CASE NO. 10-1919, 12-1361

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

V.

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

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

FOURTH STEP REPLY BRIEF OF *AMICUS CURIAE* ON BEHALF OF THERESA M. ELLIS

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Theresa Ellis filed her *pro se* appeal seeking compliance with the District Court's reinstatement order after a jury determination that she was a victim of intentional discrimination.[1] Over three years ago, the jury found that Ethicon unlawfully discriminated against Ellis and to date she still has not been reinstated. In short, Ellis' appeal asks: what does "make whole" relief mean after a finding of unlawful conduct? Ethicon's response is to ask this Court to ignore the standards of review that the Third Circuit strictly applies to jury verdicts – that fact-finder determinations should not be disturbed if a reasonable jury could reach that conclusion.[2] Ethicon further seeks to usurp the broad discretion given district court judges to fashion "make whole" relief after a finding of discrimination.[3]

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

[2] The reviewing court must "review the record in the light most favorable to the verdict winner, and affirm the denial unless the record 'is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief.'" *Starceski v. Westinghouse Electric Corporation*, 54 F.3d 1089, 1095 (3d Cir. 1995).

[3] *See* discussion in *Amicus* Step Two Br. at 58-60.

Ethicon is also asking this Court to act as fact-finder on a question that is not on appeal – whether Ethicon has complied with the reinstatement order.

Ethicon's compliance with the reinstatement order is not before this Court as the District Court never made a factual determination on this issue. As to Ellis' appeal, the District Court only found that she did not meet the high standard of proof required for emergency relief. A substantial section of Ethicon's Step Three Brief attempts to convince this Court it complied with the reinstatement order. *Amicus* agrees with Ethicon that the relevant issue remaining in this case is the supplemental relief Ellis is due since the reinstatement order. Because the District Court has not answered this question, the appropriate Order from this Court would be to affirm the District Court's findings on liability, back pay, and reinstatement, and remand for a hearing on what supplemental relief Ellis is entitled to receive.

A. Judge Sheridan's Finding Was That Ellis Did Not Meet the High Burden Of Proof Required To Grant Emergency Relief

Ethicon mischaracterizes Judge Sheridan's[4] finding that Ellis did not meet the extraordinarily high burden for an emergency relief application. The District Court ordered Ellis' reinstatement in November, 2010. Subsequently, on September 30, 2011, Ellis filed an Application for Emergency Relief requesting a Writ of Execution for a salary as part of the front pay, as well as for Ethicon to pay

[4] The case was reassigned from Judge Wolfson to Judge Sheridan on October 12, 2011. (Order Reassigning Case, Document No. 153).

legal expenses under New Jersey District Court Local Civil Rule 65.1. (Appl. Emerg. Rel., Document No. 152). Ellis' Application for Emergency Relief sought front pay until her reinstatement. The requested relief was her *pro se* effort to force Ethicon to comply with the reinstatement order.

District courts review such applications under a preliminary injunction standard. *Ajjahnon v. U.S. Postal Serv.*, No. 08-4123, 2008 WL 4508327, at *1 (D.N.J. 2008). The burden of proof on a party applying for emergency relief is particularly high. The Third Circuit applies the following factors when ruling on a motion for preliminary injunctive relief: "(1) the likelihood that the . . . [moving party] will prevail on the merits . . . ; (2) the extent to which . . . [the moving party] is being irreparably harmed . . . ; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest." *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 803 (3d Cir. 1998). In the Third Circuit, a preliminary injunction is considered an "extraordinary remedy," and is only granted after a plaintiff surpasses the high burden of proof. *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999).

While Judge Sheridan's opinion did not discuss the preliminary injunction factors in any detail, the uphill battle Ellis faced in meeting this burden was substantial. Considering only the irreparable harm element, a plaintiff must show

that the injury is "peculiar in nature, so that compensation in money cannot atone for it." *A. O. Smith Corp. v. F. T. C.*, 530 F.2d 515, 525 (3d Cir. 1976).

