No. 20-4054

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KELLY DANSIE,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Utah (Case No. 2:17-cv-01058)
The Honorable Robert J. Shelby

APPELLANT'S REPLY BRIEF

Adam W. Hansen
Colin R. Reeves
APOLLO LAW LLC
333 Washington Avenue North
Suite 300
Minneapolis, MN 55401

Nicholas D. Thompson
Counsel of Record
THE MOODY LAW FIRM
500 Crawford Street
Suite 200
Portsmouth, VA 23704
(757) 393-4093
nthompson@moodyrrlaw.com

[additional counsel listed on inside cover]

Justin L. James
JAMES, DODGE, RUSSELL & STEPHENS, P.C.
10 West Broadway
Suite 400
Salt Lake City, UT 84101

Michael E. Bourne
2751 Hennepin Ave South
Suite 563
Minneapolis, MN 55408

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Kelly Dansie was employed by Union Pacific as an on-call train conductor for 13 years. For almost a decade, Union Pacific accommodated Dansie's disability without any problem. Its litigation-inspired claim that no such accommodation was possible should be rejected by this Court.

Dansie's modest request for accommodations was reasonable. He sought a limited amount of time off each month to cover his medical appointments. Union Pacific's claim that Dansie sought unlimited leave is contradicted by the record.

It is also beside the point. Union Pacific is liable whether Dansie's request was reasonable or not because Union Pacific failed to engage with Dansie in the interactive process and that failure precluded the identification of a reasonable accommodation. Properly engaging in the interactive process would have revealed what Union Pacific already knew: Dansie could easily be accommodated, just as he was for the past ten years. Instead, Union Pacific mounted an aggressive campaign to discipline and terminate Dansie for his disability-related absences.

At trial, the jury was asked to decide only a narrow issue: whether Union Pacific terminated Dansie for a reason unrelated to his attempted exercise of his FMLA rights. But the jury asked multiple questions showing that it believed it needed to decide whether Dansie had rights under the FMLA *at all*. The district court refused to answer the jury's questions, instead referring the jury back to the previous instructions.

This was reversible error. The previous instructions said nothing that could have cleared up the jury's confusion. And the court had an obligation to affirmatively answer the jury's questions.

The district court's judgment should be reversed.

ARGUMENT

I. FAILURE TO ACCOMMODATE UNDER THE ADA.

This Court, sitting en banc, recently clarified the standards governing failure-to-accommodate claims. *See Exby-Stolley v. Bd. of Cty. Comm'rs*, 979 F.3d 784, 792 (10th. Cir. 2020) (en banc). This clarification cleared up confusion caused by several competing "articulations" of the rule in prior panel decisions. *Id.*

Exby-Stolley ultimately summarized the governing standard:

> As a general matter in an ADA discrimination claim, we have stated that an employee must show: (1) she is disabled within the meaning of the ADA; (2) she is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) she was discriminated against because of her disability. Yet, moving down a level of specificity, our cases have made clear that the third element of this general test—that the individual was 'discriminated against because of her disability'—is satisfied in a failure-to-accommodate claim *as soon as* the employer, with adequate notice of the disabled employee's request for *some* accommodation, fails to provide a reasonable accommodation.

Id. at 795.

The third element may be satisfied by showing that a request for an accommodation was made and the employer did not "take reasonable steps" to accommodate him. *Id.* at 793–94 (quoting *Bartee v. Michelin N.*

Am., Inc., 374 F.3d 906, 912 n.4 (10th Cir. 2004)). In other words, an employer can be liable for its failure to participate in the interactive process; and in such cases, a disabled employee *need not show* that his original request was reasonable. *See Bartee*, 374 F.3d at 916. This makes sense. Imposing an up-front reasonableness requirement would perversely reward employers for bad behavior. It would impermissibly absolve an employer of *any obligations* under the ADA unless the employee hit the reasonable-accommodations bullseye with his opening shot. The law does not impose any such requirement on disabled employees. All they must do to *begin* the reasonable-accommodations process is say, "I want to keep working for you—do you have any suggestions?" *Miller v. Illinois Dept. of Corr.*, 107 F.3d 483, 487 (7th Cir. 1997).

Union Pacific reads the third element overly narrowly, arguing that employees are *required* to show not only that they requested *some* accommodation, but that they requested a "plausibly reasonable" one. Aplee. Br. at 22. Although some of this Court's precedent uses this language, *Exby-Stolley* makes plain that establishing a failure to accommodate in this way is an *option*, not a requirement. *See Exby-Stolley*, 979 F.3d at 792 (explaining that "a plaintiff *may* establish a prima facie case by demonstrating 'that [he] is disabled; (2) [he] is otherwise qualified; and (3) [he] requested a plausibly reasonable

accommodation") (emphasis added) (quoting *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1204 (10th Cir. 2018)).

