№ **16-343**

In the

# Supreme Court

of the

# United States

WALTER TUVELL

*Petitioner*

*v.*

INTERNATIONAL BUSINESS MACHINES (IBM)

*Respondent*

***On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit***

## PETITION FOR WRIT OF CERTIORARI, OPTIONAL APPENDIX

WALTER E. TUVELL, PHD, *Pro Se*[1]
836 Main Street
Reading, Massachusetts 01867
(781)944-3617 (h); (781)475-7254 (c)
walt.tuvell@gmail.com

*1* • Tuvell is not "really" *pro se* — see ℘vi*f*6 *infra.*

# CONTENTS OF OPTIONAL APPENDIX[2]

## Orders, Opinions And Judgments Below

Opinion of Appellate Panel·····0–4
Opinion of District Court (Op)·····6–32
Appellate Court Denial of Rehearing
(both Panel and *En Banc*)·····34
Judgment of Appellate Panel·····36
Judgment of District Court·····38

---

*2* · **Note:** In this Optional Appendix, all documents are **reproductions of the originals** (mostly 8½″×11″ "U.S. letter"-size, but some "A4") — not **reformatted** versions as in the Required Appendix (6⅛″×9¼″, 12-point Century Schoolbook font, etc., see Sup.Ct.R. 14.1(i),33.1(b),etc.); hence they are *verifiably error-free*. *Reformatting (/transcribing)* for aesthetic purposes with *reasonable effort/expense/accuracy* would be, for some of the documents, *infeasible (if not impossible).* For those documents, any reformatting exercise would present extraordinary/insuperable difficulties/impossibilities, which would render the reformatted/derivative versions *unacceptably/suspiciously error-filled/unreliable.* For many reasons: (i) first and foremost, the "Rule of Best Evidence" (FRE, Article X, Rules 1001–1008, generally applicable to any "hearing"); (ii) only *PDF* (".pdf") "binary"-file versions of certain documents are available to Petitioner, not their original *text* (".doc," ".odt," ".wpd" or similar) "source"-file versions (noting that Petitioner uses only Linux-based computer systems/software, not Microsoft or Apple [and government entities should/must never "play market/economic favorites"]); (iii) amongst the PDF files, some are *text*-PDFs (from which text *can* simply be "exported"), but others are *image-PDFs,* from which the text *cannot* be exported — instead, the text needs to be "extracted," by either (α) manual retyping (which is unreasonably laborious and error-prone), or (β) OCR (optical character reader) pre-processing (which is technologically complicated as well as inexact, so must be manually checked/corrected anyway); and (iv) in either case (α,β) the resulting extracted text doesn't preserve formatting markup (so still requires extensive manual post-processing work [though, this step is minimally/acceptably error-prone]); (v) the many pinpoint/page-specific *cross-references* amongst the original documents would all need to be meticulously checked/adjusted manually — which is both (γ) unreasonably laborious and error-prone, and (δ) make the reformatted documents inconsistent with other original documents-of-record which reference these documents; (vi) some handwriting and/or unorthodox typographic constructions should/must be retained for the sake of various considerations (accuracy/ambiguity/authentication/emotionalism/interpretation/"flavor"/etc.); (vii) etc.

Order Accepting Petition for Rehearing
(PetReh, "Amended (Ter)"), but Rejecting
Rejecting PetRehAnn (Annotations/Endnotes)
Annotations/Endnotes (PetRehAnn) and
later amended versions (and also rejecting
Oral Hearing Transcript, with Annotations)·····40

## Court Filings By The Parties

Complaint (First Amended)·····42–72
DSOF (Def's Statement of Facts)·····74–91
DMemo (Def's Memorandum)·····92–116
RespDSOF (Plf's Response to DSOF)·····118–170
PSOF (Plf's Statement of Facts)·····172–199
PMemo (Plf's Memorandum)·····200–224
RepPMemo (Def's Reply to PMemo)·····226–236
RespPSOF (Def's Response to PSOF)·····238–268
ApltBrief (Aplt's Brief)·····270–341
ApleBrief (Aple's Brief)·····342–412
RepApleBrief (Aplt's Reply to ApleBrief)·····414–444
PetReh (Aplt's Petition for Rehearing,
"Amended (Ter)" version)·····446–470
PetRehAnn (Annotations/Endnotes to
PetReh)·····472–484

## Some Evidence

MTR of August 15, 2011 (Vasquez)·····486–487
MTR of September 7, 2011 (Vasquez)·····488–489
MTR of October 14, 2011 (Vasquez)·····490–491
MTR of October 12/14, 2011 (Ross)·····492–493
MTR of November 3/4, 2011 (Ross)·····494–495
MTR of December 16/19, 2011 (Ross)·····496–497

*About Your Benefits — Income & Asset Protection,* IBM Document №USHR109 (July 1, 2010) ℘15····498
Mandel Open Door Report ℘2–4····500–502
Knabe Deposition ℘24,35,37–40,43, 107–108,110,143–145····504–516
Feldman Deposition ℘38–40····518–520
IBM Response to Interrogatories ℘4–5····522–523
Tuvell Email of February 1, 2011····524
Tuvell Email of April 7, 2011····526
Tuvell Email of June 14, 2011····528–529
Tuvell Email of May 10, 2012····530–534
Tuvell Email of June 13, 2011····536–539
Bliss Email of January 24, 2012····540–543
Ross MetLife Statement····544
Dean Email of October 19, 2011····546–547
Ross Deposition ℘77–80····548

## Supplementary Material

Calendar of Events····550–565
District Court Docket····566–574

# United States Court of Appeals
## For the First Circuit

No. 15-1914

WALTER TUVELL,

Plaintiff, Appellant,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Denise J. Casper, U.S. District Judge]

Before

Torruella, Lynch, and Thompson,
Circuit Judges.

Andrew P. Hanson for appellant.
Matthew A. Porter, with whom Joan Ackerstein and Anne Selinger were on brief, for appellee.

May 13, 2016

**PER CURIAM**. The plaintiff, Walter Tuvell, brought this action against his former employer, defendant International Business Machines, Inc. ("IBM") claiming that it violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. and Mass. Gen. Laws Ann. ch. 151B, §§ 4(1), 4(4), 4(5), 4(16). In sum, the complaint alleged that IBM failed to reasonably accommodate Tuvell's disability (post-traumatic stress disorder), discriminated against him because of this disability, as well as because of his race, gender, and age (white male born in 1947), retaliated against him, including unlawfully terminating him, and failed to properly investigate his allegations. After discovery was conducted, IBM moved for summary judgment on all counts. The district court granted the motion. Tuvell v. Int'l Bus. Machines, Inc., No. CIV.A. 13-11292-DJC, 2015 WL 4092614, at *1 (D. Mass. July 7, 2015). Tuvell now appeals.

In finding for IBM, the district court concluded that Tuvell could not establish a viable accommodation claim because his own medical reports and provider showed that he was incapable of performing his essential job functions even with accommodation and, therefore, Tuvell was not a qualified disabled individual. And, even assuming arguendo Tuvell was so qualified, the court concluded that IBM did attempt to engage in an interactive process with Tuvell and offered him reasonable accommodations (e.g., providing extended leave and proposing different review and

feedback procedures). With respect to Tuvell's disability-based discrimination claim, the court held that Tuvell could not make out a valid claim because the undisputed facts established (1) he was not able to perform the essential functions of his job, (2) the actions alleged by Tuvell (i.e., his not getting a job in another group, certain other "tangible acts"[1]) were not sufficiently adverse, and (3) IBM had a legitimate, non-discriminatory reason to terminate Tuvell, which was the fact that he started working for another software company while still on leave from IBM. For similar reasons (that is, no adverse employment actions and a legitimate termination) Tuvell's retaliation claims were also found by the court to be unmeritorious. As for his race, age, and gender-based discrimination claims, the court decided that Tuvell alleged no facts to support these claims and only appeared to vaguely argue

[1] Examples of the so-called tangible acts included IBM limiting Tuvell's facilities access when he was on leave, sending him a warning letter regarding his communication with colleagues, and failing to process his internal complaint. Tuvell also alleges that these acts formed the basis of a hostile work environment claim -- a contention the district court rejected. Relatedly, the court also dismissed Tuvell's failure to investigate claim since it concluded that the supposed failure to investigate did not give rise to a hostile work environment and, to the extent Tuvell was trying to advance a standalone Massachusetts claim, failure to investigate does not give rise to an independent cause of action absent underlying proof of discrimination.

that his being required to switch projects with a younger Asian female must have constituted discrimination.[2]

Under the plenary standard of review for summary judgment, we perceive no genuine issue of material fact and agree with the district court that IBM is entitled to judgment as a matter of law. See Veléz-Vélez v. Puerto Rico Highway & Transp. Auth., 795 F.3d 230, 235 (1st Cir. 2015); Fed. R. Civ. P. 56(a). Simply said, the district court got it right. It closely considered each of Tuvell's arguments and, in clear terms and for persuasive reasons, rejected them.

We have made it abundantly clear that "when lower courts have supportably found the facts, applied the appropriate legal standards, articulated their reasoning clearly, and reached a correct result, a reviewing court ought not to write at length merely to hear its own words resonate." deBenedictis v. Brady-Zell (In re Brady-Zell), 756 F.3d 69, 71 (1st Cir. 2014); see also Seaco Ins. Co. v. Davis-Irish, 300 F.3d 84, 86 (1st Cir. 2002) (providing that "when a lower court accurately takes the measure of a case and articulates a cogent rationale, it serves no useful purpose for a reviewing court to write at length").

[2] Tuvell does not appear to contest on appeal the dismissal of his race, age, and gender discrimination claims.

This is one of those cases. We summarily affirm the judgment below for substantially the reasons articulated in the district court's opinion.

Affirmed. See 1st Cir. R. 27.0(c).

*{This page intentionally left blank.}*

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| **WALTER TUVELL,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**INTERNATIONAL BUSINESS MACHINES, INC.,**<br><br>**Defendant.** | **Civil Action No. 13-11292-DJC** |

**MEMORANDUM AND ORDER**

**CASPER, J.** **July 6, 2015**

## I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.*, and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

## II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless

Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

## III. Factual Background

The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress disorder ("PTSD")[1] stemming from an incident in 1997 when he was allegedly offered a job with the Microsoft Corporation ("Microsoft"), which was subsequently rescinded. D. 82 ¶¶ 1, 2.

On November 3, 2010, Tuvell was hired by Netezza Corporation ("Netezza") in the Performance Architecture Group. Id. ¶ 4. In this position, Tuvell reported directly to Daniel Feldman and reported "on a dotted line" to Fritz Knabe. Id. IBM subsequently acquired

[1] For the purposes of this motion, IBM does not challenge Tuvell's claimed disability. D. 75 at 4 n.3.

Netezza, and Tuvell, Feldman and Knabe became IBM employees. Id. ¶ 5. Until May 2011, Tuvell worked with Feldman and Knabe without any notable conflicts. Id. ¶ 6.

**A. Tuvell's Conflicts with Supervisors at IBM**

In the spring of 2011, however, Tuvell and Knabe's professional relationship began to deteriorate. Id. ¶¶ 6, 8-9. On May 18, 2011, Feldman reported to Tuvell that Knabe had expressed concern that Tuvell had not completed a work assignment on time. Id. ¶ 7. Then, on June 8, 2011, Knabe asked Tuvell about an outstanding assignment in front of several other employees. Id. ¶ 8. During this conversation, both Tuvell and Knabe were heard to raise their voices. Id. Seemingly as a result of these two incidents, on June 10, 2011, Feldman told Tuvell that he did not believe that Knabe and Tuvell could continue to work together effectively. Id. ¶ 9. Feldman subsequently switched Tuvell to a different project and, in turn, assigned another employee, Sujatha Mizar, who is Asian, female and younger than Tuvell, to work with Knabe. Id. ¶¶ 10-12. This transfer did not result in any change to Tuvell's pay or his rank within the company. Id. ¶¶ 10-11. Nevertheless, Tuvell contends that Knabe's conversation with Feldman on May 18, 2011 constituted discrimination based on age, sex and race. Id.