At times, Ethicon characterizes Ellis' Application for Emergency Relief as a renewal of her previously withdrawn Motion for Contempt. (Ethicon Br. Opp. Appl. Emerg. Rel. at 23, Document No. 154). Because Ellis appeared *pro se* for the bulk of these post judgment proceedings, the record is confusing. However, it is clear that the matter Ellis appealed was the denial of emergency relief. The District Court even characterized it as a ruling "On Application By Plaintiff For Emergent Relief." (DSA005).[5]

Regardless of its characterization, the burdens of proof under either a motion for contempt or a motion for preliminary injunction are extremely high.[6] Ethicon acknowledges this fact in its Opposition to Contempt when it stresses that "[t]he party moving for contempt has a heavy burden." (Ethicon Br. Opp. App. Emerg. Rel. at 15, Document No. 154). As a result, regardless of which standard the District Court applied, the burden on Ellis to succeed in obtaining emergency relief

[5] "SA" refers to the Supplemental Appendix filed by *Amicus* with its Step Two Brief. "DSA" refers to Defendant's Supplemental Appendix filed with its Step Three Brief. "JA" refers to the Joint Appendix filed with Ethicon's Step One Brief.

[6] A plaintiff who files a motion for contempt must also establish their claim by a showing of "clear and convincing evidence." *FTC v. Lane Labs-USA, Inc.*, 624 F.3d. 575, 582 (3d Cir. 2010).

was particularly daunting. It was precisely because of this high standard that Judge Sheridan determined that Ellis was not entitled to emergency relief. (DSA003-09).

Ethicon now attempts to transform this straightforward order denying emergency relief into a factual determination that Ethicon complied with the reinstatement order. Judge Sheridan meticulously avoided making this determination. Ethicon's construction of the emergency relief order misstates the purpose, intent, and explicit language of the order. The District Court's denial of the Motion did, however, affirm that the ADA requires both parties to be flexible "no matter who may be wrong," and that the regulations require a "contemporaneous process." (DSA009). The order correctly stated the ADA's standard for the interactive process, but it did not decide the issue of Ethicon's compliance with the reinstatement order. (DSA009).

The language in the District Court opinion further demonstrates there was no finding that Ethicon complied with the order. Judge Sheridan noted the job offers were similar, but the original reinstatement order required "that Plaintiff shall be reinstated to Ethicon as a quality engineer, or a comparable position." (DSA007; JA0111). The District Court could have resolved the issue of whether Ethicon complied with the reinstatement order. However, it did not do so because of a host of factual disputes still pending regarding whether Ellis has been offered reinstatement to a "comparable" position. *See infra Section I.B.*

Ethicon's argument on this point is a thinly veiled attempt to poison the record by giving a distorted version of the post judgment proceeding in an effort to have this Court become a finder of fact. Ethicon portrays Ellis as unreasonable and demanding based upon its unilateral version of the facts. Judge Wolfson, who handled this case for four years, did not see the Theresa Ellis depicted by Ethicon. Neither did the jury, who observed Ellis during the two-week trial. No hearings or determinations of fact have been made by a fact finder regarding the reinstatement order. The only purpose of the post-judgment proceeding was to respond to the Application for Emergency Relief that Ellis filed *pro se*.

Despite this, Ethicon attempts to entice this Court to become the initial finder of fact. The Third Circuit has consistently held that fact-finding is not the role of the appellate courts. *See Reading Co. v. Dredge Delaware Valley*, 468 F.2d 1161, 1164 (3d Cir. 1972). Instead, the "sole function" of this Court is "to review the record." *Id.* at 1164. This Court should continue adhering to the well-meaning principle that "appeals courts . . . defer to district court factfinding." *United States v. Brown*, 631 F.3d 638, 643 (3d Cir. 2011) (quoting *Miller v. Fenton*, 474 U.S. 104, 114-15 (1985). "[T]he trial court is in a 'superior position to evaluate and weigh the evidence.'" *Brown*, 631 F.3d at 643 (quoting *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984)). This Court should reject Ethicon's attempt to bypass the proper fact-finding procedure by asking this Court

to act as the finder of fact regarding whether it complied with the order of reinstatement.