Moreover, this Court has *never* suggested that a plaintiff must make a "plausibly reasonable" request before stating a claim that the employer failed to engage in the interactive process. *Contra* Aplee. Br. at 23, 26 (discussing *Punt v. Kelly Servs.*, 862 F.3d 1040 (10th Cir. 2017) and *Crowell v. Denver Health & Hosp. Auth.*, 572 F. App'x 650 (10th Cir. 2014)). All that is required is proof that the employer failed to engage in good faith in the interactive process and evidence that that refusal "resulted in a failure to identify an appropriate accommodation[.]" *See Lowe v. Indep. Sch. Dist. No. 1 of Logan Cty.*, 363 F. App'x 548, 552 (10th Cir. 2010) (quoting *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000)); *Albert v. Smith's Food & Drug Ctrs.*, 356 F.3d 1242, 1253 (10th Cir. 2004).

Ultimately, these competing standards don't make any difference in this case. Dansie obviously requested "some accommodation," which is all that this Court's precedent requires. *Exby-Stolley*, 979 F.3d at 795. And even if Dansie were required to show that his request was "plausibly reasonable," he has done so. In any event, Dansie's request—reasonable or not—triggered Union Pacific's obligation to engage in the interactive process. Union Pacific's failure to do so supplies an independent basis for liability.

II. DANSIE MADE A "PLAUSIBLY REASONABLE" REQUEST FOR ACCOMMODATIONS.

Even if the issue of whether Dansie requested a "plausibly reasonable" accommodation were dispositive, summary judgment for Union Pacific would be inappropriate. There is a genuine issue of material fact regarding whether Dansie's request for accommodations was for an indefinite period. The applicability of the case law Union Pacific cites depends entirely on resolving this factual dispute in its favor—exactly what this Court cannot do. *See Fox v. Transam Leasing, Inc.*, 839 F.3d 1209, 1213 (10th Cir. 2016).

A. There Is a Genuine Dispute of Material Fact Regarding the Nature of Dansie's Request.

The record does not compel the conclusion that Dansie requested indefinite leave. As Dansie explained, he requested "up to five days off per month until he had worked enough hours to qualify for FMLA leave again." Aplt. Br. at 62.[1]

Union Pacific claims that "Dansie's attorneys" are "misrepresent[ing] the record on appeal" regarding Dansie's "contention that the accommodation he requested was limited in scope." Aplee. Br. at 30. But the record plainly supports Dansie's characterization of his request. An email from Union Pacific's EEO manager states that Dansie

[1] Union Pacific selectively quotes Dansie's deposition testimony, implying, for exaggerated effect, that Dansie had medical appointments every day of the week. Aplee. Br. at 36 (citing Aplt. App. Vol. 4 at 951). This was not true; Dansie simply explained that some of his physicians were only available on certain days of the week. Aplt. App. Vol. 4 at 951.

requested "*up to five days* per month" of leave—not an unlimited number of days. Aplt. App. Vol. 3 at 877 (emphasis added). And a voicemail from Terry Owens, Union Pacific's director of disability management, unambiguously explains that "[Dansie] was asking for the accommodation until he could qualify for FMLA again." Aplt. App. Vol. 3 at 473.

The district court erred in crediting Union Pacific's assertion that Dansie's request was unlimited. The court disregarded the evidence cited above, instead treating the language in Dansie's two "Form Es"—forms on which Dansie provided medical documentation—as if they were the sole permissible source of evidence of Dansie's request for accommodations. Aplt. App. Vol. 4 at 987. They were not. Dansie first requested reasonable accommodations, and discussed the details of his proposed accommodation, before filing out any such forms. Aplt. App. Vol. 2 at 473, 498; Vol. 4 at 946.

Union Pacific claims that the district court did not disregard any evidence. Aplee. Br. at 29 (citing Aplt. Br. at 61–62). Instead, Union Pacific claims that the district court merely "expressed skepticism" about the relevance of evidence not contained in the Form Es. Aplee. Br. at 23.

In its own words, the district court "expressly declined to consider" such evidence. Aplt. Br. at 42. The court held that "evidence cited by Dansie outside his form E request may not properly submit his position that he requested a plausibly reasonable accommodation," concluded that

it was "confined" to the Form E requests in its review, and later reiterated that it "[would] not consider [the voicemail] for purposes of [Dansie's] summary judgment motion." Aplt. App. Vol. 5 at 1297–98. It's true that the court did then go on, briefly, to explain that even if it could consider this evidence, the evidence would not support Dansie's position. Aplt. App. Vol. 4 at 1298–99. But even if the district court can be said to have fairly "considered" this evidence after making clear that it would not do so, the evidence contradicts the court's conclusions.

