

**MORRIS COUNTY SHRM**  
**LEGAL/LEGISLATIVE UPDATE**  
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**New Jersey Case Law – “The Duty to Engage in the Interactive Process”**

**(1) *Ellis v. Ethicon, Inc.* (D.N.J. 11/13/9 and 3/1/10)**

In *Ellis*, a jury concluded that an employee was discriminated against under the ADA because the employer, Ethicon, a J&J subsidiary, did not take part in the interactive process with the employee. Ellis had a cognitive disability due to a 1999 motor vehicle accident, which occurred on his way to work.

Immediately following the accident, in 1999, she went on STD, and returned to work shortly thereafter. She was fine for a little while. Then in April 2001, she went on another STD, also related to the car accident. About 5 months into the leave, Plaintiff’s neuropsychiatrist recommended that when Ellis returned from her STD, she work from home 3 days/week. That doctor also indicated that Ellis’ restriction would need to be maintained indefinitely. Ethicon’s in-house counsel, after discussing the work from home proposal with Ellis’ supervisor, denied that accommodation. Ellis was then placed on LTD, at the end of October 2001, as per Ethicon policy. A few weeks later, Ethicon’s in-house counsel offered Ellis a part time position, which Ellis refused. Ethicon in-house counsel then advised Ellis’ attorney that it would be willing to consider other alternatives if Ellis’ doctor provided Ethicon with other accommodation ideas. Seem reasonable enough, right? Rather than do that, Ellis’ attorney asked for an in-person meeting with HR, Ethicon’s medical department and Ellis’ doctor to discuss alternate accommodations. Ethicon responded that it wanted her doctor’s revised list of accommodations before any in-person meeting. Ellis never sent such a list to Ethicon. Ellis began a new job at Aventis a few months later.

Result: no summary judgment, and a jury trial. Why? What did Ethicon do wrong here???? According to the Court: (1) Ethicon should have discussed the work from home arrangement with Ellis’ doctor before rejecting it; (2) there was a return to work meeting in 1999, but not 2001; and (3) reassignment to a lower-graded position is permissible only if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions available.

So, what happened at trial? The jury awarded the plaintiff only \$53,731, representing a portion of her lost wages [“back pay”] (plus interest), and reinstatement, but no emotional distress damages. Not a big damage verdict. What about attorneys’ fees and costs? The law is that prevailing plaintiffs in discrimination cases, in most circumstances, can recover their attorneys’ fees.

*Guess how much the plaintiff attorney's fee award was in this case??? (a) less than \$100,000. (b) between \$100,000 and \$200,000; (c) between \$200,000 and \$300,000; (d) between \$300,000 and \$400,000; or (e) no attorneys' fees were awarded because the recovery was so small in comparison to the award the Plaintiff was seeking.*

**(2) Brown v. Dunbar Armored, Inc. (D.N.J. 12/10/9)**

*Brown* is an NJLAD case, the state counterpart to the ADA. There, Plaintiff, a driver for an armored car company, underwent a coronary bypass in April 2006. Dunbar put Plaintiff on FMLA.

In May 2006, Dunbar's Director of Benefits sent Plaintiff an STD form, informed him that he needed a signed medical release to return to work and told the employee to submit to her any updated physicians' statements. In the STD claim form returned by the employee, Brown's doctor indicated an anticipated return to work date of July 5, 2006, about 2 weeks prior to the expiration of the FMLA leave. Plaintiff testified that in June 2006, he spoke with his direct supervisor, and requested to be put on light duty upon his return, until he could fully recover. The supervisor disputed that call.

*Query, can an accommodation request be made to a supervisor, rather than a human resources professional?*

Plaintiff's FMLA leave expired on July 17, 2006. A week later, on July 24, 2006, Dunbar terminated the Plaintiff's employment. That same day, Plaintiff saw a cardiologist, who cleared him for light duty work and estimated that Plaintiff could be released to full duty work by September 1, 2006, about 5 weeks later. As it turned out, Plaintiff's cardiologist cleared Plaintiff to return to work without restriction on August 22, 2006.

Note that Defendant had a policy in place permitting employees to request in writing leaves of absence following the expiration of FMLA leave. No such request was made.

*The first issue for the Court was whether or not the employee's inability to work while recovering from bypass surgery was a handicap under the NJLAD.*

*The next question for the Court was whether or not the employer appropriately participated in the interactive process.* The Court said no, and explained that given that the employee had initially provided an estimated return to work date, and that temporary leave is an accommodation under the NJLAD, the failure to consider that alternative prior to termination raised an issue for the jury.

*What of the Plaintiff's failure to request a leave of absence in writing pursuant to Dunbar's policies?*

## **Proposed NJ Legislation**

(1) A bill was introduced to the Assembly on January 12, 2010 to establish the “Healthy Workplace Act”, an act that would provide for up to a \$25,000 penalty for employers who fail to provide a work environment free of conduct that a reasonable person would find hostile or offensive. Abusive conduct would include repeated infliction of verbal abuse, humiliating conduct or the sabotage of a person’s work performance.

(2) A bill was introduced in the New Jersey Senate on February 18, 2010 proposing to require employers to verify the employment eligibility of its new hires through the federal government’s E-Verify system.

(3) A bill was reintroduced in the Assembly on February 11, 2010 seeking to prohibit employers from requiring employees to sign pre-dispute arbitration agreements, as well as other waiver agreements, such as the waiver of a jury trial.