue" exists is on the party moving for summary judgment. Celotex, 477 U.S. at 330. Once the moving party satisfies this initial burden, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). To do so, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. In other words, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also Ridgewood Bd. of Ed. v. Stokley, 172 F.3d 238, 252 (3d Cir. 1999). A genuine issue of material fact is one that will permit a reasonable jury to return a verdict for the non-moving party. Anderson, 477 U.S. at 248.

In evaluating the evidence, a court must "view the inferences to be drawn from the underlying facts in the light most favorable to the [non-moving] party." Curley v. Klem, 298 F.3d 271, 276-77 (3d Cir. 2002)(citations omitted).

I. Johnson and Johnson as a Defendant

J&J contends that because Ellis failed to name it on her Charge of Discrimination filed with the EEOC or the New Jersey Division on Civil Rights, she has failed to exhaust her administrative remedies with respect to the claims against J&J in this case. Indeed, a plaintiff alleging ADA violations must first exhaust administrative remedies by filing a charge with the EEOC or the DCR. See 42 U.S.C. 12203(c)(citing to 42 U.S.C. 12117(a) and referring to 42 U.S.C. 2000(e) for the proper remedies and procedures for retaliation claims). The relevant test in determining whether plaintiff has exhausted her administrative remedies "is whether the acts alleged in the subsequent . . . suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)). Even under the Third Circuit's liberal construction of that rule, because J&J was never listed on the EEOC charge or the DCR charge, Ellis has failed to put J&J on notice of the claims in this case. Although Ellis argues that the claims in this matter implicate certain J&J employees (i.e., Dr. Cole and Ms. Warren), the important inquiry here is notice. While these employees work for J&J, their involvement was in the context of Ellis' employment at Ethicon. Thus, it would strain the Court to hold that J&J had notice of these claims when in fact Ellis only named Ethicon in her charges. Accordingly, summary judgment is granted to J&J.

II. Failure to Accommodate under the ADA

Section 12112(a) of Title 42, United States Code, provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined by the ADA as a person "with a disability who, 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). Accordingly, to establish a prima facie case of discrimination under the ADA, a plaintiff must show "(1) [she] is a disabled person within the meaning of the ADA; (2) [she] is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) [she] has suffered an otherwise adverse employment decision as a result of discrimination." Gaul v. Lucent Technologies, 134 F.3d 576, 580 (3d Cir. 1998)(citations omitted); Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751, 761 (3d Cir. 2004). The ADA specifically provides that an employer "discriminates" against a qualified individual with a disability when the employer does "'not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer].'" Taylor v. Phoenixville School Dist., 184 F.3d 296, 306 (3d Cir. 1999)(quoting 42 U.S.C. § 12112(b)(5)(A))(alterations in original).

The inquiry this Court must make pursuant to the first prong of the three-factor test is whether Plaintiff is disabled under the ADA. A "disability" is defined by the ADA as : "(A)

a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Accordingly, under the ADA framework, a plaintiff is permitted to assert an "actual disability" under 42 U.S.C. § 12102(2)(A) and a "regarded as" disability under 42 U.S.C. § 12102(2)(c). See Williams, 380 F.3d at 762.[5] Here, Ellis and Ethicon separately move for summary judgment on the issues of whether Ellis is actually disabled and whether Ethicon regarded her as disabled.

A. Actual Disability

With respect to determining whether an individual is actually disabled within the meaning of the ADA, the Supreme Court has established a three-step process for evaluating a claim of actual disability. Bragdon v. Abbott, 524 U.S. 624, 631 (1998). A court must first determine whether the plaintiff suffered from a physical or mental impairment. Second, the court should determine the life activity allegedly limited by the impairment and whether it qualifies as a "major life activity" under the ADA. Then, the court must determine whether the claimed impairment substantially limited the major life activity. Id. Under this analysis, "a plaintiff who showed that [s]he had an impairment and that the impairment affected a major life activity would nonetheless be ineligible if the limitation of the major life activity was not substantial." Colwell v. Suffolk County Police Dept., 158 F.3d 635, 641 (2d Cir. 1998).

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[5]Although Ellis asserts a claim for record of impairment under the ADA in her Complaint (Count III), she did not oppose Defendant's request for summary judgment on this count. As such, the Court will grant Defendant's request for summary judgment on this claim. See Damiano v. Sony Music Entertainment, Inc., 975 F. Supp. 623, 637 (D.N.J. 1996)(claims deemed abandoned when the plaintiff raised neither evidence nor argument in opposition to motion for summary judgment).

The EEOC regulations define "major life activity" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i); Tice v. Centre Area Transportation Authority, 247 F.3d 506, 512 (3d. Cir. 2001). Under the EEOC's interpretive guidelines, determining whether an individual is substantially limited in one or more of the major life activities requires a two-step analysis. Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783 (3d Cir. 1998). First, the court determines whether the individual is substantially limited in any major life activity other than working, such as walking, seeing, or hearing. 29 C.F.R. Pt. 1630, App. § 1630.2(j). In making this determination, the court compares the effect of the impairment on that individual as compared with the "average person in the general population." 29 C.F.R. § 1630.2(j)(1). EEOC Regulations[6] provide that an individual is "substantially limited" in performing a major life activity if the individual is: (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) 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); Williams, 380 F.3d at 762. In addition, the regulations specify that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and the

[6]Because the ADA does not define many of the pertinent terms, the Third Circuit has held that the Regulations issued by the EEOC are instructive in this context. Deane v. Pocono Medical Center, 142 F.3d 138, 143 n.4 (3d Cir. 1998).

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); Weisberg v. Riverside Township Board of Education, 180 Fed. Appx. 357, 361 (3d Cir. 2006). The analysis should be conducted in light of the facts that existed at the time of the alleged discrimination and not in light of conditions that developed years later. See Taylor, 184 F.3d at 308 (plaintiff must show she was substantially limited during the time span when she says she was denied reasonable accommodation). Moreover, the question of whether an individual is substantially limited in a major life activity is a question of fact. Williams, 380 F.3d at 763.

If the court finds that the individual is substantially limited in any of the major life activities other than working, the inquiry ends there. Mondzelewski, 162 F.3d at 784. On the other hand, "if the individual is not so limited, the court's next step is to determine whether the individual is substantially limited in the major life activity of working." Id. In this case, Ellis asserts that her brain injury impaired three major life activities: cognitive function (i.e., learning, concentrating, thinking and remembering), caring for herself, and working.

1. Major Life Activity of Cognitive Function

Learning, concentrating and remembering fall into the general category of cognitive function. The Third Circuit has held such activities to be major life activities. See Weisberg, 180 Fed. Appx. at 362; see also Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565 (3d Cir. 2002). Ellis argues that she is substantially limited in her cognitive function, and in support thereof, she provides medical evidence as well as her and her husband's subjective testimony. In particular, Ellis asserts that she has been plagued by multiple symptoms - such as fatigue, dizziness, problems focusing and concentrating, problems tracking meeting

topics, no comprehension of time, and making multiple mistakes at work - ever since her accident in 1999. These symptoms, however, were not medically diagnosed until April 2001.

To prove the severity and the nature of her impairment, Ellis proffers the medical diagnosis from her neurologist, Dr. Mahon. Dr. Mahon examined Ellis in April 2001. He noted that she had suffered from severe mood swings since the accident, along with other symptoms including headaches, blurred vision and memory problems. Dr. Mahon diagnosed Ellis with "concussion with post concussion - severe." See Dr. Mahon's letter dated April 6, 2001 at p. 2. Dr. Mahon later testified during his deposition that he "was skeptical that [Ellis] could return to [the] work place." Dr. Mahon's Dep. at p. 10. It was his opinion that Ellis' brain damage was permanent. Id. at p. 32.

Ellis also sought the care of Dr. Watson, her neuropsychiatric. In Dr. Watson's report, she listed some of Ellis' symptoms: "she can no longer 'multitask'", she has "underlying memory and organization problems", and she has "trouble reading due to . . . accident-related convergence insufficiency that causes blurry vision." See Dr. Watson's Report dated May 1, 2001 at p. 2. The report further indicated that Ellis' "cognitive changes involve problems with concentration, speed and clarity of thinking, word retrieval and usage, memory, organizing and planning her time, spelling and reading." Id. at p. 1. Tests revealed that Ellis could not learn new material except with repetition. Id. at p. 4. Dr. Watson noted that " high-level attention was stressful and required significant effort." Id.[7]

[7]While Defendant argues that because Dr. Watson was never offered as an expert on this topic, Ellis should be precluded from relying on Dr. Watson's report that she is limited in a major live activity, the Court will, nevertheless, consider Dr. Watson's report for the purpose of this motion since her diagnosis was relied upon by Dr. Mahon when

Ellis also worked with Ms. Debra Dudeck-Sparta, a cognitive re-trainer at Good Shepard Rehabilitation Hospital. Ms. Dudeck-Sparta indicated on October 1, 2001, that Ellis had residual cognitive impairments which included: "decreased thought organization, decreased ability to sustain concentration over time, inability to multitask, mental fatigue, decreased ability to make decisions under pressure or time limits, decreased information processing, decreased executive functions, inability to set limits, challenged to self-monitor and self-evaluate, and decreased short-term memory." See Ms. Dudeck-Sparta's Report dated October 1, 2001.

Defendant contends that the medical report submitted by Dr. Watson demonstrates that Ellis is not substantially limited by her impairment of post-concussion disorder. To illustrate this point, Defendant points to the following conclusions by Dr. Watson in her report:

> Intellectual functioning: "verbal abilities are strong falling in the above-average range (Verbal IQ = 87th percentile); skills dependent on speeded visual-perception analysis are significantly lower; falling in the average range (Performance IQ = 63rd percentile)." With the expcetion of a very superior score on the test of expressive vocabulary (98th Percentile), all scores [on verbal IQ] were above average (75th- 84th percentiles)."
>
> "In contrast, with one exception, scores earned on tests of visual perceptual organization and visual processing speed were average (37th to 63rd percentiles) . . . When time is factored out, her score improves from average (63d percentile) to above average (84th percentile)."
>
> Speed of Processing: "was normal for orally presented numerical information" and "was generally average" for visually presented material.
>
> Auditory working memory: "For the most part, Ms. Ellis performed tasks requiring this skill - digit span, mental arithmetic, letter-number sequencing - in a normal (average) way . . . [P]erformance on tests of

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he made his final recommendations and diagnosis to Ethicon on October 9, 2001.

> memory for verbal material reveal average encoding abilities (Auditory Immediate Index = 102; 55th percentile) with above average retrieval and recognition (Auditory Delayed Index = 117; 97th percentile; Auditory Recognition Index = 110; 75th percentile) . . . Repetition is necessary for learning. With multiple repetitions, Ellis learns new auditory material in a normal albeit average way as demonstrated by her scores on a separate list learning test."
>
> Visual Memory: "This level of performance is compatible with [Ellis'] reports of a strong 'photographic memory [prior to her head injury]." (Visual Immediate Index = 138; 99th percentile; Visual Delayed Index = 140; 99th percentile). "Conformation (picture) naming was low average (10th percentile) and . . . retrieval from long-term memory is at the low end of average (25th percentile). Silent timed reading comprehension and knowledge of vocabulary was within normal limits."
>
> Complex novel problem solving: "requiring the ability to reason inductively with nonverbal spatial and proportional concepts, shift problem-solving strategy in response to direct feedback, and maintain focused attention over time, was mildly impaired."

See Dr. Watson's Report Dated April 21, 2001 at pp. 3-4. Based on the foregoing test results, Defendant contends that while Ellis' pre-concussion cognitive abilities were superior, as indicated by Dr. Watson, her post-concussion abilities merely went from superior to average, which fall short of the substantially limiting test of the ADA. Additionally, Defendant contends that Plaintiff continued to work as a quality engineer and that within two months of her employment ending at Ethicon, Ellis was hired by Aventis as the project manager for development of a flu vaccine. As such, Ellis was capable of functioning, without substantial limitations, in her work environment.

To further support its contention, Defendant primarily cites to the Weisberg opinion from the Third Circuit. In Weisberg, the plaintiff, a former superintendent of schools, was struck in the head by a large wooden speaker that fell from a wall behind his desk. He was diagnosed with post-concussion syndrome and complained of stress; anxiety and

depression adversely affecting his attention, concentration and speed; profound incapacitating fatigue that markedly interferes with functioning; slow to perform tasks, even those that are performed well; headaches; poor memory; and irritability. Weisberg, 180 Fed. Appx. at 359-60. The court there conducted an analysis of the plaintiff's cognitive tests, which showed that even though his cognitive abilities fell between average and below average, those results did not place the plaintiff substantially below the norm. Id. at 362. In addition, the court found that because the plaintiff failed to adduce evidence to show the extent of limitation in terms of his own experience (the plaintiff only testified that sometimes he forgets certain things or events), he failed to show that he was "severely restricted" by his impairments. Id. at 363. Moreover, the court also found that the plaintiff failed to address the duration and impact of his impairment. Coupled with contradictory facts that the plaintiff was not severely restricted (e.g.., attends nearly all of the Giant's home game, eats out roughly three nights a week, follows his investments in the stock market, plays certain games in Atlantic City casinos, and most importantly, was able to work forty hours a week), the court held that the plaintiff failed to carry his prima facie case of actual disability on the issue of whether he was substantially limited in the major life activity of "cognitive functioning." Id. at 360, 363.

While Ellis' objective cognitive test results show that her abilities fell between average to below average, the facts of this case contrast with those of Weisberg. From a medical perspective, it was the opinion of both Dr. Mahon and Dr. Watson that because of Ellis' symptoms from her head injury, she was unable to continue at the pace she had been working at Ethicon prior to her leave of absence and that her hours and responsibilities at work must be reduced, followed by an accommodated work environment. See Dr. Watson's

Report dated April 21, 2001 at pp. 5-6; see also Dr. Watson's Letter dated October 8, 2001 (the letter provided that Ellis must be accommodated in the workplace, i.e., work three full days in a distraction-free, controlled environment; work remotely for three days and travel into the office on two days; involvement of a job coach to help Ellis rehabilitate to the work setting; and enroll in a community skills program). Notably, Dr. Watson stated, in his April 11, 2001 letter to Ethicon, that Ellis' cognitive limitations were permanent and certain accommodations must be provided. See Dr. Watson's Letter dated April 11, 2001 at p. 1. These medical conclusions were not reached in Weisberg.[8]

Furthermore, "ADA requires those 'claiming the Act's protection. . . to prove a disability by offering evidence that the extent of the limitation [caused by the impairment] in terms of their own experience . . . is substantial." Toyota v. Motor Mfg., Ky., v. Williams, 534 U.S. 184, 197 (2002)(quoting Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999)). Ellis testified in her declaration and deposition that due to her symptoms, she was unable to coordinate her personal life functions without assistance. See Ellis' Decl. at ¶ 5. Specifically, during the relevant period of time when she was employed by Ethicon, post-accident, Ellis stated that her husband had to facilitate her life skills functioning, which

[8]Defendant argues that Ellis has failed to provide competent medical evidence to meet the ADA standard of her impairments. Ethicon cites to a case arising out of the Second Circuit, Sussle v. Sirina Protection Systems Corp., 269 F. Supp. 2d 285 (2d Cir. 2003), for the proposition that Ellis must present medical evidence to explain her impairments to the jury. However, the Third Circuit has held that "the necessity of medical testimony turns on the extent to which the alleged impairment is within the comprehension of a jury that does not possess a command of medical or otherwise scientific knowledge." Marinelli v. City of Erie, 216 F.3d 354, 360 (3d Cir. 2000). Even if the cognitive issues are beyond the normal jury ken, the Court finds that the medical evidence in this motion, namely, Dr. Watson's report and Dr. Mahon's diagnosis, provide sufficient explanation of Ellis' impairments.

included planning activities such as getting dressed, taking medication, diet, rest, medical appointments, bathroom activities, hygiene, etc. She was no longer able to do chores around the house. Id. at ¶¶ 5-6. In fact, Ellis' husband gave up his work to support her recovery. Id. at ¶ 11. Ellis testified that all she could manage to do was work and sleep. Id. However, Ellis insisted that she continued to work despite her conditions. These statements were supported by the medical diagnoses from Dr. Watson and Dr. Mahon.

In evaluating Ellis' limitations, focusing on what Ellis "has managed to achieve misses the mark." Emory v. Astrazeneca Pharaceuticals LP, 401 F.3d 174, 180 (3d Cir. 2005). While evidence of tasks - such as her continued employment with Ethicon and Aventis - that Ellis can successfully perform may " seem to serve as a natural counterpoint when evaluating disability, the paramount inquiry remains" does [Ellis] 'have an impairment that prevents or severely restricts [her] from doing activities that are of central importance to most people's daily lives'?" Id. at 180-81 (quoting Toyota, 534 U.S. at 197). "What [Ellis] confronts, not overcomes, is the measure of substantial limitation under the ADA." Id. at 181; see Emory, 401 F.3d at 183 ("when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable" (quotations and citations omitted in original)).

Furthermore, to demonstrate 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, Ellis provides sufficient evidence to show that her injury may have caused permanent impairments in her ability to function cognitively. See Dr. Watson's Letter dated October 11, 2001. Accordingly, based on her testimony and the doctors' diagnoses, the Court finds that Ellis has raised a genuine issue of material fact to

survive summary judgement on whether her major life activity of cognitive function has been substantially limited by her post-concussion impairments.

The Court also notes that, on this issue, both parties moved for summary judgment. However, the Court will deny both parties' requests for summary judgment for primarily two reasons. First, the determination of whether an individual is substantially limited in a major life activity is a question of fact. Williams, 380 F.3d at 763. As such, it is appropriate to submit this issue to the factfinder. Also, Defendant has raised questions regarding the sufficiency of Ellis' supporting evidence by demonstrating that Ellis may not have been substantially limited by her impairments since the objective cognitive tests tended to show that her abilities fell between average and below average. Such evidence raises a genuine issue of material fact as to whether Ellis was substantivally limited in her major life activity of cognitive function as compared to the average person in the general population. See Weisberg, 180 Fed. Appx. at 362; see, e.g., Kaufer v. UPMC Health Plan, Inc., No. 04-1325, 2006 U.S. Dist. LEXIS 47629, at *20-21 (W.D. Pa. Jul. 13, 2006)(the court found that the plaintiff, who suffered an aneurism which caused short-term cognitive deficits that were substantially resolved within four months, could defeat summary judgment on the issue of whether he was actually disabled under ADA); Pagonakis v. Express, LLC., No. 06-027, 2008 U.S. Dist. LEXIS 11332, at *20-21 (D. Del. Feb. 14, 2008)(the court denied summary judgment after considering plaintiff's diagnosis of a "traumatic brain injury", which may have limited her ability to think, hear, see and work); Cohen v. Phillips Medical Systems, Inc., No. 03-0695, 2006 U.S. Dist. LEXIS 44322 (N.D. Ohio Jun. 15, 2006)(the court found that the plaintiff's cognitive impairment substantially limited her ability to learn and work despite the fact that she continued to work in two

comparable positions, without accommodations, after the defendants failed to rehire her).

2. Major Life Activity of Caring for Oneself

To claim that Ellis was substantially limited in her ability to care for herself, Ellis has not pointed to any specific activities in her life that she has been restricted from performing as a result of her injury. Instead, Ellis states in a conclusory manner that she "could no longer care for herself, and that she expended all her physical and mental energy just trying to cope in the workplace and relied upon her husband to take care of all the household responsibilities." See Ellis' Brief in Opposition to Defendants' Summary Judgment Motion at p. 13. The Third Circuit has held that examples of the inability to care for oneself include the ability to keep oneself clean and to pick up trash to sufficiently keep the dwelling place sanitary. See Marinelli, 216 F.3d at 362-63 ("cleaning is only considered a major life activity to the extent that such an activity is necessary for one to live in a healthy or sanitary environment"). Ellis simply asserts that she was always fatigued so that her husband handled the household chores so that she could focus on work. She clearly bathed and took care of her personal hygiene which allowed her to function daily at home and in the workplace. The Court will not give credence to Ellis' allegations that she could not care for herself which essentially amount to "self-serving conclusions" that are unsupported by specific facts in the record. See Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 (3d Cir. 1990). This is simply not enough to support a substantial limitation of caring for oneself. Accordingly, Defendant's motion for summary judgment is granted with respect to this issue.

3. Major Life Activity of Working

In order for a plaintiff to demonstrate that she is substantially limited in the major

life activity of "working", she must show that she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I); see Sutton v. United Air Lines, 527 U.S. 471, 492 (1999)("[t]o be substantially limited in the major life activity of working . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice"); see also Cetera v. CSX Transp., Inc., 191 Fed. Appx. 151, 152 (3d Cir. 2006). Courts consider the geographical area, the number of jobs making use of the plaintiff's skills (class of jobs), and number of jobs that the plaintiff could perform (broad range of jobs). 29 C.F.R. § 1630.2(j)(3). A plaintiff is not disabled because she cannot perform a specific job, if other jobs making use of her qualifications are available. Sutton, 527 U.S. at 492.

Similarly, for this particular major life activity, Ellis has not provided sufficient evidence to prove that she was precluded from working either a class of jobs or a broad range of jobs. Ellis, again, in a conclusory manner, states that she was substantially impaired from working in the class of jobs involving engineering skills and training. To support her conclusion, she refers to Dr. Mahon's testimony which revealed the doctor's doubt regarding Ellis' ability to return to the workplace. Dr. Mahon's Dep. at p. 10. However, in the same testimony, Dr. Mahon conceded that he deferred to Dr. Watson's judgment as to whether Ellis could return to work. Id. Dr. Mahon explained that he and Dr. Watson made an effort "to get [Ellis] back to work." Id. The doctor further explained that "[i]t was, from my standpoint, and I think probably anybody involved in her case, we were very hopeful that we could do something to help her get back to her . . . previous level of functioning." Id. At best, the medical evidence in the record, shows that Ellis could not

perform her job as a quality engineer without certain accommodations. Such evidence is insufficient to show that Ellis was precluded from working in either her class of jobs, or a broad range of jobs in various classes. See Mulholland v. Pharmacia & Upjohn, Inc., 52 Fed. Appx. 641, 647 (6th Cir. 2002) .

Furthermore, it is undisputed that Ellis applied for work with Aventis while still collecting short-term disability benefits from Ethicon. Two months after her termination from Ethicon, Ellis accepted an offer from Aventis leading a project team to develop a flu vaccine. At this new job, she did not ask or need accommodations and worked without them until November 2003, when she took another medical leave of absence. While the Court recognizes that the disability determination must be made at the time of employment decision, see Taylor, 184 F.3d at 308, the closeness in temporal proximity between Ellis' new position and her termination at Ethicon demonstrates that she was not significantly limited from working in a broad range of jobs. See Peter v. Lincoln Technical Institute, Inc., 255 F. Supp. 2d 417, 435 (E.D. Pa. 2002)(a plaintiff cannot be significantly limited in the activity of working when she immediately found another similar job, working without restrictions and was never reprimanded for any work-related effects of her alleged disability and neither requested or received any accommodations for it). Accordingly, without the proper evidentiary support, summary judgment is also granted in Defendant's favor on the issue of whether Ellis was substantially limited in the major life activity of working.

B. "Regarded As" Disability

With respect to Plaintiff's "regarded as" claim, even if Plaintiff does not suffer from an actual disability, if she is able to establish that her employer regarded her post concussion syndrom as substantially limiting her ability to work, then her claim should

survive summary judgment. A person is "regarded as" having a disability if she:

> (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such impairment;
>
> (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) has no such impairment but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l); see Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 187 (3d Cir. 1999). In other words, to be "disabled" under the "regarded as" portion of the ADA's definition of disability, the plaintiff must demonstrate that: (1) despite having no impairment at all, the employer erroneously believed that she had an impairment that substantially limited one or more of her major life activities; or (2) she had a non-limiting impairment that PRD mistakenly believed limited one or more of her major life activities. See Tice, 247 F.3d at 514 (citing Sutton, 527 U.S. at 489). "[E]ven an innocent misperception based on nothing more than a simple mistake of fact as to the severity . . . of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability." Deane, 142 F.3d at 144; see Taylor, 177 F.3d at 182. "The relevant inquiry relates to the perception, or intent, of the employer; not whether the plaintiff was actually disabled at the time." Eshelman v. Agere Systems, 397 F.Supp. 2d. 557, 563 (E.D. Pa. 2005); Capobianco v. City of New York, 422 F.3d 47, 57 (2d Cir. 2005).

However, the "regarded as" disability must be "an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled." Rinehimer v. Cemcolift, Inc., 292, F.3d 375, 381 (3d Cir. 2002); Robinson v. Lockheed

Martin Corp., 212 Fed. Appx. 121, 125 (3d Cir. 2007). As such, the perceived condition must limit a major life activity and the limitation must be substantial, which means plaintiff would have to show that her employer believed she was limited in her ability to work in "'either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" Robinson, 212 Fed. Appx. at 125 (quoting Sutton, 527 U.S. at 491). Simply put, to be "regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job." Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999).

Ellis points to several incidents in the record to support her contention that Ethicon regard her as disabled due to neurological disabilities. To the contrary, those facts in the record support a finding that Defendant did not regard Ellis as disabled. First, Ellis asserts that "a J&J independent consultant" spoke with her doctor and he concluded that she would lack the ability to perform the core elements of her job. This statement was taken from a memo written by a doctor working for Kemper Insurance Company in Florida who was asked to evaluate Ellis' medical condition for the purpose of approving her continuing short-term disability.[9] However, Plaintiff did not adduce evidence to show, nor did she even suggest, that any decision makers at Ethicon viewed the particular document.

[9]This memo was a document prepared to determine whether Ellis was eligible for short-term disability. Thus, it is important to note that this type of determination does not meet the qualifications for being "disabled" under the ADA. See Bennett v. Calabrian Chemicals Corp., 126 Fed. Appx. 171, 172 (5th Cir. 2005)("the legal definition of a disability under the ADA is different from the eligibility criterion for [plaintiff's] short-term disability plan . . ."); see also Weigel v. Targe Stornes, 122 F.3d 461, 466 (7th Cir. 1997)("the Social Security Administration's decision to grant disability benefits to [plaintiff] is not determinative as to whether or not she may be considered a "qualified individual" under the ADA").

According to Traver, Ellis' Department Director or supervisor, she never saw the doctor's reports, and was never aware of Ellis' medical condition other than the fact that Ellis had some type of "brain-related trauma." Traver's Dep. at pp. 86, 13. Even more compelling is the fact that Traver testified that she perceived Ellis to be "very capable, very technically astute, well organized, well regarded, well respected." Id. at p. 12. It was always her impression that Ellis would return after her short-term disability leave expired. Id. at 28. Likewise, for the same reasons, Kemper's notes written by its case manager in which she expressed the opinion that Ellis would most likely transition into LTD cannot possibly show that Ethicon regarded Ellis as disabled.

Next, Ellis points to emails from Joan Greenhalgh and Valerie Pax in early October 2001, which were discussions regarding Ellis' STD status and her work status in general and the permanent restrictions recommended by Ellis' doctors. See Mr. Zuckerman's Decl. at Exh. 7. Nothing in these documents indicates that Ms. Greenhalgh, Ms. Pax or Dr. Cole regarded Ellis to be disabled as defined under the ADA. Certainly, the questions posed by Ms. Pax in her emails (such as, "can she perform the essential functions of her current job?" or "Can they accommodate without it negatively impacting the essential needs of the business?") do not show that she regarded Ellis as being precluded from more than a particular job. Similarly, Dr. Cole's memo regarding Ellis' conditions does not create a genuine issue of material fact. Dr. Cole merely echoes the diagnosis from Ellis' doctors. Her concurrence with Dr. Mahon's findings, and her view that Ellis would require very specific restrictions in order for her to function at work, are simply Dr. Cole's impression of Ellis' conditions. Indeed, the "regarded as" disability must be "an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow

disabled." Rinehimer, 292 F.3d at 381. The mere fact that Dr. Cole was aware of Ellis' impairment is "insufficient to demonstrate either that [Ethicon] regarded [Ellis] as disabled or that that perception caused the adverse employment action." Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996). Accordingly, Ellis has failed to point to any evidence that would raise a genuine issue of material fact demonstrating that Ethicon regarded her as disabled. Summary judgment is, therefore, appropriate on this issue as well.

C. The Interactive Process

Both parties have moved for summary judgment on this claim. Ellis contends that Defendant violated the ADA by failing to engage in the interactive process. Indeed, engaging in the interactive process is a "mandatory rather than a permissive obligation on the part of employers under the ADA." Barnett v. U.S. Air, Inc., 22b F.3d 1105, 1114 (9th Cir. 2000); see also Taylor, 184 F.3d 296; Williams, 380 F.3d at 771 (both the employee and the employer "have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith" (quotations omitted)). The Third Circuit has explained that "once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." Id. at 311 (citations omitted). It is not fatal to the employee's claim if the employee requests an accommodation that is not possible. "The interactive process, as its name implies, requires the employer to take some initiative." Id. at 315. "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. 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.

Essentially, an employee may establish that an employer failed to engage in the interactive process in good faith by showing that (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Williams, 380 F.3d at 772 (quotation omitted).

The Third Circuit has listed several methods in which employers can show good faith in the interactive process. Employers can "meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome." Id. The EEOC also obligates the employer to: (1) analyze the particular job involved and determine its purpose and essential functions; (2) consult with the disabled employee to understand her precise job-related limitations and how they could be overcome with a reasonable accommodation; (3) in consultation with the disabled employee, identify potential accommodations; and (4) considering the preference of the individual to be accommodated, select and implement the most appropriate accommodation. 29 C.F.R. Pt. 1630, App. § 1630.9.

The undisputed facts of this case clearly indicate that Ethicon failed to properly

engage in the interactive process. The first notice Ethicon received regarding Ellis' accommodations came from an email sent by Ellis' husband to Kemper on August 31, 2001. The email indicated that Ellis would like to return from STD leave after it ended but she needed certain accommodations, which would be recommended by Dr. Mahon after their mid-September session. Thereafter, on October 2, 2001, Ellis called the nurse case manager and informed the case manager that she would be meeting with Dr. Mahon who would most likely recommend a long-term rehabilitation program when Ellis returned to work.