B. The Court Cannot Adopt Union Pacific's Legal Analysis Without Making Impermissible Factual Findings.

Union Pacific discusses several cases in support of its argument that the accommodation Dansie requested was unreasonable. Aplee. Br. at 22–29. Relying on this case law to conclude that Dansie's request was unreasonable, however, would require the Court to (1) resolve a genuine dispute of material fact in Union Pacific's favor and (2) disregard even undisputed facts about the essential functions of Dansie's job and Dansie's attendance. And of course, the summary-judgment standard does not permit the Court to do either one. *See Fox*, 839 F.3d at 1213.

(1) Union Pacific's argument requires the Court to resolve a genuine dispute of material fact in Union Pacific's favor.

For every case it cites, Union Pacific's main argument is that (1) the employee's request was unreasonable because the employee requested unlimited leave and (2) Dansie's request is unreasonable because he also,

purportedly, requested unlimited leave. For example, in *Punt*, the plaintiff asked to take "undefined periods of time off of her job," even announcing that she planned "not to come to work this week at all." Aplee. Br. at 24; 862 F.3d at 1050–51. Similarly, in *Crowell*, the plaintiff "was unable to testify to the length of time she would need off" or how often "flare-ups" of her condition would occur. Aplee. Br. at 26; 572 F. App'x at 659.

Unlike the plaintiffs in these cases, Dansie did not request unlimited time off. He asked for up to five days per month until he was eligible for FMLA leave. Aplt. App. Vol. 3 at 877; Aplt. App. Vol. 4 at 989. Accordingly, the cases that Union Pacific cites are applicable only if the Court ignores the evidence that Dansie has produced concerning the limited nature of his request.

(2) Union Pacific's argument also ignores the required fact-based inquiry into the essential functions of Dansie's position and his actual attendance.

The cases cited by Union Pacific are distinguishable in other ways. The reasonableness of a request for accommodations depends on the essential functions of the job. Thus, depending on the nature of the job, a "reasonable" request for leave may "allow an employee sufficient time to recover from…illness such that the employee can perform the essential functions of the job…in the future." *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000). What's more, there is no per se rule that an

employee cannot take leave while still performing the essential functions of his job. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *see Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (explaining that the determination of what level of attendance is an essential function "must be made on the facts of each case").

Union Pacific falsely equates an employee who misses *scheduled* work with one who, like Dansie, works a 24-7-365 on-call schedule and simply does not have unlimited *availability*. In *Punt*, for example, the employee was a receptionist with a set 40-hours-per-week schedule. 862 F.3d at 1044, 1051. But she *never* worked a full 40 hours and gave her employer no indication of when she may, if ever, have been able to do so. *Id.*

Think of it this way: the plaintiff in *Punt* was asked to be available for *only 40* out of the 168 total hours in a week—and yet could not do so. In contrast, when Dansie asked to "lay off" up to five days per month, he was still assuring Union Pacific that he would be available to work at least *25 days per month*, *24 hours per day*—or, on average, close to *150 hours* per week. Because these schedules are strikingly different, Union Pacific's claim that *Punt* has "a very similar fact pattern" falls flat. Aplee. Br. at 17. Jobs with set schedules provide benefits to all parties. It's fair for employers to expect their employees to show up for their scheduled shifts. And employees with 40-hours-per-week schedules enjoy 128 *non-*

working hours each week that they can use to attend to personal needs, like visiting the doctor. *Punt* cannot be read to suggest, as Union Pacific urges, that any employee who cannot commit to being available 24 hours a day, 7 days a week because of a medical condition cannot be accommodated in an on-call position.

The particular facts surrounding Union Pacific's own scheduling and leave policies—and its refusal to follow them in this case—reinforce the same point. Union Pacific claims *Punt* is on point because an "undisputed" essential function of Dansie's job is to be physically present at work. Aplee. Br. at 24. This is true as far as it goes—on-site attendance is required to drive trains—but also entirely question begging. The key factual question here is not *whether* physical presence is required, but *how much*. No one is claiming that train conductors must work around the clock. The key question, instead, is *how much availability* a conductor must provide to perform his essential functions.