On June 14, 2011, Feldman sent Mizar and Tuvell an email asking for daily status reports detailing the transition tasks completed and raising any issues with regard to the shift in responsibilities. Id. ¶ 14 (citing Transition of Responsibilities Email, D. 76-19). Mizar replied to the email with a brief status update, copying Tuvell and adding that Tuvell should "feel free to add anything" that Mizar "might have forgotten." Id. (quoting Transition of Responsibilities Email, Tuvell Exh. 58). The next day, Feldman clarified that he expected a separate status report from both Tuvell and Mizar. Id. In response, Tuvell sent an email to Feldman, copying Human Resources Specialists Kelli-ann McCabe and Diane Adams, complaining that the request to

provide separate status reports was "blatant" and "snide harassment/retaliation." Id. ¶ 15 (quoting Transition of Responsibilities Email, D. 76-19). Tuvell further complained that Feldman had "unilaterally forced an adverse job action upon [Tuvell]" and that the transition constituted "a prima facie case (and even stronger) for discrimination on the grounds of both age and sex, and perhaps even race." D. 76-19 at 1-2. On June 16, 2011, Tuvell sent additional emails to Adams and McCabe complaining of harassment by Feldman based on Feldman's decision to switch Tuvell's assignment. D. 82 ¶ 16. Tuvell told Adams and McCabe that he believed it was "infeasible" for him to work with Feldman. Id.

That same day, Adams forwarded Tuvell's email regarding Feldman to a Senior Case Manager in IBM's Human Resources Department, Lisa Due. Id. ¶ 17. Due then conducted an investigation into the situation, interviewing five individuals, including Tuvell. Id. In his interview with Due, Tuvell described his experience with Feldman and Knabe as the equivalent of "torture" and "rape." Id. On June 29, 2011, Due informed Tuvell of the results of her investigation and her conclusion that his concerns were not supported. Id. ¶ 19. Due further informed Tuvell of his appeal rights if he was dissatisfied with Due's findings. Id. Based upon Due's findings, IBM decided not to transfer Tuvell to another supervisor. Id. ¶ 18.

In July 2011, Tuvell took medical leave for elective surgery followed by vacation. Id. ¶ 20; D. 76-1 at 6 (clarifying date). Before taking leave, Tuvell sent an email to Feldman and another colleague notifying them that he had completed an assignment regarding a wiki page. D. 76-22 at 3. In the email, Tuvell explained that the update could be found by searching the wiki but he also attached the link, adding "if you're lazy you can just click this link." Id. Feldman thanked Tuvell for the work but informed Tuvell that his communication style was "the sort of thing that you want to avoid." Id. at 2. Tuvell apologized for his use of the word "lazy" and said

that he would "search harder for less ambiguous/offensive wording." Id. at 1. On July 20, 2011, Tuvell sent a second email explaining that "laziness is lauded as a prime virtue of programmers," concluding that "[o]bviously no apology was necessary." Id. at 4. Tuvell then apologized for the apology. Id. When Tuvell returned from leave on August 3, 2011, Feldman met with him to discuss pending and future projects. D. 82 ¶ 24. At this meeting, Feldman also talked with Tuvell about the series of emails, which Feldman considered to be inappropriate, and gave Tuvell a warning letter. Id. ¶ 25. The letter instructed Tuvell to "[i]mmediately cease" "unprofessional, disrespectful, demeaning, disrupted, offensive or rude" behavior and specifically mentioned Tuvell's July 20, 2011 email. D. 76-11.

### B. Tuvell's Short Term Disability Leave, Internal Complaints and Accommodation Requests

On August 11, 2011, Tuvell told Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") because of a "sudden condition." D. 82 ¶ 26. Dean provided Tuvell with information on how to apply for STD leave and, on August 15, 2011, Tuvell notified Feldman that he would be taking sick days until his STD request was processed. Id. Tuvell simultaneously submitted a Medical Treatment Report ("MTR"), indicating that he was suffering from a "sleep disorder and stress reaction." Id. ¶ 32. Tuvell represented that due to his medical condition he was not "able to function at his job responsibilities." D. 76-38 at 1. The MTR further indicated that Tuvell "suffered severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities" and "suffered serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment." D. 82

¶ 33. IBM approved Tuvell's STD leave on August 17, 2011. Id. ¶ 34. While Tuvell was out on medical leave, IBM restricted his access to the company's internet and facilities. Id. ¶ 53.

On August 18, 2011, Tuvell filed a "Corporate Open Door Complaint" entitled "Claims of Corporate and Legal Misconduct." Id. ¶ 27. The first part of the complaint was titled "Acts of Frtiz Knabe" and was 129 pages, including 22 pages written by Tuvell and 107 pages of supporting materials. Id. The second part was titled "Acts of Dan Feldman" and included 31 pages of allegations, plus 122 pages of supporting documents. Id. Tuvell acknowledges that he spent 22 hours a day over the course of 2-3 weeks on these complaints. Id. ¶ 28.

A week later, on August 25, 2011, Tuvell complained that IBM had not finalized its investigation of his Open Door Complaint. Id. ¶ 29. On September 15, 2011, the Program Director for IBM's Concerns and Appeals, Russell Mandel, completed a version of the investigation report. Id. Based upon his interviews with nine people, including Tuvell, Mandel concluded that Tuvell had not been subject to any adverse employment actions. D. 88-2 at 19 (Mandel Investigative Report).

Tuvell submitted a second MTR on September 9, 2011, indicating that he was "totally impaired for work." D. 82 ¶ 35. Upon receiving the second MTR, Dean contacted Tuvell and informed him that given the nature of his diagnosis for a sleep disorder and stress reaction, the MTR form must be completed by a specialist. Id. ¶ 36. Tuvell responded that his "family physician is fully competent to diagnose [his disorder]." D. 76-16 at 5. Tuvell added that, if necessary, it would take time to get a psychotherapist and that he would "be forced to enter an abusive situation" if he had to return to work as his condition was a direct result of Feldman's "direct abusive psychological attack." Id. Dean agreed to accept the MTR completed by his physician for one month. D. 82 ¶ 36. Dean was subsequently informed by Dr. Stewart Snyder,

the Physician Program Manager of IBM's Integrated Health Services, that for psychological disorders IBM policy required the MTR forms to be completed by a psychiatrist if the employee is out for more than six weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." Id. ¶ 37. Dean contacted Tuvell and told him "that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR" if he remained out for another month. Id. ¶ 38. Tuvell responded that there was nothing that a psychiatrist could do to "help" him because there was nothing "wrong" with him and emphasized that the only reason that he was out on STD was because of the abuse he faced at work. Id. ¶ 39. Tuvell added that IBM's handling of his complaints was "intentionally psychologically abusive." Id. Dean subsequently informed Tuvell that IBM would accept a MTR from his Licensed Social Worker, Stephanie Ross, who was providing him psychotherapy. Id. ¶¶ 36, 40, 41. Tuvell then provided IBM with MTRs completed by Ross for October and November of 2011. Id. ¶ 41. These MTRs all indicated that Tuvell was totally impaired for work. Id.

Ross's October MTR indicated that Tuvell suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety," id. ¶ 42 (quoting October MTR, D. 76-26 at 1), and noted that Tuvell had "serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising." Id. Tuvell acknowledges that, at around this time, he stopped at a gas station near a work facility and that simply being that close to the building "triggered" a "blow up." Id. ¶ 43.

Ross's November MTR listed, for the first time, Tuvell's diagnosis as PTSD and indicated that Tuvell was still totally impaired for work. Id. ¶ 44. The MTR also noted that

Tuvell continued to have serious impairment "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities, and continued to have serious impairment as well with respect to managing conflict with others, negotiating, compromise, setting realistic goals, and having good autonomous judgment." Id. Ross noted that "any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Tuvell] was triggered into a state that involved hyper-reactivity, hyper-arousal" and that Tuvell "had a significant amount of obsessive thinking." Id. ¶ 45 (quoting Ross Depo., D. 76-7 at 11). Ross further noted that Tuvell would become "extremely upset," "had trouble speaking" and would cry and shake when talking about work. D. 76-7 at 10. Ross was concerned for Tuvell's "mental health stability and believed that just going into the building where he worked and seeing [] Feldman or [] Knabe could trigger his obsessive thoughts, depression, or other strong reactions." D. 82 ¶ 46.

In early November, while Tuvell was out on medical leave, his counsel wrote to Mandel identifying PTSD as a disability and requesting a reasonable accommodation. Id. ¶ 30. Specifically, Tuvell's counsel requested that Tuvell no longer be required to report to Feldman. Id. IBM subsequently informed Tuvell that it did not consider reassignment to another management team to be a reasonable accommodation but indicated that it was receptive to other proposals for possible accommodations. Id. ¶ 31. IBM also noted that Tuvell was free to look for open positions using IBM's Global Opportunity Marketplace ("GOM"). Id.

In December 2011, Tuvell submitted another MTR completed by Ross, which indicated that he was "unable to return to previous setting with [his] current supervisor and setting – PTSD symptoms exacerbate immediately." Id. ¶ 47. Ross indicated that Tuvell had serious impairment

"getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, and setting realistic goals and having good autonomous judgment." Id. ¶ 48. Ross also noted that the "only modification that would be possible is a change of supervisor and setting." Id. ¶ 49. Ross explained that around that time Tuvell could not "drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical." Id. ¶ 52.

**C. Tuvell Applies for Another Position within IBM**

On December 8, 2011, Tuvell interviewed for an open position in another IBM facility. Id. ¶ 57. Despite having submitted MTRs indicating that he was "totally disabled," Tuvell told the interviewer, Christopher Kime, that he had a "completely clean bill of health." Id. On January 6, 2012, Kime emailed Tuvell and told him that he would not be offering him the open position. Id. ¶ 64. Kime explained that he had "underestimated the difficulty of moving forward with bringing [Tuvell] to the team" and that he could not "move forward with taking [Tuvell] directly from being on short term disability."[2] Id. at 38 (quoting, Kime Email, Tuvell Exh. 64). Kime added that "[g]iven the current needs of our group" there was "concern about the work being to [Tuvell's] liking and keeping [Tuvell] as a productive and satisfied member of the team." Id. ¶ 64.

Tuvell subsequently emailed Feldman accusing IBM of retaliation based upon his failure to receive an offer for the open position. Id. ¶ 66. Feldman responded offering Tuvell a variety of other options, including receiving performance feedback from another supervisor, leaving

[2] IBM contends that Kime was not aware when he initially interviewed Tuvell that the fact that Tuvell was on short term disability leave prevented Kime from providing a performance review to management for an assessment of his qualifications and work performance. D. 82 ¶¶ 63-64.

work as necessary to seek medical attention and continued access to GOM to look for open positions. Id. ¶ 67. Tuvell rejected these proposals and, on January 23, 2012, Tuvell's counsel requested as a reasonable accommodation that IBM transfer Tuvell to Kime's open position, which had been reposted after the posting had expired. Id. ¶ 68. IBM denied Tuvell's request for reassignment. Id. ¶ 69. IBM reiterated its proposal that Tuvell receive all feedback from a different manager. Id. Tuvell reapplied for the reposted Kime position, but was not considered for the position. Id. ¶ 70.