B. The District Court In Denying Emergency Relief Properly Made No Factual Finding Regarding Whether Ethicon Complied With The Order To Reinstate Ellis To Ethicon "As A Quality Engineer, Or A Comparable Position"

Any determination of whether Ethicon complied with the reinstatement order raises a host of factual issues that were never addressed by the District Court. A brief discussion of a few of these issues demonstrates that there has been no factual determination of compliance. For example, the District Court did not address whether the two jobs offered by Ethicon were comparable to Ellis' former position. This question requires an intense factual analysis. The Third Circuit, in the context of mitigation for back pay, has identified several factors that are relevant to the issue of comparability. These factors include "virtually identical": (1) promotional opportunities; (2) compensation; (3) job responsibilities; and (4) status as the position from which the discriminated party has been terminated. *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 85 (3d Cir. 2009); *Booker v. Taylor Milk Co.*, 64 F.3d 860, 866 (3d Cir. 1995). Other circuits have employed similar analyses. *See Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 486 (5th Cir. 2007) (quoting *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990) (identifying factors used in comparing a position proposed under a reinstatement order with the discriminated party's former position); *see also Spagnuolo v.*

Whirlpool Corp., 717 F.2d 114 (4th Cir. 1983). Simply examining a few of these factors shows that the District Court did not assess whether the jobs offered were comparable. If anything, an analysis of these factors establishes that the job offers were not comparable, or at the very least, that Ellis was reasonable in questioning whether these offers properly complied with the reinstatement order.

The salary offered is an obvious starting point. Ethicon highlights their offer of a $100,000 salary, which *Amicus* does not dispute is a meaningful one. But the reinstatement order is intended to put Ellis into the position she would have been in but for the discrimination.[7] Discrimination victims have a right to be made whole.[8] Over ten years have passed since Ellis was unlawfully terminated. Her career path was interrupted. The determination of whether the offer of $100,000 is comparable to her projected salary must be considered in the context of where Ellis was before the unlawful conduct and of where she would be now.

Ellis was hired by Ethicon in 1997 at an annual salary of $70,000. (DSA124). By 2001, when Ethicon's discriminatory conduct occurred, Ellis had already been promoted and her annual salary increased to $87,600. (DSA095). Within a span of four years, Ellis had earned a promotion and over $17,000 in wage increases. A decade later, in 2010, when Ethicon offered to reinstate Ellis at

[7] The District Court intended "to restore the employee to the economic status quo that would exist but for the employer's conduct." (JA0085).

[8] As addressed by Judge Wolfson, courts have been armed with equitable powers to effectuate "make whole" remedies. (JA0084).

an annual salary of $100,000, Ellis reasonably believed that but for Ethicon's discrimination, she would have been earning a higher salary than what she was offered. Because her salary increased $17,000 in the first four years of her employment, Ellis reasonably believed her salary would have increased by more than $13,000 in the decade since Ethicon's discriminatory conduct. Ellis' concerns and attempts to negotiate the $100,000 salary offer were based on her knowledge and experience of Ethicon's engineer career path and her experience with it.

Beyond the issue of salary, the positions Ethicon offered following the reinstatement order can reasonably be viewed by Ellis as a demotion based on her knowledge of the job's responsibilities and her previous experience with Ethicon. Ellis began as a "Senior Quality Assurance Engineer" until her promotion to a "Staff Quality Engineer" in September 2000. (DSA095, 124). When Ethicon offered Ellis a position of "Senior Quality Engineer," supposedly in compliance with the reinstatement order, this offer was essentially the same position Ellis held when she was hired by Ethicon sixteen years ago. (DSA103, 160-61). There is little reason to expect Ellis to view this position as comparable to the position from which she was terminated. Indeed, only months before Ethicon made this offer, Ethicon claimed that no comparable positions existed. Luani Alvarado, Ethicon's Worldwide Vice President of Human Resources, told the District Court that there were no "open Quality Engineer or comparable positions in Ethicon's Somerville,

New Jersey facility," and that creating such a position would "divert resources from other areas." (DSA044). Two weeks after the request for stay was denied, Ethicon suddenly had an allegedly comparable position available. This curious timing alone would be reason for Ellis to question whether the positions offered were comparable or simply one that was available.