Union Pacific's policies provide no precise, numerical definition of "full time" work. Aplt. App. Vol. 2 at 547. Union Pacific's policies do, however, permit employees to use paid leave days and to "lay off" from work when "reasonable" without endangering their status as full-time workers. *Id.* The policy is even more employee-friendly on the topic of sick leave. It identifies "[f]requent sick/sickness in family layoffs *without* current medical documentation provided in advance" as a ground for concluding that a conductor is no longer working full time. *Id.* (emphasis

added). In other words, even "frequent" sick leave is permitted under Union Pacific's policies as long as the employee provides medical documentation. *Id.* Dansie always did so. And as explained in detail in Dansie's principal brief, Union Pacific singled out Dansie for especially harsh treatment. Unlike other employees, he was not permitted to use his paid time off to cover his medical appointments. Aplt. App. Vol. 4 at 952, 957. And the extent to which Dansie marked himself as unavailable for work was average among conductors. Aplt. App. Vol. 3 at 871.

In *Higgins*—the sole case Union Pacific cites where the employee worked an on-call schedule—the court found that the plaintiff was not working "full time" because he missed an excessive number of the shifts he was *actually called in* to work. In 2012 and 2013, he missed 24 percent of them, and in 2014, he missed 26 percent. *Higgins v. Union Pac. R.R. Co.*, 931 F.3d 664, 668 (8th Cir. 2019). As a result, the Eighth Circuit held that the employee was not a qualified individual because he could not work a full-time schedule. *Id.* at 672.

Unlike in *Higgins*, there is no evidence Dansie *ever* missed a shift after being called in. Rather, even during those periods Union Pacific identified as his worst periods of attendance, he simply informed Union Pacific—in advance—that he would be *unavailable* a few days a month. Aplt. Br. at 22–23, 37–39; Aplt. App. Vol. 3 at 818–19, 991, 996. And during most of these short periods of unavailability, Dansie would not

have been called to work anyways. Even when available, it is common for conductors *not* to be called in to work. Aplt. App. Vol. 2 at 570.

Union Pacific also argues Dansie's request was unreasonable because another conductor might be called in if Dansie was unavailable. Aplee. Br. at 28. This argument proves too much. If causing another employee to move up the on-call list was per se unreasonable, then Union Pacific would not permit on-call employees to take unscheduled layoffs at all. But Union Pacific does allow layoffs, as long as they're reasonable. Moreover, the summary-judgment record contains no evidence that Dansie caused other employees to have to work in his place any more than other conductors did. Thus, Dansie's request was fully in line with the essential attributes of his position.

C. Dansie Does Not Attempt to "Circumvent" the FMLA.

Union Pacific's argument—that Dansie's request was unreasonable because an employee cannot take both FMLA leave and leave as an ADA reasonable accommodation—has no legal basis. Union Pacific argues that, "as a matter of law," Dansie was not entitled to use ADA accommodations in the form of leave to "bridge the gap" before becoming eligible to take FMLA leave. Aplee. Br. at 31–32. Union Pacific accuses Dansie of trying to "circumvent" two limitations of the FMLA—the requirement that an employee work 1,250 hours during the previous 12 months to become eligible, and the 12-week maximum of how much FMLA leave an employee may take during the year. Aplee. Br. at 31–32.

First, Union Pacific forfeited this argument by failing to present it to the district court. *See Wall v. Astrue*, 561 F.3d 1048, 1067 (10th Cir. 2009).

Second, Union Pacific's point is wrong. The FMLA provides a wide range of employees—including non-disabled employees—with guaranteed unpaid medical leave. The ADA requires employers to accommodate disabled employees, and leave is a recognized form of accommodation. There is nothing incongruous about these two propositions.

Union Pacific cites no authority that even remotely supports its claim. None of the cases cited by Union Pacific even mention the ADA or FMLA. Aplee. Br. at 31–32 (citing cases). And this Court has never hinted at anything close to Union Pacific's theory, even in cases where plaintiffs have sought leave under both the ADA and FMLA. *See Cisneros*, 226 F.3d at 1130; *Robert v. Bd. of Cty. Comm'rs of Brown Cty.*, 691 F.3d 1211, 1218 (10th Cir. 2012).

Dansie did nothing wrong by seeking ADA accommodations before he had worked enough hours to qualify for FMLA leave. Dansie was entitled to receive ADA accommodations, with no "waiting period," because he is disabled and because his disability requires leave as an accommodation. *See* 42 U.S.C. § 12112(b)(5)(A). He was later entitled to FMLA leave because he had worked the requisite 1,250 hours. *See* 29 U.S.C. § 2611(2)(A)(ii). Nothing about Dansie's request undermines the

FMLA. It simply reflects the fact that, for Dansie, what served as an appropriate reasonable accommodation—laying off up to five days per month—was the same thing he had done for almost a decade under the FMLA, with no complaints from Union Pacific.