**D. Tuvell's Employment with Another Company and Termination from IBM**

On January 25, 2012, Tuvell exhausted his STD benefits but remained on unpaid medical leave. Id. ¶ 55. On February 15, 2012, Feldman's supervisor, John Metzger, contacted Tuvell directly and offered to give Tuvell all of his performance evaluations personally. Id. ¶ 71. Tuvell rejected Metzer's proposal, indicating that he was medically incapable of returning to work under Feldman. Id. ¶ 72. Around this time, unbeknownst to IBM, Tuvell was interviewing for a full time position with another company, Imprivata, which develops and sells software products. Id. ¶¶ 73, 80. On February 28, 2012, Imprivata made an offer to Tuvell and, on March 12, 2012, Tuvell started working for the software company while still on medical leave from IBM. Id. ¶ 73. Tuvell's salary at Imprivata is higher than his salary at IBM. Id. ¶ 81.

On April 25, 2012, IBM learned that Tuvell's Long Term Disability ("LTD") benefits had been denied. Id. ¶ 56. IBM informed Tuvell that he could remain on unpaid leave pending his appeal of the denial. Id.

In May 2012, Human Resources Specialist Adams became aware that Tuvell's LinkedIn page listed another company, EMC, as his current employer. Id. ¶¶ 15, 76. Adams wrote Tuvell asking him to confirm that he was not working for EMC. Id. ¶ 74. Adams notified Tuvell that

working for EMC would be a violation of IBM guidelines and that, if true, he would be terminated. D. 10 ¶ 134. Tuvell then accused IBM of defamation, arguing that he was not violating any guidelines. D. 82 ¶ 74. Adams responded that Tuvell's LinkedIn page listed EMC and asked him again to confirm that he was not working for EMC. Id. ¶ 76. Tuvell indicated that he was not working for EMC and that continuing to ask him if he was working for them was harassment and defamation. Id. ¶ 77. Tuvell refused to respond to further inquiries about where he had been working during his leave. Id. On May 15, 2012, Adams wrote to Tuvell that he should "advise IBM where you are currently working by 5pm tomorrow." Id. ¶ 78; Adams Email, Tuvell Exh. 89. Adams explained that "IBM ha[d] been attempting for approximately the past two weeks to find out if you are engaged in competitive employment" and that "IBM employees may not work for a competitor in any capacity without obtaining consent." Adams Email, Tuvell Exh. 89. Tuvell refused to provide IBM with his work information. D. 82 ¶ 79. On May 17, 2012, IBM terminated Tuvell. Id.

**IV. Procedural History**

Tuvell instituted this action on April 24, 2013 in the Middlesex Superior Court. D. 1. IBM subsequently removed the action to this Court, id., and Tuvell filed an amended complaint. D. 10. Plaintiff seeks recovery for failure to engage in interactive process (Count I); failure to reasonably accommodate (Count II); failure to assist plaintiff in obtaining reasonable accommodation (Count III); failure to reassign as reasonable accommodation (Count IV); failure to reassign due to discriminatory/retaliatory purpose (Count V); numerous adverse tangible job actions due to discrimination and/or retaliation (Count VI); harassment based on discrimination and/or retaliation (Count VII); and failure to investigate and remediate harassment (Count VIII). Id. IBM has now moved for summary judgment. D. 73. Subsequently, IBM also moved to

strike certain portions of Tuvell's affidavit in opposition to IBM's motion for summary judgment, as well as several exhibits submitted by Tuvell. D. 89.[3] The Court heard the parties on the pending motions and took these matters under advisement. D. 92.

## V. Discussion

To survive IBM's motion for summary judgment, Tuvell "must initially present a prima facie case of employment discrimination." Rennie v. United Parcel Serv., 139 F. Supp. 2d 159, 164 (D. Mass. 2001) (quoting Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1134–35 (8th Cir. 1999)) (internal quotation marks omitted). "The general rule is that 'no 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.'" Id. (quoting 42 U.S.C. § 12112(a)). In this area "[t]here are two general types of employment discrimination claims – claims involving discriminatory discharge and claims concerning the failure to reasonably accommodate a disability." Id. Tuvell raises both types of claims.

### A. Accommodation Claims (Counts I-V)

To prove a reasonable accommodation claim under both the ADA and Chapter 151B,[4]

[3] The Court did not rely on the contested portions of Tuvell's affidavit, D. 84, Exh. 47, or the challenged exhibits, D. 84, Exhs. 114-16, in considering this motion. In light of the Court's conclusion here, however, the Court DENIES IBM's motion to strike, D. 89, as moot.

[4] The Court notes that "[f]or purposes of this lawsuit, analysis under the ADA and Chapter 151B is identical." Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 n.2 (1st Cir. 2010); see also Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 153-54 (1st Cir. 2009) (explaining that "Chapter 151B is considered the Massachusetts analogue to the [ADA] . . . and noting that "[t]he [SJC] has indicated that federal case law construing the ADA should be followed in interpreting the Massachusetts disability law") (internal citations and quotation marks omitted)). Moreover, the Court notes that "[a]lthough the ADA uses the term 'disability,'

Tuvell must show that: (1) he suffers from a disability as defined by the ADA and Chapter 151B; (2) he was nevertheless able to perform the essential functions of his job, with or without reasonable accommodation, and (3) IBM knew of his disability but did not reasonably accommodate it upon his request. Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010). IBM focuses first on the second prong, arguing that Tuvell's accommodation claims (Counts I-V) must fail because Tuvell was not capable of performing the essential functions of his job, with or without a reasonable accommodation. D. 75 at 4 and 6-7 (quoting Mass. Gen. L. c. 151B, § 1(16)). "The employee bears the initial burden of producing some evidence that an accommodation that would allow him or her to perform the essential functions of the position would be possible, and therefore that he [] is a 'qualified [disabled] person.'" Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 120 (2010).

*1. Tuvell is Not a Qualified Disabled Person*

The Court agrees with IBM that Tuvell has failed to demonstrate that he was capable of performing the essential functions required of his job, even with a reasonable accommodation. Tuvell argues that he was "medically able to perform work for IBM if he was provided the reasonable accommodation of a different supervisor, or a transfer to a new position away from Feldman." D. 85 at 9. The record, however, belies such a contention.

Tuvell admits to submitting a number of MTRs, which characterized Tuvell as not "able to function at his job responsibilities," D. 76-38 at 1, and claimed that Tuvell was "totally disabled." D. 82 ¶¶ 35, 41; see also Beal v. Bd. of Selectmen of Hingham, 419 Mass. 535, 543 (1995) (noting that where the plaintiff has claimed that they are unable to perform the duties of

---

and Chapter 151B uses the term 'handicap,' the statutory definitions are essentially the same" and the Court will "use the term 'disability' solely for consistency." Faiola, 629 F.3d at 47.

the job to their employer "the plaintiff cannot now successfully claim that [they are] capable of performing the essential functions of the job").[5] Moreover, these MTRs indicated that Tuvell generally suffered from "severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities." D. 82 ¶ 33; see also id. ¶ 42, 44. Tuvell's own treatment provider, Stephanie Ross, noted that "any contact with people from work" or, even "any discussion about work" could trigger Tuvell "into a state that involved hyper-reactivity, hyper-arousal." Id. ¶ 45 (quoting Ross Depo., D. 76-7 at 11). Ross stated that Tuvell had trouble speaking and would cry and shake when talking about work. D. 76-7 at 10. Tuvell could not "drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical." D. 82 ¶ 52. Ross was concerned for Tuvell's "mental health stability" and thought that just seeing Feldman or Knabe "could trigger his obsessive thoughts, depression, or other strong reactions." Id. ¶ 46.

As such, Tuvell has not demonstrated that he would have been able to perform the essential functions of his job, even if IBM had assigned him to a different supervisor or transferred him to a new position. See Bryant v. Caritas Norwood Hosp., 345 F. Supp. 2d 155, 166 (D. Mass. 2004) (noting that "[t]he ADA defines a 'qualified individual with a disability,'

[5] Tuvell relies on Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001) and Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997) for the proposition that employees may be considered qualified disabled individuals even if they have claimed total disability on medical documents. D. 85 at 9. In Sullivan, however, the First Circuit noted that although past claims of disability "do not necessarily preclude" a plaintiff's ability to argue subsequently that he is capable of performing his job with a reasonable accommodation, a plaintiff in that situation "must explain why the representations of total disability he has made in the past are consistent with his current claim that he could perform the essential functions of [his job] with reasonable accommodation." Sullivan, 262 F.3d at 47. And in Labonte, the Supreme Judicial Court's analysis turned on the fact that the plaintiff never actually claimed total disability, only stating that he was disabled without the reasonable accommodation. Labonte, 424 Mass. at 818 (distinguishing from cases where the request for accommodations was made after the plaintiff had already admitted to being "totally disabled" and, thus, not a qualified handicapped person).

the members of the class it protects, as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires'") (citation omitted) (emphasis in original)). Even with a different supervisor, Tuvell would have had to enter the facility and have "contact with people from work." D. 82 ¶ 45. Indeed, Tuvell admits that even he "could not and did not identify anyone who could serve as his manager in place of [] Feldman." D. 82 ¶ 51. And a position transfer would not guarantee that Tuvell would never have to see, or hear about, Feldman again. Nor would Tuvell's proposed accommodations necessarily affect Tuvell's ability to get along with others "without behavioral extremes" or affect his ability to negotiate, compromise or manage conflicts with others. See id. ¶ 48. Nothing in the record demonstrates that Tuvell would have been able to successfully interact with groups or deal appropriately with criticism. Accordingly, the Court concludes that even with Tuvell's proffered reasonable accommodation – a different supervisor or a transfer to a new position – Tuvell has not demonstrated a genuine issue of material fact that he would have been capable of performing the essential functions of his job.

*2. The Interactive Process and Reasonable Accommodations*

Next, IBM argues that, even assuming that Tuvell was a qualified handicapped person, Tuvell's claims fail because IBM did engage in an interactive process (Count I) and provided Tuvell with reasonable accommodations for his alleged disability (Counts III-V). D. 75 at 4. IBM highlights that it permitted Tuvell "to take medical leave until such time as he was able to return to his position." Id. at 8 (citation omitted). Furthermore, IBM notes that, in addition to granting extended medical leave, IBM offered to allow Tuvell to receive his performance reviews from a different manager, while simultaneously affording him leave for medical appointments whenever necessary and the ability to continue looking for open positions. Id. at 8-9. In response, Tuvell argues that the "uncompensated leave" provided by IBM was "not a valid, effective or acceptable reasonable accommodation" and that any proposal that required to Tuvell to return to work below Feldman was unreasonable because it "was contrary to Tuvell's medical limitations." D. 85 at 6.

As a threshold matter, the Court notes that having found that Tuvell was not a qualified disabled person, the Court need not reach the question of whether IBM provided him with a reasonable accommodation, as it was under no obligation to do so. See Bryant, 345 F. Supp. 2d at 168. Moreover, while "the ADA's interpretive regulations may require an employer to initiate an informal, interactive process with the individual seeking accommodation . . . there is no such requirement under Massachusetts law in chapter 151B." Sullivan, 262 F.3d at 47-48 (internal citations and quotation marks omitted). And even where IBM is required to engage in such a process, "an interactive process is not necessary where, as here, no reasonable trier of fact could [find] that the employee was capable of performing the job, with or without reasonable accommodation." Id.