After speaking with Ellis, the case manager advised Ellis' supervisor, Traver, that Ellis would most likely transition into some type of LTD rehabilitation program and asked that she contact Kemper to discuss the ability to accommodate Ellis. Kemper also advised Ms. Greenhalgh, Ethicon's Occupational Health Nurse, that Ellis might be returning to work through an LTD rehabilitation program, and asked Ms. Greenhalgh to speak to HR about eligibility. On October 3, 2001, Ms. Greenhalgh began the process for Ellis to return to work. She sent an email to Ellis advising that she was aware that Ellis wanted to return to work and stressed that any return to work plan needed to be received as quickly as possible so that a return to work meeting could be scheduled with Dr. Cole. However, Ethicon, then, did not schedule a meeting with Ellis.

Thereafter, Kemper received a phone call from Dr. Watson on October 5, 2001. The doctor advised that if Ellis were to return to work, she would need to work from home three days per week and two days at the site. She reasoned that Ellis did not have the stamina to withstand the pressures and distractions at the worksite, and that allowance for a job coach would be critical. On October 8, 2001, the case manager advised Traver about the conversation with Dr. Watson. Traver then voiced concerns about Ellis' ability to do the job

if she was going to be out of the office three days a week. She stated that there was no meaningful work for Ellis that would fit into the restriction. Again, no meeting was scheduled with Ellis to discuss her accommodations.

On October 9, 2001, Dr. Watson faxed her return to work recommendations to Kemper along with the advice that Dr. Mahon was the treating physician and he would release Ellis to return to work. Dr. Watson provided a detailed gradual return to work plan. In addition, Kemper received a letter and a Return to Work release from Dr. Mahon which also enclosed the evaluation from Dr. Watson. In the letter, Dr. Mahon stated that the limitations listed in Dr. Watson's recommendations would need to be maintained permanently and indefinitely. After being advised of the restriction and its permanent nature, Traver informed Kemper that she would not accommodate a permanent requirement of working at home three days per week because Ellis would not be able to fulfill the essential functions of a Quality Engineer. On October 15, 2001, Kemper advised Ellis that Ethicon could not accommodate the permanent restrictions and that she would be rolled over to LTD on October 22, 2001. Even after the last notice from Ellis' doctors, Ethicon failed to engage in the interactive process.

Defendant argues that, through Kemper, Ethicon expressly asked Ellis to provide certain accommodations, and once it was determined that the accommodations were of a permanent nature, Ethicon was relieved of its obligation from the interactive process. In addition, Defendant further argues that discussion between Ellis' attorney and Ethicon is also a part of the interactive process, wherein Ethicon allegedly offered Ellis a part-time position, which she turned down. The Court finds Defendant's arguments unpersuasive and that Ethicon failed to act in good faith.

As noted earlier, the Third Circuit has explained that to demonstrate good faith, employers should "meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered the employee's request, and offer and discuss available alternatives when the request is too burdensome." Williams, 380 F.3d at 772. 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. In fact, Traver testified during her deposition that had there been an opportunity for continuous revisiting of the situation and had she had the opportunity to have an ongoing conversation rather than just the restrictions from Dr. Mahon, she would have been able to consider some accommodations. See Ms. Traver's Dep. at p. 31.

Certainly, 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." Taylor, 184 F.3d at 317; see Humphrey v. Memorial Hospitals Association, 239 F.3d 1128, 1139 (9th Cir. 2001)(citations omitted)("An employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives"). It is difficult for the Court to accept Defendant's argument in this context when Ethicon, during Ellis' first STD leave immediately after her accident, did indeed engage in an informal interactive process whereby Dr. Cole had

expressed her concerns regarding Ellis' accommodations recommended by her orthopedist, and worked with Ellis in formulating another plan. Ethicon simply failed to do so during Ellis' second STD leave.

While there is a dispute whether the discussions between Ms. Warren, in-house counsel, and Ellis' attorney were a part of the interactive process, the Court will not establish a bright-line rule that forbids any attorney discussion as a part of the interactive process. Indeed, the EEOC regulations expressly embrace conversations with the employee or "a family member, friend, health professional, or other representative." See Taylor, 184 F.3d at 313 (quoting EEOC Compliance Manual). Nevertheless, even if the discussions between counsel are a part of the interactive process, Ethicon continued to show a lack of good faith. Although there is some disagreement as to whether a part-time position was offered to Ellis, the conclusion remains the same; the offer, if it was made, was provided to Ellis on a take-it-or-leave it basis. Certainly, nothing in the record indicates that Ms. Warren engaged in a conversation that would satisfy Ethicon's obligation. The inquiry here is whether Ethicon analyzed the particular job involved and determined its purpose and essential functions; consulted with Ellis to understand her precise job-related limitations and how they could be overcome with a reasonable accommodation; in consultation with Ellis, identified potential accommodations; and in considering Ellis' preference to be accommodated, select and implement the most appropriate accommodation. Ms. Warren failed to take these steps. Instead, she offered a part-time position on a take-it-or-leave basis and the discussion ceased once Ellis rejected the offer. Taken together, these actions on the part of Ethicon demonstrate a lack of good faith when engaging in the interactive process. Accordingly, as a matter of law, the Court finds that Defendant failed to engage in

the interactive process.[10] However, "plaintiff in a disability discrimination case who claims that the defendant engaged in discrimination by failing to make a reasonable accommodation cannot recover with out showing that a reasonable accommodation was possible." Donahue v. CONRAIL, 224 F.3d 226, 234 (3d Cir. 2000). Thus, "'because employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable *if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations*.'" Id. at 234-35 (quoting Taylor, 184 F.3d at 317)(emphasis in original).

D. "Qualified Individual"

In order for the plaintiff to satisfy the second element of a prima facie case under the ADA, she must demonstrate that she is "otherwise qualified to perform the essential functions of the job, with or without accommodation." Leshner v. McCollister's Transportation System, 113 F. Supp. 2d 689, 692 (D.N.J. 2000). The Court has to resolve whether Plaintiff was "otherwise qualified," meaning whether she was qualified to perform the essential functions of her position, with or without reasonable accommodation. See Gaul, 134 F.3d at 580 (a "qualified individual" is a person who, with or without accommodation, can perform the essential functions of the position that such individual held or desired). To satisfy this requirement, a plaintiff must first demonstrate that she

[10]It is interesting to note that Ms. Warren allegedly offered the part-time position after Ellis' attorney sent her a position letter. As indicated by counsel for Ellis in her October 19, 2001 letter to Ms. Warren, the denial of the proposed accommodations was issued "without any discussion whatsoever and without any attempt to work with Ms. Ellis in facilitating a return to her position." See Ms. Hadziosmanovic's Letter dated October 19, 2001 at p. 2. Although no threat of litigation was mentioned in the letter, this fact buttresses the Court's finding that Ethicon failed to engage in the interactive process in good faith.

"satisf[ies] the requisite skill, experience, education and other job-related requirements of the employment position that [] [she] holds or desires." Deane, 142 F.3d at 145; Skerski v. Time Warner Cable Co., 257 F.3d 273, 278 (3d Cir. 2001). Second, a plaintiff must establish that she, "with or without reasonable accommodation, can perform the essential functions of the position held or sought." Id.

Here, there is no dispute that Ellis had the requisite skills and experience needed for the position. However, Defendant argues that due to a shift in focus from business support to new product development, Ellis would have been required to travel to the manufacturing facilities and product testing sites. She was expected to be fully integrated into the design, development, verification and validation activities for a new product. Ethicon contends that Ellis needed to attend project team meetings, generally on a weekly basis and that the required meetings with the project teams and the outside travel could not be scheduled around just the needs of one team member, Ellis.

While the Court gives deference to Ethicon's representations that being able to attend project meetings and testing sites is essential, the issue of whether Ethicon could have reasonably accommodated Ellis shall be preserved for the factfinder. "[T]he employer will almost always have to participate in the interactive process to some extent before it will be clear that it is impossible to find an accommodation that would allow the employee to perform the essential functions of a job." Taylor, 184 F.3d at 317. "When an employee has evidence that the employer did not act in good faith in the interactive process, . . . we will not readily decide on summary judgment that accommodation was not possible and the employer's bad faith could have no effect." Id. at 318. "[C]ourts should be especially wary on summary judgment of underestimating how well an employee might perform with

accommodations or how much the employer's bad faith may have hindered the process of finding accommodations." Id. In this matter, the Court has already determined that Ethicon failed to engage in the interactive process in order to determine whether Ellis could have been accommodated due to her condition. Ellis may have been qualified, because she may have been able to perform the essential functions of the job with reasonable accommodations. As such, the Court holds that Ellis has alleged facts which, viewed in light most favorable to her, present a genuine issue of material fact as to whether reasonable accommodation was possible and whether regular attendance at meetings and testing sites is an essential function of the job; these issues shall be decided by the factfinder. See Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996).[11]

B. Breach of Contract Claim and Retaliation Claim under the ADA

Count IV asserts a claim of retaliation under the ADA and Counts VII and VIII assert a claim for breach of contract and breach of the covenant of good faith and fair dealing. Because Ellis chose not to respond to Defendants' summary judgment on Counts VII and VIII, the Court shall grant summary judgment on these two counts.[12]

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[11]It appears that Ethicon does not contest that Ellis can satisfy the last element of her prima facie case for failure to accommodate, whereby Ellis would have to show that she suffered an otherwise adverse employment decision as a result of discrimination. Gaul, 134 F.3d at 580. Here, the adverse employment action is being terminated after being placed on long-term disability. Therefore, Ellis has satisfied the burden of establishing the last element of her prima facie case.

[12]Ellis' breach of contract claim has no merit. An at will-employee has no expectation of continued employment and can be terminated at any time for any lawful reason. Bernard v. IMI Sys., Inc., 131 N.J. 91, 105-06 (1993). Beyond the written materials, Ellis claims that she expected a return to work meeting the Ethicon medical department and expect Dr. Cole to speak with Ellis' doctors because that was what happened previously in 1999. However, such procedure did not create a contract, either implicitly or expressly. Once it is determined that no express contract existed, there can

Ellis also brings a retaliation claim against Ethicon.[13] She argues that retaliation occurred because she exercised her rights under the ADA. She alleges that the retaliation conduct included (1) refusal to consider the requested accommodations; (2) refusal to have discussions with her or her legal representative; and (3) termination of her employment. In order to sustain this claim under the ADA, Ellis must establish a prima facie case showing (1) protected activity; (2) an adverse employment action; and (3) a causal connection between the protected activity and the adverse action. Williams, 380 F.3d at 759. Once the prima facie case is established, the burden of persuasion shifts to defendant to articulate the legitimate business reason for the adverse action. Then, the plaintiff must proffer evidence showing that the employer's articulated reasons are a pretext for the retaliation. Id. at 759, n.3.

Defendant does not contest that Ellis can satisfy her burden of establishing a prima facie case for retaliation.[14] Instead, Defendant argues that their legitimate business reason

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be no claim of a breach of implied covenant of good faith and fair dealing. See Noye v. Hoffman LaRoche, 238 N.J. Super. 430, 433 (App. Div. 1990). Thus, Counts VII and VIII fail as a matter of law.

[13]With respect to the retaliation claim, Defendant argues that Ellis failed to exhaust her administrative remedies by failing to include her claim of retaliation in her EEOC charge or her DCR charge. As indicated earlier in this Opinion, the Third Circuit liberally construes the exhaustion requirement, which was reconfirmed in the recent Supreme Court case Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008) ("Documents filed by an employee with the Equal Employment Opportunity Commission should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies"). Although Ellis did not expressly reference the retaliation claim on her charges with the EEOC or the DCR, the Court finds that the allegations of retaliation in this matter were fairly within the scope of the her EEOC complaint.

[14]Ellis has satisfied her prima facie case for retaliation. First, there is no dispute that Ellis engaged in a protected activity, i.e., requesting accommodation. Nor is there

for terminating Ellis was based upon the fact that Ellis was unable to fulfill the essential functions of her job rather than the fact that she requested accommodations. Ellis proffered no evidence to discredit Defendant's reasons. While the Court recognizes that the issue of whether Ellis could fulfill the essential functions of her position is a fact question, the intent of Defendant to terminate her was based upon on its belief that Ellis could not perform her duties as a Quality Engineer. Ellis has failed to rebut such reasoning. Accordingly, Defendant's request for summary judgment on Ellis' retaliation claim is granted.

CONCLUSION

For the reasons set forth above, summary judgment is denied as to all parties with respect to Plaintiff's failure to accommodate claim under the ADA; specifically, whether Ellis is "actually disabled" pursuant to the ADA. However, the Court finds that Defendant failed to engage in the interactive process. Moreover, summary judgment is granted to Ethicon on Plaintiff's breach of contract claim, breach of implied covenant of good faith and fair dealing claim; and retaliation claim. Summary Judgment is also granted to J&J.

DATED: March 28, 2008

/s/ Freda L. Wolfson
Freda L. Wolfson, U.S.D.J.

dispute that Ellis suffered an adverse employment action, i.e., termination. Finally, because Ellis was terminated during the interactive process, a casual link between the request for accommodation and the termination can be inferred. Kaufer v. UPMC Health Plan, Inc., No. 04-1325, 2006 WL 1984636, at *3 (W.D. Pa. Jul. 13, 2006).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S) Defendants.	Civil Action No. 05-726(FLW) **ORDER**

THIS MATTER having been opened to the Court by Francis X. Dee, Esq., counsel for Defendants Ethicon, Inc. ("Ethicon") and Johnson & Johnson, Inc. ("J&J"), on a motion for summary judgment on all counts; it appearing that Plaintiff Theresa M. Ellis ("Plaintiff"), through her counsel, Elizabeth Zuckerman, Esq., opposes the motion and cross-moves for partial summary judgment on the issue of whether she is "disabled" within the definition of the ADA and whether Ethicon engaged in the interactive process; it appearing that the Court reviewed the parties submissions and decides these motions pursuant to Fed. R. Civ. P. 78; for the reasons set forth in the Opinion filed on even date, and for good cause shown,

IT IS on this 28th day of March, 2008,

ORDERED that summary judgment is GRANTED to J&J;

ORDERED that summary judgment is GRANTED to Ethicon on Plaintiff's breach of contract claim, breach of implied covenant of good faith and fair dealing claim; and retaliation claim;

ORDERED that summary judgment is DENIED as to all parties with respect to Plaintiff's failure to accommodate claim under the ADA; specifically, the issue of whether Plaintiff is "actually disabled" pursuant to the ADA; however, it is the Court's finding that Defendant failed to engage in the interactive process.

SO ORDERED.

/s/ Freda L. Wolfson
Freda L. Wolfson, U.S.D.J.

***NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S) Defendants.	Civil Action No. 05-726(FLW) **OPINION**

__**WOLFSON, District Judge**__:

On March 28, 2008, the Court entered an Order denying in part and granting in part defendant Ethicon, Inc.'s ("Ethicon" or "Defendant") motion for summary judgment and plaintiff Theresa M. Ellis' ("Ellis" or "Plaintiff") motion for partial summary judgment. In particular, the Court found that Defendant failed to engage in the interactive process as required by regulation under the American with Disabilities Act ("ADA"). In the present motion, Defendant moves the Court to reconsider its finding on this issue for two reasons. First, Defendant argues that the Court applied an incorrect legal standard when it held that good faith engagement in the interactive process required Ethicon to physically meet with Plaintiff. Second, Defendant points out that the Court may have overlooked factual evidence that would create genuine issue of material fact as to whether Plaintiff failed to meet her own obligations under the ADA, which, Defendant argues, ultimately led to the breakdown in the interactive process. For the reasons set forth below, the Court grants the motion.

Background

As the Court has recounted the undisputed facts of this case in its Summary Judgment Opinion dated March 28, 2008 ("Opinion"), the Court will refer to the facts set forth therein for the purpose of this motion.

Discussion

While the Federal Rules of Civil Procedure do not expressly recognize motions for "reconsideration," United States v. Compaction Sys. Corp., 88 F.Supp. 2d 339, 345 (D.N.J. 1999), the Local Civil Rules governing the District of New Jersey do provide for such review. See Lite, N.J. Federal Practice Rules, Comment 6 to L.Civ.R. 7.1 (Gann 2008). Local Civil Rule 7.1(i) allows a party to seek reconsideration of a court's decision if there are "matters or controlling decisions which counsel believes the Judge ... has overlooked." L. Civ. R. 7.1(I); see also Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 215 F. Supp. 2d 482, 507 n.12 (D.N.J. 2002).[1] Relief by way of a motion for reconsideration is "an extraordinary remedy" that is to be granted "very sparingly." Interfaith Cmty. Org., 215 F. Supp. 2d at 507. A motion for such reconsideration must be filed "within 10 days after the entry of the order or judgment on the original motion." L. Civ. R. 7.1(i). A timely motion for reconsideration may only be granted upon a finding of at least one of the following grounds: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of

[1] In Interfaith Cmty. Org., the court cited L. Civ. R. 7.1(g) as the provision governing a motion for reconsideration in this district. On February 24, 2005, however, certain amendments to our Local Rules became effective and reconsideration motions are now governed by L. Civ. R. 7.1(i).

law or fact or to prevent manifest injustice.'" Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). Indeed, a "party seeking reconsideration must show more than a disagreement with the court's decision," Panna v. Firstrust Sav. Bank, 760 F. Supp. 432, 435 (D.N.J. 1991), and will fail to meet its burden if it merely presents "a recapitulation of the cases and arguments considered by the Court before rendering its original decision." Elizabethtown Water Co. v. Hartford Casualty Ins. Co., 18 F. Supp. 2d 464, 466 (D.N.J. 1998) (quoting Carteret Sav. Bank, F.A. v. Shushan, 721 F. Supp. 705, 706 (D.N.J. 1989)). The Court will only grant such a motion if the matters overlooked might reasonably have resulted in a different conclusion. Bowers v. Nat'l Collegiate Athletic Assoc., 130 F. Supp. 2d 610, 613 (D.N.J. 2001). In sum, it is improper on a motion for reconsideration to "ask the Court to rethink what it ha[s] already thought through – rightly or wrongly." Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1314 (D.N.J. 1990)(*citations omitted*).

In the Opinion, the Court found that Ethicon failed to properly engage in the interactive process. Indeed, the Third Circuit has explained that "once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." Taylor v. Phoenixville School Dist., 184 F.3d 296, 311 (3d Cir. 1999) (citations omitted). Adhering to the Third Circuit's requirements, this Court focused on two aspects of the discussions between Ellis and Ethicon, and made findings as a matter of law: the initial discussions, whereby Ethicon, after determining that the restrictions from Ellis' doctors were

unacceptable, failed to engage in the interactive process by not offering alternative recommendations; and the continued discussions between Ellis' attorney, Ms. Nicola Hadziosmanovic, and Ethicon's in-house counsel, Ms. Lisa Warren, whereby the Court found that Ethicon's alleged offer of a part-time position was on a take-it-or-leave basis. These findings together formed the basis of the Court's determination that Ethicon failed to engage in the interactive process in good faith.

For the first determination, the Court reasoned that even after Ethicon received multiple notices of Ellis' condition and her doctor's restrictions, it failed to meet with Ellis to discuss her restrictions. Crucially, the Court found that "even after the last notice from Ellis' doctors [Dr. Watson's recommendations dated October 8, 2001and Dr. Mahon's letter dated October 11, 2001], Ethicon failed to engage in the interactive process. Court's Opinion at p.33. Defendant argues that the Court imposed a requirement of a physical meeting to establish good faith interactive process. The Court disagrees. The Court not only based its finding on the fact that Ethicon failed to meet with Ellis once they received notice from Dr. Watson and Dr. Mahon, the Court also based it on the fact that Ethicon failed to request "information regarding Ellis' condition and the reasons for the doctors' recommendations." Court's Opinion at p. 34. In addition, Ethicon "failed to offer alternatives when it determined that the accommodations were too burdensome." Id. Based on the combination of those factual determinations, the Court found that Ethicon failed to engage in the interactive process during the initial discussions regarding Ellis' accommodations. The legal basis upon which this finding hinged is that "an employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives." Id. Ethicon

simply rejected Ellis' recommendations without offering any alternatives. Contrary to Defendant's suggestion, the Court did not, as a matter of law, require employers, such as Ethicon, to have physical meetings with employees in order to fulfill their obligations under the ADA. Instead, the Court found that meeting with employees is merely one way, among others, for employers to engage in the interactive process.

Next, the Court notes that neither party moves for reconsideration of the Court's holding that continuing discussions between attorneys may be considered as a part of the interactive process. See Burke v. Iowa Methodist Medical Center, No. 99-30634, 2001 U.S. Dist. LEXIS 21126, at *17-18 (S.D. Iowa Feb. 22, 2001). Rather, Defendant argues that the Court overlooked evidence which would create a genuine issue of material fact as to whether Ethicon properly engaged in the interactive process during continued discussions between the attorneys. Because Defendant contends that the Court overlooked evidence that may very well change the outcome, the Court will recount the facts in detail of the discussions between the attorneys.

On October 15, 2001, through an email from Kemper, Ellis was advised by Ethicon that she could not be accommodated because the restrictions were permanent, and that she would be rolled over to Long-Term Disability on October 22, 2001. Kemper also advised Ellis that it could not reach her by phone. Thereafter, on October 19, 2001, Ethicon claims that Ellis, through her attorney's letter, continued discussions regarding her restrictions with Ethicon's in-house counsel. According to the Defendant, Ms. Warren had telephone conversations with Ms. Traver, Cindi Harris of Ethicon's Human Resources and Nancy Rudko, who worked with Ethicon's employee benefits. Warren Decl. at ¶ 3. After gathering certain information, on October 31, 2001, Ms. Warren spoke with Ellis' attorney and

allegedly offered Ellis a part time job created solely for her in light of her restrictions. Id. at ¶ 4. On November 13, 2001, Ms. Warren was advised by Ellis' attorney over the phone that Ellis was not interested in the part time job. Id. at ¶ 6. During the same conversation, Ms. Hadiosmanovic allegedly stated to Ms. Warren that she would contact Ellis' doctors to try to get revised accommodations. Id. Since that date, Ms. Warren stated that she never spoke to Ellis' attorney, nor received any revised restrictions. Id. On the other hand, Plaintiff contests the alleged offer of the part time position.

Based on these alleged facts, Defendant contends that it was Plaintiff who failed to engage in the interactive process when she neglected to contact Ms. Warren with revisions from her doctors. In the Opinion, the Court found that the part time position, if it was indeed offered, was on a take-it-or-leave it basis. As such, Defendant, nevertheless, failed to engage in the interactive process. In light of the foregoing fact that Ellis' attorney allegedly promised Ms. Warren that she would contact Ellis' doctors to get revised accommodations, which was not discussed in the original Opinion, the Court shall reconsider its prior decision as this fact may reasonably lead a jury to a different conclusion.[2]

Here, each sides criticizes the other for not participating in the interactive process, which the ADA contemplates that employers and employees will engage in to determine the availability and suitability of reasonable accommodations. See Whelan v. Teledyne

[2]The Court bases its reconsideration on the fact, as set forth in Warren's Declaration, that Ellis' attorney never contacted Ms. Warren after she agreed to obtain revised restrictions from Ellis' doctors; this was overlooked in reaching the decision in the Summary Judgment Opinion. Because neither counsel highlighted the Warren Declaration in the manner as they did here, the Court overlooked this important fact as presented in this opinion.

Metalworking Products, 226 Fed. Appx. 141, 147 (3d Cir. 2007)("The interactive process requires participation from both parties because each party holds information the other does not have or cannot easily obtain")(quotations and citations omitted). Despite the Court's previous ruling regarding the nature of the part time position, a reasonable jury may find that Ethicon was open to more discussions when Ellis' attorney advised Ms. Warren that she would seek modifications for Ellis' restrictions. As such, a jury may find that it was Ellis that ended the interactive process once she rejected the part time job and failed to provide additional information as promised. If the jury were to reach that conclusion, Ethicon would have satisfied its obligations under the ADA.

Nevertheless, Plaintiff argues that irrespective of the nature of the part time position, an offer of reinstatement after termination cannot, as a matter of law, be considered part of the interactive process because the purpose of the process is to avoid termination. While there could be incidences where an offer of reinstatement was made in bad faith (for example, to ward off litigation), in the present case, there is a genuine issue of material fact as to whether Ms. Warren's efforts were carried out in good faith. Certainly, when viewing the facts most favorable to Defendant, the non-movant, Ms. Warren's actions could be viewed as engaging in the interactive process. Moreover, Plaintiff's reference to termination is based on Ellis' LTD status. However, this process is automatic; in that Ethicon did not affirmatively act to terminate Ellis' position, but rather, allowed Ellis to be rolled into LTD. It might be a different result if Ethicon actively terminated Ellis, and then, in an attempt to ward off litigation, offered her another position. Regardless, such determination is for the jury to decide upon the conclusion of a trial. Similarly, the Court rejects Plaintiff's argument that an offer of a part time position does not demonstrate good faith because it

is not comparable. Pursuant to 42 U.S.C. § 12111(9)(B), reasonable accommodation may include "job restructuring, part-time or modified work schedules . . . ." 42 U.S.C. § 12111(9)(B); see also Burke, 2001 U.S. Dist. LEXIS 2116 at *17. Thus, by statute, it cannot be determined that it was inappropriate for Ethicon to offer a part time job as a reasonable accommodation to Ellis.

Having made the foregoing findings, the Court reconsiders its prior ruling in the Opinion regarding whether the parties engaged in the interactive process in good faith. This inquiry shall be preserved for the factfinder. All other aspects of the Opinion remain unchanged.

DATED: June 2, 2008

/s/ Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S) Defendants.	Civil Action No. 05-726(FLW) **ORDER**

THIS MATTER having been opened to the Court by Frank X. Dee, Esq., counsel for defendant Ethicon, Inc. ("Defendant"), on a motion to reconsider this Court's Summary Judgment Order dated March 28, 2008; it appearing that Plaintiff Theresa M. Ellis ("Plaintiff"), through her counsel, Elizabeth Zuckerman, Esq., opposed the motion; the Court having considered the motion pursuant to Fed. R. Civ. P. 78, for the reasons set forth in the Opinion filed on even date, and for good cause shown,

IT IS on this 2nd day of June, 2008,

ORDERED that Defendant's motion for reconsideration is GRANTED; the Court's Summary Judgment Order shall be revised consistent with the Reconsideration Opinion filed herewith; specifically, the issue of whether the parties engaged in the interactive process in good faith shall be preserved for the jury.

/s/ Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge

***NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S) Defendants.	Civil Action No. 05-726(FLW) **OPINION**

WOLFSON, District Judge:

A jury has rendered its decision and found that Defendant Ethicon, Inc. ("Defendant" or "Ethicon"), Plaintiff's former employer, violated the Americans with Disabilities Act ("ADA") by failing to provide reasonable accommodations to Plaintiff Theresa Ellis ("Plaintiff" or "Ellis") in light of her cognitive disability. Now, after the trial, Defendant moves for judgment under Fed. R. Civ. P. 50(b) or, in the alternative, for a new trial under Rule 59. In arguing that the verdict is contrary to the evidence presented at trial, Defendant confines its argument to three particular points: (1) Ethicon did not fail to engage in the interactive process; (2) Ellis was not disabled under the ADA; and (3) Ellis was not qualified to perform the essential functions of her job at Ethicon. Plaintiff opposes the motion and cross-moves to alter or amend the judgment with respect to equitable remedies pursuant to Rule 59(e). For the reasons that follow, Defendant's motion is DENIED and Plaintiff's motion is DENIED. In addition, the

Court shall award Plaintiff back pay in the amount of $42,400[1] and reinstate Ellis' employment at Ethicon as a quality engineer, or a comparable position.

BACKGROUND AND PROCEDURAL HISTORY

The Court will only briefly summarize here Ellis' work and medical history while she was employed by Ethicon. Ellis began employment with Ethicon in September 1997 as a Senior Quality Assurance Engineer. In January 1999, Ellis was involved in an automobile accident on her way to work. After being diagnosed with cervical strain, Ellis was placed on disability by her doctor as of January 7, 1999, and went on a short-term disability. Thereafter, Ellis returned to work.

Ellis worked without any restrictions and without incident from September 1999 until April 2001. In April 2001, Ellis started to complain of dizziness, pain and inability to concentrate. Dr. John Mahon, a neurologist, diagnosed Ellis with post concussion syndrome and a mild traumatic brain injury stemming from the 1999 car accident. Dr. Mahon also referred Ellis to a neuropsychiatrist, Dr. Barbara Watson, for an evaluation. After rounds of testing, Dr. Watson recommended that Ellis work in an accommodated work environment, e.g., short-term disability, reduction of hours and responsibilities, and/or an accommodated work environment. Based on Dr. Watson's report and Dr. Mahon's recommendation, Ellis began a second period of short-term disability on April 23, 2001.

Defendant contests the jury's verdict with respect to its participation in the interactive process regarding Plaintiff's intended return to work plan following her

[1] As it will be discussed later in this Opinion, this number must be converted to 2009 present value numbers.

short-term disability leave. Below is a timeline of what transpired in the weeks before Ellis' short-term disability period ended:

1. On October 5, 2001, Dr. Watson spoke to Melissa Stretch, a Kemper nurse coordinator who was responsible for administering Ethicon's disability benefits, regarding Ellis' return to work recommendations. Specifically, Dr. Watson recommended, inter alia, that Ellis should work three days from home and that a job coach should be provided for a successful return to work. Dr. Watson also recommended a detailed gradual return to work plan. See P175; May 7 Tr., 32-41.
2. On October 15, 2001, Kemper received a letter and a Return to Work release from Dr. Mahon which also enclosed the evaluation from Dr. Watson. In the letter, Dr. Mahon stated that the limitations listed in Dr. Watson's recommendations would need to be maintained indefinitely. See D50; May 6 Tr., 73-74. While the parties disputed at trial the duration of Ellis' disability, Ethicon insisted that Ellis' limitations due to her cognitive impairments were represented as being permanent in nature. In that regard, Lisa Warren, Ethicon's in-house counsel, testified during the trial that due to the permanency of Ellis' accommodations, Ethicon was unable to accept the doctors' recommendations.[1] See May 14 Tr., 5-6 ("Ethicon was not able to accommodate the three days a week from home, two days in the office permanent restriction that was requested from her physician").
3. Ellis' attorneys from the law firm of Carella Byrne continued discussions with

[1]The relevant testimonies will be recited in detail later in this Opinion.