In short, there was nothing unreasonable about Dansie's request to lay off up to five days a month until he had worked enough hours to qualify for FMLA leave.

III. UNION PACIFIC IS LIABLE FOR ITS FAILURE TO PARTICIPATE IN THE INTERACTIVE PROCESS WHETHER OR NOT DANSIE MADE A "REASONABLE" REQUEST.

Union Pacific is liable to Dansie for a separate, independent reason—its failure to participate in the interactive process—because (1) Dansie is a qualified individual, (2) Union Pacific failed to engage in good faith in the interactive process, and (3) this failure to engage "resulted in a failure to identify an appropriate accommodation[.]" *See Lowe*, 363 F. App'x at 552 (quoting *Rehling*, 207 F.3d at 1016).

Dansie need not show that he requested a "plausibly reasonable" accommodation for Union Pacific to be liable for its failures in the interactive process. *See, e.g.*, *Albert*, 356 F.3d at 1253 (reversing summary judgment based on employer's failure to participate in interactive process without requiring the plaintiff to show she requested a "reasonable" accommodation); *Lowe*, 363 F. App'x at 555 (same); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018) (same);

Summers v. Altarum Inst., Corp., 740 F.3d 325, 331 n.4 (4th Cir. 2014) (same). Indeed, the *entire point* of finding an employer liable for failing to engage in the interactive process is that such a failure *precluded the identification* of a reasonable accommodation. *Lincoln*, 900 F.3d at 1206 n.29.

This does not mean Dansie asserts a "stand alone" interactive-process claim, as Union Pacific contends. Aplee. Br. at 37. The case law Union Pacific cites merely explains, correctly, that an employer is not liable for failing to participate in the interactive process if no reasonable accommodation was ultimately possible. *See Lincoln*, 900 F.3d at 1206 n.29. Dansie has never suggested otherwise. Aplt. Br. at 52, 59–60. Rather, Union Pacific is liable because it failed to engage with Dansie in good faith *and* that failure precluded the identification of any number of potential reasonable accommodations.

A. Union Pacific Caused the Breakdown in the Interactive Process.

Union Pacific's argument that it participated in good faith in the interactive process rests on misleading and inaccurate factual claims. Based on the record, no reasonable jury could conclude that anyone other than Union Pacific caused the breakdown in the interactive process.

(1) Dansie did not "disregard" advice about how to revise his Form E.

First, Union Pacific argues that Owens, its director of disability management, participated in the interactive process in good faith by

giving Dansie advice about how to revise his Form E, and that Dansie "chose to disregard" Owens' advice. Aplee. Br. at 35–36.

Union Pacific never claimed in its summary-judgment briefing that Dansie "disregarded" Owens's instructions. Union Pacific has therefore forfeited the issue. *See United States v. Porter*, 405 F.3d 1136, 1141–42 (10th Cir. 2005).

Nor did Dansie disregard Owens's advice. He followed it. As Union Pacific admits, the only advice Owens gave was that Dansie's first Form E "wasn't specific enough" about the amount of time he needed. Aplee. Br. at 35. As Union Pacific also admits, Dansie then revised the form with more specific information—the estimate of five days per month. Aplee. Br. at 36. Dansie immediately returned the revised form to Owens. Aplt. App. Vol. 4 at 946.

Although Union Pacific criticizes Dansie for allegedly seeking an open-ended leave, there is no evidence anyone at Union Pacific ever told Dansie he needed to "place a concrete limit" on the number of days he requested to lay off. Aplee. Br. at 36. But even if Owens believed there was something insufficient about Dansie's second Form E, she could have simply *told him* that. Instead, she never contacted him again. Aplt. App. Vol. 4 at 947.

This is precisely what the law forbids. "Once an employee commences the interactive process to find a reasonable accommodation, employers have an 'affirmative obligation to seek the employee out and

work with her to craft a reasonable accommodation.'" *Mlsna v. Union Pacific R.R. Co.*, 975 F.3d 629, 638 (7th Cir. 2020) (quoting *EEOC v. Sears Roebuck & Co.*, 417 F.3d 789, 807 (7th Cir. 2005)). An "employer must do more than 's[i]t on its hands' when [an] employee requests [an] accommodation." *Id.* (quoting *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779, 786–787 (7th Cir. 2016)). That is exactly what Union Pacific did here. If Union Pacific thought that Dansie's request for leave was too open-ended, it had an obligation to tell him that and suggest alternatives. What it cannot do is refuse to engage with the employee, fire him, and then seek to avoid liability by raising objections to the employee's proposal for the first time in litigation.

(2) Dansie did not refuse any offer to help him find a different job within the company.