Nevertheless, the Court will address the parties' remaining accommodation arguments. First, IBM argues that it was Tuvell who refused to engage in an interactive process. D. 75 at 13. It is not disputed that Tuvell made a request for a specific accommodation, as he demanded a transfer to a new supervisor or to a new position. IBM argues, however, that Tuvell's behavior – "repeatedly demanding that IBM acquiesce to the only accommodation he would accept, while consistently refusing to consider any alternatives set forth by IBM" – does not amount to participation in an interactive process. Id. at 13-14. Indeed, "[b]oth parties, not just the employer, are required to engage in the reasonable accommodation process and to act in good faith." Rennie, 139 F. Supp. 2d at 168. The process is meant to be "cooperative" and an "appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Id. (citation omitted).

Here, the record evidence shows that IBM attempted to engage in an interactive process with Tuvell. Although IBM indicated that it did not consider reassignment to another management team to be a reasonable accommodation, IBM indicated that it was open to other proposals for other possible accommodations. See e.g., D. 82 ¶¶ 18, 31. Despite IBM's demonstrated willingness to negotiate, Tuvell never made an alternate proposal.[6] Nevertheless,

[6] At the motion hearing, Tuvell seemed to suggest that he was able to successfully work from home and that IBM's failure to allow him system access while on short term disability leave was an attempt to deny him the reasonable accommodation of working remotely. See Feldman Email, Tuvell Exh. 111. Neither party, however, actually suggested this measure and, therefore, Tuvell cannot now ground his claim on IBM's failure to give him an accommodation that he never asked for absent evidence that his disability prevented him from properly requesting an accommodation or the accommodation was obvious. Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 102 & n.11 (1st Cir. 2007) (quoting Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001)) (noting that "the employer's duty to accommodate is triggered by a request from the employee" and "the plaintiff has the burden of showing that she 'sufficiently requested the accommodation in question'"). Moreover, even if Tuvell had been

IBM allowed Tuvell to remain on extended leave, encouraged him to continue to look for another IBM position through the GOM system and regularly reached out to Tuvell proposing different review and feedback procedures. See e.g., id. ¶¶ 26, 31, 34, 55-57, 67, 71. Indeed, on separate occasions, both IBM and Feldman offered Tuvell the opportunity to receive all feedback from a different manager and Metzger, Feldman's supervisor, reached out to Tuvell after Tuvell had exhausted his STD benefits offering to give Tuvell all his performance evaluations personally. Id. ¶ 71. Tuvell rejected these proposals.

In response, Tuvell contends that none of IBM's proposals were reasonable. Specifically, Tuvell argues that none of the accommodations given, or offered, to him were reasonable because he was medically incapable of returning to work under Feldman and, therefore, the only possible reasonable accommodation was to receive a new supervisor[7] and/or transfer to a new department. D. 85 at 5-8. Again, as discussed above, "a plaintiff must show that a proposed accommodation would enable [him] to perform the essential functions of [his] job." Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001); Evans v. Fed. Express Corp., 133 F.3d 137, 140 (1st Cir. 1998) (noting that "[o]ne element in the reasonableness equation is the likelihood of success"). For the reasons already articulated, Tuvell has not shown that even his requested accommodation would have allowed him to perform his job.

In any case, the Court notes that the law requires only that "employers [] offer a reasonable accommodation, not necessarily the accommodation sought." Bryant, 345 F. Supp. 2d at 169 (emphasis in original). Indeed, the employer retains "the ultimate discretion to choose

---

offered the option of working remotely, he still may have reported to Feldman, or interacted with him.

[7] As noted above, Tuvell "could not and did not identify anyone who could serve as his manager in place of [] Feldman." D. 82 ¶ 51.

between effective accommodations." Id. (citation omitted). Contrary to Tuvell's arguments, IBM was under no obligation to, essentially, "find another job for an employee who is not qualified for the job he or she was doing." August v. Offices Unlimited, Inc., 981 F.2d 576, 581 n.4 (1st Cir. 1992) (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987)). Rather, "[e]mployers are only required not to 'deny an employee alternative employment opportunities reasonably available under the employer's existing policies,'" id., and for "the position involved." Mass. Gen. L. c. 151B, § 4(16). Here, IBM allowed an extended leave period and encouraged Tuvell to apply for any open positions in the company through the GMO system. These are reasonable accommodations, and the ADA does not require IBM to transfer Tuvell or assign him to another supervisor. See e.g., Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996) (noting that plaintiff's proposal to "work under a different supervisor" was the equivalent of asking to be able to "establish the conditions of her employment, most notably, who will supervise her" and explaining that such a "decision remains with the employer"); Wernick v. Fed. Reserve Bank of New York, 91 F.3d 379, 384 (2d Cir. 1996) (noting that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy. Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons").

Finally, Tuvell argues that IBM should have transferred him to the open position in Kime's group (Counts III-V). See e.g., D. 85 at 11. It is correct that the ADA does provide that a "reasonable accommodation may include . . . reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). Here, however, Tuvell's admitted, serious impairments "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and

interaction and active participation in group activities" indicates that even his desired transfer would not have been reasonable under the circumstances. D. 82 ¶ 44; see also Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202 (6th Cir. 2010) (holding proposed accommodation unreasonable where plaintiff failed to show how proposal would allow him to overcome a "key obstacle" to performing an essential function); Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 90 (1st Cir. 2012) (noting that "to show that a proposed accommodation is reasonable, a plaintiff must demonstrate that it would enable [him] to perform the essential functions of [his] job and would be feasible for the employer under the circumstances") (internal quotation marks omitted) (alteration in original)). This is especially true given the additional evidence in the record that "any contact with people from work, any discussion about work" and "going anywhere near the work facility" could trigger Tuvell "into a state that involved hyper-reactivity, hyper-arousal" and "obsessive thinking." D. 82 ¶ 45.

Accordingly, the Court concludes that Tuvell has not rebutted IBM's showing that there is no genuine issue of material fact as to his failure to accommodate claims.

**B. Discrimination Claims (Counts VI-VIII)**

IBM next argues that Tuvell's discrimination claims must fail because he "has failed to make out a *prima facie* case of disability discrimination or provide any evidence demonstrating that the legitimate business reasons proffered by IBM are pretext for discrimination . . ." D. 75 at 14.

To assess Tuvell's employment discrimination claims, the Court must apply the familiar burden-shifting framework.[8] Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 154

[8] "The application of the McDonnell Douglas framework to claims of disability discrimination under the ADA was confirmed in Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999)." Furtado v. Standard Parking Corp., 820 F. Supp. 2d 261, 270

(1st Cir. 2009) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). To establish a *prima facie* case of discrimination under the ADA and Chapter 151B, Tuvell must show that: (1) he suffers from a disability; (2) he was nevertheless able to perform the essential functions of his job, with or without reasonable accommodation; and (3) his employer took an adverse employment action against him because of his disability. Faiola, 629 F.3d at 47. Tuvell has the initial burden of establishing a *prima facie* case. Beal, 419 Mass. at 540. If Tuvell establishes his *prima facie* case, "the burden then shifts to [IBM] to articulate a legitimate, non-discriminatory reason for [its] employment decision and to produce credible evidence to show that the reason advanced was the real reason." Sensing, 575 F.3d at 154 (quoting Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 104 (1st Cir. 2005)). If IBM offers "such a legitimate reason, the burden shifts back to [Tuvell] to produce evidence to establish that [IBM's] non-discriminatory justification is mere pretext, cloaking discriminatory animus." Id.

*1. Adverse Employment Actions*

For the reasons articulated above, the Court concludes that Tuvell cannot establish a *prima facie* case of disability discrimination as he was unable to perform the essential functions of his job. Moreover, the Court concludes that the two adverse employment actions that Tuvell relies on – his failure to get a job in Kime's group and IBM's decision to terminate him – are not adverse actions taken because of his disability. It is correct that termination "is not the only 'adverse employment action' that can satisfy this element." Sensing, 575 F.3d at 157. Indeed, "[p]revailing case law in the First Circuit and elsewhere supports a fairly liberal approach in determining what constitutes an adverse employment action." Rennie, 139 F. Supp. 2d at 169. Nevertheless, Tuvell must demonstrate that the allegedly adverse action had an effect "on

---

(D. Mass. 2011).

working terms, conditions, or privileges that are material . . . as opposed to those effects that are trivial and so not properly the subject of a discrimination action." Sensing, 575 F.3d at 160 (citation omitted). To begin, Tuvell's failure to receive the open position in Kime's group is not an adverse action, as his position with the company did not change. Tuvell remained employed in his current position and the objective terms and conditions of his employment – his salary, benefits, title and responsibilities – remained unchanged. Indeed, Tuvell did not experience any change in his employment until IBM terminated him in May 2012. D. 82 ¶ 79. Further, the record evidence does not show that IBM's decision to terminate Tuvell was motivated by a discriminatory animus.

*2. Legitimate, Nondiscriminatory Reason for IBM's Employment Decision*

Because this Court concludes that Tuvell cannot establish a *prima facie* case of employment discrimination, IBM does not have to articulate a nondiscriminatory reason for its decision to terminate him. Beal, 419 Mass. at 545 n.6 (citing Sarni Original Dry Cleaners, Inc. v. Cooke, 388 Mass. 611, 614-15 (1983)). Nevertheless, IBM has offered a legitimate, nondiscriminatory reason for its decision to terminate Tuvell. In brief, IBM discovered that Tuvell had posted that he was working for an IBM competitor, EMC, while still employed by IBM. D. 82 ¶¶ 73-81. When IBM attempted to confirm that Tuvell was not, in fact, working for EMC, Tuvell refused to disclose his new employer. Id. As a result, IBM terminated Tuvell's employment.

This brings the Court to the final step in the burden-shifting framework. Here, Tuvell must present evidence to rebut IBM's explanation. He has not done so. To survive summary judgment, Tuvell must present specific, admissible evidence to create a genuine issue as to "show that the adverse employment action was [actually] the result of discriminatory animus."

Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 39 (1st Cir. 2003). While "there is no mechanical formula for finding pretext," it can be demonstrated "by showing that the employer's proffered explanation is unworthy of credence." Id. (citation omitted). Tuvell argues only that because: (1) he "authorized" IBM to contact EMC to confirm that he was not employed there; (2) he feared "a retaliatory response" if he actually did tell IBM where he was working and; (3) he offered to tell an (unidentified) third-party where he was working who could then confirm with IBM that he was not working for a competitor – that he had completely "neutralized" IBM's concerns. D. 85 at 19-20. Tuvell asserts, therefore, that there is a sufficient inference of "discriminatory or retaliatory motive." Id. Notably, Tuvell does not dispute: (1) that he posted online that he was working for an IBM competitor; (2) that IBM contacted him to confirm whether he was working for a competitor; (3) that IBM repeatedly asked him to confirm where he was working while still employed by the company; and (4) that he refused. As such, Tuvell's arguments are insufficient to rebut IBM's legitimate, nondiscriminatory explanation for Tuvell's termination. The record shows that, on March 12, 2012, Tuvell had indeed started working for the software company Imprivata while still on medical leave from IBM. D. 82 ¶ 73.

*3. Other "Tangible Acts"*

Finally, Tuvell raises a number of other "tangible acts" (Counts VI-VII) that he contends constitute adverse employment actions. Specifically: (1) the curtailment of his access to IBM facilities, computer networks and email while he was out on medical leave; (2) the August 2011 formal warning letter Tuvell received regarding his communication with colleagues; (3) his reassignment within his own group; (4) refusing to process and finalize his internal complaint; and (5) treating his work from home days as sick days. D. 85 at 3-5.