Ethicon regarding Plaintiff's accommodations. See May 14 Tr., 15-20. Specifically, on October 19, 2001, Ellis' then-attorney, Nicola Hadziosmanovic ("Nicola H."), sent a letter to Ms. Warren addressing return to work issues. D-54; May 12, 92-93.

4. After Ellis' second short-term disability period ended on October 21, 2001, she was automatically rolled into the long-term disability ("LTD") program, which effectively terminated Ellis. See May 14 Tr., 7-9.

5. On October 31, 2001, Ms. Warren offered Plaintiff, through Nicola H., a part-time position, instead of agreeing to accommodate Ellis by allowing her to work three days a week from home. See May 14 Tr., 15-20. Ms. Warren informed Nicola H. that Ethicon would be willing to consider other alternatives if Ellis' doctor provided Ethicon with revised accommodations. See May 12 Tr., 139-40.

6. On November 13, 2001, Ms. Warren spoke with Nicola H. and Nicola H. informed her that Ellis had rejected the part-time position. May 14 Tr., 140-42. Nicola H. also requested a meeting to "iron out accommodations." Id. Ms. Warren again advised Nicola H. that "plaintiff [had to] get revised accommodations from her doctor and then [they] could sit down with her manager (Ms. Traver)." Id. at 143. However, Ellis never sent revised accommodations as requested.

7. Subsequent to Ellis' termination, Ellis secured a position at Aventis, where she worked from December 17, 2001 to August 2004 without accommodation. However, Ellis took another short-term disability during that time period,

from November 5, 2003 to March 28, 2004.

8. On December 31, 2001, Ms. Warren, during a telephone conversation with Ellis' husband, learned that Ellis had started a new job and was informed that Ellis was not aware that Ethicon had offered her a part-time position. See P179.

At trial, the parties disputed each other's participation in the interactive process. After almost two weeks of trial, the jury found, in special verdict interrogatories, that, with respect to Ellis' ADA claim, Ellis proved by a preponderance of the evidence that in October 2001, she was substantially limited in the major life activity of cognitive function, and therefore, she was disabled under the ADA; that she was qualified to perform the essential functions of her job as a quality engineer with or without accommodations; that Ethicon unreasonably failed to provide the accommodations requested by Ellis or any other reasonable accommodations; and that accommodating Ellis in her job as a quality engineer would not have been an undue hardship. See Verdict Sheet, 1-2.

In addition, in its advisory verdict, the jury found that Ellis proved that she suffered a loss of wages between October 21, 2001 and today; that Ethicon was a cause of Ellis' short-term disability at Aventis from November 5, 2003 to March 28, 2004; and that Ethicon was a cause of Ellis' disability which resulted in Ellis leaving Aventis in August 2004. However, the jury also found that Ethicon proved that Ellis failed to mitigate her damages. In light of those findings, the jury recommended that Ellis receive $311,200 in back pay if Ethicon was partially liable for causing Ellis' disability at Aventis, or $486,250 if Ethicon was fully responsible. See Id. at 4-5. With respect to

front pay, the jury found that Ellis is currently able to work with or without accommodations, and recommended an award of $734,000. See Id. at 6.

Now, Defendant moves for judgment notwithstanding the verdict, or in the alternative, a new trial. In response, Plaintiff moves to amend or alter the judgment with respect to damages. In the first part of the Opinion, the Court will discuss Defendant's motion. In the second part, the Court will supplement any additional facts necessary to adjudicate Plaintiff's motion.

DISCUSSION

I. Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial

A. Judgment as a Matter of Law

Federal Rule of Civil Procedure 50 states, in pertinent part:

> (a) Judgment as a Matter of Law.
>
> > (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
> >
> > (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment--and may alternatively request a new trial or join a motion for a new trial under Rule 59. . . .

See Fed. R. Civ. P. 50(a). Similar to the summary judgment standard, the reviewing

court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000); Goodman v. Pennsylvania Turnpike Comm'n, 293 F.3d 655, 665 (3d Cir. 2002). Generally, a Rule 50 motion should be granted only if evidence is not sufficient for a jury reasonably to find liability. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993). Although judgment as a matter of law should be granted sparingly, a scintilla of evidence will not enable the non-movant to survive a Rule 50 motion. See Id. "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." Id. (internal quotation omitted). In other words, the key to surviving a Rule 50 motion is a legally sufficient evidentiary basis for the verdict. Goodman, 293 F.3d at 665. The Third Circuit has cautioned that the test for prevailing on a Rule 50(b) motion is a stringent one because it implicates the right to a trial by jury embodied in the Seventh Amendment. Watcher v. Pottsville Area Emergency Med. Servs., 248 Fed. Appx. 272, 280 (3d Cir. 2008).

B. New Trial

This Court may order a new trial if it is required to prevent injustice or to correct a verdict that was contrary to the weight of the evidence. American Bearing Company, Inc. v. Litton Industries, Inc., 729 F.2d 943, 948 (3d Cir. 1984); Radwan v. Carteret Bd. of Educ., 62 Fed. Appx. 34, 37-38 (3d Cir. 2003). The decision to grant or deny a new trial is left almost entirely to the discretion of the district court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980); Blancha v. Raymark Industries, 972 F.2d 507, 512

(3d Cir. 1992). A new trial should be granted based upon a verdict being against the weight of the evidence only "where a miscarriage of justice would result if the verdict were to stand." Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1352 (3d Cir. 1991). The purpose of this rule is to ensure a court does not replace the jury verdict with one based upon its own interpretation of the facts. Olefins Trading, Inc. v. Han Yang Chem. Corp., 9 F.3d 282, 290 (3d Cir. 1993). "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if [s]he does not usurp, the prime function of the jury as the trier of the facts." Lind v. Schenley Industries Inc., 278 F.2d 79, 90 (3d Cir.1960) (en banc).

C. Interactive Process

As noted above, Defendant raises several issues with respect to the jury's determination. Defendant contends that the jury's determination that Ethicon unreasonably failed to provide the accommodations requested by Ellis or any other reasonable accommodations cannot be reconciled with the evidence at trial. Defendant vigorously maintains that Ethicon participated in good faith in the interactive process and that the process was ended by Ellis, not Ethicon. Therefore, Defendant argues, because of Ellis' failure to participate in that process, the jury's judgment in this respect is against the weight of the evidence. The Court finds this argument unconvincing. However, before embarking upon a discussion of the pertinent evidence presented at trial, it is incumbent upon the Court to again elucidate in detail the requirements of the interactive process in this circuit.

The starting point is the ADA's regulations which state that: "To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate

an informal, interactive process with the [employee] 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." 29 C.F.R. § 1630.2(o)(3); Taylor v. Phoenixville Sch. Dist. 184 F.3d 296, 317 (3d Cir. 1999). This concept is further supported by the Equal Employment Opportunity Commission's ("EEOC") interpretive guidelines, which provide that: "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." 29 C.F.R. Pt. 1630, App. § 1630.9 at 359.

These authorities form the basis for the Third Circuit's rulings on the interactive process. See Taylor, 184 F.3d at 317-18 ("Based on the regulation and interpretive guidelines, we held in Mengine that "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith" (citations and quotations omitted)). Exploring sister circuits, the Third Circuit has found persuasive authorities buttressing the framework of the interactive process. These circuits, including this circuit, are in agreement that engaging in the interactive process is a "mandatory rather than a permissive obligation on the part of employers under the ADA," and that "once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." Taylor, 184 F.3d at 311; see, e.g., Beck v. University of Wisconsin 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; a party that fails to communicate, by way of initiation or response, may also be acting in bad faith"); Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996)(The "employee's initial request for an accommodation... triggers the employer's obligation to participate in the interactive process...").

To this end, the Third Circuit is clear in its mandate that an appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the employee with a disability. Taylor, 184 F.3d at 311 (citations omitted); see generally, Hohider v. UPS, 574 F.3d 169 (3d Cir. 2009). It is not fatal to the employee's claim that the employee requests an accommodation that is not reasonably feasible. "The interactive process, as its name implies, requires the employer to take some initiative." Id. at 315. This process would be meaningless "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. 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.

It is important to note that "the interactive process does not dictate that any particular concession must be made by the employer; nor does the process remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions." Id. at 317 (citing Walton v. Mental Health Association of Southeastern Pennsylvania, 168 F.3d

661, 670 (3d Cir. 1999)). All the interactive process requires is that employers make a good-faith effort to seek accommodations. Id. The Third Circuit has consistently admonished that "an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA." Deane v. Pocono Med. Ctr., 142 F.3d 138, 149 (3d Cir. 1998)(en banc); Hohider, 574 F.3d at 193-94; see also Armstrong v. Burdette Tomlin Mem'l Hosp., 438 F.3d 240, 246-47 (3d Cir. 2006)("[i]f 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" (citations omitted)).

Conversely, an employer is not liable if the employee fails to supply it with information necessary to devise an appropriate accommodation, or if the employee "'does not answer the employer's request for more detailed proposals.'" Whelan v. Teledyne Metalworking Prods., 226 Fed. Appx. 141, 146 (3d Cir. 2007)(quotations and citations omitted). Of course, an employee also may not unreasonably insist on a single accommodation; this type of insistence would deem the employee at fault for breaking down the interactive process. Id.

At trial, an employee can establish that an employer failed to engage in the interactive process in good faith by showing that: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Williams v. Phila. Hous. Auth.

Police Dep't, 380 F.3d 751, 772 (3d Cir. 2004) (quotation omitted). On the other hand, an employer can show good faith by "meet[ing] with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome." Id. The EEOC also obligates the employer to: (1) analyze the particular job involved and determine its purpose and essential functions; (2) consult with the disabled employee to understand her precise job-related limitations and how they could be overcome with a reasonable accommodation; (3) in consultation with the disabled employee, identify potential accommodations; and (4) considering the preference of the individual to be accommodated, select and implement the most appropriate accommodation. 29 C.F.R. Pt. 1630, App. § 1630.9.

As a preliminary matter, the Court previously rejected Plaintiff's argument that as a matter of law Defendant discontinued the interactive process by allowing Ellis to roll into the LTD program – which effectively terminated Ellis – after her short-term disability benefits period ended. The Court reasoned that the process of being rolled into the LTD program is automatic; Ethicon did not affirmatively act to terminate Ellis' position, but rather, passively enrolled Ellis into the LTD program pursuant to policy. It might be a different result if Ethicon actively terminated Ellis, and then, in an attempt to ward off litigation, offered her another position. Thus, the Court reserved the determination -- whether the interactive process continued post-termination -- for the factfinder. See June 3, 2008 Reconsideration Opinion at 7-8. The Court also rejected the position that any attorney-to-attorney discussion cannot be a part of the interactive

process. See Ellis v. Ethicon, Inc., No. 05-726, 2008 U.S. Dist. LEXIS 27202, at *57 (D.N.J. Mar. 28, 2008); Burke v. Iowa Methodist Medical Center, No. 99-30634, 2001 U.S. Dist. LEXIS 21126, at *17-18 (S.D. Iowa Feb. 22, 2001). Now, the Court will turn to Defendant's contentions.

As for the first element - whether Ethicon knew about Ellis' disability - the witnesses' testimony establish, and Ethicon does not dispute on this motion, that Ethicon was aware of Ellis' cognitive impairments. Ellis also requested accommodations before the end of her short-term disability period. In particular, Dr. Mahon and Dr. Watson recommended that Ellis work from home three days a week and work in the office two days a week. See May 6 Tr., 73-74. This request duly satisfies the second element which requires Ellis to show that she requested accommodations for her disability; this, too, was not disputed by Ethicon. Similarly, Defendant does not raise the issue of whether Ellis could have been accommodated absent bad faith.

Instead, Defendant takes issue with Plaintiff's proof with respect to the third element - whether Ethicon participated in the interactive process in good faith. In that connection, Defendant submits that the evidence overwhelmingly supports the conclusion that Ethicon continued to engage in the interactive process in good faith until Ellis ended it. For support, Defendant cites testimony from Ms. Warren that Plaintiff's initial proposed accommodation of working three days from home was considered and rejected by Ethicon based on the statement in Dr. Mahon's letter that the restriction was permanent and indefinite. Defendant also points to the testimony of Ms. Traver, Plaintiff's then-supervisor, that such accommodation was not feasible based on the understanding that working from home three days a week was not consistent with the

job requirements for a quality engineer. See May 11 Tr., 174-77; May 15 Tr., 3-5. In light of that understanding, Defendant argues that Ms. Warren's testimony was unrebutted and establishes the fact that Ellis ended the interactive process when she failed to continue discussions after a part-time position was offered to Ellis' attorney, and thus, the jury's finding that Ethicon failed to engage in the interactive process cannot be reconciled with the evidence.

Defendant's argument is reminiscent of the contention made in its motion for reconsideration prior to trial. Then, the Court entertained the exact issue raised here. At that time, the Court was of the opinion that there were genuine issues of fact with regard to the parties' involvement in the interactive process subsequent to the proposal of a part-time position by Ethicon which had to be resolved by the factfinder at a trial. See June 3, 2008 Reconsideration Opinion. The facts of this case were fully considered by the jury and a finding was made that Ethicon failed to provide Ellis with reasonable accommodations. Contrary to Defendant'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.

Ms. Warren's testimony, with respect to the discussions between Ellis' attorney, Nicola H., and Ms. Warren herself, does not compel the conclusion that Defendant engaged in the interactive process in good faith.[2] In terms of a time-line, Ms. Warren

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Defendant cites to Third Circuit cases that stand for the proposition that a plaintiff cannot meet her burden of proof on an issue merely by disbelief of defendant's evidence. See, e.g., Schoonejongen v. Curtiss Wright, 143 F.3d 120, 130 (3d Cir. 1998); Williams v. Borough of West Chester, P.A., 891 F.2d 458, 460 (3d Cir. 1989). However, those cases were decided on a summary judgment motion whereby the Third Circuit cautioned that a

testified that Ethicon received a letter from Dr. Mahon proposing that accommodations should be made in order for Ellis to work from home three days a week. See May 12 Tr., 138-39. Ms. Warren testified that she spoke with Ellis' supervisor, Ms. Traver, who advised her that Ethicon would not be able to provide the requested accommodation due to certain job requirements of a quality engineer. Id. This determination was communicated to Ellis by way of an email on October 15, 2001. See May 6 Tr., 74-78; P-92. Ms. Warren acknowledged that on October 18, 2001, she received a call from Nicola H. to address Ellis' return to work. See May 12 Tr., 136-37. Ms. Warren further acknowledged that a letter was sent by Nicola H. on behalf of Ellis on October 19, 2001, discussing generally Ethicon's rejection of Ellis' proposed accommodations. See D-54. Having received the letter, Ms. Warren testified that she spoke with Ms. Traver and determined that Ellis was a valued employee and that Ethicon would be willing to permit Ellis to work on a part-time basis. Id. at 140. According to Ms. Warren, this proposal of a part-time position was communicated to Nicola H. during a telephone conversation on October 31, 2001. Id.

Thereafter, on November 13, 2001, Ms. Warren testified that Nicola H. asked about other alternative accommodations because Ellis was not interested in a part-time position. Id. at 141. In response, Ms. Warren advised Nicola H. that Ethicon would

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plaintiff cannot survive summary judgment simply by asserting that the factfinder might disbelieve the testimony of defendant's witnesses. Hozier v. Midwest Fastener, Inc., 908 F.2d 1155, 1165 (3d Cir. 1990). Here, however, a jury has heard and considered all the testimony. Indeed, it is the jury's role to weigh credibility and to determine whether to believe or discredit, in part or whole, a witness' testimony. See United States v. Wise, 515 F.3d 207, 214 (3d Cir. 2008)("we 'must be ever vigilant ... not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury'" (quoting United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005)).

require revised accommodations from Ellis' physicians. Id. During this telephone call, Nicola H. also requested a meeting with Human Resources, Ethicon's medical personnel, and Ellis' doctor to "iron out accommodations." Id. at 142. Despite such a request, Ms. Warren reiterated that before Ethicon would take any steps, it would need "revised accommodations from [Ellis'] doctor." Id. However, Ms. Warren also indicated that Ethicon would be willing to consider "whatever [Ellis'] doctor was willing to permit her to do," as long as it was "within the parameters of the business they were trying to run." Id. at 143-44.

Ms. Warren further testified that she did not hear anything back from Nicola H. regarding any revised accommodations. Rather, at the end of December of 2001, Ms. Warren received a call from Ellis' husband, Scott Zukowski, and he advised Ms. Warren that his wife was not aware that a part-time position had been offered, and that Ellis was not interested since she had started another job. Id. at 154. Based on Ms. Warren's testimony, Defendant argues that Ethicon did in fact engage in the interactive process in good faith, and that it was Ellis that ended the process by failing to provide additional accommodations from her doctor, and subsequently, secured another job.

Whether Ethicon participated in the interactive process in good faith is a fact sensitive inquiry that requires the factfinder to look at the totality of the circumstances. See O'Dell v. Dep't of Pub. Welfare, No. 02-130, 2004 U.S. Dist. LEXIS 23585, at *19-20 (W.D. Pa. Nov. 14, 2004)("the Third Circuit underscores the factually-sensitive determinations [of the interactive process] to be made on a case-by-case basis . . .; it is the role of the fact-finder to determine the reasonableness of the accommodation"). No one aspect of the process is determinative of good or bad faith. Johnson v. McGraw-Hill

Cos., 451 F. Supp. 2d 681, 711 (W.D. Pa. 2006); EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 805-06 (7th Cir. 2005)("[t]he last act in the interactive process is not always the cause of a breakdown, however, and [the] court must examine the process as a whole to determine whether the evidence requires a finding that one party's bad faith caused the breakdown"). In light of those principles, the Court disagrees with Ethicon's insistence that the jury could not have found bad faith in Ethicon's rejection of Ellis' initial proposal for accommodations. Indeed, the first finding of bad faith could have been based on Ethicon's absolute rejection of Ellis' initial proposed accommodations without seeking any explanation from Ellis and her doctors, or exploring other alternative accommodations. In fact, the jury heard Dr. Waston's testimony that the accommodation of working three days a week from home was not permanent in nature at the time when it was proposed. Dr. Watson qualified her recommendations by stating that based upon Ellis' impairments and progress, the accommodations might be permanent. See May 7 Tr., 33-36; 39-40. In any event, no one from Ethicon contacted Dr. Watson, or Dr. Mahon, about the proposed accommodations. Id. at 34. Significantly, Ms. Traver testified that if she had known that the proposed accommodations were not permanent, but presented "as transient and progressive toward full return to work," she would have been willing to have a discussion with Ellis regarding a gradual return to work plan. May 11 Tr., 128-132; 152. However, Ellis' proposed accommodations were rejected without any further action on Ethicon's part. The evidence supports a finding that after Ethicon received the proper notice from Ellis, Ethicon ignored its duty to engage in the interactive process simply because it believed Ellis had not come forward with a reasonable accommodation. See Taylor, 184 F.3d at

317. Instead, it was not until Ellis' attorney contacted Ms. Warren that the conversation regarding Ellis' return-to-work plan resumed.[3]

Likewise, Ethicon's failure to propose alternative accommodations once Ellis rejected the part-time position supports the jury's finding of bad faith. Ms. Warren testified that a return-to-work meeting never occurred because Ellis failed to provide revised accommodations from her doctors. Ethicon maintains that it was not obligated under the ADA to negotiate Ellis' medical restrictions before addressing possible accommodations. The crux of Ethicon's defense at trial was that it should not be faulted for Ellis' failure to answer Ethicon's request for more detailed proposals; this failure on Ellis' part should have relieved Ethicon from providing any further offers of reasonable accommodations. However, despite Ethicon having presented evidence on this issue and so arguing to the jury, the jury nonetheless rejected this position in ruling against Defendant, and the record supports the jury's determination.

The interactive process obliges an employer to make a reasonable effort to determine the appropriate accommodation. To that end, Ethicon's perception that the accommodations Ellis proposed were impractical for business reasons did not relieve

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In further arguing that Ethicon's conduct was unreasonable, Plaintiff points to the return-to-work interactive process during her first short-term disability leave in 1999 and compares it to the process in 2001. In doing so, Plaintiff argues that a return-to-work meeting with Ethicon never occurred in 2001, even though there was a meeting in 1999; therefore, Ethicon's failure to hold such a meeting is evidence of bad faith. Plaintiff's comparison is misplaced. During the trial, the Court specifically instructed the jury that the testimony regarding Plaintiff's return-to-work process following her short-term-disability leave in 1999 can only be considered as evidence of Plaintiff's state of mind as to her expectations. Furthermore, the jury was instructed not to conclude from this evidence that all return-to-work situations are the same. See May 5. Tr., 88. In addition, an in-person meeting is not the only way to engage in the interactive process.

Ethicon of its obligation to discuss possible accommodations that were available and appropriate. See Canny v. Dr. Pepper, 439 F.3d 894, 903 (8th Cir. 2006)("Dr Pepper's perception that the accommodations Canny suggested were impractical did not relieve Dr Pepper of its obligation to discuss possible accommodations that were available and appropriate"); Humphrey v. Memorial Hospitals Assoc., 239 F.3d 1128, 1138 (9th Cir. 2001)("MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process"). Notwithstanding the part-time position, which was at odds with the recommendations of Ellis' doctors,[4] Ethicon never apprised itself of Ellis' medical condition and/or suggested alternative accommodations that would comport with the proposed accommodations suggested by Ellis' doctors. More importantly, "the ADA was enacted to compel employers to look deeper and more creatively into the various possibilities suggested by an employee with a disability." Skerski v. Time Warner Cable Co., 257 F.3d 273, 285 (3d Cir. 2001). Based upon the evidence, the jury could have found that a reasonable accommodation within Ellis' position was possible and that Ethicon failed to explore alternative accommodations that would have enabled Ellis to retain her full-time status. Id. ("'an employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the

[4]Indeed, the part-time position was not comparable to Ellis' full-time position. Importantly, the jury heard testimony that the position would have paid less and that short-term disability benefits are not available for part-time employees. See May 14 Tr., 27.

individual is qualified with or without reasonable accommodation.'" (quoting EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(o)).

Defendant next argues that Plaintiff never provided the medical information Ethicon requested because Plaintiff was "not interested" in returning to Ethicon as evidenced by the fact that Plaintiff took a job at Aventis. However, Plaintiff's employment at Aventis in December 2001 does not excuse Defendant's responsibility under the ADA. Moreover, the jury heard testimony from Ellis that she sought employment with Aventis in December 2001 because at that time she was already terminated from Ethicon and she was under the impression that Ethicon was unwilling to accommodate her disability.[5] See May 5 Tr., 156-57. Certainly, it was within the jury's province to weigh the credibility of Plaintiff on this issue.

The Court also finds Defendant's attorney-client privilege argument without merit. Throughout the trial, Defendant argued that it was prejudiced by Plaintiff's abuse of the attorney-client privilege with respect to certain communications between Ellis and the Carella Byrne attorneys. Specifically, Defendant repeatedly complained that while Ellis and her husband denied knowledge of the key communications that had occurred regarding Ethicon's offer of a part-time position, the Court disallowed Defendant from exploring and impeaching these general denials on cross-examination of Plaintiff or on the examination of Ms. Flax, one of Ellis' attorneys from Carella Byrne.

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[5] It is certainly plausible that Ellis believed Ethicon was unwilling to accommodate her in December 2001. The jury heard testimony regarding Ellis' first short-term disability period at which time Ethicon actively participated in the interactive process. Ellis testified that she expected similar treatment in 2001, but it never took place. May 5 Tr., 88-95, 144-147.

As a result, Defendant surmises that the jury was led to conclude that Ellis did not know about the part-time offer or Ethicon's willingness to consider other restrictions and to continue the interactive process. Defendant's reasoning fails to take into account the jury instruction that addressed this exact issue. The Court charged the jury that communications between attorneys are to be treated the same as if the communications had occurred between the parties since attorneys are the agents of their client. Therefore, Ellis was deemed to have knowledge of the part-time position since it was offered to her attorney. Thus, Defendant's disagreement with the Court's evidentiary ruling is without merit on this motion.

Accordingly, 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.

D. Qualified Individual

Next, Defendant argues that Plaintiff failed to prove that she could have been reasonably accommodated in a way that would have enabled her to perform the essential functions of a quality engineer. Defendant advances that Plaintiff's own testimony - that she could have performed the essential functions of her job by temporarily working three-days a week from home - was contradicted by Dr. Watson's prognosis that the proposed restrictions were "permanent" and "indefinite." In addition, Defendant faults Plaintiff for her failure to prove that such a temporary accommodation would have been consistent with the essential functions of the job.

Under the ADA, a "qualified individual" is one "who, 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); Skerski, 257 F.3d at 278. To satisfy this requirement, a plaintiff must first show that she "satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires." Deane, 142 F.3d at 145. Second, a plaintiff must demonstrate that she, "with or without reasonable accommodation, can perform the essential functions of the position held or sought." Id. There is no dispute as to the first part of this analysis as the evidence readily establishes, and Ethicon does not controvert, that Ellis possessed the skills and experience necessary to perform the duties of a quality engineer. See May 12 Tr., 5 (Traver: "Theresa was a very good quality engineer. She was a strong performer. She has great credentials and skills, very technically competent . . ."). Rather, Defendant's contention here relates to the latter question.

Turning to this second question requires the Court to conduct a two-part inquiry. The first determination is whether Ellis can perform the essential functions of her job without accommodation. Skerski, 257 F.3d at 278. If this is the case, Ellis would be considered a "qualified individual," thereby satisfying the second part of a prima facie case under the ADA. Id. If Ellis cannot perform the essential functions of her job as a quality engineer without accommodation, then the inquiry is whether she can perform those same functions with a reasonable accommodation. Similarly, if she is able to perform with accommodations, she will be considered a "qualified individual" under the ADA. Id. at 278-79.

At trial, the jury heard testimony from Ms. Traver that Ellis could not have

performed the essential functions of a quality engineer by working at home three days a week because she needed to meet in person with other team members to facilitate the development of new products. See May 12. Tr., 3. In addition, as a quality engineer, Ellis was occasionally required to travel to off-site locations.[2] However, Ms. Traver also testified that she was willing to accommodate Ellis by allowing her to work from home three days a week on a temporary basis. Id. at 4. In order to do so, Ellis' duties would be reassigned to another member of the engineering staff. Ms. Traver pointed out that these duties were the essential functions of Ellis' position. In that regard, Defendant argues that even with accommodations, Ellis could not have performed the essential functions of her job because some of her essential duties had to be reassigned. However, this ignores other evidence in the record that would provide a sufficient evidentiary basis for the jury to find that Ellis was a qualified individual.

Without doubt, there was a great deal of evidence suggesting that with accommodations, Ellis was able to perform her job. In her testimony, Ms. Traver agreed that a portion of Ellis' position is report writing and data analysis which could be done from a remote location. Id. at 11. In addition, from a remote location, Ellis could have contacted other staff members via telephone, email, and conceivably, video conferencing. Id. Ms. Traver also agreed that if there had been an opportunity to discuss the accommodations and work on a gradual reentry into the workplace, she would have been able to place Ellis back into her job, albeit some of the duties would be

[2] Ellis testified that during the period between her return from the first short-term disability and her second short-term disability, she only had to travel one day for work to a nearby company close to where she lived, and that she did not have to travel by airplane. See May 5 Tr., 104.

temporarily assigned to other engineers. In sum, Ms. Traver was of the opinion that Ellis would have been able to continue to perform her job with certain accommodations. Indeed, Ms. Traver was "willing to consider anything . . . that would have [led] [] to full functionality at the end." Id. at 22. In fact, Ms. Traver was even open to the idea of permitting Ellis to permanently work from home one day a week. Id. at 21.

Dr. Watson's testimony further illustrates that Ellis was able to perform her job with certain accommodations. The doctor testified at length that Ellis could return to work if she could work from home three days a week. Dr. Watson reasoned that this plan would "eliminate the commute and save the wear and tear." May 7 Tr., 35. Ellis would be able to "use all her energy to focus on what she needed to do to get that job done, pace herself through the day." Id. If need be, Ellis could "take a nap at lunch for 20 minutes . . . come back to a project and think about it, . . . work a longer day at home and get the job done without interruptions, without the phone ringing . . . ." Id. With these accommodations in place Ellis would have "had a very decent chance of being able to do her job." Id. In light of the testimony of the various witnesses, the jury had sufficient evidentiary basis to find that Ellis was a "qualified individual" within the meaning of the ADA.

E. Cognitive Impairment as a Disability

Defendant also argues that Plaintiff has failed to prove that her disability was substantially limiting in the major life activity of cognitive function as required by the ADA. In that regard, Defendant advances similar arguments in this context as done in its motion for summary judgment - Dr. Watson's testimony only proves that Plaintiff's cognitive function was between average and below average ranges and subject to "mild

impairment" overall.

In the first instance, a determination must be made with respect to whether the individual is substantially limited in any major life activity other than working, such as walking, seeing, or hearing. 29 C.F.R. Pt. 1630, App. § 1630.2(j). In making this determination, the effect of the impairment on that individual is compared with the "average person in the general population." 29 C.F.R. § 1630.2(j)(1). EEOC Regulation 6 provides that an individual is "substantially limited" in performing a major life activity if the individual is: (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) 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); Williams, 380 F.3d at 762.