Union Pacific also argues that Owens "offer[ed] to help Dansie find a different job within the company that was compatible with his medical needs[,]" and that Dansie refused the offer because he believed there were no jobs available that could better accommodate his schedule of doctor's appointments. Aplee. Br. at 36.

This argument reflects a misleading and inaccurate view of the record. Owens testified at her deposition that she could not remember if she spoke with Dansie about finding alternative employment, and admitted, "perhaps he was interested in it[.]" Aplt. App. Vol. 2 at 522. Union Pacific cites to a voicemail left by Owens, in which she recounts a

recent conversation with Dansie, as proof of this offer. Aplee. Br. at 36 (citing Aplt. App. Vol. 3 at 473). Union Pacific fails to mention that the conversation took place after Dansie reached out to Owens in *May 2017*—eight months after Dansie first requested accommodations and on the eve of Dansie's final disciplinary hearing. Aplt. App. Vol. 3 at 869; Vol. 4 at 947–48. At this point, any offer of assistance from Owens was too little, too late. As Owens recounts the conversation, she offered to help Dansie find another position, and he replied, "Well I don't know about that, we'll just have to see what comes out of the disciplinary hearing." Aplt. App. Vol. 3 at 473. All this comment shows is that Dansie was aware he would be unable to be placed in an alternate position in the likely event he was terminated.

Moreover, Dansie *did* consider other positions. Aplt. App. Vol. 4 at 953. He did not realize that he could be accommodated in any of them, because he thought he may not be able to always schedule doctor's appointments on the same two days of the week (i.e., his days off) even if he moved to a regular-schedule position. Aplt. App. Vol. 4 at 951. That belief turned out to be incorrect; the accommodation Union Pacific eventually granted placed him in a regular-schedule position that allowed him to schedule appointments on his days off, but also allowed for some unscheduled layoffs. Aplt. App. Vol. 5 at 1346. But he had no way of knowing this was an option without any input from Union Pacific.

(3) Union Pacific's failures precipitated the breakdown in the interactive process.

No reasonable jury could find that Union Pacific did not cause the breakdown in the interactive process. Union Pacific demonstrated its bad faith at every turn: it withheld information, falsely informing Dansie his accommodation had been approved; it failed to communicate entirely and never offered any alternative accommodation after secretly denying the one he requested; and it mounted a nine-month campaign to discipline him for the layoffs caused by his disability, terminating him in violation of its own written policies, on an accelerated timeline, all while ignoring his protestations that he needed accommodations. Aplt. Br. at 25–41, 52–58.

Union Pacific has responded to none of these facts, nor the case law cited by Dansie in his principal brief, aside from making the irrelevant comment that "by the time Dansie filed this lawsuit," he knew his accommodation request had been denied.[2] Aplee. Br. at 14. The interactive process broke down long before Dansie filed his lawsuit.

B. Union Pacific Forfeited Any Argument that No Reasonable Accommodation Was Possible.

Moreover, Union Pacific has forfeited any argument that no reasonable accommodation was possible by raising it in a perfunctory

[2] This argument also may not be considered, because Union Pacific relies on Dansie's trial testimony, which was not before the court at summary judgment. Aplee. Br. at 14 (citing Aplee's App. at 44–46); *see Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1475 (10th Cir. 1993).

manner. *See Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1122 (10th Cir. 2004).

Union Pacific's argument on this point is both undeveloped and irrelevant. After citing the general rule that a plaintiff must establish that a reasonable accommodation was *possible*, Union Pacific argues, in a single sentence, that the district court "correctly held" that Dansie's request "was not a reasonable accommodation as a matter of law." Aplee. Br. at 29. But this is a non sequitur. The fact that an employee made one specific request that may or may not have been "reasonable" has no bearing on the issue of whether *any* reasonable accommodation was *possible*. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999) (explaining that plaintiff's concession that the sole accommodation she requested was not possible was not dispositive because "the purpose of the interactive process is to determine the appropriate accommodations").

Here, as Dansie has explained, Union Pacific could have accommodated Dansie by simply following its own written policies and allowing him to take his earned paid leave days. Aplt. Br. at 59. Dansie's own supervisors admitted that reasonable accommodation was possible, and when Union Pacific was forced by an arbitration board to finally participate in the interactive process, a solution was easily found: transferring Dansie to a regular-schedule position and allowing him to

"lay off" as needed up to three days per month. Aplt. App. Vol. 5 at 1276, 1346.

Union Pacific's refusal to engage in the interactive process provides an independent and adequate basis to find that Union Pacific failed to accommodate Dansie. The district court erred in concluding otherwise.