Again, based upon a review of the limited facts that were developed on this issue, the job responsibilities do not appear to be comparable.[9] The "Staff Quality Engineer" position, the one Ellis held when she was unlawfully terminated, includes more responsibilities and prestige than the "Senior Quality Assurance Engineer." Ethicon conceded this point when Luani Alvarado wrote to Ellis on December 20, 2010 explaining, "I understand your interest in being reinstated to a Staff Quality Engineer Position. . . . Ethicon does not have such a position open at this time, and the Senior Quality Engineer Position cannot be *upgraded* to a Staff Quality Engineer level consistent with the scope and responsibilities of the position." (DSA134) (emphasis added).

[9] "Senior Quality Engineer" positions require a minimum of *five* years work-related experience, *prefer* new product development experience, find Six Sigma or Process Excellence certifications as an "asset," prefer *basic* knowledge in Statistics, Sampling Planning, Risk Assessment and Process Validation, and requires 20-25% travel. (DSA107). In contrast, the "Staff Quality Engineer" position Ellis held prior to her termination requires *seven* years work experience, *requires* new product development experience, *highly desires* Six Sigma or Process Excellence certifications, prefers *intermediate to advanced knowledge* in Statistics, Sampling Planning, Risk Assessment and Process Validation, and requires 20% travel maximum. (DSA204).

Additionally, the offers could reasonably be interpreted, not as a reinstatement, but as treating Ellis as a new hire – subject to all the conditions and contingencies applicable to new employees.[10] Ellis was required to complete an employment application and undergo satisfactory background and reference checks. (DSA124). It is unclear why an employer needs to check references and perform a background check when reinstating an employee to her former position. The offer letter also explained the potential impact if Ellis did not agree to these hiring conditions, as the offer was "contingent upon [Ellis] accurately completing and submitting all requested information and meeting all necessary requirements for employment." (DSA105, 202). Failure to do so would render the offers "null and void." (DSA105, 202). Ethicon's reinstatement process reasonably led Ellis to question whether she was actually being reinstated to a position comparable to her old job or simply being treated as a new hire.

Finally, Ellis was understandably concerned when Ethicon refused to engage in the interactive process until after she accepted the reinstatement offer. Correspondence from Ethicon stated it would not provide details of any possible accommodations until *after* she accepted the offer. (DSA201). Considering the history between Ellis and Ethicon on this particular issue, and that it has taken

[10] While the offer purports to be "an offer to reinstate," the only part of the reinstatement offer that in any way signaled that Ellis was being treated in a manner other than a new hire was by crediting her prior service in regards to vacation. (DSA104, 201).

many years to resolve this matter, it was reasonable for Ellis to want to know what, if any, accommodations Ethicon would provide for her disability. The issue of reasonable accommodation is the key issue the parties have been fighting about for over a decade. This, coupled with the uncertainty regarding whether the positions were comparable, provides compelling reasons for Ellis to want these details addressed in advance.

In light of all of this, it is patently unfair for Ethicon to paint Ellis as unreasonable or demanding for her reluctance to accept Ethicon's offers. However, as discussed above, compliance with the reinstatement order is not before this Court and it should reject Ethicon's invitation to act as the initial fact finder and to decide whether Ethicon complied. Even the limited record on this issue demonstrates both that the District Court did not decide this issue, and that it was correct in not doing so because of the legitimate questions surrounding Ellis' reinstatement.

C. The District Court Acted Within Its Discretion In Ordering Reinstatement And It Remains The Preferred Option For This Court

Ethicon rehashes an old contention, renewing its argument that the District Court was wrong to order reinstatement. After four years of handling this case, the District Court had a thorough understanding of the facts and properly ordered reinstatement. Ethicon concedes that reinstatement is the preferred equitable remedy for discrimination victims, but still argues that Ellis should be denied the

preferred remedy simply because she left her job at Aventis in 2004. Ethicon Step Three Br. at 47. *Amicus* Step Two Brief explains in detail why a failure to mitigate has no relevance to the equitable reinstatement order. *Amicus* Step Two Br. at 52-60. This position is consistent with that taken by the EEOC, the federal agency charged with enforcing the employment provisions of the ADA. *See* Brief of the U.S. Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Ms. Ellis, Filed Dec. 21, 2012.