In addition, the regulations specify that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment; (ii) 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); Weisberg v. Riverside Township Board of Education, 180 Fed. Appx. 357, 361 (3d Cir. 2006). The analysis should be conducted in light of the facts that existed at the time of the alleged discrimination and not in light of conditions that developed years later. See Taylor, 184 F.3d at 308 (plaintiff must show she was substantially limited during the time span when she says she was denied reasonable accommodation).

In its argument, Defendant has merely focused on the first part of the equation - whether Ellis was unable to perform a major life activity that the average person in the general population can perform. In doing so, it focused on Dr. Watson's testing and maintains that, at worst, Ellis' cognitive functions were within average limits despite the fact she is mildly impaired. However, Ethicon seemingly missed the second aspect of the substantially limiting test: substantially limiting can also be defined as a limitation that 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.

Previously, the Court found that while Dr. Watson's testing had shown that Ellis' abilities fell between average to below average, it was the opinion of both Dr. Mahon and Dr. Watson that because of Ellis' symptoms from her head injury, she was unable to continue at the pace she had been working at Ethicon prior to her short-term disability leave and that her hours and responsibilities at work must be reduced, followed by an accommodated work environment. At trial, Dr. Watson elaborated on this finding. See generally, May 7, Tr., 30-41. Dr. Watson testified that mild traumatic brain injury could result in physical manifestations of fatigue, gait, instability, dizziness, problems with balance, and blurry and double vision. See May 3 Tr., 16. Because of these symptoms, Ellis experienced so called "cognitive fatigue." Id. "That is probably the most troubling and difficult symptom a brain-injured person has to cope with." Id. Aside from the fact that Ellis would not be able to demonstrate a wide range of emotion, she would encounter problems with concentration, speed and clarity of thinking, word

retrieval and usage, memory, organizing and planning her time, spelling and reading. Id. Overall, Dr. Watson found Ellis' condition troubling and insisted that she required certain accommodations to re-enter the job force. Id. at 24. Dr. Watson cautioned that "while Ms. Ellis pain, cognitive fatigue, and depression were well-controlled and managed in a testing situation, they are likely major contributors to suboptimal functioning in daily life." Id.

Indeed, Defendant did not timely proffer its own expert. The jury was left with Dr. Watson's testimony regarding Ellis' cognitive issues. While a few of the test scores showed that Ellis' mental abilities were somewhat average, Ellis' difficulties at work and her medical evidence viewed in their entirety were sufficient for a reasonable trier of fact to conclude that Ellis' impairments substantially limited her cognitive functioning abilities. See Emerson v. Northern States Power Company, 256 F.3d 506, 511-12 (7th Cir. 2001)(As to the major life activity of learning, the court noted that, even though plaintiff scored within the normal limits on neuropsychological testing, her difficulties at work and her medical evidence was sufficient for a finding that her cognitive impairments substantially limited her ability to learn).

Furthermore, the "ADA requires those 'claiming the Act's protection. . . to prove a disability by offering evidence that the extent of the limitation [caused by the impairment] in terms of their own experience . . . is substantial." Toyota v. Motor Mfg., Ky., v. Williams, 534 U.S. 184, 197 (2002)(quoting Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999)). Ellis testified that due to her symptoms, she was unable to coordinate her personal life functions without assistance. Specifically, Ellis stated that after her car accident, her husband had to facilitate her life skills in order for her to

function; these included planning activities such as getting dressed, taking medication, diet, rest, medical appointments, bathroom activities, hygiene, etc. She was no longer able to do chores around the house. In fact, Ellis testified that all she could manage to do was work and sleep. However, Ellis insisted that she continued to work despite her conditions. Considering the evidence as a whole, the inquiry is whether Ellis had an impairment that substantially prevented or severely restricted her from doing activities that are of central importance to most people's daily lives. Emory v. AstraZeneca Pharms. LP, 401 F.3d 174, 180-81, 183 (3d Cir. 2005)(quotations omitted)("when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable" (quotations and citations omitted in original)). In light of the evidence presented at trial, there is ample evidentiary basis for the jury to have found that Ellis' cognitive functions were substantially limited.

Accordingly, Defendant's motion for judgment as a matter of law is denied. In the same vein, the Court does not find that the verdict needs to be corrected in order to prevent a miscarriage of justice. As such, Defendant's motion for a new trial is also denied.

II. Damages

To begin, Plaintiff's motion addresses certain issues regarding equitable remedies, however, she mistakenly moves the Court pursuant to Fed. R. Civ. P. 59, which is invoked in order to alter or amend a judgment. At this juncture, there is no yet any judgment on Plaintiff's entitlement to or the amount of equitable relief. Rather, the jury verdict in this respect is only advisory in nature; however, the jury's finding of liability is

binding.[6] Pollard v. E.I. DuPont de Nemours & Co., 532 U.S. 843, 849 (2001). In particular, judgements pertaining to back pay and front pay are remedies tried to the Court. Id. In that regard, the Court has to make separate and independent findings of fact and conclusions of law. See Wilson v. Prasse, 463 F.2d 109, 116 (3d Cir. 1972); Fed. R. Civ. P. 52(a).

A. Back Pay

In its advisory verdict, the jury determined that Ellis suffered a loss of wages between October 22, 2001 - the date of Ellis' termination from Ethicon - and May 21, 2009 - the date of verdict. Specifically, the jury found that Ethicon was a cause of Ellis' short-term disability at Aventis from November 5, 2003 to March 28, 2004, and that such disability resulted in Ellis leaving Aventis in August 2004. However, in so finding, the jury also determined that Ethicon proved that Ellis failed to mitigate her damages by failing to obtain substantially similar employment after she left Aventis. The jury assessed back pay damages of $311,200 in the event Ethicon is only partially liable for Ellis' termination, or $486,250 if Ethicon is fully responsible.

In determining damages in an employment discrimination suit, Congress armed the courts with broad equitable powers to effectuate this "make whole" remedy. See 42 U.S.C. § 2000e-5(g)(1); Eshelman v. Agere Systems, Inc., 554 F.3d 426, 440 (3d Cir. 2009); Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 764 (1976). District courts are entrusted with wide discretion to "locate 'a just result'" regarding the parameters of

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With respect to Plaintiff's claim of emotional distress, the jury found that Ellis failed to prove that Ethicon's failure to provide a reasonable accommodation and termination of her did not play a substantial role in causing Ellis to suffer emotional distress; this finding is binding on this Court.

the relief granted in the circumstances of each case. Eshelman, 554 F.3d at 440; see also Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547, 1565 (3d Cir. 1996)(en banc). Consistent with the chief remedial purpose of the ADA, the Court's task is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); see McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995); Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985).

In exercising its discretion to fashion a remedy, district courts should, inter alia, endeavor "to restore the employee to the economic status quo that would exist but for the employer's conduct." In re Continental Airlines, 125 F.3d 120, 135 (3d Cir. 1997); see McKennon, 513 U.S. at 362. Among the remedies, courts have awarded back pay to achieve this goal. Loeffler v. Frank, 486 U.S. 549, 558 (1988); Spencer v. Wal-Mart Stores, Inc., 469 F.3d 311, 315 (3d Cir. 2006)("[W]e have treated back pay as a form of equitable relief awarded at the discretion of the court").

In general, back pay is designed to make victims of unlawful discrimination whole by restoring them to the position they would have been in absent the discrimination. Donlin v. Philips Lighting N. Am. Corp., 564 F.3d 207, 218 (3d Cir. 2009)(citing Loeffler v. Frank, 486 U.S. 549, 558 (1988)). Section 706(g) of the Civil Rights Act of 1964 governs back pay awards in ADA cases. Eshelman, 554 F.3d at 440 n.7. Section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . any other equitable relief as the

> court deems appropriate . . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g). Moreover, the base for calculating back pay is the salary an employee would have received but for a violation of the law, Watcher, 248 Fed. Appx. at 276, and uncertainties are resolved against a discriminating employer. Durham Life Ins. Co. v. Evans, 166 F.3d 139, 156 (3d Cir. 1999)(citations omitted).

Back pay is not an automatic or mandatory remedy, but "one which the courts 'may' invoke" at their equitable discretion. Donlin, 564 F.3d at 218(quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975)); see also Waddell v. Small Tube Prods., Inc., 799 F.2d 69, 78 (3d Cir. 1986). "When a plaintiff finds employment that is equivalent or better than the position she was wrongly denied, the right to damages ends because it is no longer necessary to achieve an equitable purpose; the plaintiff at that point has been restored to the position she would have been in absent the discrimination." Donlin, 564 F.3d at 218.

Here, it is undisputed that Plaintiff obtained employment with Aventis beginning on December 17, 2001 after she was terminated on October 21, 2001. Defendant submits that the back pay should be limited to Ellis' short unemployment period (from October 22, 2001 to December 16, 2001) because first, Plaintiff has failed to prove that Ethicon caused her disability in 2003 and 2004 and consequent inability to continue working at Aventis and second, because Ellis failed to mitigate her damages by seeking other employment after she left Aventis. The Court will address these issues and will calculate the appropriate back pay.

1. Whether Ethicon's Termination was a cause of Ellis' Subsequent Disability at Aventis

First, Defendant argues that the jury's finding that Ethicon's actions did not play a substantial part in causing Ellis to suffer emotional distress foreclosed the issue of back pay. In particular, Defendant maintains that the Court is bound by the jury's finding to the extent it overlaps with any fact issue on equitable remedies before the Court. This argument is without merit. The burden of proof on emotional distress is clearly set forth in this Court's jury instruction:

> Ms. Ellis has the burden of proving damages by a preponderance of the evidence. Ms Ellis must show that she suffered emotional distress and that it would not have occurred without Ethicon's failure to provide reasonable accommodations and its termination of her. She must also show that Ethicon's act played a substantial part in bringing about the injury and that the injury was either a direct result or a reasonably probable consequence of Ethicon's act. This test – a substantial part in bringing about the injury – is to be distinguished from the test you must employ in determining whether Ethicon's actions were motivated by discrimination. In other words, even assuming that Ethicon's actions were motivated by discrimination, Ms. Ellis is not entitled to damages for an injury unless Ethicon's discriminatory actions actually played a substantial part in bringing about that injury.
>
> . . .
>
> [I]n awarding emotional distress damages, you are not to award damages for the mount of wages that Ms. Ellis would have earned either in the past or in the future if she had continued in employment with Ethicon. These elements of recovery of wages that Ms. Ellis would have received from Ethicon are called "back pay" and "front pay." Back pay and front pay are to be awarded separately . . . .

May 19 Tr., 30 (emphasis added). Based upon this instruction, the jury found that Ellis had not proved by a preponderance of the evidence that Ethicon "played a substantial part" in causing Ellis to suffer emotional distress. However, notwithstanding that

determination, the jury did find that Ethicon was "a cause" of Ellis' short-term disability at Aventis and her disability which resulted in her leaving Aventis in August of 2004. Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962)("where the special verdict answers appear to be inconsistent but "there is a view of the case that makes the jury's answers . . . consistent, they must be resolved that way").[7] These two determinations were predicated upon different proofs and are separate and distinct remedies. Hence, the Court is not bound by the jury's rejection of causation with regard to Ellis' claim of emotional distress in considering back pay.

Nevertheless, Defendant contends that even if the Court were to go beyond the jury's verdict on emotional distress causation, Ellis did not meet her burden of proving that Ethicon caused her inability to continue working at Aventis. Defendant points out that Ellis testified that she did not ask for accommodations from Aventis because she did not require them. Also, Defendant urges the Court to reject Dr. Gross' theory that Ellis' inability to continue working at Aventis resulted from her decision, based upon her experience at Ethicon, to not disclose her disability or ask for accommodations for fear that she would be fired.

Citing portions of Ellis' testimony, Defendant points out that Ellis indicated she did not request accommodations from Aventis because she believed she was able to work

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Defendant's reliance on Roebuck v. Drexel University, 852 F.2d 715 (3d Cir. 1988), is misplaced. In Roebuck, the Third Circuit held that the issue of intentional race discrimination is common to both Title VII and § 1981 claims, and hence, the trial court is bound in a Title VII case to conform its verdict to the findings of the jury in a concurrently tried § 1981 case. Id. at 737-38. Roebuck's holding does not make the jury's finding regarding emotional distress binding on this Court's determination regarding back pay.

through her disability. However, the fact remains that Ellis testified she was reluctant to request accommodations from Aventis due to her negative experience at Ethicon when she requested accommodations. May 7 Tr., 123; May 6 Tr., 13-14. As such, Ellis utilized the cognitive therapy she had learned to cope with her impairments at a working environment that was different than Ethicon. Id. at 15. As Ellis set forth in her testimony, however, the work at Aventis eventually "piled up," and she no longer was able to cope with the working conditions. May 6 Tr., 16-17.

Additionally, Dr. Gross, Ellis' treating psychiatrist and an expert witness, testified that the termination from Ethicon had a devastating impact on Ellis' work life. See Gross, 15. Dr. Gross explained that the reason why Ellis was so determined to work at Aventis immediately after leaving Ethicon was the fact that she valued her career. Id. at 16-17. In fact, contrary to the testimony of Dr. Badgio, Defendant's expert, Dr. Gross indicated that Ellis' desire to continue working despite her disability was so strong[8] that she feared disclosing her cognitive impairments to Aventis would prevent her from being hired, or that she would be fired, as an employee. Id. at 19. However, since Ellis hid her disability from Aventis and worked without any accommodations, she became more depressed, her self-doubts worsened, and ultimately, Ellis was hospitalized. Id. at 20. Dr. Gross attributed Ellis' disability – which, in part, caused her to take a short-term disability leave from November 5, 2003 to March 28, 2004, and leave Aventis in August 2004 – to Ellis' experiences surrounding her termination from Ethicon. Id. at 20-21.

Defendant presents the Court with multiple reasons that may have contributed to

[8]Indeed, Dr. Badgio concurred with this observation by pointing out that Ellis is "a woman who has always relied [a] great deal upon denial. She consistently throws herself into hard work." Badgio, 77.

Ellis' disability at Aventis and also countered Dr. Gross' observations with its own expert's testimony. To that extent, Defendant is merely weighing the evidence and suggesting to the Court that the testimony of Dr. Gross and Ellis is not credible. The Court finds that while Dr. Badgio's testimony tended to contradict Dr. Gross' diagnosis, Ellis has proved by a preponderance of the evidence that her termination from Ethicon was a cause of her disability at Aventis. In that regard, the Court finds Dr. Gross' explanation sound:

> A. Well, first of all, I know Theresa Ellis very well, psychologically and so forth. Second of all, I've been a psychiatrist for 30 years that deals with issues like this all the time. You know, patients don't always know where there's something happens in their life how traumatic it will be to them. Until you point it out to them over a period of time, sometimes they're oblivious to it or they're in denial. So that it's not unusual for someone not to talk about an issue right away because they're not even aware that it's a serious psychological issue. Sometimes it's subconscious, unconscious . . . .
>
> Q. Right. And you were aware of other stressors in Ms. [Ellis'] life; isn't that right?
>
> A. That's correct.
>
> Q. And yet despite the stress of financial burdens and marital stress and relationships with her family, you continue to believe that the termination from Ethicon has impacted Ms. Ellis more than those other stressors; is that right?
>
> A. Oh, absolutely.
>
> Q. And is that because of its effect on her self-esteem?
>
> A. Her self-esteem. It was a slap in the face; it was a failure. I mean she has ongoing issues financially, has been through some marital issues. But she's still married; she still able to pay her bills; and yes, [there were] some family issues. You can't compare that to being fired. The first time in her life, a very intelligent, competent person, who now has been told you can't work in this place anymore; you are not good enough.

Gross, 66-67. That stress, coupled with her cognitive impairments, eventually led Ellis

to leave Aventis. See Id. at 19-21. Indeed, the jury in its advisory verdict, notwithstanding Dr. Badgio's testimony, credited Dr. Gross' testimony and thus, also concluded that Ethicon's conduct was a cause of Ellis' disability at Aventis. Accordingly, the Court, having weighed the evidence, finds that Ellis' termination from Ethicon was a cause of her disability at Aventis.[3]

2. Mitigation of Damages

Plaintiff's recovery is limited by mitigation principles. Ellis had a statutory duty to minimize damages by using reasonable diligence to find other suitable employment. 42 U.S.C. § 2000e-5(g); Booker v. Taylor Milk Co., 64 F.3d 860, 864-65 (3d Cir. 1995).

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[3] Having determined that Ethicon's conduct was a cause of Ellis' disability at Aventis, the Court need not also determine whether an award of back pay must also take into account other causes, much like a personal injury claim involving comparative fault. The cases cited by Defendant offer little to support its novel legal assertion. See, e.g., Mckinnon v. Kwong Wah Restaurant, 83 F.3d 498 (1st Cir. 1996)(with respect to "emotional distress," the court found that the defendant must establish a casual relationship between the prior injury and the damages claimed by the plaintiffs); Miles-Hickman v. David Powers Homes, 613 F. Supp. 2d 872, 889 (with respect to the period of back pay, because the court could not conclude plaintiff would have remained employed as a sales assistant in a depressed housing market for than two years after her employment, it did not award back pay for more than two years); Sowers v. Kemira, Inc., 701 F.Supp. 809, 827 (S.D. Ga. 1988)(based upon a reason of speculation regarding causation, the court limited the period for awarding "front pay," not back pay). Indeed, the Court's independent search of the case law does not reveal any Third Circuit authorities supporting Defendant's position. Rather, the Third Circuit in Robinson v. SEPTA, 982 F.2d 892, 898 (3d Cir. 1993), opined that back pay damages should not be reduced through a comparative fault-type analysis. Id. While Defendant distinguishes Robinson on the basis that the court was dealing with multiple causes for the employer's discriminatory conduct instead of plaintiff's injury, the court's sound reasoning applies in this context. Indeed, the court predicated its finding upon the notion that "back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Id. Since the Court finds that Ethicon's discriminatory conduct was a cause of Ellis' disability at Aventis, an award of back pay in this case compensates Ellis for the effect of Ethicon's past conduct. Accordingly, the Court finds Defendant's argument regarding proximate cause without merit.

In the context of a Title VII claim, the Supreme Court has held:

> An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in [42 U.S.C. § 2000e-5(g)]. This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.

Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982) (footnotes and internal citations omitted). "While it is the duty of a discrimination claimant to mitigate her losses, it is the employer who has the burden of proving a failure to mitigate." Caufield v. Center Area School Dist., 133 Fed. Appx 4, 10-11 (3d Cir. 2005); see Robinson v. Southeastern Pa. Transp. Auth., Red Arrow Div., 982 F.2d 892, 897 (3d Cir. 1993); Goss v. Exxon Office Systems Co., 747 F.2d 885, 889 (3d Cir. 1984). To prove a failure to mitigate, Ethicon had to prove either that other substantially equivalent positions were available to Ellis and she failed to use reasonable diligence in attempting to secure those positions, or, alternatively, that Ellis withdrew entirely from the employment market. Tubari, Ltd., Inc. v. NLRB, 959 F.2d 451, 454 (3d Cir. 1992). "When an employer successfully proves a failure to mitigate, any back-pay award to an aggrieved employee will be cut off or reduced beginning at the time of the employee's failure to mitigate and any front-pay award will be foreclosed." Caulfield, 133 Fed. Appx at 11 (citing Ford Motor Co., 458 U.S. at 233-34).

The jury found that Ellis failed to mitigate her damages by failing to find suitable employment after she left Aventis. Indeed, Ellis' testimony shows that she made no attempt to return to work at Aventis or seek any other employment. See May 6 Tr.,

147-48.

Q. Have you tried to go back to work at Aventis?

A. No.

Q. Have you made any inquiries about going back to work at Aventis?

A. No.

Q. Since you left Aventis, have you tried to get a job at another company?

A. No.

Q. Have you made any attempts to search for employment since you left Aventis?

A. Outside of just scanning for jobs, no.

Q. Have you sent letters, resumes –

A. No.

Q. -anything to anybody to try to get a job since you left Aventis?

A. No, no networking.

Id. Although Ellis' efforts to secure new employment need not be successful, she must exercise good faith in attempting to secure a position. Caufield, 133 Fed. Appx. at 12. Her only explanation for not re-entering the workplace was the pendency of this lawsuit. In that regard, Ellis testified that, through this litigation, she was seeking reinstatement as she believed her best chance for success was to return to Ethicon with reasonable accommodations. Ellis reasoned that because Ethicon is aware of her disability, she would not have to deal with the emotional issues resulting from disclosing her disability to a new employer. However, if the Court were to accept such argument, then every plaintiff in an employment discrimination suit would be able to satisfy his/her statutory

obligation to mitigate by claiming that his/her former employment presents the optimal opportunity for success; such result is contrary to the purpose of the statute. See McKnight v. General Motors Corp., 973 F.2d 1366, 1372 (7th Cir. 1992)(a plaintiff "[cannot] just leave the labor force after being discharged, in the hope of someday being made whole by a judgment at law"). Plaintiff does little to oppose this issue.

Instead, Plaintiff incorrectly focuses on Defendant's failure to prove that substantially equivalent work was available. Once Defendant meets its burden on the mitigation issue by showing that Ellis withdrew from the job market search, Ethicon does not also have to establish the availability of substantially equivalent employment. West v. Nabors Drilling USA, Inc., 330 F.3d 379, 393 (5th Cir. 2003). The West court elucidated:

> The burden is on the employer to prove failure to mitigate. Although the employer is normally required to prove that substantially equivalent work was available and that the former employee did not exercise reasonable diligence to obtain it, once the employer proves that an employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially equivalent employment. A plaintiff may not simply abandon his job search and continue to recover back pay.

Id.(citations and quotations omitted). While the Third Circuit has not had the occasion to formally address this issue, it has implicitly acknowledged such a result when it advised that showing of comparable positions is not required when the plaintiff has withdrawn from the job market. Caufield v. Center Area School Dist., 133 Fed. Appx 4, 10-11 (3d Cir. 2005)(addressing back pay under the ADEA, the court held that "[t]o prove a failure to mitigate, [defendant-appellee] had to prove either that other substantially equivalent positions were available to Appellant and she failed to use reasonable

diligence in attempting to secure those positions, or, alternatively, that Appellant withdrew entirely from the employment market" (quotations and citations omitted)) (emphasis added); see also Tubari, Ltd., Inc. v. NLRB, 959 F.2d 451, 454 (3d Cir. 1992).[9] In light of the foregoing principles, Plaintiff has failed to advance any persuasive legal argument, or point to any cogent evidence presented at trial, that would prove that she reasonably sought employment after leaving Aventis and thus, Defendant has satisfied its burden of showing Plaintiff failed to mitigate after leaving her employment at Aventis in August 2004. The Court, therefore, takes into account Plaintiff's failure to mitigate when fashioning an award of back pay.

B. Calculation of Back Pay

The starting point in the calculation is determining the period of back pay. Under the law, back pay encompasses the period between the date of Ellis' termination from Ethicon to the date of the judgment. The beginning of the back pay period is the date on which Ellis was terminated from Ethicon, i.e., October 22, 2001. Since Ellis' employment at Aventis began on December 17, 2001, she was unemployed from October, 22 2001 to December 16, 2001. Defendant argues that Ellis is not entitled to any back pay during this period because she chose to forego another comparable position at Aventis offered to her two days after Ellis was terminated from Ethicon. However, in light of the Third Circuit decision in Donlin, the Court previously rejected this argument. The Court reasoned that Defendant has not proved that the position of statistician at Aventis was "substantially comparable" to Ellis' position as a quality engineer at Ethicon.

[9]While Tubari applied mitigation principles under the NLRB rather than the ADA, the rule announced there is also utilized in employment discrimination cases. See, e.g., Booker, 64 F.3d at 865 (Title VII).

Therefore, she was not required to accept such a position. See Donlin, 564 F.3d at 222-23 ("only unjustified refusals to find or accept other employment are penalized"). Accordingly, the Court will include this period of unemployment when calculating back pay.

Next, the back pay period will also include the period when Ellis began working at Aventis until she left Aventis because of her disability, i.e., December 17, 2001 to August 4, 2004. However, Ellis' earnings at Aventis must be subtracted from the award of back pay. The Court notes that in Defendant's proposed calculation, Ethicon excluded the period of Ellis' short-term disability at Aventis from November 5, 2003 to March 28, 2004, because Defendant argues that Ellis' subsequent disability at Aventis cannot be attributed to Ethicon's conduct. However, since the parties stipulated to the earnings Ellis made at Aventis during the relevant years in their Pre-Trial Order, and those earnings are more than what she would have made at Ethicon[4], the effect of the short-term disability period on the award of back pay is moot.

Finally, the Court must determine the end date of the back pay period. To begin, the Court credits Ellis' testimony with regard to her treatment at the Nevada Community Enrichment Program for approximately two-and-a-half months after leaving Aventis. See May 2, Tr., 27-28. In that regard, the Court finds that Ellis was not able to work for the period she was receiving treatment at the facility.[5] Notwithstanding this finding, Ellis simply has failed to present to the Court any evidence that would demonstrate that

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[4] See chart below.

[5] Because the Court has found, in this Opinion, that Ellis is capable of working with accommodations, notwithstanding the fact she left Aventis on disability and never returned to work, Plaintiff has not put forth any evidence demonstrating her inability to work after leaving Aventis, except for the two-and-a-half months of treatment.

Ellis was incapable of working with or without accommodations after her treatment in Nevada. In fact, both of Plaintiff's experts did not opine on whether Ellis was capable of working immediately after leaving Aventis. Instead, on the issue of Plaintiff's ability to work, Dr. Gross testified that Ellis should be reinstated to her position at Ethicon. See Gross, 21-22. Similarly, Dr. Watson did not treat Ellis in 2004 when Ellis left Aventis, and therefore, she has no opinion as to Ellis' working capabilities at that time. Indeed, Plaintiff did not consult with Dr. Watson again until 2007, at the time this case was nearing trial in this Court. Moreover, while Ellis and her husband testified in general as to Ellis' cognitive impairments and how those impairments affected her daily living, neither Ellis nor her husband testified specifically about her inability to work after leaving Aventis. Instead, Ellis stated that she is capable of working and that returning to Ethicon would be the best opportunity for her to succeed. Thus, the Court finds that Ellis has failed to prove that she was incapable of working after her treatment in Nevada.

In addition, the Court has already found that Ellis failed to mitigate her damages by not making any reasonable efforts to secure employment after she left Aventis. In that regard, Ellis is not entitled to any back pay after her treatment. Accordingly, the appropriate back pay period is from October 22, 2001 -- the date she was terminated from Ethicon -- to December 20, 2004 – the date she was able to work after leaving Aventis (including the two-and-a-half month period of treatment) -- less her earnings from Aventis.

Next, the Court must determine what Ellis' yearly salary would have been at Ethicon from 2001 to 2004, including any raises or bonuses. However, because Plaintiff did not produce any evidence at trial with respect to bonuses or fringe benefits

that she would have received had she stayed at Ethicon, the Court will not speculate as to the amount of these benefits, and thus, will not consider them in calculating back pay.

Plaintiff offered the expert testimony of Dr. Gamboa, a vocational expert on damages, to support her claim of back pay. Dr. Gamboa testified that Ellis' total economic loss (past and future), which included a reduction for taxes, both federal and state taxes, is $1,769,000. See Gamboa, 22. The starting point for Dr. Gamboa's conclusion is determining Ellis' present value salary. Dr. Gamboa used $82,540 -- which is inaccurate -- as Ellis' salary when she left Ethicon and, without an explanation, testified that Ellis' present value salary in 2007 was $98,907.[6] Id. at 19. Dr. Gamboa then multiplied that figure by Ellis' worklife expectancy of 19 years and subtracted from that number $200,000, which represents Ellis' earnings from Aventis, and any federal and state taxes. Dr. Gamboa concluded that Ellis' total economic loss is approximately $1.7 million. However, in light of the findings made in this Opinion, the Court holds that, in many respects, Dr. Gamboa's simplistic calculations are neither helpful nor reliable.

First, the Court finds Dr. Gamboa's calculation of present value unreliable because he converted the wrong yearly salary for Ellis at Ethicon in 2001.[7] Moreover, his present value calculation only accounted up to the year 2007. Most significantly, Dr. Gamboa did not explain how he arrived at any of the figures. In particular, he provided no explanation of his methodology, calculations, or assumptions, except that he assumed

[6] Before trial, Plaintiff submitted a report by Dr. Gamboa. However, because that report was never introduced at trial, the Court will not rely on the report. The Court will only rely on Dr. Gamboa's video-taped testimony.

[7] Dr. Gamboa used $82,540 as Ellis' yearly salary when she left Ethicon in 2001; however, her salary was $86,900.

that Ethicon caused Plaintiff's disability at Aventis and caused her to be subsequently unable to work and he assumed a worklife expectancy of 19 years (from 2001 to 2020, when Plaintiff will be age 55). Furthermore, while Dr. Gamboa increased the basis of Plaintiff's Ethicon earnings to 2007 dollars, he subtracted Aventis earnings in 2002-2004 dollars; this appears to be an inconsistent approach. In light of these deficiencies, the Court is unable to rely on Dr. Gamboa's calculation when considering Plaintiff's back pay. Likewise, the Court rejects the jury's advisory verdict on the amount of back pay because the jury's determination appears to have been based upon Dr. Gamboa's unreliable testimony. More importantly, it appears that the jury's recommendation did not take into account Ellis' failure to mitigate her damages – even though the jury had found that Ellis failed to mitigate. See Jury Verdict (What is the dollar amount of the wages that Ms. Ellis lost by her termination from Ethicon between October 22, 2001 and today caused by Ethicon?). The Court will undertake an independent appraisal of Ellis' back pay.