To show an adverse employment action, however, "[t]here must be real harm; subjective feelings of disappointment and disillusionment will not suffice." King v. City of Boston, 71 Mass. App. Ct. 460, 468 (2008) (internal quotation marks omitted) (citing MacCormack v. Boston Edison Co., 423 Mass. 652, 664 (1996)). The "action must materially change the conditions of plaintiffs' employ." Gu v. Boston Police Dep't, 312 F.3d 6, 14 (1st Cir.2002). Here, Tuvell's access to facilities and computer networks was only limited while he was out on leave and reportedly totally incapacitated to work. See e.g., D. 82 ¶ 35. As such, there was no "real harm" in limiting his access while he was not working. King, 71 Mass. App. Ct. at 468. Furthermore, the formal warning letter did not have any effect on Tuvell's pay, benefits, title or any other term or condition of employment. Nor did his inter-group transfer result in any change to Tuvell's pay or his rank within the company. In addition, Tuvell has presented no evidence to support the allegation that IBM did not process his complaint; in fact, it is undisputed that two investigations were conducted into Tuvell's allegations (Due's and Mandel's). D. 82 ¶¶ 17, 29. And finally, Tuvell's work from home days were only treated as sick days after Tuvell had advised IBM that he was "totally disabled" and unable to work. Tuvell, therefore, did not need work from home days while he was not working.

*4. Hostile Work Environment*

Tuvell also alleges that the "tangible acts," discussed above, created a hostile work environment "on the basis of his handicap, retaliation, race, gender [and] age" (Count VII). D. 10 at 28-29. To prove a hostile work environment claim, Tuvell must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Andujar v. Nortel Networks, Inc., 400 F. Supp. 2d 306, 329 (D. Mass. 2005)

(citation omitted). "The work environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [Tuvell] in fact did perceive to be so." Id. (citing Conto v. Concord Hosp., Inc., 265 F.3d 79, 82 (1st Cir.2001)). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Here, Tuvell found these incidents subjectively offensive. Without diminishing his subjective belief, however, Tuvell's complained of "tangible acts" represent regular business practices and policies (i.e., treating medical leave days while "totally disabled" as sick days or switching employees on projects within the same group) and relatively standard workplace interactions and criticisms. As such, the Court concludes that Tuvell's allegations do not approach the level of severe or pervasive conduct that would be objectively offensive. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000) (noting that the "workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world").

In sum, the Court concludes that Tuvell has not rebutted IBM's showing that there is no genuine issue of material fact as to his disability discrimination claims.[9]

[9] Tuvell's failure to investigate claim (Count VIII) is likewise dismissed. Tuvell's claim that IBM's alleged failure to investigate gave rise to a hostile work environment has been addressed above. To the extent that Tuvell also seeks to argue that IBM's alleged failure to investigate gives rise to an independent cause of action under Massachusetts law, see D. 85 at 23, the Court notes that no independent claim of failure to investigate exists absent underlying proof of discrimination. Keeler v. Putnam Fiduciary Trust Co., 238 F.3d 5, 13 (1st Cir. 2001).

**C. Retaliation Claims (Counts V-VIII)**

Having determined that Tuvell cannot sustain his accommodation and discrimination claims, the Court will address briefly his retaliation claims (Counts V-VIII), which are based on the same conduct described in detail above. To succeed on his retaliation claim, Tuvell must prove that: (1) he was "engaged in protected conduct;" (2) "suffered an adverse employment action; and (3) [that] there was a causal connection between the protected conduct and the adverse action." Jones v. Walgreen Co., 679 F.3d 9, 21 n.7 (1st Cir. 2012) (citing Colón–Fontánez v. Municipality of San Juan, 660 F.3d 17, 36 (1st Cir. 2011)) (alteration in original). If Tuvell establishes a *prima facie* case of retaliation, then the burden shifts to IBM "to articulate a legitimate, nondiscriminatory [or nonretaliatory] reason for its employment decision." Id. at 20 (citation omitted) (alteration in original). If IBM meets this burden, then Tuvell must show that the offered reason is pretextual. Id. Under both Massachusetts and federal law, the success of Tuvell's retaliation claims does not depend on the success of his disability claims. Id. (noting that "[f]ederal and Massachusetts law are in harmony on this issue"). As discussed in detail above, however, the pre-termination actions complained of by Tuvell are not adverse employment actions. Furthermore, IBM has offered a legitimate, nonretaliatory reason for terminating Tuvell's employment, and Tuvell has offered no admissible evidence to rebut IBM's proffered explanation. Accordingly, the Court concludes that Tuvell's retaliation claims are without merit.

**D. Age, Gender and Race Discrimination Claims (Counts V-VIII)**

Finally, the Court notes that Tuvell has offered no facts to support his discrimination claims based on age, gender and race. Tuvell has alleged no facts, distinct from those addressed elsewhere, to sustain a discrimination claim on the basis on age, gender or race. Tuvell appears to argue that his transfer within his group, switching projects with Mizar – who is Asian, female and younger – may have constituted discrimination. Tuvell offers no support for this opinion, however, stating only that it constituted discrimination because "something bigger" was "at play" that "had to be illegal." D. 82 ¶ 11 (quoting Tuvell Dep., D. 76-2 at 7). This allegation, standing alone, is not enough to rebut IBM's showing that there is no genuine issue of material fact as to his age, gender and race discrimination claims. Moreover, as discussed above, Tuvell acknowledges that this switching of projects did not result in any change to Tuvell's pay, title or rank within the company. Accordingly, the Court concludes that there is no genuine issue of material fact as to Tuvell's remaining discrimination claims.

## VI. Conclusion

For the foregoing reasons, the Court ALLOWS IBM's motion for summary judgment, D. 73. In addition, the Court DENIES IBM's motion to strike, D. 89, as moot.

**So Ordered.**

/s/ Denise J. Casper
United States District Judge

*{This page intentionally left blank.}*

# United States Court of Appeals
## For the First Circuit

No. 15-1914

WALTER TUVELL

Plaintiff - Appellant

v.

INTERNATIONAL BUSINESS MACHINES, INC.

Defendant - Appellee

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
and Kayatta,

Circuit Judges.

ORDER OF COURT

Entered: June 15, 2016

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Walter Eugene Tuvell Jr.
Matthew A. Porter
Joan I. Ackerstein
Anne Selinger

*{This page intentionally left blank.}*

# United States Court of Appeals
## For the First Circuit

No. 15-1914

WALTER TUVELL,

Plaintiff, Appellant,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant, Appellee.

**JUDGMENT**

Entered: May 13, 2016

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:

/s/ Margaret Carter, Clerk

cc:
Andrew P. Hanson
Matthew A. Porter
Joan I. Ackerstein
Anne Selinger

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

**WALTER TUVELL**
Plaintiff(s)

v. CIVIL ACTION NO. **13-11292-DJC**

**INTERNATIONAL BUSINESS MACHINES, INC.**
Defendant(s)

**JUDGMENT IN A CIVIL CASE**

CASPER, D.J.

☐ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by the Court**. In accordance with the Memorandum and Order dated July 7, 2015 granting summary judgment for the defendant;.

**IT IS ORDERED AND ADJUDGED**

Judgment for the defendant International Business Machines, Inc.

Robert M. Farrell, Clerk

Dated: 7/8/15

/s/ Lisa M. Hourihan
( By ) Deputy Clerk

NOTE: The post judgment interest rate effective this date is ____%.

(judgciv.frm - 10/96) [jgm.]

*{This page intentionally left blank.}*

# United States Court of Appeals
## For the First Circuit

No. 15-1914

WALTER TUVELL

Plaintiff - Appellant

v.

INTERNATIONAL BUSINESS MACHINES, INC.

Defendant - Appellee

**ORDER OF COURT**

Entered: June 7, 2016

That portion of plaintiff-appellant's third pro se motion seeking leave to file an amended petition for rehearing/rehearing en banc is granted. The third amended pro se petition is accepted for filing on this date. Because appellant is not entitled to file more than one version of his petition for rehearing, the remaining portion of plaintiff-appellant's third motion seeking leave to file an annotated version of the petition is denied, and the Clerk is directed to return to plaintiff-appellant the tendered amended annotated version of his petition for rehearing/rehearing en banc. Similarly, the Clerk is directed to return the "Motion of Filing Amended Oral Argument Transcription, Amended" and the "Notice of Filing Re-Amended Oral Argument Transcription, Annotated" as such filings are also unauthorized. No further requests for leave to amend plaintiff-appellant's petition for rehearing/rehearing en banc will be entertained by the court.

By the Court:

/s/ Margaret Carter, Clerk

cc: Walter Eugene Tuvell Jr.
Matthew A. Porter
Joan I. Ackerstein
Anne Selinger

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| WALTER TUVELL,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES, INC.,<br><br>Defendant. | C. A. No. 13-cv-11292-DJC |

**FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

A. PRELIMINARY STATEMENT

This is an action in law and equity for damages and other relief based on retaliation, handicap discrimination, failure to reasonably accommodate, harassment, and other forms of employment discrimination. This case is brought pursuant to G.L. c. 151B, §§ 4(1), 4(16), 4(4), 4(5), other statutory provisions and tort claims.

B. PARTIES TO THE ACTION

1. Mr. Walter Tuvell, Plaintiff, is a White male, born in 1947. He has a BS from the Massachusetts Institute of Technology, and a PhD from the University of Chicago, both in Mathematics. He has had a long, diverse and successful career of nearly thirty years as an architect/designer/developer in the field of computer software.

2. Defendant International Business Machines, Inc. (IBM) is a corporation with one or more places of business located in Massachusetts, including in Cambridge and Marlboro, Massachusetts. At all times relevant, Defendant had and has more than six employees, and thus is an "employer" as defined in G.L. c. 151B, § 1(5).

3. Mr. Russell Mandel was and is IBM's Director of the Concerns and Appeals Program, within the Human Resources organization.

4. Mr. Daniel Feldman is an employee of IBM.

5. Mr. Fritz Knabe was once, but is no longer, an employee of IBM.

C. JURISDICTION AND VENUE

6. All jurisdictional prerequisites to a civil action have been met. On or about March 12, 2012 and September 18, 2012, Mr. Tuvell filed charges of discrimination with the Massachusetts Commission Against Discrimination. On or about February 19, 2013, the EEOC issued Right to Sue letters for the claims raised herein.

7. Venue in this Court is proper pursuant to G.L. c. 151B, § 9, ¶ 2.

D. FACTUAL ALLEGATIONS

8. Mr. Tuvell joined Netezza Corporation on November 3, 2010, working in the Performance Architecture Group under Dan Feldman. Mr. Tuvell also reported in dotted line fashion to Fritz Knabe.

9. In or about January 2011, IBM acquired Netezza, and Mr. Tuvell, Mr. Feldman and Mr. Knabe became employees of IBM.

10. Mr. Tuvell is a qualified disabled individual under the Americans With Disabilities Act, and its Massachusetts counterpart, G.L. c. 151B, § 4(16). Mr. Tuvell suffers from Post-Traumatic Stress Disorder (PTSD). He was diagnosed with PTSD in or about 2001, which remains his primary diagnosis, and has also been diagnosed with Acute Stress Reaction Adjustment Disorder with Mixed Anxiety and Depression. Mr. Tuvell has been treated with psychotherapy and medication to treat his illness.