To support its unfounded assertion, Ethicon cites two cases, which merely reaffirm the notion that District Courts have broad discretion in determining whether reinstatement is appropriate. *See Ellis v. Ringgold Sch. Dist.*, 832 F.2d 27, 31 (3d Cir. 1987) (finding that it was within the district court's discretion to determine whether a plaintiff should be reinstated or not); *see also McKnight v. Gen. Motors Corp.* 908 F.2d 104, 115-17 (7th Cir. 1990) (affirming the lower court's decision not to order reinstatement based on the facts in that case).

As *Amicus* indicated in its Step Two Brief, the District Court's reinstatement order can only be disturbed based upon a showing of abuse of discretion. Nothing in the record supports Ethicon's argument that the District Court abused its discretion in this case. *Amicus* Step Two Br. at 52-60.

D. This Court Should Affirm District Judge Wolfson's Judgment That Ellis Was Entitled To Reinstatement And Remand For A Determination On Supplemental Relief

The ADA has a remedial "make whole" purpose and intent. *Eshelman v. Agere Sys., Inc*., 554 F.3d 426, 442 (3d Cir. 2009) (citing *In re Continental Airlines*, 125 F.3d 120, 135 (3d Cir. 1997)); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). As *Amicus*' Step Two Brief made clear, reinstatement best achieves this purpose because it restores a discrimination victim to a "position they would have been in had the discrimination never occurred" and prevents future lost earnings. *Maxfield*, 766 F.2d at 796. At the time of her decision in 2009, Judge Wolfson properly exercised her discretion ordering reinstatement and a $53,731.31 back pay award because she determined it was the best remedy to make Ellis whole. *Amicus* Step Two Br. at 52-53, 58-60; (JA0129). *See Spencer v. Wal-Mart Stores, Inc*., 469 F.3d 311, 315 (3d Cir. 2006); *Squires v. Bonser*, 54 F.3d 168, 171 (3d Cir. 1995) ("The decision whether to award reinstatement thus lies within the discretion of the district court.").

The District Court entered Orders on November 16, 2009 and March 1, 2010 to reinstate Ellis and award her back pay respectively. Reinstatement and back pay remain the preferred remedies, and the District Court was correct in ordering them. However, the amount of back pay ordered in 2009 was intended to coincide with

Ellis' immediate reinstatement. More than a decade has passed since Ethicon unlawfully terminated Ellis, and more than three years have passed since the District Court ordered Ellis' reinstatement. Despite the order, Ellis has not returned to work, and thus has been both unjustly denied her relief and uncompensated for time that continues to accrue because of Ethicon's failure to reinstate her. This failure to reinstate Ellis is an issue that the District Court neither anticipated nor addressed, and is the precise problem that Ellis attempted to address when she filed her Motion for Contempt and her later Application for Emergency Relief. While Ellis may not have followed the best procedural mechanisms in her *pro se* attempts to obtain compliance with the reinstatement order, this remains an issue that needs to be resolved by the District Court.

Post-trial, Ethicon made a motion to stay reinstatement (SA003) which was denied.[11] Considering this ongoing litigation and its subsequent failure to reinstate Ellis, Ethicon has effectively obtained the stay that the District Court denied. As Judge Wolfson aptly stated, Ellis' perpetual unemployment is "manifestly unfair," because she continues to be deprived of the wages and benefits owed to her.

[11] Judge Wolfson denied Ethicon's motion because, "[a] stay would only serve to continue Plaintiff's deprivation of the wages and benefits she would have as an Ethicon employee . . . and would force Ellis to suffer further anguish and economic hardships . . . to further delay Plaintiff from returning to work, to which a jury concluded she was entitled, is manifestly unfair and may in fact rise to the level of 'substantial injury.'" (SA014).