Without any reliable evidence as to Ellis' salary, raise or fringe benefits, the Court resorts to using Ellis' Ethicon salary in 2001 as a starting point when calculating her back pay. Consequently, the Court will subtract Ellis' hypothetical Ethicon salary from her earnings at Aventis during the relevant years. The following chart represents the back pay to which Ellis is entitled:

Time Period	Hypoth. Ethicon Earnings	Aventis Earnings[8]	Back Pay Entitled
10/22/01- 12/16/01 (8 weeks)	$13,369	0	$13,369
12/17/01 – 12/31/01 (2 weeks)	$3,342	$3,020	$322
2002	$86,900	$76,295	$10,605
2003	$86,900	$92,822	0
1/1/04-8/4/04 (33 weeks)	$55,148	$76,217	0
8/5/04 – 10/20/04 (appx. 2.5 months)	$18,104	0	$18,104
Total			$42,400

The Court finds that $42,400 is the appropriate back pay; however, the back pay amount must be awarded in the present value of 2009. Because Plaintiff did not offer the Court sufficient evidence to calculate that figure, the Court will allow Plaintiff to submit a declaration from an expert to furnish the appropriate calculation. Defendant shall have leave to file a response.

C. Federal Income Tax Consequences

Ellis requests the Court to increase any back pay award to offset the negative tax consequences of a back pay award. The Supreme Court has held that a back pay award under discrimination statutes is taxable in the year that it is paid. See Comm'r of Internal Revenue v. Schleier, 515 U.S. 323 (1995); Eshelman, 554 F.3d at 441; Robinson v. Se. Pa. Transp. Auth., 982 F.2d 892, 898 (3d Cir. 1993). In light of that tax scheme, the Third Circuit has explained that "employees may be subject to higher taxes if they receive a lump sum back pay award in a given year." Eshelman, 554 F.3d at 441. In other words, receipt of a lump sum back pay award could elevate an employee into a

[8] The parties stipulated to the earnings Ellis made at Aventis during the relevant years. See Final Pre-Trial Order.

higher tax bracket for that year. As a result, the employee would have a greater tax burden than if she were to have received that same pay in the normal course. This is the basis of Ellis' request to receive an additional sum of money to compensate for her added tax burden.

The Third Circuit has held that a district court may, pursuant to its broad equitable powers granted by the ADA, award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create. In re Continental Airlines, 125 F.3d 120, 135 (3d Cir. 1997). Without this type of equitable relief in appropriate cases, it would not be possible "to restore the employee to the economic status quo that would exist but for the employer's conduct." Id. In that regard, the Third Circuit recently declared:

> [A]n award to compensate a prevailing employee for her increased tax burden as a result of a lump sum award will, in the appropriate case, help to make a victim whole. This type of an award, as with prejudgment interest, represents a recognition that the harm to a prevailing employee's pecuniary interest may be broader in scope than just a loss of back pay. Accordingly, either or both types of equitable relief may be necessary to achieve complete restoration of the prevailing employee's economic status quo and to assure "the most complete relief possible." Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 478 U.S. 421, 465 (1986); see also Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 850-54 (2001) (recognizing "front pay" as an equitable remedy authorized under Title VII); Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976)("It can hardly be questioned that ordinarily [the equitable relief of restoration of seniority] will be necessary to achieve the 'make whole' purposes of [Title VII]").

Eshelman, 554 F.3d at 442. However, in so holding, the court cautioned that "a prevailing plaintiff in discrimination cases is [not] presumptively entitled to an additional award to offset tax consequences above the amount to which she would

otherwise be entitled. Employees will continue to bear the burden to show the extent of the injury they have suffered." Id. at 443. Accordingly, district courts, in using their wide discretion to locate a just result, "should grant relief in light of the circumstances peculiar to the case." Id. (citations and quotations omitted).

The Court is inclined to award Plaintiff an additional sum of money to offset negative federal tax consequences. This conclusion follows the reasoning in Eshelman. In Eshelman, 554 F.3d at 440, a jury found that the defendant, the plaintiff's former employer, had discriminated against her in terminating her employment. The jury awarded the plaintiff back pay, to which the district court then added a sum of money to compensate for the negative tax consequences of a lump sum back pay award. Id. The Third Circuit subsequently affirmed the district court's decision. Here, a jury has found that Ethicon did in fact terminate Ellis in violation of the ADA. Adhering to the remedial goals of the ADA, Ellis, being the prevailing party, is entitled to this type of award in order to restore her economic status quo to that where would have existed but for Ethicon's conduct. However, before assessing the amount of the award, Plaintiff must provide the Court with additional financial analysis and evidence with regard to her tax burden for the relevant years in order to avoid speculation. Argue v. David Davis Enters., No. 02-9521, 2009 U.S. Dist. LEXIS 32585, at *77 (E.D. Pa. 2009)(determinations with respect to negative federal tax consequences must properly be grounded in facts of the case).

D. Prejudgment Interest

In the Third Circuit, there is "a strong presumption in favor of awarding prejudgment interest, except where the award would result in 'unusual inequities.'"

Booker, 64 F.3d at 868. Prejudgment interest "serves to compensate a plaintiff for the loss of the use of money that the plaintiff otherwise would have earned had [s]he not been unjustly discharged." Booker, 64 F.3d at 868; see also Arco Pipeline Co. v. SS Trade Star, 693 F.2d 280, 281 (3d Cir. 1982) ("The purpose of prejudgment interest is to reimburse the claimant for the loss of the use of its investment or its funds from the time of the loss until judgment is entered."). "As with the back pay award, prejudgment interest helps to make victims of discrimination whole." Booker, 64 F.3d at 868; Eschelman, 554 F.3d at 442 (Prejudgment interest is now universally accepted form of equitable relief).

However, the Court must decide the applicable interest rate. Loesch v. City of Philadelphia, No. 05-578, 2008 U.S. Dist. LEXIS 48757, at *8 (E.D. Pa. Jun. 19, 2008)("If a court decides to award prejudgment interest to the requesting party, the applicable prejudgment interest rate is left to the sound discretion of the Court" (citations and quotations omitted)). The parties dispute which applicable rate applies. Plaintiff urges the Court to employ the IRS overpayment rates under 28 U.S.C. § 6621(a)(1), while Defendant suggests the Court utilize the statutory post-judgment interest rate under 28 U.S.C. § 1961. As the parties point out, the Third Circuit has approved the use of both types of rates, see Sun Chip, Inc. v. Matson Navigation Co., 785 F.2d 59, 63 (3d Cir. 1986) and Taxman v. Bd. of Educ. of Tp. Of Piscataway, 91 F.3d 1547, 1566 (3d Cir. 1996), and district courts in this circuit have not favored one type of rate over the other. In making this determination, the Court is persuaded by other district courts that have found the IRS overpayment rate appropriate. See Taylor v. Cent. Pa. Drug and Alcohol Servs. Corp., 890 F. Supp. 360, 368-69 (M.D. Pa. 1995); Pignataro v.

Port Auth., No. 04-1767, 2008 U.S. Dist. LEXIS 61398, at *12 (D.N.J. Aug. 11, 2008). The "[Internal Revenue Service ("IRS")] overpayment rates, 26 U.S.C. § 6621(a)(1)," is "the most logically consistent with the purpose for awarding prejudgment interest, i.e., to place the plaintiff in the position [she] would have been in had [she] not been unlawfully deprived of [her] salary." Taylor, 890 F. Supp. at 369 (noting that several other courts in the Third Circuit have adopted IRS interest rate calculation under the same rationale). The Taylor court noted that using the IRS overpayment rates is sound because the National Labor Relations Board, consistent with congressional intent, calculates prejudgment interest on back pay awards using the IRS overpayment rate, and the NLRA's remedies serve as a blueprint for fashioning remedies under Title VII. Id. Accordingly, the Court adopts the approach set forth in 26 U.S.C. § 6621(a)(1), and pursuant to IRS Revenue Ruling 2009-27, the interest rate is 4% for fourth quarter of 2009.[9] In that connection, the parties shall calculate, and submit to the Court, the appropriate prejudgment interest employing 4% as the interest rate.

III. Front Pay or Reinstatement

Rather than an award of front pay, Plaintiff seeks reinstatement of her position as a quality engineer at Ethicon. See Plaintiff's Brief in Support of Motion at p.12. Reinstatement is the preferred remedy to avoid future lost earnings. Maxfield v. Sinclair Int'l, 766 F.2d 788, 796 (3d Cir. 1985); Starceski v. Westinghouse Electric Corp., 54 F.3d

[9]As a final note, the Court rejects Defendant's argument that the pre-judgment interest should not include periods covered by the trial adjournments that Plaintiff requested. Adjournments are a part of the trial practice, and the Court does not find any reason to parse through the pre-trial phases to determine which party, or the Court's schedule, resulted in delay; it is the reality and risk of litigation.

1089, 1103 (3d Cir. 1995). It 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). However, reinstatement may not be feasible in all cases. Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1438-49 (3d Cir. 1985). For instance, there may be no position available at the time of judgment or the relationship between the parties may have been so damaged by animosity that reinstatement is impracticable. Maxfield, 766 F.2d at 796; see Donlin 564 F.3d at 220; Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984); Cancellier v. Federated Department Stores, 672 F.2d 1312, 1319 (9th Cir.), cert. denied, 459 U.S. 859, (1982). In such circumstances, "the remedial purpose of the statute would be thwarted and plaintiff would suffer irreparable harm if front pay were not available as an alternate remedy to reinstatement." Whittlesey, 742 F.2d at 728.

Since reinstatement is an equitable remedy, it is within the district court's discretion whether reinstatement is feasible. Maxfield, 766 F.3d at 796; Ellis, 832 F.2d at 30; see also Garza v. Brownsville Independent Sch. Dist., 700 F.2d 253 (5th Cir. 1983); Protos v. Volkswagen of America, Inc., 797 F.2d 129 (3d Cir.) (court ordered reinstatement as remedy for violation of Title VII by employer who failed to reasonably accommodate plaintiff's religious practices), cert. denied, 479 U.S. 972 (1986).

As a preliminary matter, Defendant suggests that if the Court were to find that Plaintiff failed to mitigate her damages, which the Court has found, reinstatement should be foreclosed. The Court disagrees. While an award of front pay may be foreclosed or reduced by a plaintiff's failure to mitigate, reinstatement is not. The Third Circuit has not had the occasion to visit this issue; however, the Court finds the Tenth Circuit's

reasoning persuasive in Dilley v. SuperValu, Inc. 296 F.3d 958, 967 (10th Cir. 2002). See Id.(failure to mitigate does not bear on a plaintiff's entitlement to reinstatement). Indeed, mitigation is relevant to determining a plaintiff's entitlement to back pay and front pay, but "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 Dilley court explained:

> 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. This is reflected in the reality that courts routinely find that a plaintiff's failure to mitigate negates or reduces his claim for back pay or front pay, but nevertheless analyze his claim for reinstatement without even referencing the mitigation finding. See Hazel v. United States Postmaster Gen., 7 F.3d 1, 5 (1st Cir. 1993); Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870 (5th Cir. 1991); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1470 (5th Cir. 1989)("If the district court finds on remand that [the plaintiff] cannot be reinstated, the court must consider his failure to mitigate his damages in determining the extent to which, if at all, front pay is appropriate."). The district court's reasoning also runs counter to those cases where courts have reduced damages based on a failure to mitigate even where reinstatement has been ordered. See, e.g., Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1271, 1280 (4th Cir. 1985); Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 117, 120 (1st Cir. 1977).

Dilley, 296 F.3d at 967. Accordingly, the Court will consider reinstatement despite the fact that the Court has found Plaintiff failed to mitigate her damages after leaving Aventis.

To that end, the Court finds that reinstatement is the most appropriate remedy under the circumstances of this case. Arguing the contrary, Defendant asserts that Plaintiff has not established that she is able to work at this point in time. The Court disagrees. Although advisory in nature, the jury found that Ellis is currently able to

work with or without accommodations. This finding is based upon the testimony from Dr. Gross. Dr. Gross opined that the emotional stress Ellis was experiencing at Aventis stemmed from Ethicon's termination due to her disability, which dealt a severe blow to her self-esteem. Consequently, she was afraid of disclosing her disability to Aventis, and indeed, worked at Aventis without any accommodations. Eventually, Ellis was unable to "keep up with it psychologically and cognitively." Gross, 20. In that regard, it was Dr. Gross' opinion that reemployment at Ethicon would provide Ellis the best opportunity to work again. He reasoned that Ellis would not have to deal with the disclosure issues regarding her disability. Id. at 64. Further, Dr Gross testified:

> Q. Okay. Now, looking at Theresa Ellis today, do you have an opinion as to the psychological impact if Ethicon were ordered to reinstate her with reasonable accommodations?
>
> A. I think this would be a beneficial thing for her emotionally. She wants to work; she would – she'd love to go back to Ethicon where this – that she loved, the job that she loved. It's sort of like someone falling off a horse and getting back on the horse, and so they feel that they're okay again. This would be a benefit to her.
>
> . . .
>
> A. Certainly that my recommendation would be for [Ellis] to try to return to work, at the right job and kind of in the right way in terms of accommodations initially.

Gross, 21-22. In response to Dr. Gross' testimony, Defendant claims that because Dr. Gross certified Ellis' Social Security disability benefits, he believed Ellis cannot work. Such argument is misplaced because social security benefits do not take into account the

possibility of reasonable accommodation. See Lujan v. Pacific Maritime Ass'n, 165 F.3d 738, 740 (9th Cir. 1999)("it is possible, due to the different definitions of disability employed by various agencies, to qualify for disability benefits and to satisfy the ADA's definition of a qualified person with a disability. Therefore, an individual's statements that [s]he is disabled or totally disabled for purposes of disability benefits are not necessarily inconsistent with [her] representations that [she] is a 'qualified individual with a disability" (quotations and citations omitted)); see also Motley v. New Jersey State Police, 196 F.3d 160, 164 (3d Cir. 1999)("there are situations in which a person may be disabled enough to qualify for receipt of disability benefits under SSDI, yet still be able to bring a cognizable ADA claim. In large part, this is because, when determining whether to award SSDI benefits, the possibility of reasonable accommodation is not taken into account. Under the ADA, however, a 'qualified individual' includes all people who 'can perform the essential functions' of the job 'with or without reasonable accommodation.'" (citations omitted)).

Defendant next contends that Plaintiff's own theory for obtaining relief after August 2004 should be sufficient for the Court to find reinstatement inappropriate. In particular, Defendant cites Plaintiff's own testimony regarding the devastating emotional and psychological impact on her which resulted from Ethicon's termination. In that connection, Defendant reasons that because Ellis' response to Ethicon was so adverse, it would be difficult to conceive of how she could be returned to the same environment. The Court finds this argument unconvincing. Indeed, while the evidence presented at trial supports the finding that Ellis' emotional devastation partly resulted from being terminated from Ethicon, none of the testimony established the fact that Ellis worked in

an adverse environment at Ethicon. In fact, to the contrary, Ms. Traver highly regarded Ellis. She testified that "up until the time [Ellis] went out on disability, her performance was always exemplary, I would say. She was a very solid performer, well-regarded, well-respected, and so there weren't specific performance issues." May 11 Tr., 120-121. As it was already pointed out in this Opinion, Ms. Traver expressed that she was willing to accommodate Ellis to the extent Ellis' proposed accommodations were not permanent. The Court also rejects Defendant's contention that there is no comparable position available within Ethicon. There is simply no evidence in the record that would suggest to the Court that Ellis' prior position, quality engineer, or a comparable position, is not currently available at Ethicon. For these reasons, the Court finds reinstatement is proper, and accordingly, front pay will not be awarded.

CONCLUSION

For the reasons set forth above, Defendant's motion is DENIED and Plaintiff's motion is DENIED. The Court shall award Plaintiff back pay in the amount of $42,400, however, this amount must be awarded in the present value of 2009, and also reinstate Ellis' employment at Ethicon as a quality engineer, or a comparable position. Additionally, Plaintiff shall submit her request for attorney's fees and costs and additional calculations consistent with this Opinion, i.e., present value of 2009, prejudgment interest and negative federal tax consequences, no later than twenty days from the date of the Order accompanying this Opinion. Defendant shall respond no later than ten days from the filing date of Plaintiff's submissions.

An appropriate Order shall follow.

DATED: November 13, 2009

/s/ Freda L. Wolfson
The Hon. Freda. L. Wolfson
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S) Defendants.	Civil Action No. 05-726(FLW) **ORDER and JUDGMENT**

THIS MATTER having been opened to the Court by Frank X. Dee, Esq., counsel for Defendant Ethicon, Inc. ("Defendant"), on a motion for Judgment or a New Trial; it appearing that Plaintiff Theresa M. Ellis ("Plaintiff"), through her counsel, Elizabeth Zuckerman, Esq., opposes Defendant's motion and moves to alter or amend the judgment with respect to equitable remedies pursuant to Rule 59(e); the Court has reviewed the submissions of the parties in connection with the motions pursuant to Fed. R. Civ. P. 78; for the reasons set forth in the Opinion filed on even date, and for good cause shown,

IT IS on this 13th day of November, 2009,

ORDERED that Defendant's motion for judgment or a new trial is **DENIED**;

ORDERED that Plaintiff's motion pursuant to Rule 59(e) is **DENIED**;

ORDERED that judgment is entered in favor of Plaintiff against Defendant, in accordance with the jury's verdict, with respect to Plaintiff's Americans with Disabilities Act claim; and it is further

ORDERED that Plaintiff's intentional infliction of emotional distress claim is

dismissed;

ORDERED that Plaintiff shall be awarded back pay consistent with the Opinion, including prejudgment interest and negative federal income tax;

ORDERED that Plaintiff shall be reinstated to Ethicon as a quality engineer, or a comparable position; and it is further

ORDERED that Plaintiff shall submit her request for attorney's fees and costs and additional calculations consistent with the Opinion, no later than twenty days from the date of this Order; Defendant shall respond no later than ten days from the filing date of Plaintiff's submissions.

/s/ Freda L. Wolfson
The Hon. Freda. L. Wolfson
United States District Judge

***NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S), Defendants.	Civil Action No. 05-726(FLW) **OPINION**

WOLFSON, District Judge:

In the instant application, Plaintiff Theresa M. Ellis ("Plaintiff") seeks, inter alia, $387,481.35 in attorney's fees and $35,176.50 in costs in connection with litigating this suit, wherein she obtained a favorable jury verdict with respect to her discrimination claim pursuant to the Americans with Disabilities Act ("ADA") against Defendant Ethicon, Inc. ("Defendant"). Previously, on November 16, 2009, the Court denied Defendant's motion for judgment or a new trial and awarded Plaintiff back pay in the amount of $42,400, along with prejudgment interest, and an amount to compensate Plaintiff for any negative tax consequences. The Court also reinstated Plaintiff to her position at Ethicon in lieu of front pay. To that end, the Court advised Plaintiff to submit an application for attorney's fees and costs, along with the appropriate calculations to adjust the back pay award to present value, to add prejudgment interest and include an appropriate amount compensating for negative tax consequences. In response to the Court's Order, Defendant now moves to alter the judgment pursuant to Fed. R. Civ. P. 59(e) with respect to adjusting the back pay award to

present value, and it opposes, in part, Plaintiff's application for fees and costs. For the reasons stated herein, the Court will award Plaintiff $340,858.85 in fees and $37,926.50 in expenses and costs. The Court will amend its previous ruling regarding back pay consistent with this Opinion.

Background

Since the facts of this case have been extensively recounted in various opinions, the Court will not repeat them here. However, the Court will incorporate, and refer to, the facts set forth in its November 16, 2009 Opinion for the purpose of these motions.

Discussion

I. Attorneys' Fees and Costs

According to the Court's instructions, Plaintiff files the instant application for attorneys' fees and costs associated with this litigation. In support of her application, Plaintiff relies on various exhibits and certifications, including the certification of Plaintiff's counsel, Elizabeth Zuckerman, Esq. and the Declaration of Fredric J. Gross, Esq., an experienced employment attorney practicing in New Jersey, to justify her request of $387,481.35 in fees and $35,176.50 in costs. Defendant raises three distinct objections to Plaintiff's fee application: (1) a $400 hourly rate is not reasonable; (2) a lower rate should apply to associate-level work performed by Ms. Zuckerman; and (3) fees should not be awarded in connection with filing a motion to disqualify. Defendant otherwise does not object to the number of hours expended on the litigation.

The Americans with Disabilities Act permits courts to award reasonable attorneys' costs to a prevailing party. The statute provides that "[i]n any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may

allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . ." 42 U.S.C. § 12205.

Plaintiff, the prevailing party in this case, is not automatically entitled to compensation for all the time her attorneys spent working on the case; rather, a court awarding fees must "decide whether the hours set [forth] were reasonably expended for each of the particular purposes described and then exclude those that are 'excessive, redundant, or otherwise unnecessary.'" Student Pub. Interest Research Group v. AT & T Bell Lab., 842 F.2d 1436, 1441-42 (3d Cir. 1988)(citation and quotation omitted).[1] A party seeking attorney fees bears the ultimate burden of showing that its requested hourly rates and the hours it claims are reasonable. See Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990); see also Smith v. Philadelphia Hous. Auth., 107 F.3d 223, 225 (3d Cir. 1997) . To initially satisfy this burden, "the fee petitioner must 'submit evidence supporting the hours worked and rates claimed.'" Rode, 892 F.2d at 1183 (quotation omitted).

Under the ADA, the determination of a reasonable fee begins by calculating a lodestar, which is the product of hours counsel reasonably worked on the litigation and a reasonable hourly rate. Lanni v. State of New Jersey, 259 F.3d 146, 149 (3d Cir. 2001); Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995)("PIRGNJ"); Damian J. v. Sch. Dist. of Phila., No. 08-2520, 2009 U.S. App. LEXIS 28255, at *5-6 (3d Cir. Dec. 23, 2009). Thus, there are two components to the reasonable fee analysis: the rate charged and the time expended. The lodestar is the presumptively

[1] "[Third Circuit] case law construing what is a reasonable fee applies uniformly to all fee shifting statutes." Goodman v. Pa. Turnpike Comm'n, 293 F.3d 655, 677 (3d Cir. 2002) (alteration, quotation marks and citation omitted).

reasonable fee. Planned Parenthood of Cent. New Jersey v. Attorney General of the State of New Jersey, 297 F.3d 253, 265 n. 5 (3d Cir. 2002).

"It is the general rule that a reasonable hourly rate is calculated according to the prevailing market rates in the community." S.D. v. Manville Bd. of Educ., 989 F.Supp. 649, 656 (D.N.J. 1998). "This burden is normally addressed by submitting affidavits of other attorneys in the relevant legal community attesting to the range of prevailing rates charged by attorneys with similar skill and experience." Id. (citations omitted). Moreover, the current market rate is the rate at the time of the fee petition, not the rate when the services were performed. Lanni v. State of New Jersey, 259 F.3d 146, 149 (3d Cir. 2001)("To take into account delay in payment, the hourly rate at which compensation is to be awarded should be based on current rates rather than those in effect when the services were performed")(quoting Rendine v. Pantzer, 141 N.J. 292 (1995)); see Rode v. Dellarciprete, 892 F.2d 1177, 1188-89 (3d Cir. 1990) (describing petition based on current rates as premised on a theory of "delay compensation"). "A current market rate is exactly that - a reasonable rate based on the currently prevailing rates in the community for comparable legal services." Lanni, 259 F.3d at 150. Once the hourly rate is set, then that rate is multiplied by the numbers of hours reasonably expended to arrive at the amount of the fee award. Id.

Significantly, the Court may not reduce an award sua sponte; rather, it can only do so in response to specific objections made by the opposing party. Bell v. United Princeton Properties, Inc., 884 F.2d 713, 719 (3d Cir. 1989). But once the opposing party has made a specific objection, the burden is on the plaintiff to justify the size and reasonableness of her request. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 713 (3d Cir. 2005).

In reviewing a fee application, a district court must conduct a "thorough and searching analysis" to identify such charges. Evans v. Port Auth. of N.Y. & N.J., 273 F.3d 346, 362 (3d Cir. 2001). As noted above, Defendant objects to Plaintiff's fee request on three separate grounds; the Court will address each contention below.

A. Hourly Rate

Plaintiff is seeking an hourly rate of $400 for Ms. Zuckerman and Mr. George W. Fisher, Esq., $375 for Mr. Richard Yaskin, Esq.,[2] and $125 for Ms. Priya Vimalassery, a paralegal. Defendant claims that the hourly rate for Ms. Zuckerman and Mr. Fisher is unreasonable. It reasons that the record establishes that Plaintiff retained Ms. Zuckerman and her firm at a "top" rate of $300 per hour, see Zuckerman Aff., ¶ 4, and this billing rate is the best evidence of the market rate. To this end, Defendant has parsed through Plaintiff's exhibits and certifications and discredits each of Plaintiff's supporting documents.

In 2005, Plaintiff signed a Retainer Agreement with Zuckerman & Fisher, LLC. The Agreement provided that the then hourly rate for Ms. Zuckerman and Mr. Fisher was $300. Zuckerman Aff., ¶ 4. A couple of years later, the Zuckerman Firm's billing rate increased to $350. Id., ¶ 8. However, effective January 1, 2010, the billing rate increased again to $400 - Plaintiff is requesting this amount as the hourly rate. Id. While the hourly rate quoted in Plaintiff's Retainer Agreement is helpful in determining a reasonable hourly rate, the Third Circuit has instructed courts to look to the applicant attorneys' customary billing

[2]Mr. Yaskin is an attorney who assisted Ms. Zuckerman at the inception of this case. The Court notes that Defendant does not object to Mr. Yaskin's hourly rate or the number of hours he spent in this litigation.

rate for fee-paying clients at the time the fee petition was filed. Lanni, 259 F.3d at 150; PIRGNJ, 51 F.3d at 1185. In that regard, in the first instance, the Court finds the $400 hourly rate unreasonable. At the time this application was filed in December 2009, the Firm's hourly rate was $350. Therefore, there is no basis for the Court to permit a $400 hourly rate when all of the work performed by Ms. Zuckerman and Mr. Fisher, up to and including the filing of this request, are prior to the rate increase in 2010.

Rather, the Court finds the hourly rate of $350, which was the Firm's hourly rate at time this petition was filed, reasonable. The starting point in determining a reasonable rate is the experience of the attorneys. See Tenafly Eruv Ass'n v. Borough of Tenafly, 195 Fed. Appx. 93, 97 (3d Cir. 2006). There is no dispute that Plaintiff's attorneys are experienced lawyers in the field of employment discrimination. Indeed, Ms. Zuckerman has cited to many published cases in which she has represented plaintiffs, and she has been representing plaintiffs in employment disputes since 1990. Mr. Fisher also has substantial trial experience in both state and federal courts. Plaintiff's evidence – a survey of cases discussing hourly rates and the Declaration of Mr. Gross[3] – support the reasonableness of the $350 hourly rate, which falls within the norm of New Jersey attorneys with similar positions and experience. Id.; Zuckerman Aff., ¶¶ 12(e)-(f); see also Gross Decl.

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[3] Defendant contests the probative value of Mr. Gross' Declaration because it maintains that there is no showing that Ms. Zuckerman's experience and expertise are similar to Mr. Gross or other counsel discussed by him. The Court disagrees. Mr. Gross, an attorney who practices in New Jersey, attests to the range of prevailing rates charged by other employment attorneys in the State. In fact, Mr. Gross specifically delineates the rates of attorneys who work in employment boutique firms, such as Zuckerman & Fisher. According to Mr. Gross' Declaration, the $350 hourly rate falls within the low-end of the reasonable range of the rates charged by other attorneys with similar experience. See Gross' Decl., ¶¶ 17-23.

Although Defendant criticizes Plaintiff's supporting evidence, Defendant neither presents any contrary evidence nor cites to a single authority that stands for the proposition that this Court is bound by the rate negotiated in the Retainer Agreement at the inception of this case in 2005. Smith, 107 F.3d at 225 ("Once the plaintiff has carried this burden [i.e., submitting evidence of the appropriate hourly rate], [the] defendant may contest that prima facie case only with appropriate record evidence . . ."). Instead, the Court notes that this case spans more than five years. While the Retainer Agreement set forth a $300 hourly rate, the majority of the attorney's billable hours occurred after the rate increased to $350, particularly since the bulk of the time charged was in 2008-2009, when Ms. Zuckerman and Mr. Fisher prepared and conducted trial, and filed pre- and post-trial motions. Accordingly, pursuant to Lanni, the Court is satisfied that Plaintiff has demonstrated that the hourly rate of $350 is reasonable.

B. Associate-Level Work

At the outset, Defendant does not take issue with either the number of hours or the hourly rate of the paralegal. Rather, Defendant contends that 159.12 of the attorneys' billable hours, which include time for legal research and drafting certain correspondence, should have been performed by an associate or other less experienced attorney, and thus, these hours should not be compensated at the lead-attorney hourly rate applicable to Ms. Zuckerman and Mr. Fisher. The Court disagrees.

Although a court must exclude hours that reflect "the wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates," delegation is neither always possible in a small firm nor always desirable. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983); Sheffer v. Experian

Information Solutions, Inc., 290 F. Supp. 2d 538, 550 (E.D. Pa. 2003). Here, Defendant's argument with regard to the duty to delegate presupposes that Plaintiff's lead attorneys readily have junior associates at their disposal. See Poston v. Fox, 577 F. Supp. 915, 919-20 (D.N.J. 1984) (finding that it is not always possible to delegate in small office); see also Roldan v. Phila. Hous. Auth., Civ. A. No. 95-6649, 1999 U.S. Dist. LEXIS 19093, at *14-15 (E.D. Pa. Dec. 7, 1999) (holding that reduction in rates is unwarranted in office that is understaffed and where no less experienced attorney was available to perform tasks). Although Plaintiff was represented by attorneys from a law firm, Zuckerman & Fisher, that firm has no access to junior associates. See Zuckerman Supp. Aff. ¶ 3. (indicating that Zuckerman & Fisher only consists of two founding partners). Given the unavailability of junior attorneys to work on this litigation, "this Court does not find Plaintiff's attorneys' non-delegation of responsibilities unreasonable." Sheffer, 290 F.Supp.2d at 550.