11. During intermittent, episodic periods of time in which Mr. Tuvell's condition is in its acute phase, his sleep is limited to approximately two hours per night, he cannot eat, and he experiences heightened anxiety. During these periods of time, Mr. Tuvell experiences very severe emotional reactions to adverse actions. Mr. Tuvell experiences flashbacks causing him to dwell upon and re-experience extremely stressful experiences from his past. Mr. Tuvell, when in the grip of this all-consuming fear and anxiety, is unable to work. He becomes a victim of obsessive thoughts. Mr. Tuvell, in this condition, becomes fearful that he will be attacked, psychologically. To be clear, however, although Mr. Tuvell experiences a sense that he is in profound danger, he has never threatened or acted out violently against anyone in response, and has never had any inclination to do so. In its untreated form, Mr. Tuvell's medical impairments would be completely debilitating in times of severe stress.

12. Beginning in December 2010, Mr. Feldman was notified of Mr. Tuvell's disability, through observations of Mr. Tuvell's demeanor, and through discussions in which Mr. Tuvell described his challenges. Mr. Feldman understood Mr. Tuvell's potential for extreme anxiety and sensitivity in the context of an abusive workplace environment, and the diagnosis of PTSD.

13. IBM required Mr. Tuvell and its other employees to report unlawful conduct. IBM's written policies, and contractual obligation to Mr. Tuvell, requires IBM to fully and fairly investigate internal complaints brought to its attention by Mr. Tuvell, and to fairly and reasonably resolve such complaints. IBM's written policies, and contractual obligation to Mr. Tuvell, also requires IBM to fully investigate, and fairly respond to requests for reasonable accommodation of handicap.

14. On or about May 18, 2011, Mr. Knabe asserted to Mr. Feldman, in Mr. Tuvell's absence, that Mr. Tuvell had failed to produce that day certain Excel graphics as instructed. These assertions were entirely false. In fact, Mr. Knabe had not instructed Mr. Tuvell to produce any work at all that day, much less produce any Excel graphics. Later in the day, Mr. Feldman reported Mr. Knabe's accusation to Mr. Tuvell, and supported Mr. Knabe's accusation, dismissing Mr. Tuvell's protests. Mr. Knabe's and Mr. Feldman's conduct constitutes harassment based on sex, age, and/or race.

15. On June 8, 2011, Mr. Knabe yelled loudly at Mr. Tuvell in front of co-workers, asserting that Mr. Tuvell failed to produce certain specified work items that day as ordered. These assertions were entirely false. In fact, Mr. Knabe had ordered Mr. Tuvell to produce certain different specified work items that day, and Mr. Tuvell had indeed produced these latter work items that day, as Mr. Knabe was already fully aware. Mr. Knabe's conduct constitutes harassment based on sex, age and/or race. On June 10, 2011, Mr. Knabe acknowledged in writing that he had indeed raised his voice at Mr. Tuvell.

16. Mr. Tuvell spoke to Mr. Feldman about Mr. Knabe's May 18 and June 8 conduct, and repeatedly disputed Mr. Knabe's (and now Mr. Feldman's) false assertions that he had failed to provide responses to work assignments. These conversations constitute protected activity under c. 151B. Mr. Feldman responded with psychological abuse, reflexively taking Mr. Knabe's side in the conflict without basis, refusing to give Mr. Tuvell credence, refusing to investigate into the matter, refusing to respond to Mr. Tuvell's repeated inquiries for more detail concerning his alleged misconduct, and refusing Mr. Tuvell's repeated requests for a three-way meeting with Mr. Feldman and Mr. Knabe to clear the air and to make plain what Mr. Tuvell's work expectations had actually been. Mr. Feldman's conduct and omissions constituted harassment based on disability and/or retaliation based on Mr. Tuvell's protected activity.

17. On June 10, 2011, Mr. Tuvell met with Mr. Feldman, who reported having met with Mr. Knabe the previous day. Mr. Feldman asserted that it was now too late to try patching over the difficulties with Knabe, and that Mr. Tuvell and Mr. Knabe could no longer work together. Mr. Feldman indicated that Mr. Knabe called Mr. Tuvell a bully and a liar, which was a false statement. Mr. Knabe's comments constitute harassment motivated by retaliation, age, gender and/or racial discrimination.

18. Mr. Feldman demoted Mr. Tuvell from the highest level work within the Performance Architecture group to the lowest. Mr. Feldman required Mr. Tuvell to switch job assignments with Ms. Sujatha Mizar, a woman of East Asian heritage, who

was far under forty years of age. This demotion constituted both harassment and a tangible job action, based on retaliation, handicap, age, gender and/or race.

19. Mr. Tuvell was far more qualified for the high-level job assignment taken over by Ms. Mizar, as he has a PhD, and she does not, and he had decades of much more relevant experience.

20. On June 12, 2011, Mr. Feldman required that all of Mr. Tuvell's further communications with him must be made in the presence of Human Resources representatives, citing Mr. Tuvell's filing of a complaint, and Mr. Feldman's knowledge of Mr. Tuvell's prior history of a single, successful ADR proceding with a prior employer. Mr. Feldman's unilateral imposition of this stringent, and unjustified workplace limitation constitutes a tangible adverse action and/or harassment based on retaliation, disability, age, gender and/or race. In addition, after months of addressing Mr. Tuvell as "Walt," Mr. Feldman addresses his June 12, 2011 e-mail to "Dr. Tuvell." This change of tone further supports a claim of a hostile work environment based on retaliation, disability, age, gender and/or race.

21. On June 13, 2011, Mr. Tuvell met with Ms. Kelli-ann McCabe, HR Representative, and on June 14, 2011, Mr. Tuvell e-mailed Ms. McCabe. Mr. Tuvell complained about the harassment that he was experiencing from Mr. Knabe, and these communications are protected conduct under the ADA and c. 151B. Furthermore, Mr. Tuvell informed Ms. McCabe during these communications that he had PTSD, and placed IBM on further notice that he had a disability.

22. On or about June 15, 2011, Mr. Feldman demands that Mr. Tuvell submit a report on the transition of work between Mr. Tuvell and Ms. Mizar, despite the fact that Mr. Tuvell had nothing to add to the report that Ms. Mizar had already submitted on the same subject. This conduct helps to constitute a hostile work environment based on handicap, retaliation, age, gender and race. On one or more earlier occasions in November-December 2010, prior to Mr. Tuvell's complaint, Mr. Tuvell inadvertently failed to file one or more weekly reports to Mr. Feldman, but Mr. Feldman did nothing in response.

23. On or about June 15, 2011, Mr. Tuvell complains to Mr. Feldman, Ms. McCabe and Ms. Diane Adams that the requirement for duplicative transition reports constitutes continued harassment, and Mr. Tuvell again complains that he is being subjected to age, race and gender discrimination, as well as retaliatory harassment. This communication constitutes protected activity under c. 151B and the ADA.

24. On June 16, 2011, at 10:44 AM, Mr. Tuvell communicates with Ms. Adams and Ms. McCabe, again referencing his PTSD and his vulnerability to harassment, and states that it is becoming unfeasible for him to continue working with Mr. Feldman, due to fears of future harassment. At 3:47 PM the same day, Mr. Tuvell requests the reasonable accommodation of being removed from Mr. Feldman's managerial oversight. On this, and many subsequent occasions, some of which will be noted in this complaint, Mr.

Tuvell identifies himself as someone with a disability, and that his disability prevents Mr. Tuvell from continuing to work with Mr. Feldman.

25. On June 16, 2011, at 3:58 PM, Mr. Tuvell informs Ms. Adams that the idea of continuing to work with Mr. Feldman is making him feel sick. This communication is protected under G.L. c. 151B and the ADA.

26. On June 16, 2011, Mr. Feldman requires, on one day's notice, that Mr. Tuvell independently (without consulting others) establish a detailed, daily schedule for the next three upcoming weeks on all four projects that he is taking over for Ms. Mizer, based solely on Ms. Mizer's short "one-line" descriptions of her projects. Mr. Tuvell is still on a learning curve with respect for the new projects, and has never set a daily schedule for three weeks in the future, let alone for unfamiliar projects. Mr. Tuvell requests an example of such a schedule from Mr. Feldman, but none is forthcoming. All of this constitutes continuing harassment based on handicap, retaliation, age, gender and/or race.

27. On June 17, 2011, Mr. Tuvell complains of continuing harassment to Mr. Feldman, Ms. McCabe and Ms. Adams. Mr. Tuvell also complains of the fact that he is being undermined professionally, as his important contributions are being taken over by Ms. Mizar, placing her in the position of getting the credit for his ideas and work. This communication is protected conduct under G.L. c. 151B, and the ADA.

28. On June 23, 2011, Mr. Tuvell complains about continuing harassment and discrimination, and notes that the harassment/discrimination has exacerbated his medical symptoms, and that he is nearly incapacitated by PTSD, a disability known to Defendant. Mr. Tuvell requests that his disability be accommodated by having him work for someone other than Mr. Feldman. This communication is protected conduct under G.L. c. 151B, and the ADA, both as opposition to discrimination and as a request for reasonable accommodation.

29. On various occasions, including June 24, 2011 and June 28, 2011, Mr. Tuvell requests job modifications such that he no longer must interact with Mr. Feldman, as a reasonable accommodation to his disability. Mr. Tuvell notes that such an accommodation would be a preferable reasonable accommodation to the grant of disability leave. Such communications constitute protected conduct under the ADA and c. 151B, and represent requests for reasonable accommodation.

30. On June 27, 2011, Mr. Tuvell complains of discrimination, harassment, and retaliation, based on Mr. Feldman's directive that Mr. Tuvell independently draft a detailed, day-by-day, three week schedule involving four new technology projects on one day's notice. Mr. Feldman had never required such a schedule of Mr. Tuvell previously. On information and belief, Mr. Feldman did not demand that Ms. Mizar, who took over Mr. Tuvell's project, provide a similar plan.

31. On June 28, 2011, Mr. Tuvell twice complains that working with Mr. Feldman, and the constant harassment is destroying Mr. Tuvell's health, that he does not feel safe

around Mr. Feldman, and requesting the accommodation of being assigned away from Mr. Feldman. These communications are protected conduct under G.L. c. 151B, and the ADA, and represent requests for reasonable accommodation to be separated from Mr. Feldman. On these occasions, as well as the many other times when Mr. Tuvell sought similar relief, IBM failed in its obligation to reasonably accommodate Mr. Tuvell.

32. On June 29, 2011, Mr. Tuvell's internal complaint is rejected by Ms. Lisa Due. IBM conducted an insufficient and deferential investigation of Mr. Tuvell's complaint, and failed in its obligation to remediate unlawful conduct brought to its attention.

33. Ms. Due suggests that Mr. Tuvell look for another job within IBM using the Global Opportunity Marketplace (GOM) job system. On June 29, 2011, Mr. Tuvell escalates the complaint to Mr. Mandel, through the IBM Concerns and Appeals process. This action constitutes protected conduct under G.L. c. 151B, and the ADA, and constitutes a request for reasonable accommodation.

34. On June 29, 2011, Mr. Tuvell requests that he be reassigned away from Mr. Feldman due to his retaliatory conduct. This communication represents protected opposition and protected request for reasonable accommodation.

35. On June 30, 2011, Mr. Feldman harasses Mr. Tuvell with respect to requiring unnecessary status updates. This constitutes continuing harassment based on handicap, retaliation, age, gender and race. Mr. Tuvell complains to Mr. Feldman about the harassment. This complaint constitutes protected conduct under G.L. c. 151B, and the ADA.

36. On June 30, 2011, Mr. Tuvell again complains of the harassing demotion, which is protected speech under the ADA and c. 151B. In response, Mr. Feldman subjected Mr. Tuvell to further retaliatory harassment, by attacking Mr. Tuvell's professionalism.