(SA0014). To remedy this injustice, *Amicus* argued in its Step Two Brief that this Court should affirm the judgment of the District Court, and remand for a hearing to determine what supplemental relief Ellis is owed due to Ethicon's post-judgment failure to reinstate. *Amicus* Step Two Br. at 62.[12]

Ethicon contends that it tried to reinstate Ellis to comparable positions yet she refused; therefore, according to Ethicon, the District Court found that Ellis "unjustifiably failed to accept either reinstatement offer." Ethicon Step Three Br. at 52; (DSA009). As discussed earlier, this argument misinterprets the District Court's holding because Judge Sheridan only determined that Ellis did not meet the high burden for emergency relief. *See supra Section I.A.*

Amicus, in its Step Two Brief, proposed an alternate approach of adopting the jury's advisory front pay award. *Amicus* made this suggestion based upon Ethicon's aggressive and continued opposition to reinstating Ellis and viewed it as a solution to allow Ellis to be granted "make whole" relief and to avoid the difficulties Ethicon allegedly would incur if Ellis was reinstated. Ethicon has consistently fought Ellis' reinstatement.[13] Due to Ethicon's aggressive opposition

[12] Ellis' lost wages should be calculated from the date of the order of reinstatement until she is actually re-employed. *Amicus* Step Two Br. at 62.

[13] Ethicon argued post-trial that its unlawful termination had such a "devastating emotional and psychological impact" on Ellis that it would be challenging for her to return to work. (JA0056). In support of its Motion to Stay, Ethicon's Worldwide Vice President of Human Resources, Luani Alvarado, insisted, among other things, that reinstatement would cause serious "hardship" to Ethicon, because

to reinstatement, *Amicus*' suggested front pay remedy both enabled Ethicon to avoid reinstating Ellis and allowed Ellis to receive some of the relief to which she was entitled. However, Ethicon now just as vigorously opposes this solution, making a procedural argument that "[p]laintiff cannot rely on Ethicon's appeal to provide her a right to challenge the Final Judgment from which she did not appeal," and that this Court has no authority to award this type of relief. Ethicon Step Three Br. at 54. *Amicus* was only attempting to propose a resolution that would provide a remedy to allow both parties to move forward but does not want to create additional legal issues that will perpetuate this litigation. Accordingly, in light of Ethicon's strong objection, *Amicus* no longer advocates that this Court consider front pay as an alternate form of relief. As *Amicus* has discussed in detail, the Court should affirm the reinstatement Order and remand solely on the issue of what relief Ellis is entitled to receive until her reinstatement. *See supra p. 13 to 16.*

II. ETHICON CONTINUES TO ASK THIS COURT TO IGNORE THE ESTABLISHED STANDARDS OF REVIEW AND INSTEAD ACT AS A SECOND JURY—AN INVITATION THIS COURT SHOULD REJECT

As discussed, Ellis' *pro se* appeal is simply a layperson's attempt to obtain the relief that the District Court ordered after a finding of discrimination. Part of Ethicon's response to this *pro se* plea for compliance is to re-argue the legal

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"reinstating Ellis would be economically and administratively challenging." (DSA043). The quality engineer position "cannot be created without significantly impacting existing team and organizational structures." (DSA043).

underpinning for the finding of discrimination and relief ordered. These were addressed in *Amicus* Step Two Brief and will not be repeated; however, a response is required to correct the record since a finding of liability is the foundation for any supplemental relief, including Ellis' Application for Emergency Relief.

A. There Is No Merit Or Relevance To Ethicon's Rehashed Argument Regarding Attorney/Client Privilege

As *Amicus'* Step Two Brief explains in detail, the discussions between Ellis and her counsel have absolutely no relevance to the interactive process. *See Amicus* Step Two Br. at 29-33. The District Court's decision to not invade attorney-client communications should be reversed only for a clear abuse of discretion, a standard Ethicon clearly fails to satisfy. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."). Ethicon's only new argument is that the jury must have been confused. This assertion is meritless.

The District Court explicitly explained the concept of imputation in its jury instructions. *See Amicus* Step Two Br. at 35-36. Further, both Ethicon and Ellis referenced and elaborated on the imputation instruction in their closing arguments. (JA1571, 1605). The jury demonstrated its understanding of the imputation rule when it asked the court if it could consider Ethicon's post-October 22nd job offer as a proposed accommodation. (JA1626). The court answered in the affirmative, explaining that October 22, 2001 was not a cutoff date and that it was within the

province of the jury to decide whether any accommodations proposed constituted part of the interactive process. (JA1629-30). *See Amicus* Step Two Br. at 18-19. Further, in Ellis' closing, her counsel reminded the jury that Ethicon *did* in fact offer Ellis a job through Warren's communication. (JA1605). Ethicon went a step further, suggesting that Ellis fabricated her ignorance about Ethicon's offer in an attempt to strengthen her case. (JA1574).