Furthermore, "it is reasonable for lead trial counsel to desire to expend his or her own time on some activities that, although within the competency of less highly paid associates, are better performed by the lead counsel to ensure the smooth functioning at trial." Id. Having reviewed Defendant's chart which consists of billable hours that it contends should have been delegated to associates, the Court can only find two instances, totaling .30 billable hour for faxing, that are not otherwise research tasks and drafting legal correspondence. However, these instances of non-delegation are not frequent enough to mandate reducing the number of hours that will be computed in the lodestar. See Poston, 577 F. Supp. at 920 ("The court will not reduce the number of hours worked on this basis for it finds that the hours of work that could have been effectively delegated are de minimis").

C. Hours Spent on Motion to Disqualify Defense Counsel

Defendant posits that the portion of Plaintiff's fee application, which consists of time for the filing of a motion to disqualify defense counsel, should be excluded merely because that motion was not successful and was not necessary to Plaintiff prevailing on her ADA claim. Importantly, Defendant does not contend that the time spent preparing the motion was excessive. In support of its position, Defendant cites to case law which addresses unsuccessful claims. Indeed, courts should not reduce a fee award "simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). Child Evangelism Fellowship of New Jersey v. Stafford Township School District, No. 02-4549, 2006 U.S. Dist. LEXIS 62966, at *62 (D.N.J. Sep. 5, 2006)("there mere fact that the Motion to Enforce the Preliminary Injunction was unsuccessful . . . does not require this Court to reduce [CFE's] fee award"). To that end, the Third Circuit has instructed that "[t]he mere failure of certain motions or the failure to use depositions is insufficient to warrant a fee reduction . . . ." Blum v. Witco Chemical Corp., 829 F.2d 367, 378 (3d Cir. 1987). Rather, the inquiry should be focused on whether the filed motion was "necessary" and "useful." See, e.g., Planned Parenthood v. AG, 297 F.3d 253, 270-71 (3d Cir. 2002)(while the motion for summary judgment was not filed, the work on the motion was 'necessary' and 'useful'").

Here, the Court finds that the filing of the motion to disqualify in this case was necessary. At the time, Plaintiff filed the motion because she believed that she was a former client of defense counsel's firm McElroy, Mulvaney, Deutsche and Carpenter in a matter substantially similar to the present case. Plaintiff contended that defense counsel's representation of Defendant in this case was contrary to the prohibition against

representing current clients with adverse interests to former clients. While defense counsel was not disqualified, the Magistrate Judge rendered a lengthy opinion resolving certain intricate issues of attorney conduct pursuant to New Jersey's Rules of Professional Conduct. Having reviewed the motion and that court's opinion on this matter, this Court is satisfied that filing of the motion was necessary to resolve allegations of possible conflict of interest. Accordingly, time billed for this motion will be included in the fee award. Davis v. Advanced Care Techs., Inc., No. 06-2449, 2007 U.S. Dist. LEXIS 74728, at *13-14 (E.D. Ca. Sep. 26, 2007) ("The motion to remand, however, was part of the hours reasonably spent in litigating the underlying declaratory relief matter and was not a separate claim, but rather a method of pursuing Davis' ultimately successful claim"); James v. Chichester Sch. Bd., No. 96-7683, 1999 U.S. Dist. LEXIS 2831, at *4-5 (E.D. Pa. Mar. 2, 1999).

D. Calculation of Fees and Costs

The Court now calculates the fee award consistent with the rulings herein. First, the Court has reviewed Plaintiff's fee schedule. Because the Court has rejected Defendant's contention regarding delegation of duties to associates, all of the billable hours of Ms. Zuckerman and Mr. Fisher will be credited accordingly. The Court remarks that Defendant did not object to the amount of time billed by the attorneys in this litigation. Indeed, the Court's review did not reveal any excessive or redundant billable hours.[4] To that end, Ms. Zuckerman's and Mr. Fisher's total billable hours accrued during the representation of this case are 932.45. Mr. Yaskin's total billable hours are 26.22. Next, because the Court finds $350 is the reasonable hourly rate for Ms. Zuckerman and Mr. Fisher, and Defendant does

[4]Indeed, Ms. Zuckerman certifies, and the record reflects, that most of Mr. Fisher's time spent in this litigation was not billed to Plaintiff.

not object to Mr. Yaskin's hourly rate of $375, the lodestar amount is therefore $336,190.10. In addition, Ms. Vimalassery, the paralegal, billed a total of 37.35 hours at an hourly rate of $125, which yields a total of $4,668.75 – this calculation was not contested by Defendant. Accordingly, the total fee award is $340,858.85.

Finally, Defendant did not object to Plaintiff's request for expenses and costs in this litigation. Plaintiff has documented expenses in the amount of $37,926.50.[5] Having reviewed this documentation, the Court finds the full amount to be reasonable and compensable.

II. Back Pay Award and Motion to Amend Judgment

To begin, pursuant to the Court's instructions in its Opinion dated November 13, 2009, Plaintiff sought the assistance of an expert in: (1) calculating prejudgment interest for the back pay award of $42,400; adjusting the award to present value; and adding an amount to account for negative tax consequences. At the outset, the expert, John Vlasac, certifies that based on his analysis, there is no adverse tax consequence attributable to the lump sum receipt of Plaintiff's back pay award. Next, Plaintiff proposes that the Court modify the back pay award by assuming a 4.85% increase in salary that Plaintiff projects that she hypothetically would have earned at Ethicon from October 21, 2001 to October 20, 2004. The Court rejected such a proposal previously "because Plaintiff did not produce any evidence at trial with respect to bonuses or fringe benefits that she would have received had

[5]This amount includes $35,176.50 set forth in Ms. Zuckerman Affidavit, which Defendant did not contest, and an additional $2750.00 for the expert cost of John Vlasac, CPA. Because the Court instructed Plaintiff to include certain calculations in connection with the back pay award, which required the assistance of an expert, the Court finds this additional amount reasonable.

she stayed at Ethicon, the Court will not speculate as to the amount of these benefits, and thus, will not consider them in calculating back pay." Here, Plaintiff does not point to any evidence that the Court overlooked, or produce any other newly discovered evidence to support her proposal. Accordingly, Plaintiff's request on this basis is denied.

With respect to prejudgment interest and an upward adjustment of the back pay award to present value, Defendant asks the Court to amend its previous ruling.[6] A motion to alter or amend a judgment is governed by Rule 59(e) of the Federal Rules of Civil Procedure, which allows a party to move to alter or amend a judgment within twenty-eight days of entry. Fed. R. Civ. P. 59(e). The purpose of this Rule is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); see Livingston v. United States, No. 09-546, 2009 U.S. Dist. LEXIS 97539 (D.N.J. Oct. 20, 2009). To that end, a judgment may be altered or amended if the party seeking reconsideration establishes at least one of the following grounds: (1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the Court entered judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Café, by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)); Holsworth v. Berg, 322 Fed. Appx. 143, 146 (3d Cir. 2009). "To support reargument, a moving party must show that dispositive factual matters or controlling decisions of law were overlooked by the court in reaching its prior decision," and

[6]Motion to alter or amend the judgment "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). On November 30, 2009, Defendant timely filed its Rule 59(e) motion after the entry of the Court's Order on November 16, 2009.

that oversight negatively affected the movant. Assisted Living Associates of Moorestown, L.L.C., v. Moorestown Tp, 996 F. Supp. 409, 442 (D.N.J. 1998). By contrast, mere disagreement with the district court's decision is inappropriate on a motion to alter judgment, and should be raised through the appellate process. Id. (citing Bermingham v. Sony Corp. of America, Inc., 820 F. Supp. 834, 859 n.8 (D.N.J. 1992), aff'd. 37 F.3d 1485 (3d Cir. 1994); G-69 v. Degnan, 748 F. Supp. 274, 275 (D.N.J. 1990)). "The Court will only entertain such a motion where the overlooked matters, if considered by the Court, might reasonably have resulted in a different conclusion." Assisted Living, 996 F. Supp. at 442.

Defendant urges that combining a present value adjustment on past loss with prejudgment interest would be improperly duplicative. Defendant reasons that both calculations address the same time value of money. Plaintiff does not substantively respond. Rather, she relies on the Court's previous Opinion in calculating the back pay award. The Court, however, agrees that this Court's prior ruling would result in an error of law because of the duplicative remedy, and therefore, will reconsider this issue.

"[A]djusting to present value is equivalent to awarding prejudgment interest." Sokol Crystal Products, Inc. v. DSC Communications Corp., 15 F.3d 1427, 1434 (7th Cir. 1994)). That is because an award of prejudgment interest itself adjusts an award for past loss to present value: "Not all portions of a verdict are economic in character, and only the sum that represents past economic loss is properly adjusted to present value through an interest calculation. [Past economic loss requires an] adjustment for the time the successful plaintiff's money was out of the market which prejudgment interest provides." Poleto v. Consolidated Rail Corp., 826 F.2d 1270, 1278 n.14 (3d Cir. 1987), abrogated on other grounds, Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990); Dominator,

Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1106 (9th Cir. 1985) ("[p]rejudgment interest is awarded so that the award will reflect the present value of plaintiff's claim"); Chace v. Champion Spark Plug Co., 725 F. Supp. 868, 872 (D. Md. 1989) ("And it makes no difference whether plaintiffs characterize the value of losing the benefit of money as prejudgment interest or they simply bring back pay to present value, since the amounts so computed are compensatory in nature").

Indeed, having recalculated the numbers, the Court finds that both present value and prejudgment interest do precisely the same thing: apply a rate of return to account for the time value of money – that is, the "loss of the use of [Plaintiff's] investment or [plaintiff's] funds from the time of the loss until judgment is entered." Arco Pipeline Co. v. SS Trade Star, 693 F.2d 280, 281 (3d Cir. 1982). Simply put, present valuation and prejudgment interest both are a measure of the time value of money, they are duplicative, and only one type is permitted. In that regard, the Court amends its previous ruling on this issue so as to correct an error of law.

In considering this issue, the Court need not credit Plaintiff's proposed methods because she applies the present value of the back pay award in calculating the amount of prejudgment interest. Since the Court has rejected this approach as duplicative here, the Court will recalculate the back pay award as follows:

Back Pay Period	Back Pay	Average Time to November 30, 2009	Interest on Back Pay at 4%
10/22/01 - 12/15/01	$13,369	8.03 year	$4,294.12
12/17/01 - 12/31/01	$322	7.94 years	$102.27
2002	$10,605	7.42 years	$3147.56
2003	0	6.42 years	0
1/1/04 - 8/4/04	0	5.63 years	0
8/4/04 - 10/20/04	$18,104	5.23 years	$3,787.36
TOTAL	$42,400		$11,331.31

As an explanation, the Court previously used the above-delineated Back Pay Periods in which Plaintiff was entitled to an award and calculated the amount of back pay in each of the prescribed periods. Accordingly, the total amount of back pay is $42,400. Next, the Court utilized the 4% interest rate, which was decided in the Court's previous Opinion, to calculate the prejudgment interest in each of the periods wherein back pay was awarded. The Court also must calculate the number of years from the midpoint of the applicable back pay period to November 30, 2009. The Court then applies the following formula to arrive at the appropriate interest for each year back pay is awarded:

(the back pay amount) x (.04) x (number of years) = interest

In that regard, the total prejudgment interest is $11,331.31. Accordingly, Plaintiff's back pay award is $53,731.31.[7]

[7]Indeed, Plaintiff proposes that the present value of the back pay award of $42,4000 in 2009 is $51,618, which is substantially similar to the back pay award including prejudgment interest. However, for the reasons state above, applying both the present value and prejudgment interest will be duplicative. As such, the Court's award for back pay will be consistent with the calculations herein.

Conclusion

For the reasons set forth above, Plaintiff's motion is granted in part, denied in part. Defendant's motion is granted. Plaintiff shall be awarded $53,731.31 in back pay; $340,858.85 in fees and $37,926.50 in expenses and costs.

DATED: March 1, 2010

/s/ Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THERESA M. ELLIS and SCOTT A. ZUKOWSKI, w/h, Plaintiffs, v. ETHICON, INC., JOHNSON & JOHNSON, INC., and JOHN DOE(S), Defendants.	Civil Action No. 05-726(FLW) **ORDER and AMENDED JUDGMENT**

THIS MATTER having been opened to the Court by Elizabeth Zuckerman, Esq., counsel for Plaintiff Theresa M. Ellis ("Plaintiff"), on an application for attorneys' fees and costs pursuant to the Americans with Disabilities Act; it appearing that Defendant Ethicon, Inc. ("Defendant"), through its counsel, Frank Dee, Esq., opposes Plaintiff's fee application in part and moves, pursuant to Fed. R. Civ. P. 59(e), to alter the Court's Judgment filed on November 16, 2009, with respect to the back pay award; it appearing that the Court having reviewed the papers submitted by the parties in connection with these motions pursuant to Fed. R. Civ. P. 78; for the reasons set forth in the Opinion filed on even date, and for good cause shown,

IT IS on this 1st day of March, 2010,

ORDERED that Plaintiff's fee application is granted; Plaintiff is awarded $340,858.85 in fees and $37,926.50 in expenses and costs; it is further

ORDERED that Defendant's motion is granted; Plaintiff is awarded $53,731.31 in

back pay consistent with the calculations set forth in the Opinion; it is further

ORDERED that this case shall be marked **CLOSED**.

/s/ Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge

10-1919

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THERESA M. ELLIS, ET AL.,

Plaintiff-Appellee,

v.

ETHICON INC., ET AL.,

Defendant-Appellant.

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

BRIEF OF APPELLANT, ETHICON INC.

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Ethicon Inc. is a wholly owned subsidiary of Johnson & Johnson, a publicly traded company.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Final judgment was entered on March 1, 2010. (JA0129). Defendant-appellant timely filed its Notice of Appeal on March 29, 2010. (JA0001).

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

Defendant, Ethicon, Inc., appeals from a judgment entered on a jury verdict finding that it violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, *et seq.*, by failing to provide a reasonable accommodation for plaintiff's alleged disability. A key issue at trial was whether Ethicon had failed to engage in an interactive process with plaintiff or her representative to determine whether her disability could be reasonably accommodated. As part of that process, plaintiff's representative (an attorney) and Ethicon agreed that plaintiff would obtain a clarification of her medical restrictions from her physician. Plaintiff did not do so and, instead, accepted employment with another company, informing Ethicon that she was not interested in returning to employment at Ethicon. Plaintiff testified that she was not aware of the interactive process discussions between her attorney representative and Ethicon, and the District Court relied upon that testimony to uphold the verdict.

1. Whether the District Court erred by permitting plaintiff and her husband to testify that they were not aware of their attorney representative's on-going, interactive-process discussions with Ethicon while, at the same time, using the attorney-client privilege to bar cross-examination and other evidence regarding what they were told by their attorney representatives.

This issue was raised and ruled on by the District Court during trial, as well as in *in limine* and post-trial motions. (JA0780, JA0791, JA1053-JA1055, JA1066-JA1067, JA1072, JA1277-JA1278, JA1259-JA1262, JA1265; JA201; JA0237).

2. Whether the District Court erred by entering judgment on the jury's finding that Ethicon violated the ADA, where the uncontradicted evidence established that plaintiff's and Ethicon's representatives were engaged in an *agreed-upon* interactive process to address potential accommodations that was terminated unilaterally by plaintiff.

This issue was raised by Ethicon in its post-trial motion under Rules 50 and 59, and ruled upon in the District Court's November 13, 2009 decision. (JA0237; JA0056).

3. Whether the District Court erred by entering judgment on the jury's finding that plaintiff was cognitively disabled, where her own expert testified that her tested cognitive ability was consistent with that of the average person in the

general population – the applicable standard under the ADA – and that her claimed disability was an inability to function as well at an elite level.

This issue was raised by Ethicon in its post-trial motion under Rules 50 and 59, and ruled upon in the District Court's November 13, 2009 decision. (JA0237; JA0056).

4. Whether the District Court erred by entering judgment on the jury's verdict that plaintiff was qualified for her position, where the evidence established that she was not able to perform essential functions of the position under the medical restrictions stated by her doctor.

This issue was raised by Ethicon in its post-trial motion under Rules 50 and 59, and ruled upon in the District Court's November 13, 2009 decision. (JA0237; JA0056).

5. Whether the District Court erred by ordering Ethicon to reinstate plaintiff, despite the undisputed finding that plaintiff had withdrawn entirely from the job market five years before the trial.

This issue was raised by Ethicon in the post-trial proceedings addressing equitable relief and ruled on by the District Court in its November 13, 2009 decision. (JA0056, JA0232, JA0240).

STATEMENT OF RELEATED CASES AND PROCEEDINGS

This case has not previously been before this Court, and Ethicon is not aware of any completed, pending, or contemplated case or proceeding before any court related to this case, except for proceedings before the District Court in this same case.

STATEMENT OF THE CASE

Plaintiff, Theresa M. Ellis, filed this action on February 2, 2005 alleging that defendant, Ethicon Inc. ("Ethicon"), had violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, *et seq.*, by failing to reasonably accommodate her alleged cognitive disability. (JA0153, Complaint). The case was tried from May 4, 2009 to May 21, 2009. The issues of liability and emotional distress damages were tried to a jury. Equitable issues were tried to the court, with the jury rendering an advisory verdict on back pay and front pay. (JA0224, Jury Verdict).

On May 21, 2009, the jury returned its verdict. (*Id*.) In responses to special interrogatories, the jury found that (1) plaintiff was disabled under the ADA; (2) she was a qualified individual under the ADA; and (3) Ethicon unreasonably failed to provide a reasonable accommodation. (*Id*.) The jury also found that Ethicon's actions did not "play[] a substantial part in causing Ms. Ellis to suffer emotional distress." (*Id*.) In its advisory verdict, the jury found that "Ms. Ellis failed to mitigate her damages." (*Id*.) On May 21, 2009, the District Court entered

judgment on the jury's liability and emotional distress findings. (JA0231, Judgment).

Ethicon moved for judgment under Rule 50 and for a new trial under Rule 59. (JA0237). Plaintiff cross-moved under Rule 59(e) to alter or amend the judgment (although no judgment had yet been entered on equitable remedies) to award back pay and either front pay or reinstatement. (JA0232, JA056, JA0111).

By Order and Judgment dated November 13, 2009 (entered on November 16, 2009), the District Court denied both parties' motions, but awarded equitable relief to plaintiff. (JA056, JA0111). The Court awarded back pay of $42,400. The Court denied front pay or back pay for the period after December 20, 2004 because of plaintiff's failure to mitigate damages after that date. (JA0097). The Court also ordered "that Plaintiff shall be reinstated to Ethicon as a quality engineer, or a comparable position." (JA0111).

Subsequently, Ethicon moved under Rule 59(e) to correct an error in the back pay award, and plaintiff filed an application for an award of attorneys' fees and costs. (JA0240; JA0243). By Order and Amended Judgment entered on March 1, 2010, the District Court granted both motions. (JA0129).

The March 1, 2010 Order and Amended Judgment constitutes the final judgment (JA0129). Ethicon filed its Notice of Appeal on March 29, 2010. (JA0001). Plaintiff has not cross-appealed.

STATEMENT OF FACTS

1. Plaintiff's Employment

Plaintiff began employment with Ethicon in September 1997. (JA562; JA1239; JA0466). Ethicon designs and manufactures a variety of surgical and other sophisticated medical devices. (JA1147-JA1155). Plaintiff was employed as a Senior Quality Engineer in Ethicon's New Product Development Quality Engineering Department and, in September 2000, promoted to Staff Quality Engineer. (JA0563; JA0388; JA0602-JA0603; JA1240; JA0466). In both positions, plaintiff was responsible for working with design and manufacturing process teams to ensure quality for products being developed for launch in the market. (JA0604-JA0605; JA1147-JA1155).

Plaintiff had two short-term disability leaves during her employment, in 1999 and 2001. (JA07112-JA0173, JA0781; JA0447). Both were attributed to the effects of a January 1999 automobile accident. (JA0579-JA0580; JA0723-JA0724; JA1094). Plaintiff's first leave immediately followed that accident. (JA0712). As she testified, she requested and received temporary accommodations in connection with a gradual return to work, and then returned to a full-time schedule in August 2009. (JA0763-JA0768). She then continued to work without requesting or needing any accommodation. (JA0599). On April 23, 2001, plaintiff began another short-term disability leave. (JA1240, JA0466). On October 22, 2001,

because the six-month maximum period of short-term disability had expired and she had not yet returned to work, plaintiff automatically transitioned to long-term disability status. (JA1020-JA1022; JA0406).

In December 2001, while Ethicon was waiting for plaintiff to provide clarified medical restrictions for her to return to work at Ethicon, plaintiff accepted employment at Aventis Corporation in a similar type of position, Project Manager for Influenza Manufacturing, with compensation comparable to what she had at Ethicon. (JA0662; JA0677-JA0678, JA0715-JA0716, JA0796-JA0798; JA1242, JA0467; JA1415; JA0505). Plaintiff's employment with Aventis began on December 17, 2001. (JA1242; JA0467). Although she denied at trial that she had been seeking employment at Aventis before she sought to return to work at Ethicon (JA0919-JA0920), plaintiff testified that she had interviewed at Aventis in August 2001 (JA0661-JA0662), was offered a position in October 2001, and was offered and accepted a second position in December 2001 (JA0662). Plaintiff's round trip commute to Aventis was seventy miles less than her commute to Ethicon. (JA1059).

Plaintiff worked at Aventis, without any accommodation for her alleged disability, until August 2004, with a short-term disability leave from November 5, 2003 to March 28, 2004. (JA0801; JA0904-JA0909; JA1242; JA0467).

From 2004 when she left Aventis through the time of trial in 2009, plaintiff testified that she did not seek any other employment or even explore employment opportunities. (JA0812-JA0813).

2. Plaintiff's 2001 Disability Leave and Initial Return to Work Discussions

a. Plaintiff's 2001 Disability Leave

On April 21, 2001, plaintiff began a short-tem disability leave. (JA1240, JA0466). At that time, she was diagnosed by her neurologist and treating physician, Dr. John Mahon, with post-concussion syndrome and a mild traumatic brain injury caused by the 1999 accident. (JA0821; JA1240, JA0466). Dr. Mahon referred plaintiff to a neuropsychiatrist, Dr. Barbara Watson. (JA0821).

b. Initial Requests for Plaintiff to Provide Information Needed to Return to Work

During plaintiff's short-term disability leave, her progress and possible intent to return to work were addressed primarily through the third party administrator of Ethicon's STD plan, Kemper National Services, Inc. (JA0724-JA0725; JA1338-JA1339). Plaintiff's husband, Scott Zukowski, communicated on plaintiff's behalf. (JA0968-JA0969). On August 31, 2001, Mr. Zukowski informed Kemper that plaintiff and he "would be seeing Dr. Mahon again in the middle of September to discuss the possibility of a return to work and the restrictions/accommodations that would need to be made." (JA0393). Subsequently, based on an assessment of her condition and required services,

plaintiff's matter was reassigned within Kemper back to the original Nurse Case Manager, Melissa Stretch, RN. (JA0395).

Ms. Stretch continued to communicate with plaintiff (through her husband) and her doctors regarding plaintiff's condition and possible return to work. (JA0395). On September 27, 2001, Ms. Stretch reminded plaintiff that her last day of short-term disability eligibility would be October 21, 2001, and that she would need to provide the information required for a possible return to work as soon as possible (JA0395; JA0984). On October 2, 2001, under the heading "*URGENT* Pls Respond ASAP," Ms. Stretch asked plaintiff's doctors to provide the medical information required for her to return to work:

> I must know (1) restrictions; (2) when they start; (3) when they stop; (4) I must have updated medicals ASAP.

(JA0396; JA0841-JA0844). From October 3 to October 10, 2001, Ms. Stretch continued to communicate with plaintiff, her husband, and plaintiff's doctors, both in writing and by telephone, requesting the medical release and information needed to address a possible return to work and reminding plaintiff that her short-term disability leave would end on October 21, 2001. (JA0986-JA0987, JA0403, JA0467, JA1244; JA0874, JA0891).

Ethicon's occupational health nurse, Joan Greenhalgh, RN, also emailed plaintiff on October 3, 2001, requesting the needed medical information. (JA0732-JA0734; JA0400; JA0427). Ms. Greenhalgh's email emphasized that "an

understanding of both the medical restrictions and the core requirements of the job must be had by your management, the occupational health physician and your health care providers." (JA0400).

c. Permanent Restrictions Provided by Plaintiff's Doctor

Plaintiff's treating doctor, Dr. Mahon, provided Kemper with a Return to Work release for plaintiff by letter dated October 11, 2001. (JA0481). Dr. Mahon's release set forth medical restrictions for plaintiff's proposed return to work. (JA0481; JA0738-JA0739). Relying on an October 8, 2001 letter from Dr. Watson, Dr. Mahon conditioned any return to work by plaintiff on the restrictions that plaintiff be permitted to work from home three days each week and be provided a job coach "for both the home office and actual job site." (JA0481; JA0847-JA0856). Dr. Mahon specifically stated that the restrictions were "permanent":

> The limitations listed in the accompanying letter from Dr. Watson are permanent and will need to be maintained indefinitely as it is now 2½ years since the patient's accident.

(JA0481; JA0738-JA0739).

The restrictions stated in Dr. Mahon's October 11, 2001 Return to Work release – including the three-day-a-week work at home schedule – also had been addressed as possible restrictions in earlier communications. (JA0481; JA0403; JA0986-JA0987; JA1243-JA1244). Specifically, they had been raised in an

October 5, 2001 discussion between Dr. Watson and Ms. Stretch, (JA0403; JA0986-JA0987; JA1243-JA1244), and Ms. Stretch also had received a copy of Dr. Watson's October 8, 2001 letter proposing these restrictions. (JA0481). Foreshadowing the permanency later stated explicitly by Dr. Mahon, Dr. Watson's letter stated that the restrictions "may need to be a permanent accommodation." (JA0439; JA0878-JA0879). *At trial*, Dr. Watson testified that the restrictions proposed in her letter were "indefinite" but not necessarily permanent. (JA0878, JA0854-JA0855).

On October 12, 2001, relying on the stated permanency of the restrictions, plaintiff's supervisor, Leslie Traver, determined that plaintiff's medical restrictions were not compatible with the essential requirements of plaintiff's Staff Quality Engineer position. (JA1294-JA1296).[1] Plaintiff herself admitted that she "would not be able to meet the whole objective of my position" working at home three days a week. (JA1294). Ms. Traver identified "core" functions of the position that could not be done working from home three days a week – for example,

[1]Ms. Traver had been informed of the possible restrictions in conversations with Ms. Stretch on October 8 and 11, 2001, and of the actual restrictions upon Ms. Stretch's receipt of Dr. Mahon's October 11, 2001 letter (JA1171-JA1172; JA0467).

Relying on an October 15, 2001 diary entry in which Ms. Stretch noted that she had received Dr. Mahon's letter, plaintiff argued that Ms. Stretch and Kemper had not received the October 11 letter until October 15. (JA0462). Other evidence, including the letter's telecopy header, established that it was telecopied to Kemper on October 12, 2001. (JA0481; JA0738-JA0739).

"participating in evaluations of the device by surgeons, conducting external audits, [and] working with external manufacturing process engineers to get the external manufacturer ready to do production, build and launch." (JA1161). She explained that "[t]he QE [Quality Engineer] really led the team through [the] structured activity" for design and manufacturing process quality, (JA1144-JA1147), and, reviewing the specific duties stated in the job description for the position, she explained how these duties required the Quality Engineer to be on-site. (JA1144-JA1147). Because of the Quality Engineer's integral involvement in "so many elements of [the new product development] along the way," having the Quality Engineer on-site only two days a week "would ultimately delay the launch of the product." (JA1160). Ms. Traver testified that placing plaintiff in the position with the stated restrictions, therefore, would have required reassigning core functions of the position to others. (JA1161-JA1162).

At trial, and over Ethicon's foundation objection, plaintiff's counsel questioned Ms. Traver on whether she could have accommodated plaintiff if the stated restrictions were only temporary. (JA1103-JA1104; JA1106-JA1107; JA1110, JA1112-JA1113). Ms. Traver testified that "if the accommodations [were] presented as transient and progressive toward full return to work … I would have been willing to consider any scenario that would have resulted in Theresa being able to perform the full job at the end of that transition program." (JA1104-

JA1105). She explained that the department could not accommodate the stated permanent work-at-home restriction, but if the restrictions had been temporary, she could have reassigned essential functions of the job to other quality engineers "*for a period of time*." (JA1192; emphasis added). Ms. Traver testified, however, that based on her conversations with Ms. Stretch, she understood that the restrictions were "permanent" and "indefinite." (JA1103, JA1164-JA1165). Dr. Mahon's letter explicitly stated that the restrictions were "permanent." (JA0481).

After speaking with Ms. Traver on October 12, 2001, Ms. Stretch telephoned both plaintiff and her husband to try to discuss the matter, but was unable to reach them. (JA0405). On October 15, 2001, therefore, Ms. Stretch sent an email to plaintiff and her husband, informing them that she was trying to reach them and that Ethicon could not accommodate the "permanent restrictions for Theresa's return to work" under Dr. Mahon's October 11, 2001 letter. (*Id*.; JA0739-JA0743). She also reminded them that plaintiff's short-term disability leave would end on October 21, 2001, and that she would then transition to LTD status. (JA0405). She asked them to call her "if you have questions." (JA0405).

At trial, plaintiff acknowledged that Ms. Stretch's email stated her understanding that the restrictions were permanent, but that plaintiff did not try to contact Ms. Stretch or anyone else to suggest that the restrictions might not have been permanent. (JA0747-JA0751).

3. Continuation of Discussions, and the Parties' Agreed Process for Addressing Medical Restrictions and Possible Accommodations

After October 15, 2001, the parties, through attorney representatives, continued discussing plaintiff's possible return to work. (JA1308). As plaintiff testified, she had retained attorney Nicola Hadziosmanovic and the Carella Byrne law firm to communicate with Ethicon on this point. (JA1245-JA1246, JA1253-JA1254; *see also* JA1430). Because of plaintiff's counsel's involvement, Ethicon continued these discussions through its in-house counsel, Lisa Warren. (JA1294).