37. As a result of Mr. Feldman's retaliatory harassment, Mr. Tuvell experiences severe symptoms from PTSD, as exacerbated by his workplace stress, and is not able to come to work in the office. Later on June 30, 2011, Mr. Tuvell again complains about improper actions, and harassment taken against him, which constitutes protected conduct under the ADA and G.L. c. 151B.

38. On June 30, 2011, Mr. Tuvell informs Mr. Feldman that Mr. Tuvell may have to petition to work at a remote work location (his home) away from Mr. Feldman for medical reasons. This constitutes a protected request for reasonable accommodation.

39. On July 1, 2011, Mr. Tuvell e-mails Mr. Mandel regarding his complaints about discrimination and retaliation, and asks to be moved away from Mr. Feldman and Mr. Knabe, and the hostile work environment. This constitutes protected opposition and a protected request for reasonable accommodation.

40. On July 5, 2011, Mr. Tuvell e-mails Mr. Mandel, stating that Mr. Tuvell fears working with Mr. Feldman, based on Mr. Feldman's record of retaliation. Mr. Tuvell states that he will do his best to continue to work with Mr. Feldman, but that he is doing so under protest. This communication represents protected opposition and a protected request for reasonable accommodation.

41. On July 5, 2011, Mr. Feldman falsely implies to Mr. Tuvell that Mr. Tuvell engaged in unprofessional and/or disrespectful conduct, participated in an inappropriate work environment, and/or failed to follow management direction (and referencing an alleged failure to develop the aforementioned plan). This communication represents harassment based on race, age, gender, handicap, and retaliation for engaging in protected conduct.

42. On July 5, 2011, Mr. Tuvell writes to Mr. Mandel, requesting that he be removed from a hostile work environment, and documenting Mr. Mandel's refusal to do so. Mr. Tuvell notes the difficulty he is experiencing working with Mr. Feldman, but promising to try his best. Mr. Tuvell's communication is protected conduct under the ADA and c. 151B.

43. On July 6, 2011, Mr. Tuvell specifically asks for guidance in preparing the type of plan that is requested of him, but he never receives substantive guidance. The failure of Mr. Feldman to respond demonstrates a recognition that the request for the unusual plan represented harassment and retaliation, and did not reflect a genuine operational requirement.

44. On July 6, 2011, when communicating about an aspect of his work, Mr. Tuvell wrote in an e-mail to Mr. Feldman and one other colleague, "You can easily find it by searching the wiki for "blktrace", or if you're lazy you can just click this link:" On July 11, 2011, Mr. Feldman capriciously asserts that Mr. Tuvell's wholly innocent and colloquial use of the word "lazy" is inappropriate. Mr. Feldman's overly critical scrutiny constitutes harassment based on race, age, gender, retaliation and/or handicap.

45. While Mr. Tuvell initially apologized for using the word "lazy," after some thought, he understands that no supervisor, in good faith, could have possibly interpreted his light-hearted use of the term "lazy" in a negative fashion. On July 20, 2011, Mr. Tuvell notes in an e-mail that no apology had been necessary, and notes that his psychological issues had prevented him from advocating for himself earlier. Mr. Tuvell's communication constitutes protected opposition to unlawful harassing conduct.

46. On August 3, 2011, Mr. Tuvell meets with Mr. Feldman. Mr. Feldman asks Mr. Tuvell what he was scheduling to do next. Mr. Tuvell stated that he intended to spend some reasonable time working on his internal complaint, as the two had agreed previously. Mr. Feldman stated that Mr. Tuvell was now forbidden to work on the complaint. Mr. Tuvell's reasonable efforts to utilize some work time, without jeopardizing his work product, to prepare his opposition to unlawful work conditions represents protected conduct under the ADA and c. 151B, and Mr. Feldman's refusal to

permit Mr. Tuvell any time for that purpose is per se retaliation, and exhibits a retaliatory mindset. In reply, Mr. Tuvell then said, in a normal tone of voice, which expressed a slight tinge of surprise and exasperation, "Now wait a minute, Dan." At that point, Mr. Feldman falsely accused Mr. Tuvell of yelling, and threatened him with termination if he yelled again. This conduct constituted further harassment based on retaliation, handicap, race, gender and/or age.

47. At the August 3, 2011 meeting, Mr. Feldman falsely asserts that the lighthearted line about laziness was insulting. This conduct constitutes further harassment based on retaliation, handicap, race, gender and/or age.

48. At the August 3, 2011 meeting, Mr. Feldman presented Mr. Tuvell with a Formal Warning Letter, based on Mr. Tuvell's allegedly disruptive comments, including the "lazy" comments, and the explanatory e-mail of July 20, 2011. The Formal Warning Letter, which threatened termination without benefits for future violations was both a tangible job action, and continued harassment, based on retaliation, handicap, race, gender and/or age.

49. Because Mr. Tuvell was already experiencing symptoms of his disability at the time, having just been previously been accused of another false firing offense of yelling, he was physically unable to visualize the contents of the warning letter—he could only see a white rectangle with indistinct black lines. Mr. Tuvell placed the letter on the floor beside his chair, and politely stated that he would read it later. Mr. Tuvell then fainted in his chair, was unconscious for an un-determined period of time, and woke up covered in sweat, very dizzy and disoriented. After Mr. Tuvell recovered consciousness, the letter was no longer on the floor; it appears that Mr. Feldman picked it up. Mr. Feldman offered no assistance to Mr. Tuvell during this episode.

50. On August 3, 4, and 5, 2011, Mr. Tuvell complained to Mr. Mandel and Ms. Adams about continuing retaliation and harassment, including the fact that Mr. Feldman had forbidden the use of time to compile an internal complaint/appeal, and Mr. Tuvell requested emergency relief. These communications were protected conduct under the ADA and c. 151B.

51. On August 5, 2011, Mr. Tuvell notes that if he is subject to discipline for using the word lazy, then others should be disciplined for stating that a coworker's "raison d'etre is the regression test," under a similar level of hyper-scrutiny. Mr. Tuvell further noted that the subject of this statement is not Caucasion, and that he might be the victim of discrimination. Mr. Tuvell's communication is protected conduct under c. 151B.

52. On August 5, 2011, Mr. Mandel replies, saying that IBM does not accept third party complaints, and that if the co-worker is offended by the "raison d'etre" comment, he will have to file himself. Mr. Mandel's statement is false and pretextual, as IBM does accept third party complaints.

53. The harassment, retaliation and disparate treatment caused an exacerbation of Mr. Tuvell's PTSD symptoms. As a result, Mr. Tuvell began to feel that he was medically incapable of reporting to work. On August 11, 2011, Mr. Tuvell e-mailed Kathleen Dean, of IBM's Integrated Health Services, stating that he has come down with a medical condition, wants to know about the short term disability (STD) process, and requests a longer term solution, including an accommodation. This is a protected communication demonstrating notice of need of reasonable accommodation.

54. On August 11, 2011, Mr. Tuvell informs Mr. Feldman that he was taking sick days until his request for short term disability is acted upon. Mr. Tuvell also informed Mr. Feldman that Mr. Tuvell is seeking an accommodation. This is a protected communication requesting reasonable accommodation, and constituting notice of a need of reasonable accommodation.

55. In or about mid-August, 2011, IBM recieves a Medical Treatment Report concerning Mr. Tuvell, from Mr. Tuvell's medical care-giver, in support of his STD application. The report states that Mr. Tuvell is experiencing a sleep disorder and stress reactions, as a result of which he is totally impaired with respect to performing his job responsibilities.

56. On August 17, 2011, IBM certifies Mr. Tuvell's STD status, and accords him the reasonable accommodation of STD leave. While the leave constituted one type of accommodation, it was inadequate and inappropriate, since a different, available reasonable accommodation, which would have preserved Mr. Tuvell's full salary, and equal opportunity to participate in, and excel in the workplace, would have been to simply stop the harassing and/or retaliatory conduct, and/or assign Mr. Tuvell to work with a person who did not exacerbate Mr. Tuvell's medical symptoms.

57. On August 18, 2011, pursuant to IBM policy, Mr. Tuvell files his Corporate Open Door Filing, with IBM Executive Office Staff, in which he complains about unlawful discrimination. This filing represents protected opposition under c. 151B and the ADA. However, all members of the Executive Office improperly refuse to consider it, instead sending it down the chain to Mr. Mandel, despite Mr. Tuvell's clearly stated protestatoins that Mr. Mandel has disqualified himself from investigating this case, because of Mr. Mandel's prior false representations to Mr. Tuvell concerning IBM's non-consideration of third party complaints.

58. On August 25, 2011, Mr. Mandel informs Mr. Tuvell that Mr. Mandel will not finalize his investigation of Mr. Tuvell's complaint until Mr. Tuvell is back from STD leave. Mr. Mandel's unilateral decision to disadvantage Mr. Tuvell on the basis of Mr. Tuvell's taking disability leave, constitutes handicap discrimination, retaliation for taking reasonable accommodation, and otherwise constitutes retaliatory harassment.

59. Given that Mr. Tuvell was forced, medically, out of the workplace, due to Mr. Feldman's discriminatory and retaliatory conduct (as well as due to IBM's failure to accord appropriate reasonable accommodation), Mr. Mandel's refusal to fully address

Mr. Tuvell's complaint until he returns to work further victimizes Mr. Tuvell. It constitutes an unlawful, tangible job action, as well as harassment based on handicap, race, age and/or gender.

60. On August 25 and 31, 2011, Mr. Tuvell opposes Mr. Mandel's retaliatory and harassing refusal to complete the investigation of Mr. Tuvell's complaints while Mr. Tuvell remains on disability leave. Mr. Tuvell's communications constitute protected conduct under c. 151B and the ADA.

61. On September 4, 2011, Mr. Tuvell files a further formal complaint (Addendum II to his original complaint) based on Mr. Mandel's refusal to finalize the investigation of the complaint during the pendancy of Mr. Tuvell's disability leave. This communication constitutes protected activity under c. 151B and the ADA.

62. On September 6, 2011, Mr. Tuvell discovers that his Netezza Internet VPN access to the Netezza network has been rescinded. Mr. Tuvell inquires about the lack of access. On September 7, 2011, Mr. Mandel explained that access had been denied during the pendancy of Mr. Tuvell's STD leave. Other IBM employees on STD do not have their computer access cut off. In fact, corporate policy dictates that employees on STD retain normal employee rights and privileges. This conduct constitutes a tangible job action, as well as continued harassment based on Mr. Tuvell's use of reasonable accommodation, his request(s) for reasonable accommodation, opposition to unlawful activities, his handicap, his age, race and/or gender.

63. On September 7, 2011, Mr. Tuvell opposes IBM's discriminatory and/or retaliatory decision to deny him VPN access. This communication constitutes protected conduct under c. 151B and the ADA.

64. The continued harassment, discrimination and/or retaliation exacerbates Mr. Tuvell's medical condition.

65. On or about September 7, 2011 and October 12, 2011, IBM receives additional medical documentation from Mr. Tuvell's medical care-givers supporting Mr. Tuvell's disability leave. The October 2011 documentation states that "without safe resolution of current hostile work environment without fear of reprisals . . . symptoms will persist." Further medical documentation filed with IBM in or about November 2011 states, "pt. [patient] continues to experience intense triggering of symptoms with any reference to work environment and incident of demotion and lack of investigation." Based on this documentation, IBM approves continued STD leave for Mr. Tuvell, but continues to refuse Mr. Tuvell the reasonable accommodation of not working for Mr. Feldman.