IV. DANSIE IS ENTITLED TO A NEW TRIAL ON HIS FMLA-INTERFERENCE CLAIM BECAUSE THE DISTRICT COURT REFUSED TO GIVE SUPPLEMENTAL JURY INSTRUCTIONS.

Dansie is entitled to a new trial on his FMLA claim because, after the jury expressed confusion about a central issue in the case, the trial judge failed to clear away its confusion. *See Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

A. The District Court's Failure to Clear Away the Jury's Confusion Was Reversible Error.

Dansie is entitled to reversal because the trial judge made no effort to eliminate the jury's confusion about a central issue of the case. *See Crowley v. Epicept Corp.*, 883 F.3d 739, 750 (9th Cir. 2018) ("The Supreme Court has clearly stated that it is reversible error for a trial judge to give an answer to a jury's question that is misleading, *unresponsive*, or legally incorrect." (emphasis added) (citing *Bollenbach*, 326 U.S. at 614)); *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1036 (4th Cir. 1975) (reversing judgment where trial judge declined to respond to jury's inquiry and noting that "the responsibility of the judge to the

jury is particularly marked where the jury indicates its confusion on a specific subject").

Here, the jury was understandably confused about what issues it was—and was not—being asked to decide. The jury heard two days of testimony about Dansie's disability, his ADA accommodations request, his efforts to qualify for FMLA leave, and Union Pacific's efforts to terminate him. Apt. App. Vol. 1 at 10–11, D.E. 103–104. Dansie's trial theory was that Union Pacific manufactured a reason to terminate him and expedited the termination process so that he would be unable to work enough hours to qualify for FMLA leave. Aplt. App. Vol. 5 at 1467–77.

It was understandable, after hearing this wide-ranging evidence, for the jury to believe it needed to decide a wide range of issues. But that wasn't the case. The jury was asked to pass judgment only on Union Pacific's affirmative defense to FMLA interference—that is, whether Union Pacific had proved "that its termination of Dansie's employment was unrelated to the exercise or attempted exercise of his FMLA rights[.]" Aplt. App. Vol. 5 at 1372. But the jury incorrectly believed it needed to decide an antecedent question: whether Dansie had rights under the FMLA *at all*. The jury made its confusion plain during deliberations, when it submitted questions to the court asking (1) whether the FMLA was "retroactive" and (2) what it saw as a "crucial" question: whether the law against FMLA interference "appl[ies] to person who have FMLA only, or also people trying to obtain FMLA?" Aplt. App. Vol. 5 at 1378, 1382.

The original jury instructions were not deficient; they simply provided no guidance on a predicate *legal* question that was not before the jury. And the jury's question was a highly intelligent one: essentially asking whether the FMLA prohibits an employer from taking adverse action to avoid having an employee qualify for leave. That's a reasonable question, but it wasn't the jury's question to answer. Consider this analogy: In a breach-of-contract case, the judge determines, as a matter of law, that an offer was made and accepted. The only issue for the jury to decide is consideration. During deliberations, the jurors observe that the contract was never signed. They ask, "Can a document that was never signed be considered a contract?" The judge refuses to answer and points the jury back to the instructions as a whole. But those instructions say nothing about signatures or the law of acceptance. This would be reversible error. Once the question is posed, the judge has an affirmative obligation to answer the question (here, "yes") and tell the jury that it is not charged with determining whether the offer was accepted.

This case presents the exact same problem. Dansie asked the court to instruct the jury—in response to its questions—that protected activity includes the attempt to work enough hours to qualify for FMLA leave. Aplt. App. Vol. 5 at 1393. Yet the district court refused to provide supplemental instructions and simply referred the jury back to the original instructions "as a whole." Aplt. App. Vol. 5 at 1380, 1383.

And just as in the contract hypothetical, merely referring the jury back to the original instructions was insufficient because the original instructions did not answer the jury's questions. The jury instructions did not explain what makes an employee eligible for FMLA leave; nor did they explicitly state that the jury did not need to decide whether Dansie was eligible. Aplt. App. Vol. 5 at 1374. Failing to answer the jury's question about a legal issue it wasn't supposed to decide was error. *See United States v. Southwell*, 432 F.3d 1050, 1053, 1056 (9th Cir. 2005) (reversing conviction where district court referred jury back to instructions that did not answer the question the jury asked); *United States v. Warren*, 984 F.2d 325, 330 (9th Cir. 1993) (same); *McDowell v. Calderon*, 130 F.3d 833, 839, 842 (9th Cir. 1997) (same).