Throughout the discussions between Ms. Warren and Ms. Hadziosmanovic, Ms. Warren repeatedly stated Ethicon's openness to consider alternative accommodations. (*See* §§3.a and 3.b, *infra*). Ms. Warren's testimony on this point is uncontradicted. The threshold question was whether plaintiff's doctor could provide any flexibility or modification of the stated restrictions. (*Id*.) As established by Ms. Warren's uncontradicted testimony and corroborated by other proofs, Ms. Hadziosmanovic and she agreed that the next step was for plaintiff to see Dr. Mahon to review his stated restrictions to determine whether there was any flexibility permitting alternative accommodations. (*See* §3.b, *infra*). Plaintiff's failure to do so effectively terminated the interactive process, and her renunciation of any interest in returning to Ethicon ended that process conclusively. (*See §*3.c, *infra*).

These discussions between the parties' representatives continued before and after the date on which plaintiff automatically rolled into long-term disability status, October 22, 2001. (JA1349-JA1350). Ms. Warren explained that the change from STD to LTD did not impact the discussion of plaintiff's potential return to work and whether her medical restrictions could be accommodated:

> If she returned to employment [pursuant to the discussions regarding her return to work], she would have been reinstated as an active employee retroactive to the date . . . that her STD, short term disability, ended.

(JA1314). There was no contrary evidence.

a. Ethicon's Offer of a Part-Time Position or to Consider Other Alternatives Based on Revised Restrictions

Ms. Hadziosmanovic called Ms. Warren on October 18, 2001, and, at Ms. Warren's request, sent a letter to her on October 19, 2001 addressing the return to work issue. (JA1293-JA1294; JA0488; JA1249-JA1250).[2] After receiving this letter, Ms. Warren revisited with plaintiff's supervisor, Ms. Traver, the business's ability to accommodate the restrictions stated by plaintiff's doctor. (JA1294-JA1296). Ms. Traver confirmed that the essential functions of plaintiff's quality engineer position could not be performed on a three-day-a-week work at home basis. (*Id.*) In order to work within the restrictions that had been stated by

[2] Ms. Hadziosmanovic was neither deposed nor available as a witness at trial. The only testimony to her discussions with Ms. Warren was Ms. Warren's testimony.

plaintiff's doctor, Ms. Warren and Ms. Traver identified the alternative of a part-time position for plaintiff. (JA1294-JA1295).

Ms. Warren spoke with Ms. Hadziosmanovic on October 31, 2001. (JA1191). During that conversation, she informed Ms. Hadziosmanovic of Ethicon's proposal to create a part-time position for plaintiff in order to meet the restrictions provided by Dr. Mahon. (JA1332-JA1333; JA1296-JA1297). Ms. Warren also informed Ms. Hadziosmanovic that Ethicon would be willing to consider "alternative accommodations" if Dr. Mahon provided Ethicon with revised accommodations. (JA1296-JA1297).

On November 9, 2001, Ms. Hadziosmanovic and two other Carella Byrne attorneys, Melissa Flax and Peter Stuart, met with plaintiff. (JA1271, JA1273). According to plaintiff, the purpose of this meeting was to "find out the status of Ethicon's response to the letter that Nicola [Hadziosmanovic] had sent and reinstatement as a staff engineer with the accommodations and a meeting around that." (JA1430). Plaintiff admitted at trial that, at this meeting, "there was a discussion about possible alternative accommodations." (JA0776-JA0778). According to plaintiff, they discussed that the purpose of the work-at-home restriction was to provide her with a "controlled environment" and, therefore, they discussed "what flexibility there was around a controlled environment." (JA1435-JA1436). She specifically "was asked to ask my neurologist [Dr. Mahon] about

the use of an office in place of work at home" – that is, about whether being given an office instead of a cubicle could provide the required controlled environment. (*Id*.)

Despite this testimony, plaintiff and her husband also testified at trial that they neither knew about Ethicon's offer to create a part-time position for her nor that Ethicon had offered to consider alternative accommodations if plaintiff obtained revised restrictions from her doctor. (JA0780; JA1072). Although this testimony necessarily and directly implicated plaintiff's discussions with Carella Byrne, the District Court permitted plaintiff to shield key parts of those discussions at trial based on the attorney-client privilege – precluding Ethicon's counsel from cross-examining plaintiff and her husband or questioning Ms. Flax on those discussions. (JA1247-JA1248, JA1260-JA1263, JA1265-JA1267).

b. The Parties Agree on Next Steps, with Plaintiff First to See Dr. Mahon to Review the Stated Restrictions

On November 13, 2001, Ms. Hadziosmanovic responded to Ms. Warren by telephone. (JA1297-JA1299). Ms. Hadziosmanovic said that she had met with plaintiff and her husband, and that plaintiff "was not interested in a part-time position." (JA1298; JA1261-JA1262).

During their discussion, Ms. Hadziosmanovic and Ms. Warren also discussed the next steps to take. (JA1299-JA1300, JA1303-JA1304). In response to Ms. Hadziosmanovic's suggestion of a meeting to "iron out accommodations,"

Ms. Warren proposed that plaintiff first "get revised accommodations from her doctor and then [they] could sit down with [plaintiff's] manager [Ms. Traver]." (JA1299). Ms. Warren also told Ms. Hadziosmanovic that

> the company would be willing to consider whatever [plaintiff's] doctor was permitting her to do; the company would then discuss it to figure out if there was a way to accommodate it or not within the parameters of the business they were trying to run.

(JA1300; JA1303-JA1304).

After their discussion, Ms. Warren waited to hear back from Ms. Flax, Ms. Hadziosmanovic, or another Carella Byrne attorney with revised medical restrictions for plaintiff. (JA1353-JA1354; JA1307). As testified by Ms. Flax and reflected in an email from her to plaintiff, plaintiff's attorneys, in turn, were waiting to hear back from plaintiff. (JA1262-JA1264; JA0498). Plaintiff never sent the revised medical information for which both parties' attorneys were waiting. (JA0498; JA1262-JA1264, JA1307, JA1310-JA1311; JA119).

c. Plaintiff's Failure to Pursue Revised Restrictions from Dr. Mahon and Her Termination of Return to Work Discussions

Consistent with Ms. Hadziosmanovic and Ms. Warren's prior discussion, plaintiff's attorneys again asked her to speak to her doctor. (JA0498; JA1262-JA1264). On December 3, 2001, Ms. Flax sent an email to plaintiff and her husband reminding them that "[d]uring our meeting, we discussed a possible alternative accommodation for Theresa if she should return to Ethicon," that

plaintiff "would speak with [her doctor] about this alternative accommodation and get back to me," and that she had not yet done so. (JA0498; JA1262-JA1264). Later that day, plaintiff's husband responded to Ms. Flax by email, stating in part:

> We will schedule to meet with Dr. Mahon this week on alternatives/flexibility surrounding Theresa's accommodations, *but regardless, Theresa has no intention of working for Ethicon again*.

(JA0498(B); JA1052-JA1057) (*italics added*). The District Court admitted this email but, citing the attorney-client privilege, redacted the italicized clause and precluded Ethicon's counsel from cross-examining plaintiff or her husband on that statement. (JA0498(B); JA1052-JA1057).[3]

Plaintiff testified that she did not see Dr. Mahon as she had been asked. (JA0498; JA1262-JA1264). She testified that she made an appointment with Dr. Mahon in early December, but that he cancelled the appointment. (JA1436). She rescheduled for mid-December, but then she cancelled that appointment because "by that point, I had a verbal offer on another position at Aventis." (*Id.*). Plaintiff

[3] The redacted statement in plaintiff's husband's email was in response to a redacted portion of Ms. Flax's email:

"During my telephone call with [plaintiff's husband], he indicated that Theresa does not want to go back to work and would prefer that we negotiate a severance/settlement package. We need direction from Theresa, the client, confirming that she does not want to return to Ethicon, even with an accommodation. Please have Theresa provide us with this confirmation. If this is the case, we will forego the Americans with Disabilities Act remedy and pursue only with a severance remedy." (JA0498(A)).

never discussed alternative medical restrictions with Dr. Mahon. (*See* JA0498; JA1264).

On both December 5 and December 12, 2001, Ms. Warren and Ms. Flax traded telephone calls, but were not able to reach each other. (JA1306-JA1307; JA0501).

Plaintiff began full-time employment with Aventis on December 17, 2001 (JA0801, JA1022). On December 31, 2001, Plaintiff's husband told Ms. Warren that she was employed elsewhere and was "not interested" in returning to Ethicon. (JA1307, JA1310-JA1311).

STANDARD OF REVIEW

In Point I, Ethicon submits that a new trial is required based on the District Court's misapplication of the attorney-client privilege. Evidentiary rulings are subject to review for abuse of discretion. *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 86 (3d Cir. 2009); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 524 (3d Cir. 1996).

In Points II and III, Ethicon submits that the District Court erred by not granting judgment for Ethicon as a matter of law based on the uncontradicted evidence on key points or, minimally, granting a new trial based on the clear weight of the evidence.

This Court exercises plenary review over the District Court's denial of judgment as a matter of law. *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 433 (3d Cir. 2009). The Court applies the same standard that was applicable below: 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 sufficient evidence from which a jury reasonably could find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). "The question is not whether there is literally no evidence supporting the unsuccessful party, but whether there is evidence upon which a reasonable jury could properly have found its verdict." *Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1083 (3d Cir. 1995). (citation omitted).

The Court generally reviews for abuse of discretion a District Court's denial of a new trial. *E.g.*, *Rotindo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992). However, when the District Court's ruling on a matter committed to its discretion "is based on the application of a legal precept, … the standard of review is plenary." *Rotindo, supra*; *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329, 333 (3d Cir. 1985). In addition to submitting that the verdict is against the great weight of the evidence, Ethicon also submits that a new trial is required based on the District Court's misapplication of legal precepts regarding the parties'

interactive process responsibilities as addressed in Points II and III.B, as well as the misapplication of the attorney-client privilege as addressed in Point I.

In Point IV, Ethicon submits that the District Court erred by ordering reinstatement. The grant of reinstatement or other equitable relief generally is reviewed for abuse of discretion. *Donlin*, *supra*. Ethicon submits, however, that the order of reinstatement was based on the District Court's misapplication of a legal precept and, therefore, subject to plenary review. *See Rotindo*, *supra*; *Koshatka*, *supra*.

SUMMARY OF ARGUMENT

The District Court erred by not entering judgment for Ethicon as a matter of law or by failing to direct a new trial, for several reasons.

First, the District Court's misapplied the attorney-client privilege, allowing plaintiff to misuse the privilege as both a sword and a shield. Plaintiff's and her husband's claimed ignorance of the interactive process discussions between Ethicon and plaintiff's attorney representatives directly placed in issue what they were or were not told by plaintiff's attorney representatives. Nonetheless, the District Court both permitted them to testify to that claimed ignorance and, at the same time, barred Ethicon's counsel from critical lines of examination about the discussions between plaintiff or her husband and the attorney representatives who were engaged in the interactive process on plaintiff's behalf. While plaintiff and

her husband gave their self-interested side of the story, Ethicon's counsel was deprived of the ability to unmask, through cross-examination, the whole story. The jury, therefore, was presented with only one-side of the evidence on a point that the District Court itself identified as key to upholding the verdict: plaintiff's claimed "impression that Ethicon was unwilling to accommodate her disability." (JA0075).

Second, the *uncontradicted* evidence establishes that Ethicon complied with its obligations under the ADA by engaging in an *agreed-upon* interactive process addressing the question of reasonable accommodations. Specifically, the parties' representatives agreed that the next step was for plaintiff to see her treating neurologist, Dr. Mahon, to seek clarification or revision of his stated restrictions, after which the parties would meet to discuss possible reasonable accommodations for those medical restrictions. The interactive process broke down and then was terminated because plaintiff chose not to follow up with Dr. Mahon and, after accepting a position with another employer, renounced any interest in returning to Ethicon. These facts were established by the uncontradicted evidence at trial.

The jury, however, likely was misled by plaintiff's and her husband's repeated testimony and argument at trial that they were not aware of the ongoing discussions between plaintiff's and Ethicon's attorney representatives. Even if this testimony by plaintiff and her husband were believed, it is immaterial and insufficient to support the verdict. As a matter of law, Ethicon's communications

with the attorney representative whom plaintiff engaged to pursue the interactive process on her behalf must be treated as communications with plaintiff herself. Her claimed lack of knowledge presents no basis for blaming Ethicon for a breakdown in the process caused either by plaintiff's or her representative's failure to communicate with each other. The emphasis at trial on this testimony, however, could only have misled the jury to believe that it was relevant and to excuse plaintiff's abdication of the interactive process. Indeed, the District Court itself relied on the jury reaching that conclusion in order to uphold the verdict.

Third, judgment for Ethicon or, minimally, a new trial was required because plaintiff did not prove that she was disabled under the ADA or that, under the restrictions stated by her doctor, she was qualified for her position. In both respects, the verdict was inconsistent with uncontradicted evidence – including testimony by plaintiff's own expert establishing that she was not disabled under the ADA standard. In both respects, however, the jury's verdict can be explained by testimony and arguments at trial that confused the legal standards – suggesting that plaintiff was disabled based on an elite standard not applicable under the ADA, and suggesting that a manager's hypothetical willingness to have considered reassigning essential duties of plaintiff's position to accommodate her created a legal duty to do so.

Fourth, even if the judgment otherwise were upheld, the District Court's order of reinstatement should be reversed. The District Court correctly found that plaintiff had abandoned the workforce entirely by failing to even explore employment opportunities during the five years from 2004, when she left Aventis, through the trial in 2009. The Court, however, viewed plaintiff's abandonment of the workforce as merely a question of mitigation bearing only on back pay and front pay, and not reinstatement. In doing so, the Court failed to address the equitable nature of reinstatement and underlying equitable principles that require consideration of plaintiff's abandonment of the workforce. Neither equity nor the purposes of the ADA support rewarding a plaintiff by ordering her reinstatement to the workforce that she herself abandoned. The award of reinstatement, therefore, was based on a misapplication of law and should be reversed.

ARGUMENT

POINT I

THE DISTRICT COURT'S MISAPPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE REQUIRES A NEW TRIAL

The District Court applied the attorney-client privilege at trial in a way that allowed plaintiff to use the privilege both as a sword and a shield, disclaiming knowledge while avoiding cross-examination on that claim. Plaintiff and her husband testified that they were not aware of the on-going interactive process

discussions between Ms. Hadziosmanovic and Ms. Warren. (JA0780, JA1072). At the same time, the District Court barred Ethicon from cross-examining plaintiff and her husband or examining an attorney who was engaged in the interactive process on plaintiff's behalf, Ms. Flax, on what plaintiff and her husband were or were not told or discussed relating to the interactive process conversations with Ethicon. Thus, the Court precluded Ethicon's counsel from:

- Cross-examining plaintiff about the discussion of a proposed alternative accommodation at the November 9, 2001 meeting between plaintiff and her attorney representatives – following Ethicon's offer of a part-time position, expressed willingness to consider other accommodations, and request that plaintiff review her restrictions with Dr. Mahon. (JA0791).
- Cross-examining plaintiff's husband on communications with plaintiff's attorney representatives after the November 9, 2001 meeting about whether plaintiff's doctor would propose alternative accommodations. (JA1066-JA1067).
- Introducing the part of a December 3, 2001 email from plaintiff's husband to Ms. Flax stating that plaintiff was not interested in returning to Ethicon, or examining plaintiff's husband on that statement. (JA1053-JA1055).

- Questioning Ms. Flax about Ethicon's offer of a part-time position as an accommodation and any response by plaintiff to that offer. (JA1259-JA1262).
- Questioning Ms. Flax on the reason for asking plaintiff to review the medical restrictions with her doctor – *i.e.*, whether this was done pursuant to the interactive process discussions with Ethicon. (JA1277-JA1278).
- Introducing Ms. Flax's notes of her December 5, 2001 conversation with plaintiff, which specifically addressed scheduling a meeting with "J&J" [Ethicon's parent company]. (JA1265).

Ethicon submits that the District Court abused its discretion by permitting plaintiff to misuse the attorney-client privilege to mislead the jury, requiring a new trial.

The District Court's own analysis demonstrates the prejudice caused by this error and its materiality to the jury's verdict. In its post-trial decision, the District Court rejected Ethicon's argument that its rulings "led [the jury] to conclude that Ellis did not know about the part-time offer or Ethicon's willingness to consider other restrictions and to continue the interactive process," because the Court had instructed the jury that Ellis was charged with her attorneys' knowledge of the discussions with Ethicon. (JA0076). But in the same decision, the District Court itself upheld the jury verdict by contradicting this instruction: the Court reasoned

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." (JA0075). Thus, the Court reasoned that the jury relied on this testimony specifically for the purpose that the jury instruction prohibited.

The District Court's error also is clear. The Court permitted plaintiff to do what the law prohibits: place her attorney-client communications in issue and, at the same time, rely on the privilege to shield those communications. *See, e.g.*, *Berckeley Investment Group, Ltd. v. Colkitt*, 455 F.3d 195, 22 n.24 (3d Cir. 2006) ("the attorney-client privilege cannot be used as both a 'shield' and a 'sword': Berckeley cannot rely upon the legal advice it received for the purpose of negating its scienter without permitting Colkitt the opportunity to probe the surrounding circumstances and substance of that advice"); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 536-537 (3d Cir. 1996) (plaintiff who claimed that she did not appreciate the legal consequences of her actions put the advice of her counsel at issue, requiring that communications between the plaintiff and her counsel be disclosed to the defendant so that the accuracy of plaintiff's claims could be tested).

No less than did the plaintiffs in *Berckeley* and *Livingston*, plaintiff placed in issue her communications with her attorneys. Plaintiff's and her husband's

testimony that they were not aware of Ethicon's continued engagement in the interactive process necessarily implicates what she and her husband discussed with the attorneys who were engaged in that interactive process on her behalf. Ethicon's counsel, however, was precluded by plaintiff's claim of attorney-client privilege from addressing what plaintiff and her husband were told, and thereby was precluded from exploring and impeaching their general denials of knowledge on cross-examination or on the examination of Ms. Flax. (*See* JA0791, JA1066-JA1067, JA1053-JA1055, JA1259-JA1262, JA1277-JA1278, JA1265).

The result was a distorted and selectively one-sided presentation of evidence on the issue of plaintiff's and her husband's knowledge. That was wrong. And, as demonstrated by the District Court's own analysis, it very likely led the jury to conclude that plaintiff did not know about Ethicon's efforts to continue the interactive process and, contrary to law, to excuse plaintiff's own responsibility for the breakdown of that process. Minimally, therefore, the District Court should have directed a new trial.

POINT II

THE DISTRICT COURT ERRED BY ENTERING JUDGMENT AGAINST ETHICON DESPITE UNCONTRADICTED EVIDENCE THAT THE PARTIES WERE ENGAGED IN AN AGREED-UPON INTERACTIVE PROCESS THAT PLAINTIFF UNILATERALLY ENDED

The ADA prohibits discrimination "against a qualified individual on the basis of disability" with respect to employment. 42 U.S.C. §12112(a). Prohibited discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. §12112(b)(5). This prohibition is intertwined with the interactive process set forth in the EEOC's interpretative regulations under the ADA:

> Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.

29 C.F.R. Pt. 1630, Appendix to §1630.9. Under the interactive process, the employee and the employer both "'have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.'" *Williams v. Philadelphia Housing Auth. Police Dep't*, 380 F.3d 751, 771 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005), quoting *Mengine v. Runyon*, 114 F.3d 415, 420 (3d

Cir. 1997). The interactive process does not mandate specific acts by the employer. "An employer may satisfy its obligation to participate in the interactive process in any number of ways." *Whelan v. Teledyne Metalworking Products*, 226 Fed. Appx. 141, 147 (3d Cir. 2007), citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999). "All the interactive process requires is that the employer make a good faith effort to seek accommodations." *Taylor*, *supra*.

Plaintiff, therefore, bore the burden of proving both that Ethicon failed to engage in the interactive process in good faith and that, but for that failure, there could have been a reasonable accommodation of her disability consistent with her medical restrictions. *See Williams*, 380 F.3d at 772; *Taylor*, 184 F.3d at 319-20.

A. Ethicon Engaged in the Interactive Process by Requesting that Plaintiff Obtain Information on Her Medical Restrictions, and Plaintiff Then Unilaterally Ended the Interactive Process by Failing to Provide that Information and Renouncing any Interest in Returning to Ethicon

The uncontradicted evidence in this case established that the parties' representatives had agreed upon the next step in the interactive process – that plaintiff see her doctor to review her medical restrictions. *See* pp. 14-19, *supra*. The uncontradicted evidence also established that the process broke down when plaintiff failed to do so and, ultimately, renounced any interest in returning to work at Ethicon. *See* pp. 18-19, *supra*. As a matter of law, Ethicon cannot be held liable on these facts.

The judgment cannot be upheld if plaintiff herself caused the interactive process to break down. "[T]he process must be interactive because each party holds information the other does not have or cannot easily obtain." *Taylor*, 184 F.3d at 316. For example, when an employee "fail[s] to hold up her end of the interactive process by clarifying the extent of her medical restrictions, [the employer] cannot be held liable for failing to provide reasonable accommodations." *Steffs v. Stepan Co.*, 144 F.3d 1070, 1073 (7th Cir. 1998). As this Court has explained:

> Participation is the obligation of both parties, however, so an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals.

Taylor, 184 F.3d at 317.

The critical proofs regarding the interactive process in this case addressed what occurred after the October 15, 2001 communication of Ethicon's inability to accommodate the permanent, three-day-a-week-at-home restrictions provided by Dr. Mahon. (Statement of Facts §3.b). After October 15, 2001, the parties continued to communicate about possible accommodations, through their respective attorneys, Ms. Hadziosmanovic and Ms. Warren. (*Id.*). The evidence clearly established the timeline and what was discussed in this continuation of the interactive process:

- Ms. Hadziosmanovic and Ms. Warren had repeated discussions beginning on October 18, 2001.
- The restrictions previously provided by Dr. Mahon were stated by Dr. Mahon to be permanent, understood by Ms. Stretch and Ms. Traver as permanent, and understood by Ms. Warren to be permanent, and neither Dr. Mahon nor plaintiff indicated otherwise.
- Attempting to work within the restrictions provided by Dr. Mahon, Ms. Warren told Ms. Hadziosmanovic that Ethicon could create a part-time position for plaintiff.
- In her discussions with Ms. Hadziosmanovic, Ms. Warren repeatedly expressed Ethicon's openness to consider alternative accommodations if there was flexibility in the restrictions previously provided by Dr. Mahon.
- Ms. Warren proposed to Ms. Hadziosmanovic that the next step was for plaintiff to see Dr. Mahon to seek clarification or revision of his stated restrictions, after which there could be a meeting to address accommodations.
- Consistent with Ms. Warren's proposal, plaintiff was told by her attorneys to see Dr. Mahon to address whether there was any flexibility in the stated restrictions.

- Plaintiff cancelled her appointment with Dr. Mahon because she had accepted employment with Aventis.
- After Ms. Warren and Ms. Hadziosmanovic had agreed that the next step was for plaintiff to see Dr. Mahon, plaintiff provided no information or response to Ethicon until December 31, 2001, when her husband informed Ms. Warren that plaintiff had joined Aventis and was no longer interested in returning to Ethicon.
- Plaintiff's failure to do so terminated the interactive process, and her renunciation of any interest in returning to Ethicon ended that process conclusively.

(Statement of Facts §§3.b and 3.c). These facts were established by uncontradicted evidence, including plaintiff's own testimony that she was asked to confer with Dr. Mahon and did not, the testimony and email correspondence by plaintiff's representative Ms. Flax, and Ms. Warren's unrebutted testimony regarding her discussions with Ms. Hadziosmanovic. (*Id*.) [4]

[4] Ms. Hadziosmanovic was neither deposed nor available at trial, and did not testify. Ms. Warren's testimony was unrebutted and, indeed, fully consistent with the testimony of Ms. Hadziosmanovic's colleague, Ms. Flax, and with other evidence establishing that plaintiff was asked to address her medical restrictions with Dr. Mahon and "a possible alternative accommodation for Theresa [plaintiff] if she should return to Ethicon." (JA0498).

Because no competent evidence contradicted Ms. Warren's testimony, there was no credibility issue. It is well-settled that a plaintiff cannot meet her burden of

The parties, therefore, agreed on how they were proceeding under the interactive process: plaintiff was to see Dr. Mahon to review her medical restrictions, and the parties then would meet. (JA1299-JA1300, JA1303-JA10304). Ethicon's request for that additional medical information was an appropriate step in the process. *See, e.g.*, *Taylor*, 184 F.3d at 315 (recognizing employer's burden under the interactive process "to request additional information that the employer believes it needs").

Further, by failing to provide that information, plaintiff was responsible for causing the interactive process to break down. As this Court has recognized, an employee fails to uphold her part of the interactive process if the employee "fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals." *Taylor*, 184 F.3d at 317. Other courts similarly have held that an employee who fails to provide requested medical information is responsible for the breakdown of the interactive process and cannot prevail on an ADA claim. *See Steffs v. Stepan Co.*, *supra*; *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (affirming dismissal of ADA

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proof on an issue by asserting that testimony can be disbelieved, without affirmative evidence rebutting that testimony. *See Schoonejongen v. Curtiss Wright*, 143 F.3d 120, 130 (3rd Cir. 1998) ("It is by now axiomatic that 'a nonmoving party . . . cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit'"); *Williams v. Borough of West Chester, P.A.*, 891 F.2d 458, 460 (3d Cir. 1989) (same); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 (3d Cir. 1990) (same).

claim where the employee did not provide a requested certification from her doctor because the employer "needed the requested information in order to determine appropriate reasonable accommodation for [the plaintiff] in the event she was able to return to work at all"); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996) (plaintiff was responsible for the breakdown in the interactive process where she failed to provide additional information about her condition to enable the employer to evaluate other possible accommodations); *Allen v. Pacific Bell*, 348 F.3d 1113, 1115 (9th Cir. 2003) (company not required to engage in further interactive processes where plaintiff did not submit medical information to modify his doctor's initial restrictions); *Jackson v. City of Chicago*, 414 F.3d 806 (7th Cir. 2005) (plaintiff was responsible for the breakdown in the interactive process where she did not respond to the employer's request for information about her abilities and the nature of her restrictions). *See also Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 738 (5th Cir. 1999) ("the [interactive] process broke down because [plaintiff] stayed silent, and quit").

Under *Taylor* and these other cases, Ethicon cannot be held liable for a failure to accommodate when plaintiff failed to provide requested medical information. Even more fundamentally, Ethicon cannot be held liable when it was proceeding in an *agreed-upon way* with plaintiff's representative. Even if it were true that plaintiff and her husband were unaware of the ongoing discussions

between Ethicon (Ms. Warren) and plaintiff's attorney representative (Ms. Hadziosmanovic), Ethicon cannot be held responsible for a breakdown in communications between plaintiff and her counsel. Holding Ethicon liable in this situation defies both the purposes of the ADA's interactive process and the most basic concepts of fairness, while rewarding plaintiff for her own default.

B. The District Court's Reasons Do Not Support the Judgment

In ruling on Ethicon's Rule 50 motion, the District Court did not disagree with the fundamental premise of the motion: the parties, through Ms. Hadziosmanovic and Ms. Warren, had agreed that the next step was for plaintiff to see Dr. Mahon, and plaintiff decided not to follow-up with Dr. Mahon because she had accepted a job with Aventis. Instead, the Court rejected Ethicon's position on essentially two grounds: (1) Ethicon did not contact plaintiff's doctors to clarify whether the proposed restrictions were permanent or offer proposed alternatives for full-time employment, and (2) the jury could have excused plaintiff's failure to provide the requested medical information based on her testimony that "she was under the impression that Ethicon was unwilling to accommodate her disability." (JA0072-JA0075). Both of these grounds are contrary to the law and the uncontradicted evidence.[5]

[5] The Court correctly rejected plaintiff's argument that Ethicon discontinued the interactive process by allowing plaintiff to roll into LTD status on October 22, 2001. (JA0067). As established by the uncontradicted evidence, this change

1. The District Court Failed to Account for Ethicon's Continued Participation in the Interactive Process and Imposed a Burden on Ethicon Beyond Its Obligations Under the ADA

Despite the fact that Dr. Mahon's October 11, 2001 letter (on which Ethicon relied) explicitly stated that the restrictions were "permanent," the District Court suggested that the jury could have relied on Dr. Watson's testimony (not available to Ethicon at the time of the return to work decision) to determine that the restrictions were not permanent. (JA0072). The Court then faulted Ethicon because "no one from Ethicon contacted Dr. Watson, or Dr. Mahon, about the proposed accommodations," and "Ellis' proposed accommodations were rejected without any further action on Ethicon's part" to explore temporary accommodations. (*Id*.)

The problem with the District Court's reasoning is that it overlooks what Ethicon did do: Ethicon asked that plaintiff obtain further information from her doctor regarding the restrictions, and continually expressed a willingness to consider other alternatives once the restrictions had been clarified. (Statement of Facts §§2.b and 3.b-c). Nothing in the ADA or the interactive process required Ethicon to contact plaintiff's doctors directly. Nor did anything in the ADA or the

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occurred automatically when plaintiff's STD leave ended, there was no affirmative action by Ethicon to terminate plaintiff's position, the parties continued their return-to-work discussions, and, if reasonable accommodations were reached, plaintiff would have been reinstated to active employment retroactive to October 22, 2001. (JA1020; P-92; *see* pp. 8-14, *supra*).

interactive process shift to Ethicon a burden to continue to propose alternatives before receiving the requested medical information from plaintiff. To the contrary, this Court and others consistently have recognized that an employer may appropriately request the employee to provide additional medical information and the employee must provide that information to continue the interactive process. *See* cases cited at pp. 35-36, *supra*.