Ethicon did not object to the imputation instruction and used it, to what it hoped was its advantage, in its closing argument:

> Now, as the Judge told you in the instruction, this is as if [the job] was being offered directly to the plaintiff because the lawyers are agents of the clients. . . . [I]t's just as if Lisa Warren was talking directly to Ms. Ellis and offering the job directly to her. It doesn't matter if Ms. Ellis says: Hey, I didn't know about it; or, My lawyer didn't tell me. That doesn't matter, as the Judge instructed you.

(JA1571). The jury understood this instruction, did not ask for clarification, and still decided against Ethicon. Assuming these conversations had marginal relevance, the District Court's decision to disallow cross-examination on the issue does not constitute error.[14] Ethicon's continued arguments on this point are a strained attempt to distract the Court from the real issues as discussed at the opening of this brief.

[14] If anything, the error was harmless. *See Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 80 (3d Cir. 2009) ("[W]e will only reverse if we find the District Court's error was not harmless.").

B. Ethicon's Continued Insistence That It Engaged Ellis Is The Interactive Process Is Contrary To The Jury Verdict Which Should Not Be Disturbed

Whether Ethicon made a good faith effort to engage in the interactive process was a question of fact for the jury; however, Ethicon continuously urges this Court to improperly take on a fact-finding role. *See OlefinsTrading, Inc. v. Han Yang Chem. Corp.*, 9 F.3d 282, 290 (3d Cir. 1993); *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960). Ethicon continues to maintain that it engaged Ellis in the interactive process, post-termination, through her attorney; because the jury found otherwise it was obviously "confused and misled." Ethicon Step Three Br. at 18. Ethicon argues that the jury could not have disbelieved Warren's testimony because it was uncontradicted. Ethicon Step Three Br. at 22. This is an error of logic. It is quite possible that the jury weighed Warren's testimony and believed it to be a true and accurate reflection of events, but agreed with Ellis' argument that Warren's communications and Ethicon's action did not show that Ethicon engaged in the interactive process.

The jury understood the broad spectrum of communications it was permitted to consider, and it was anything but "confused and misled." To the contrary, the jury made an informed decision based upon the facts that Ethicon failed to engage Ellis in the interactive process. The verdict should not be disturbed.

C. The Jury Correctly Found That Ellis Is An Individual With A Disability Who Can Perform The Essential Functions Of The Job With Reasonable Accommodation

The jury also found that Ellis was both an individual with a disability and was qualified under the ADA, a determination that Ethicon consistently argued throughout the litigation was, in fact, a fact-based inquiry. However, after the jury found in favor of Ellis, Ethicon seeks to disregard the jury's specific findings of fact. As described in *Amicus'* Step Two Brief, Ethicon attempts to rewrite the ADA in order to cut out part two of the definition and ignore how seriously the manner and duration of Ellis' cognitive thinking was affected. *See* 29 C.F.R. § 1630.2(j)(2); *Amicus* Step Two Br. at 40-48. Ellis could no longer read as well following the accident. (JA0576). Ellis' memory was affected, requiring her to complete tasks differently. (JA0838-39). For example, she had to "rehearse," after working hours, the directions she needed to follow while at Aventis to avoid getting lost. (JA0681). The jury considered all of these facts in finding that Ellis was an individual with a disability. Judge Wolfson addressed this same argument in Ethicon's Motion for Judgment as a Matter of Law, which she dismissed in light of the "amply evidentiary basis" for the jury's finding of disability. (JA0083).

The jury further found that Ellis was a *qualified* individual with a disability. There was no identification at the time of the essential functions of Ellis' job because Ethicon failed to engage in the interactive process. Assuming that these

functions were identified, there was no subsequent discussion of how Ellis may have been accommodated so as to maintain the job's essential functions. This is Ethicon's Catch-22 argument addressed by *Amicus* in its initial brief. *See Amicus* Step Two Br. at 49.