The district court's failure to respond meaningfully affected the jury's verdict. The verdict form asked whether Union Pacific had proved that Dansie's termination "was unrelated to the exercise or attempted exercise of *his FMLA rights*." Aplt. App. 1384 (emphasis added). The jury could have answered "yes" to that question based on an incorrect belief that Dansie had no FMLA rights to exercise—even if it also believed Union Pacific terminated him to prevent him from qualifying for FMLA leave. By refusing to clear away the jury's confusion and eliminate that possibility, the district court committed reversible error. *See United States v. Zimmerman*, 943 F.2d 1204, 1214 (10th Cir. 1991) (reversing for plain error where district court did not give supplemental instructions

and explaining that "[t]he jury should have been instructed in a way that there was *no possibility* that the conviction was based on an incorrect legal basis").

B. The Lack of Error in the Original Instructions Does Not Excuse the District Court's Refusal to Answer the Jury's Questions.

The district court's error cannot be excused simply because the original instructions did not contain errors. Although Union Pacific asserts that "when the jury has been properly instructed, it is appropriate for the trial court to refer jurors back to their original instructions in the face of a jury question[,]" the cases Union Pacific cites for this proposition merely show that doing so is appropriate *if* it resolves the jury's confusion. Aplee. Br. at 41–43.

In *United States v. Alcorn*, for example, the court gave detailed responses to the jury's questions, both referring the jury back to the specific instruction most relevant to its questions, and expounding on what issues the jury was, and was not, required to decide. *See* 329 F.3d 759, 763–65 (10th Cir. 2003). In *United States v. Gerhard*, the court unambiguously *answered* the jury's question, stating, "The answer to your question is no. You need not find either two or three of the defendants guilty for any of the defendants to be guilty. You should still refer to the definition of conspiracy as set forth in the instructions." 615 F.3d 7, 29–30 (1st Cir. 2010).

Here, in contrast, the district court offered no meaningful guidance. It did not answer the jury's question, clarify which issues the jury had to decide, or even refer the jury to a specific relevant instruction.

C. Dansie Is Entitled to Reversal Regardless of the Standard Applied.

Union Pacific argues that Dansie has identified the wrong standard for establishing prejudice stemming from jury instructions. Aplee. Br. at 44–45. This is incorrect. Union Pacific asserts that Tenth Circuit law distinguishes between errors "in responding to a jury inquiry" and other jury-instruction errors, and cites *Allen v. Minnstar, Inc.* for the proposition that the former requires reversal only if "the error affected the substantial rights of a party." Aplee. Br. at 45 (quoting 97 F.3d at 1372).

Union Pacific cites no case that explicitly distinguishes between types of jury-instruction errors. The language in *Allen* reflects an outdated rule; when *Allen* was decided, this Court had not yet settled on what standard applies for any type of jury-instruction error. *See Morrison Knudsen v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1236–37 (10th Cir. 1999) (noting contradictory precedent). Though the Court has not explicitly overruled *Allen*, the Court's recent cases cite only to the "slight possibility" standard, without ever stating that the party must show his substantial rights were affected. *See, e.g.*, *Exby-Stolley*, 979 F.3d at 820;

Advanced Recovery Sys. v. Am. Agencies, 923 F.3d 819, 827 (10th Cir. 2019).

Ultimately, however, the standard applied does not change the result. The district court's failure to clear away the jury's confusion *did* affect Dansie's substantial rights. *See Bollenbach*, 326 U.S. at 614; *United States v. Duran*, 133 F.3d 1324, 1334–35 (10th Cir. 1998) ("[W]hen a jury indicates through its queries that it is confused as to important legal standards in a case, particularly where there is an apparent basis for the confusion, it is plain error for the district court not to clear up that confusion.").

CONCLUSION

The district court's judgment should be reversed.

Date: December 18, 2020

Respectfully submitted,

/s/Nicholas D. Thompson
Nicholas D. Thompson
Counsel of Record
THE MOODY LAW FIRM
500 Crawford Street
Suite 200
Portsmouth, VA 23704
(757) 393-4093
nthompson@moodyrrlaw.com

Adam W. Hansen
Colin R. Reeves
APOLLO LAW LLC
333 Washington Avenue North
Suite 300
Minneapolis, MN 55401

Michael E. Bourne
2751 Hennepin Ave South
Suite 563
Minneapolis, MN 55408

Justin L. James
JAMES, DODGE, RUSSELL &
STEPHENS, P.C.
10 West Broadway
Suite 400
Salt Lake City, UT 84101

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because the brief contains 6,492 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

Date: December 18, 2020

/s/Nicholas D. Thompson
Nicholas D. Thompson

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Norton AntiVirus, and according to the program is free of viruses.

Date: December 18, 2020

/s/Nicholas D. Thompson
Nicholas D. Thompson

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: December 18, 2020

/s/Nicholas D. Thompson
Nicholas D. Thompson