The District Court, however, dismissed plaintiff's default by transforming the point into an unidentified factual issue resolved by the jury:

> The crux of Ethicon's defense at trial was that it should not be faulted for Ellis' failure to answer Ethicon's request for more detailed proposals. . . . [T]he jury nonetheless rejected this position in ruling against Defendant. . . .

(JA0073). But there was no factual issue for the jury on this point. The evidence was uncontradicted that Ethicon had requested more information on plaintiff's medical restrictions – which plaintiff's attorney representative then asked plaintiff to get from her doctor – and both Ethicon and plaintiff's own attorneys were waiting for her to provide that information in order to discuss possible alternatives. (JA1299-JA1300, JA1303-JA1304) Neither the jury nor the District Court were free to relieve plaintiff of her own responsibility under the interactive process as established by *Taylor* and other cases.

The District Court also hypothesized that the jury could have found bad faith based on the October 15, 2001 response to the proposed three-days-a-week-at-home schedule. (JA0072). The Court incorrectly characterized that response as an "absolute rejection of Ellis' initial proposed recommendations without seeking any explanation from Ellis or her doctors, or exploring other alternative accommodations." (JA0072). The Court's characterization overlooks the undisputed evidence – including the text of the email itself – that Ms. Stretch tried to reach plaintiff and her husband by telephone to discuss the matter and that she invited them to call her. (JA0405). It also overlooks plaintiff's admission that she herself did not seek to correct Ethicon's stated understanding that her restrictions were permanent. (JA0747-JA0751). Further, despite plaintiff's unspoken personal belief that the restrictions did not need to be permanent and Dr. Watson's later testimony *at trial* (*see* JA0854-JA0855), Ethicon was entitled *in October 2001* to rely on Dr. Mahon's explicit statement that the restrictions were permanent. *See, e.g., Alexander v. Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003) (the employer "was entitled to rely and act upon the written advice from [the employee]'s physician that unambiguously and permanently restricted her from vacuuming," and the "the employee's belief or opinion that she can do the function is simply irrelevant").

More importantly, the interactive process did *not* end on October 15, 2001. It continued three days later – and then continued for weeks – with the discussions between Ms. Hadziosmanovic and Ms. Warren (Statement of Facts, §3.b). Those discussions included precisely what the District Court faulted Ethicon for not doing: a proposed alternative accommodation (JA1294-JA1297; JA1332-JA1333), a request for more information on the medical restrictions (JA1300-JA1301, JA1352-JA1353, JA1357-JA1359), and an expressed willingness to meet and discuss other possible alternatives once that medical information was provided. (JA1299-JA1300, JA1303-JA1304). There is no evidence that those discussions were in bad faith. To the contrary, the parties were proceeding in an agreed-upon way, and both Ethicon and plaintiff's own representatives were waiting for her to see Dr. Mahon. (JA1353-JA1354, JA1307, JA1252-JA1264; JA0498).

The interactive process terminated because plaintiff failed to see Dr. Mahon and renounced any interest in returning to work at Ethicon. (JA1307, JA1310-JA1311). As a matter of law, that is not conduct for which Ethicon can be faulted and held liable under the ADA.

2. The District Court Erroneously Relied on Plaintiff's Testimony that She Was Not Aware of the Parties' Continued Discussions to Excuse Her Failure to Provide Requested Medical Information and Her Renunciation of any Interest in Returning to Ethicon

Both the employee and employer have responsibilities under the interactive process, and it is well-settled that an employee cannot hold the employer responsible for a breakdown in the process caused by the employee's failure to provide requested information. *See* pp. 35-36, *supra*. The District Court, however, reasoned that the jury could have credited and relied on plaintiff's testimony that she failed to follow through on the request that she see Dr. Mahon and instead accepted employment with Aventis "because at that time she was already terminated from Ethicon and she was *under the impression* that Ethicon was unwilling to terminate her disability." (JA0075; emphasis added).[6] Ethicon's and plaintiff's representatives were in fact continuing to discuss her return to work at the time – and waiting for her to see Dr. Mahon as part of those discussions. (Statement of Facts, §§3.b and 3.c). The Court's rationale, therefore, depends on the jury accepting the testimony by plaintiff and her husband that they were not aware of those discussions, including Ethicon's offer of a part-time position,

[6] The record discloses a more obvious reason why plaintiff sought employment at Aventis: her round-trip daily commute to Aventis was 70 miles shorter than to Ethicon. (JA1059). In fact, plaintiff interviewed at Aventis as early as August 2001. (JA0661-JA0662).

expressed willingness to consider other alternatives, and request for additional medical information.

Plaintiff's and her husband's testimony on this point was immaterial. Plaintiff chose to retain counsel to engage in the interactive process on her behalf in what otherwise would have been a continued discussion between an employee and her employer or the third-party program administrator. This case was tried and submitted to the jury on the basis that the communications between the parties' representatives – Ms. Hadziosmanovic and Ms. Warren – "are to be treated the same as if the communications had occurred between the parties since attorneys are deemed to be the agents of their clients." (JA0076). *See McCarthy v. Recordex Serv., Inc.* 80 F.3d 842, 853 (3d Cir. 1996), *cert. denied*, 519 U.S. 825 (1996). The jury was so instructed. (JA1545). Contrary to the District Court's reasoning, therefore, the jury was *not* free to rely on plaintiff's testimony that she was not aware of the discussions between Ms. Hadziosmanovic and Ms. Warren.

Further, this testimony by plaintiff and her husband cannot change the material facts. It does not rebut the uncontradicted evidence of Ms. Warren's discussions with Ms. Hadziosmanovic. It cannot establish a communication breakdown between Ms. Warren and Ms. Hadziosmanovic. At best, plaintiff's and her husband's testimony could only address whether there was a communication breakdown between them and their own representative, Ms. Hadziosmanovic.

Such a breakdown, if it occurred, could not be the basis to impose liability on Ethicon. As plaintiff herself testified, she engaged Ms. Hadziosmanovic to continue return-to-work discussions with Ethicon. (JA1245-JA1246, JA1253-JA1254; *see also* JA1430). Ethicon, therefore, properly continued those discussions and engaged in the interactive process with plaintiff's chosen representative, Ms. Hadziosmanovic.

POINT III

THE DISTRICT COURT ERRED BY ENTERING JUDGMENT ON THE VERDICT BECAUSE PLAINTIFF DID NOT PROVE SHE WAS DISABLED AND THAT SHE WAS QUALIFIED UNDER THE ADA

A. The Finding that Plaintiff Was Disabled under the ADA Is Contrary to Plaintiff's Medical Tests and Reflects the Application of the Wrong Legal Standard

The District Court erred by entering judgment on the jury's verdict that plaintiff "was substantially limited in the major life activity of cognitive functioning and therefore disabled as that term is defined by the ADA." (JA0224). The testimony and objective tests performed by plaintiff's own treating neuropsychiatrist and expert, Dr. Watson, corroborated by plaintiff's admitted ability to return to work in December 2001 without needing any accommodations, established that she did not have a disability in 2001 as defined by the ADA.

"Disability" under the ADA is an impairment "that substantially limits one or more major life activities." 42 U.S.C. §12102(1)(A). The EEOC defines "substantially limits":

> (1) The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) 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). *See Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 195-96 (2002) (discussing regulation). The standard of comparison is "the average person in the general population." 29 C.F.R. §1630.2(j)(1). The relevant time for determining whether the plaintiff had a disability is "the time that she sought an accommodation from [the employer]." *Toyota Motor Mfg., supra*.[7]

Plaintiff's alleged disability was an impairment of cognitive functioning. Her principal evidence on this point was the testimony of her neuropsychiatrist, Dr. Watson. Dr. Watson specifically tested plaintiff's cognitive functioning.

[7] The ADA Amendments Act, Pub.L. No. 110-325, §8, 122 Stat.3553 (2008), does not apply to this case. The Act, effective January 1, 2009, is not retroactive. *See Colwell v. Rite Aid Corp.*, 602 F.3d 495, 501 n. 5 (3d Cir. 2010) ("every court of appeals decision of which we are aware has held that the amendments are not retroactive"). Therefore, whether plaintiff had a disability in 2001 must be determined under the standards that existed prior to 2009.

(JA0824). Her objective tests found no substantial impairment against "norms … compared to people as close as we can get it to her age, her level of education, her gender." (JA0867-JA0868). On all tested cognitive functions, plaintiff performed at least "within the average range" – intellectual, learning from presented information, word retrieval, reading comprehension, verbal IQ, performance IQ, expressive vocabulary, visual perception and processing, complex problem solving, auditory memory, memory from verbal material, visual memory, and arithmetical skills. (JA0868-JA0871). In many cognitive functions she was "above average" or even "very superior." (*Id*.)

Dr. Watson's testimony established, as a matter of law, that plaintiff was not disabled compared, as the ADA requires, to the average person in the general population. Even by comparison to a more select group – persons of plaintiff's age, education level, and gender[8] – Dr. Watson's tests found only what she described as "mild impairment" or "minor impairment" with respect to complex or high-level problem solving. (JA0870-JA0871, JA0886-JA0887). While Dr. Watson also opined that plaintiff suffered from "pain, cognitive fatigue, and depression" contributing to "suboptimal functioning in daily life," (JA0831, JA0839), her only quantification of the actual impairment of plaintiff's cognitive

[8] *See, e.g.*, *Weisberg v. Riverside Tsp. Bd. of Ed.*, 180 Fed. Appx. 357, 362 n.2 (3d Cir. 2006) (rejecting argument that comparison can be limited to persons of plaintiff's age, education, and experience).

functioning was that it was "mild" or "minor." (JA0870-JA0871, JA0886-JA0887).

"[M]ild" or "minor" impairment, by definition, is not an impairment that "substantially limits" a function as required to establish a disability. 42 U.S.C. §12102(1)(A). "'[S]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" *Toyota Motor Mfg.*, 534 U.S. at 196-97. Further, the term "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled." *Id*. Thus, to meet the "substantially limits" standard, "an individual must have an impairment that prevents or severely restricts the individual from" performing the major life activity involved. *Id*. *See Weisberg*, 180 Fed. Appx. at 362 (plaintiff's cognitive function was not substantially limited where "at most . . . [he] falls into the bottom quartile of the country on certain measures of cognitive function, but ranks highly or in the average range on other measures"); *Bowen v. Income Producing Mgmt.*, 202 F.3d 1282 (10th Cir. 2000) (plaintiff who suffered brain injury was not substantially limited despite his memory loss, inability to concentrate, and difficulty performing simple math because he had "greater skills than the average person in general"); *Gonzalez v. National Bd. of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000) (plaintiff not substantially limited because his reading tests showed that he could read as well as the average person).

Dr. Watson transformed plaintiff's "mild" or "minor" impairment into something more by creating an elite and idiosyncratic standard for plaintiff – that of a Stanford educated engineer. (JA0886-JA0887). Applying this elite standard, Dr. Watson concluded that plaintiff's normal test results showed a disability because "when [plaintiff] has an average or normal score, *that's not normal for her*." (*Id*.; emphasis added). As she explained on redirect:

> [Plaintiff] did have areas of deficit, clear deficit, mild impairment on tests of high level problem solving. I would not expect a Stanford educated engineer to have mild problem-solving deficits…. In terms of all the low average to average scores, quite frankly, you would not expect a quality assurance engineer with her level of education to be functioning at a low average to average range. That's normal, yes, but not normal for her. . . . Therefore, when she has an average or normal score, that's not normal for her.

(*Id*.)

Dr. Watson's conclusion of disability, therefore, cannot support the verdict because it depends on an incorrect legal standard. Dr. Watson did not conclude that plaintiff had a substantial limitation compared to "the average person in the general population." 29 C.F.R. 1630.2(j)(1). *See, e.g.*, *Emory v. AstraZeneca Pharms. L.P.*, 401 F.3d 174, 179-180 (3d Cir. 2005) (applying "average person in the general population" standard); *Taylor*, 184 F.3d at 307 (same).

Further, plaintiff's claim of substantial impairment was contradicted by her own testimony that, when she commenced employment with Aventis in December

2001, she did not require any accommodation. (JA0906; JA0801; JA0679-JA0670). Plaintiff and Dr. Watson both explained that she was able to overcome any challenges presented by her impaired cognitive functioning by using notes and other reminders. (JA0680-JA0681; JA0834). As a matter of law, cognitive difficulties that can be addressed by "compensatory type things, like keeping more records" or receiving reminders "are not unusually restrictive limitations on cognitive functioning such that they amount to a substantial limitation." *Weisberg*, 180 Fed. Appx. at 363. *See Albertson's, Inc. v. Kirkingburg*, 527 U. S. 555, 567 (1999) (determining whether an individual has a disability under the ADA must "take account of the individual's ability to compensate for the impairment").

The District Court relied on this Court's statement that "when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." (JA0083, quoting *Emory*, 401 F.3d at 180-81). *Emory*, however, involved precisely what the evidence demonstrates was absent in this case: *substantial* mental impairment. As the Court observed in *Emory*, diagnostics tests "establish[ed] that Emory's math, reading and cognitive skills are far below those possessed by average persons in the general population," with "poor calculation and computational abilities, literacy skills which place him in the bottom of the first percentile according to one test, and a deficient learning curve," and, as a result, "Emory is unable to engage in the most basic and essential

methods of learning-reading written materials and following oral instruction." 401 F.3d at 180-81.

Despite the evidence that plaintiff's impairment of cognitive function was "mild" or "minor," the District Court also reasoned that the jury properly could have found that plaintiff was disabled based on plaintiff's asserted difficulties "coordinat[ing] her personal life functions without assistance":

> Specifically Ellis stated that after her car accident, her husband had to facilitate her life skills in order for her to function; these included planning activities such as getting dressed, taking medication, diet, rest, medical appointments, bathroom activities, hygiene, *etc*. She was no longer able to do chores around the house. In fact, Ellis testified that all she could manage to do was work and sleep.

(JA0083). The Court's reasoning, however, is contrary to the basis on which plaintiff's claim was tried. The "major life activity" addressed by plaintiff's disability claim was cognitive functioning, not caring for oneself. As the Court charged the jury:

> Ms. 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.

(JA1538-JA1539). The Court further described cognitive functioning as "learning, concentrating, reading, and remembering." (*Id*.) Indeed, plaintiff's claim that she was disabled based on an impairment of the "major life activity of caring for oneself" was dismissed on summary judgment:

> Ellis simply asserts that she was always fatigued so that her husband handled the household chores so that she could focus on work. She clearly bathed and took care of her personal hygiene which allowed her to function daily at home and in the workplace. The Court will not give credence to Ellis' allegations that she could not care for herself which essentially amount to "self-serving conclusions" that are unsupported by specific facts in the record. *See Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 (3d Cir. 1990). This is simply not enough to support a substantial limitation of caring for oneself.

(JA0028).

By reasoning that the difficulties plaintiff asserted at trial could trump Dr. Watson's findings specifically addressing the major life activity at issue (cognitive functioning), the District Court also misapplied the Supreme Court's instruction in *Toyota Motor Mfg., supra*. The Supreme Court recognized that proof of substantial impairment must include evidence on "the extent of the limitation (caused by the impairment) in terms of [the plaintiff's] own experience." 534 U.S. at 197. However, the Court did not hold that such evidence was sufficient. To the contrary, the Court was addressing the insufficiency of "*merely* submit[ting] evidence of a medical diagnosis of an impairment," plainly contemplating that the plaintiff's experiences must also be supported by medical evidence of a substantial impairment. *Id. See also Emerson v. Northern States Power Co.*, 25 F.3d 506, 511-12 (7th Cir. 2001) (although the plaintiff scored within normal limits on certain neuropsychological tests, the disability finding was supported not only by

the difficulties she experienced but also by medical evidence establishing cognitive difficulties and her failure of a test "requir[ing] her to count by threes and sevens").

The evidence at trial established that plaintiff was neither prevented nor severely restricted from performance of the major life activity – cognitive functioning – on which her claim was based. As a matter of law, therefore, judgment should have been entered for Ethicon. Minimally, because of the weight of the evidence and the likelihood that Dr. Watson's use of an incorrect standard misled and confused the jury, the District Court abused its discretion by not granting a new trial.

B. The Finding that Plaintiff Was a Qualified Individual Under the ADA Is Contrary to the Proofs and Reflects the Application of the Wrong Legal Standard

Under the ADA, a qualified individual with a disability is one "who, 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). *See, e.g., Gaul v. Lucent Technologies*, 134 F.3d 576, 580 (3d Cir. 1998). The District Court erred by entering judgment on the jury's verdict that "[plaintiff] was qualified to perform the essential functions of her job as a staff quality engineer in October, 2001 with or without reasonable accommodations." (JA0224-JA0225). In doing so, the Court applied an incorrect legal standard in two respects: (1) the Court required only that plaintiff could perform "a portion of [her] position," and

(2) the Court conflated Ms. Traver's testimony to what she might have been *willing* to do regarding a potential modification of the job duties with what the ADA *required*. (JA0078-JA0079).

"The term *essential functions* means the fundamental job duties of the employment position," as opposed to "marginal functions of the position." 29 C.F.R. §1630.2(n)(1) (emphasis in original). A job duty is essential if, for example, *any* of the following applies: "the reason the position exists is to perform that function," there is "a limited number of employees available among whom the performance of that job can be distributed," *or* the function is "highly specialized so that the incumbent is hired for his or her expertise or ability to perform the particular function." 29 C.F.R. §1630.2(n)(2); *see Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 279 (3d Cir. 2001). The "employer's judgment as to which functions are essential" and the job description provide substantial evidence of what functions are essential to a position. 29 C.F.R. §1630.2(n)(3). In short, "[a] job function is essential if its removal would fundamentally alter the position." *Kiphart v. Saturn Corp.*, 251 F.3d 573, 584 (6th Cir. 2001).

The evidence at trial established that the proposed work-at-home restriction, whether on a temporary or a permanent basis, did not permit plaintiff to perform the essential functions of the Quality Engineer position. Plaintiff herself admitted that she would not be performing duties of the job:

> Q. [Y]ou wouldn't be able to perform all the objectives of your job working at home three days a week. Is that correct?
>
> A. Right. During that transition phase, … I would not be able to meet the whole objective of my position.

(JA0800). The duties plaintiff would not have been able to perform were essential functions of the job. As Ms. Traver testified without contradiction, permitting plaintiff to work at home would have required reassigning plaintiff's "core" job duties to other engineers: "participating in evaluations of the device by surgeons, conducting external audits, working with the external manufacturing process engineers to get the external manufacturer ready to do production, build and launch." (JA1161). The Quality Engineer was the person who "led the team through that structured activity." (JA1144-JA1147).

To conclude that plaintiff would have been able to perform her job with the work-at-home restriction, the District Court relied on testimony that "*a portion* of Ellis' position is report writing and data analysis which could be done from a remote location." (JA0078; emphasis added). However, that is not the legal standard. 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) (emphasis added). An employee must be able to perform all of the essential functions of a position, not just a portion of those functions. *See, e.g., Kvorjak v. Maine*, 259 F.3d 48 (1st Cir. 2001) (employee could not perform his job at home,

even if he could conduct interviews by telephone and write decisions at home, because he could not perform his other essential functions such as training and advising other office workers). Similarly, the Court's reasoning that "Ellis could have contacted other staff members via telephone, email, and conceivably, video conferencing," (JA0078), does not address Ms. Traver's testimony that essential on-site responsibilities of the position would still have to be transferred to other engineers. *See Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006) (employer not required to reasonably accommodate the employee by allowing him to work off-site, where his essential functions included troubleshooting, training, supervising, and "supporting personnel," and required actual attendance at the plant).

The District Court also relied on Ms. Traver's testimony (admitted over Ethicon's objection) that, if plaintiff's restrictions had been only temporary (contrary to Dr. Mahon's explicit direction in October 2001 that the restrictions were "permanent"), she would have been willing to reassign even core functions of the job to permit plaintiff to return. (JA0079; *see* p. 52-53, *supra*).

The District Court's reasoning, however, transforms Ms. Traver's testimony about what she hypothetically would have been *willing* to do on a temporary basis into a legal obligation. But that is not the standard under the ADA. Whether or not an employer is willing to consider reassigning essential job functions or even creating a new position to accommodate a disabled employee, the ADA does not

require the employer to do so. *E.g.*, *Donahue v. CONRAIL,* 224 F.3d 226, 232 (3d Cir. 2000) ("employers are not required to modify the essential functions of a job in order to accommodate an employee"). And the employer's willingness to consider such measures cannot be deemed to create a greater obligation than what the ADA imposes. To hold otherwise would subvert the ADA's goals: it "would unacceptably punish employers from doing more than the ADA requires, and might discourage such an undertaking on the part of employers." *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001) (finding lifting to be essential function of job even though employer let co-workers perform the employee's lifting duties); *Rehrs v. Procter and Gamble, Inc.*, 486 F.3d 353 (8th Cir. 2007) (employer should not be punished for "doing more than the ADA requires").

The District Court erred, therefore, by not entering judgment for Ethicon. Minimally, the weight of the evidence and the Court's misapplication of the legal standards regarding what Ethicon was required to do establishes that the Court erred by not granting a new trial.

POINT IV

THE DISTRICT COURT ERRED BY ORDERING REINSTATEMENT

Because plaintiff "withdrew entirely from the employment market" after leaving Aventis in August 2004, the District Court correctly held that plaintiff was not entitled to front pay. (JA0092-JA0095). Plaintiff herself admitted that, in the

five years after she left Aventis through the time of trial in 2009, she did not seek any employment. (JA0812-JA0813). Nonetheless, the District Court ordered that Ethicon reinstate plaintiff "as a quality engineer, or a comparable position." (JA0111). The Court reasoned that plaintiff's "failure to mitigate" did not foreclose reinstatement because "there is no logical link between a plaintiff's pursuit of alternative employment and whether he should be reinstated to a position from which he was wrongfully discharged." (JA0106, quoting *Dilley v. SuperValu Inc.*, 296 F.3d 958, 967 (10th Cir. 2002)).

The District Court erred by ordering reinstatement. Although reinstatement is an equitable remedy, 42 U.S.C. §2000e-5(g)(1), the Court failed to address the equitable principles under which an individual's own conduct bear upon her entitlement to equitable relief. Because the reinstatement order is based on the District Court's "interpretation and application of a legal precept" – whether a plaintiff's abandonment of the workforce is material to her entitlement to reinstatement – this Court's review is plenary. *See Rotindo, supra*; *Koshatka, supra*.

The shared equitable nature and purpose of reinstatement and front pay provide the "logical link" overlooked by the District Court. As described by the Supreme Court, front pay is the "functional equivalent" of reinstatement. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 854 n.3 (2001); *Donlin v. Philips*

Lighting North America Corp., 581 F.3d 73, 86 (3d Cir. 2009) ("front pay is an alternative to the traditional equitable remedy of reinstatement"). Both provide relief relating to the plaintiff's obtaining a comparable position in the workforce – either through reinstatement or through front pay for a reasonable period needed for the plaintiff to obtain such a position. *See Maxfield v. Sinclair International*, 766 F.2d 788, 796 (3d Cir. 1985) (the purpose of reinstatement is that plaintiffs "be made whole by restoring them to the position they would have been in had the discrimination never occurred. Front pay, an award for future earnings, is sometimes needed to achieve that purpose"); *In re Continental Airlines*, 125 F.3d 120, 135 (3d Cir. 1997) (recognizing " the similarity in purpose between the two remedies"). Thus, similar equitable principles must guide courts in the application of both remedies.

Under equitable principles, a plaintiff's own conduct may bear on his or her right to equitable relief. *E.g.*, *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). In labor and employment discrimination cases, courts have looked to such equitable principles to determine whether reinstatement is appropriate. *See St. John v. Employment Dev. Dept.*, 642 F.2d 273, 275 (9th Cir.1981) (affirming denial of reinstatement "under principles of equity" based on Title VII plaintiff's post-termination conduct); *Feltington v. Moving Picture Machine Operators Union Local 306*, 636 F.2d 890, 892 (2d Cir.

1980) (in action under the Labor-Management Reporting and Disclosure Act, the plaintiff was entitled to reinstatement to the union unless disallowed by "laches or unclean hands" or other equitable grounds); *see also Fogg v. Gonzales*, 492 F.3d 447, 456 (D.C. Cir. 2007) (affirming denial of front pay because Title VII plaintiff had "unclean hands" based on post-discharge conduct). *See generally McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-61 (1995) (addressing the impact of after-acquired evidence on an ADEA plaintiff's entitlement to equitable relief, the Court reasoned that even if the "unclean hands" defense were not applicable, "[t]hat does not mean, however, the employee's own misconduct is irrelevant to all the remedies otherwise available under the statute").

The case cited by the District Court, *Dilley*, is both factually and analytically distinct from the issue as presented in this case. Factually, *Dilley* did not address the type of complete withdrawal from the workforce that occurred and that the District Court found in this case – an admitted five-year period, from the time she left comparable employment at Aventis through the time of trial, during which period the plaintiff neither held nor sought any employment. (*See* JA0812-JA0813) Analytically, the *Dilley* court did not address the equitable nature of reinstatement nor consider the plaintiff's own conduct under equitable principles. The cases on which the *Dilley* court relied simply discussed front pay separately from reinstatement – *e.g.*, addressing the impact of a failure to mitigate on front

pay after first finding that reinstatement was not appropriate on other grounds. Nothing in those cases suggests that reinstatement could be appropriate even when equitable principles precluded front pay. Much less do those cases hold that equitable considerations of the plaintiff's own conduct are not relevant to the appropriateness of reinstatement.[9]

This Court addressed the argument that a Title VII plaintiff's alleged abandonment of her profession precluded reinstatement in *Ellis v. Ringgold School District*, 832 F.3d 27 (3d Cir. 1987). In that case, unlike in this case, the plaintiff did not withdraw entirely from the employment market. Instead, the defendant argued that plaintiff should not be reinstated as a teacher because, during the litigation, she had taken a job outside the teaching profession. The Court rejected the argument that the plaintiff had abandoned her profession by mitigating damages through unrelated employment:

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[9] In *Hazel v. United States Postmaster Gen.*, 7 F.3d 1, 5 (1st Cir.1993), the First Circuit held that the plaintiff's failure to mitigate precluded damages and that "granting equitable relief would be equally futile"; no reinstatement was ordered. In *Reneau v. Wayne Griffin & Sons, Inc.*., 945 F.2d 869, 870-71 (5th Cir.1991), the Fifth Circuit affirmed the District Court's conclusion that reinstatement was not feasible and remanded the case to determine whether front pay was appropriate. In *Hansard v. Pepsi-Cola*, 865 F.2d 1461, 1469-70 (5th Cir.1989), the Fifth Circuit held simply that the court must determine that reinstatement is not feasible before addressing front pay. In *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir.1985), the District Court had awarded reinstatement and back pay, but only back pay was addressed on the appeal. Finally, in *Rosado v. Santiago*, 562 F.2d 114 (1st Cir.1977), the Court affirmed reinstatement, but there was no issue involving a complete withdrawal from the workforce.

> Standing alone, the fact that a plaintiff takes a job in an unrelated field to meet her obligation of mitigation should not be construed as a voluntary withdrawal from her former profession.

Id. at 30. The Court explained that to hold otherwise would "discourage[] efforts at mitigation." *Id*. However, the Court implied that an actual abandonment of the profession would preclude reinstatement:

> To show abandonment of a profession, defendant must show more than that plaintiff merely secured alternative employment.

Id.

Further, reinstatement, like its alternative in the form of front pay, is intended to remedy future unemployment caused by prior discrimination and, therefore, is not appropriate when "the sting of discrimination ha[s] ended by the time of trial" and the plaintiff's unemployment is due to other factors. *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992). In *McKnight*, a Title VII plaintiff who had been discharged from his position as a manufacturing supervisor voluntarily changed careers to become a stockbroker. Affirming the denial of both reinstatement and front pay, the Seventh Circuit explained:

> Here, through reinstatement or a front pay award, McKnight appears to be attempting to force GM to insure his future employment success. At trial he presented evidence that he had made a successful career change. Now, he presents evidence that he has had trouble keeping jobs since then. Nevertheless, as we have explained, "*You cannot just leave the labor force after*

> *being wrongfully discharged in the hope of someday being made whole by a judgment at law*."

Id. (emphasis added).

In this case, plaintiff did precisely what *McKnight* described as rendering equitable relief inappropriate: she left the workforce and, by her own admission, made no attempt to re-enter the workforce while she waited for the conclusion of this lawsuit. (JA0695-JA0696). Equity should not provide plaintiff with a remedy giving her what she chose to abandon years earlier. Nor do equitable principles and the purposes of the ADA support relief that would encourage individuals to sit idly by for years with the expectation of court intervention. The District Court, therefore, erred by failing to consider the equitable nature of reinstatement and the effect of plaintiff's own conduct on the appropriateness of that relief.

CONCLUSION

For all the foregoing reasons, 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.

Respectfully submitted,

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s/ Francis X. Dee

Francis X. Dee
Counsel of Record

Dated: June 29, 2011

CERTIFICATION OF BAR ADMISSION

I certify that Francis X. Dee and I both are admitted to practice before the United States Court of Appeals for the Third Circuit.

s/ Stephen F. Payerle

Stephen F. Payerle

Dated: June 29, 2011

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 14,000 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 2003 and 2004 in 14 point Times New Roman font.

s/ Stephen F. Payerle

Stephen F. Payerle

Dated: June 29, 2011

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, McAfee Antivirus version 8.5, has been run on the file and no virus was detected.

s/ Stephen F. Payerle

Stephen F. Payerle

Dated: June 29, 2011

CERTIFICATION OF SERVICE

I certify that the original and nine 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 plaintiff, Theresa M. Ellis, by Federal Express next day delivery.

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

s/ Stephen F. Payerle

Stephen F. Payerle

Dated: June 29, 2011