Ethicon's argument that Ellis must identify a reasonable accommodation in order to be a qualified individual with a disability is a convenient way to ensure an employee will always lose. When an employer does not engage in the interactive process, no essential job functions or reasonable accommodations can be identified. In this scenario, as here, Ethicon would then have the court rule against an employee who cannot identify a specific accommodation. This cannot be correct. As Judge Wolfson explained, "[i]t would be a grave injustice for Ethicon to violate the ADA and subsequently preclude Plaintiff from working by claiming that Plaintiff is not qualified." (SA0013).

There is ample evidence from which the jury could have, and did, conclude that a reasonable accommodation was possible.[15] The fact that Ethicon still

[15] One possible accommodation that the jury could have concluded existed, and that Ethicon takes issue with, was the possibility of temporary reassignment of some functions of the job while Ellis transitioned back into the workplace. In its reply, Ethicon states that such *temporary* reassignments are by definition a modification of the essential elements of a job. *See* Ethicon Step Three Br. at 43-45. Ethicon states no legal authority for this point and, as *Amicus* stated in its Step Two Brief, where there is no legal authority and the proposed rule is so antithetical to the purposes of accommodation under the ADA, it should be rejected. *See Amicus* Step Two Br. at 50-52.

disagrees with the jury's finding does not make the jury wrong. The jury was presented evidence of Ellis' disability, the nature of her job, and the way she managed to cope through the use of self-help techniques. (JA0834). Judge Wolfson recognized in her opinion denying Ethicon's motion for Judgment as a Matter of Law that "there was a great deal of evidence suggesting that with accommodations, Ellis was able to perform her job." (JA0078).

The jury heard testimony that Ellis' supervisor, Travers, would have been willing to take all possible measures to bring her back into the workplace, although Ethicon itself made no such offers. (JA1106-09). Travers even proposed temporary reassignment of some responsibilities as one possibility to ease Ellis back into the workplace. Considering the weight of the evidence, the jury determined that Ellis could have performed the job with reasonable accommodations and that Ethicon fell short of presenting evidence to the contrary.

III. CONCLUSION

The jury correctly resolved the issue of liability in favor of Ellis when it found that Ethicon had discriminated against her by failing to engage in the ADA-mandated interactive process. The District Court also ruled properly when it initially decided that reinstatement and back pay were appropriate remedies. The real issue facing this Court today is that of relief since Ellis still has not been reinstated.

It is telling that at each step of this litigation, Ethicon has continuously argued that everyone else involved is either wrong or confused, and that Ethicon alone has a monopoly on the truth. Ethicon maintains the jury was confused on the issues, alleging a "likelihood of jury confusion and resulting prejudice." Ethicon Step Three Br. at 21. Ethicon has asserted that the Judge Wolfson was wrong, "misapplying the attorney/client privilege" and "an incorrect legal standard," among other errors. Ethicon Step Three Br. at 22, 52. Ethicon argues that *Amicus*, too, is wrong and confused as *Amicus* "interposes another incorrect legal standard" and "confuses two separate elements of Plaintiff's required proofs." Ethicon Step Three Br. at 41-42. The EEOC, too, "misses the point." Ethicon Step Three Br. at 47.

In the alternative, Ethicon's argument seems to be that even if it did do something wrong, there are no consequences for its violation of federal law, since Ethicon insists Ellis is not entitled to back pay and she still has not been reinstated. But violations of federal law have consequences. A jury found that Ethicon intentionally discriminated against Ellis. It has been over a decade since Ethicon violated Ellis' rights, and she has still not been made whole.

Amicus asks this Court to affirm the finding of liability and the order of reinstatement, and remand solely to determine what supplemental relief Ellis is entitled to receive.

Respectfully submitted,

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_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: February 13, 2013

Counsel of Record for Court Appointed Amicus Curiae

CERTIFICATION OF BAR ADMISSION

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

_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: February 13, 2013

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with the type-volume limitation of Rule 28.1(e)(2)(C) because it contains 6,095 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), 32(a)(6) and

32(a)(7)(C) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14 point Times New Roman font.

_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: February 13, 2013

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

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

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/s/ Michael L. Foreman
Michael L. Foreman
Dated: February 13, 2013

CERTIFICATION OF SERVICE

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

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

_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: February 13, 2013