66. On September 14, 2011, Mr. Mandel confirms that Mr. Tuvell would be prevented from entering IBM facilities while he is out on STD leave. On information and belief, IBM written policy rejects such discrimination and other IBM employees on disability leave are not prevented from entering IBM facilities. This act constitutes both a tangible job action, and continued harassment. It is based on retaliation for Mr.

Tuvell's request and/or availment of the reasonable accommodation of disability leave, his oppositions to unlawful conduct, his race, age and/or gender.

67. On September 14, 2011, Mr. Tuvell e-mails his opposition to the discriminatory and/or retaliatory exclusion from the workplace. This communication is protected under c. 151B and the ADA.

68. On September 21, 2011, based on IBM's inaction on his internal complaint, Mr. Tuvell escalates his complaint to Richard Kaplan, Chief Trust and Compliance Officer for IBM. This communication is protected conduct under c. 151B and the ADA. The complaint to Mr. Kaplan is improperly forwarded by IBM back to Mr. Mandel.

69. On October 5, 2011, Mr. Tuvell receives from Mr. Feldman a notification that after thirteen weeks of STD medical leave, his benefits will be reduced to 66 2/3 % of his usual salary. On October 5, 2011, Mr. Tuvell responds, and objects to the reduction of pay. Mr. Tuvell again identifies himself as disabled under the ADA, and requested reasonable accommodation. Mr. Tuvell pointed out that he had requested on a number of occasions the reasonable accommodation of being separated from the hostile conditions that were causing his medical symptoms. Mr. Tuvell objected to IBM's continued failure to accord him reasonable accommodation of non-discriminatory and non-retaliatory workplace conditions. Mr. Tuvell further notified IBM that its reduction of benefits constituted an adverse action, because it was capable of making reasonable accommodation that permitted Mr. Tuvell's full participation in the workplace, and full compensation, but it was refusing to make such accommodation. This request for reasonable accommodation was protected under the ADA and c. 151B.

70. On October 10, 2011, Mr. Mandel rejected the request for a change of supervisor as an accommodation for Mr. Tuvell's medical condition, at this and previous points. Mr. Mandel suggests that as an alternative accommodation, Mr. Tuvell could himself utilize the Global Opportunity Marketplace (GOM), which lists IBM's available internal job opportunities, in order to find a new position. The denial of a change of supervisors is a violation of the obligation to reasonably accommodate Mr. Tuvell's disability. Furthermore, IBM had, under the ADA, at this point, an affirmative obligation to search its own vacant positions, and reassign Mr. Tuvell to a position for which he qualified. Mr. Mandel's suggestion that Mr. Tuvell make his own search for a vacant position for transfer, through a process that was available to all IBM employees regardless of disability status, was inadequate given the ADA's requirement to proactively reassign Mr. Tuvell to a vacant position, and thus constitutes an independent violation of the law.

71. On October 17, 2011, Mr. Tuvell again requests the reasonable accommodation of being removed from Mr. Feldman's influence, and requested an interactive dialogue to achieve that goal. Mr. Tuvell also complains about the failure of IBM to so far live up to these legal obligations. Mr. Tuvell's communication was protected conduct under c. 151B and the ADA.

72. On October 17, 2011, Mr. Tuvell asserts that his PTSD represents a disability covered by the ADA, and that his disability represents a medical condition that prevents him from continuing to work with Mr. Feldman. Mr. Tuvell again requests the reasonable accommodation of no longer having to work with Mr. Feldman, including the possibility of terminating Mr. Feldman. This communication represents a protected request for accommodation, and an internal complaint based on the ongoing failure to reasonably accommodate him.

73. On October 17, 2011, Mr. Mandel responds to Mr. Tuvell's October 17, 2011 e-mail, reaffirms a refusal to change Mr. Feldman as Mr. Tuvell's supervisor, and again suggests that Mr. Tuvell himself look for other positions within IBM, as part of an interactive process for determining reasonable accommodation.

74. On October 18, 2011, Mr. Mandel acknowledges understanding that Mr. Tuvell was requesting job modifications such that he would not have to interact with Mr. Feldman, or reassignment as a reasonable accommodations, and that IBM does not consider those to be a reasonable accommodations. IBM's past and continued refusal to reasonably accommodate Mr. Tuvell violates c. 151B and the ADA. Its position on what constitutes a reasonable accommodation plainly violates the law. E.g. 42 U.S.C. section 12111(9)(B).

75. On October 18, 2011, Mr. Tuvell again complains about IBM's lack of response to his internal complaint, again asserts his status as disabled under the ADA, and again opposes the discriminatory policy of refusing to act on his complaint while he is on STD leave. This communication is protected conduct under c. 151B and the ADA.

76. On October 19, 2011, Mr. Tuvell complains that Mr. Mandel's decision to stall resolution of Mr. Tuvell's internal complaint based on Mr. Tuvell's availment of disability leave constitutes discrimination/retaliation in violation of the ADA. This communication is protected conduct under c. 151B and the ADA.

77. On or about October 19 and 20, 2011, Mr. Tuvell objects to Mr. Feldman falsely characterizing work at home days as sick days, asks for citation to the policy that supports the practice, and notes that it is inconsistent with pre-June 30, 2011, when he worked at home. Mr. Feldman's practice constitutes a tangible adverse action, as well as continuing harassment based on retaliation, handicap, race, gender, age and/or any combination thereof.

78. On November 2, 2011, Mr. Feldman made knowingly false statement mischaracterizing Mr. Tuvell's work situation with respect to sick days — casting work-at-home days as refusal to work in the office days. This adverse treatment of work-at-home days is inconsistent with the work-at-home days that Mr. Tuvell used prior to June 30, 2011. Mr. Tuvell responded by opposing these statements and practice as continuing retaliatory harassment. Mr. Tuvell did so again on October 22, 2011. Mr. Tuvell's communications are protected conduct under c. 151B and the ADA.

79. On November 3, 2011, Mr. Tuvell filed Addendum IV to his internal complaint, complaining about handicap discrimination, retaliation, and failure to accommodate. Mr. Tuvell's communication is protected conduct under c. 151B and the ADA.

80. On or about November 9, 2011, Mr. Mandel received a letter from Mr. Tuvell's attorney, Mr. Robert Mantell, identifying Mr. Tuvell's disability and requesting reasonable accommodation. Included among the requested accommodations is a request for reassignment of Mr. Tuvell away from Mr. Feldman. This communication represents protected conduct. IBM's continued failure to come to some solution whereby Mr. Tuvell would be permitted to work in a non-harassing environment without having to interact with Mr. Feldman, constitutes a many-times repeated violation of the affirmative duty to reasonably accommodate Mr. Tuvell.

81. On November 17, 2011, Mr. Mandel spoke with Mr. Tuvell on the telephone, and explained that Mr. Tuvell's June 29, 2011 internal Complaint was rejected. The overly delayed response to Mr. Tuvell's complaint, whose "investigation" took place over more than four and a half months, was inadequate and unlawful. Mr. Mandel's rejection reflected an extremely deferential take on past events, ignored evidence, improperly favored Mr. Knabe and Mr. Feldman, and disfavored Mr. Tuvell. The response failed to address or even acknowledge Mr. Tuvell's complaints of discrimination. Mr. Mandel indicated that there were a variety of complaints that Mr. Tuvell had made, that had not been investigated and were not eligible for investigation. Some of those issues that were not investigated involved Mr. Tuvell's complaints of handicap harassment, discrimination and retaliation. Moreover, Mr. Mandel's explanation revealed a biased and incomplete investigation. To note merely one example, Mr. Mandel stated that he concluded that Mr. Tuvell raised his voice to Mr. Knabe, but that Mr. Knabe did not raise his voice to Mr. Tuvell. This ignores that fact that Mr. Knabe apologized to Mr. Tuvell in writing for Mr. Knabe's raising his voice. Moreover, the investigation affirmed the discipline of Mr. Tuvell for innocently stating in e-mail that he would provide a link for those who are "lazy." Moreover, Mr. Tuvell was criticised for communications that were protected conduct under c. 151B, and so those alleged criticisms were retaliatory per se. The unjustifiably delayed result, inadequately researched investigation, unsupportable and per se illegal conclusions demonstrate that Defendant engaged in an inadequate, sham investigation in violation of the c. 151B and ADA duties to investigate and remedy unlawful discrimination and retaliation. The defective conclusions also independently further establish a continuing hostile work environment based on retaliation, handicap, gender, race and/or age, in violation of c. 151B and the ADA. Toward the end of the November 17, 2011 conversation, Mr. Mandel said that someone would contact Mr. Tuvell about engaging in an interactive process for finding a reasonable accommodation.

82. On November 23, 2011, Mr. Feldman rejected the idea of changing Mr. Tuvell's management team, or moving him from his current position, as a reasonable accommodation. Mr. Feldman stated that Mr. Tuvell could himself use IBM's Global Opportunity Marketplace to find other positions, and that Diane Adams from Human Resources would be available to assist him in this endeavor, but there was no suggestion that Ms. Adams herself would help in actually finding other positions. This

communication, denying reassigment or a change in the management team, constitutes a violation of the obligation to reasonably accommodate Mr. Tuvell. Furthermore, the suggestion that Mr. Tuvell himself use GOM to find for himself a potential reassignment, rather than Defendant taking affirmative steps to find Mr. Tuvell a vacant position for reassignment, independently constitutes a separate violation of the duty to reasonably accommodate.

83. On November 23, 2011, Mr. Tuvell requests assistance from Ms. Adams in seeking reassignment through IBM's Global Opportunity Marketplace. Nothing of substance results from this and/or any other attempt to elicit assistance in locating a vacant position for transfer. Defendant wholly fails to offer Mr. Tuvell any reassignment which would effect a reasonable accommodation, and thus, Defendant violated its duty to reasonably accommodate Mr. Tuvell's disability.

84. On November 23, 2011, Mr. Tuvell requests a written response to his internal complaint, pursuant to Section 2.8 of the Concerns and Appeals Program. Mr. Mandel replies with a non-substantive answer, saying only that after investigation, Mr. Mandel concluded that "management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you." This non-responsive response not only demonstrates pretext, and confirms the inadequacy of the investigation, but fails to provide sufficient specificity to satisfy Defendant's burden to respond to Mr. Tuvell's prima facie case.

85. On November 28, 2011, after searching for alternative positions on IBM's Global Opportunity Marketplace, Mr. Tuvell applies for an internal posting SWG-0436579.

86. While on STD leave, Mr. Tuvell has an obligation to "check-in" with his employer on a weekly basis. Mr. Tuvell complies with this requirement. On November 28, 2011, Mr. Feldman falsely accuses Mr. Tuvell of not checking-in during the week. This constitutes additional harassment on the basis of retaliation, handicap, age, race and/or gender.

87. On November 28, 2011, Mr. Tuvell informs Mr. Feldman that he had checked-in, as required, and that he is medically incapable of returning to work under Mr. Feldman. Mr. Tuvell once again requests reassignment as a reasonable accommodation. This communication constitutes a protected communication and request for reasonable accomodation under c. 151B and the ADA. Mr. Feldman later acknowledges that he had indeed received Mr. Tuvell's prior, timely check-in, and that Mr. Tuvell was not deficient in checking-in.

88. Mr. Chris Kime was the manager tasked with filling the SWG-0436579 posting. On November 30, 2011, Mr. Kime informs Mr. Tuvell that Mr. Tuvell's resume demonstrates his qualification for the position, and Mr. Kime schedules a meeting to discuss the position.

89. On December 1, 2011, Mr. Tuvell informs Mr. Kime that Mr. Tuvell is returning from a STD leave, but that Mr. Tuvell is healthy to work. Mr. Tuvell, in this communication, alerts Mr. Kime of his disability status, as well as his availment of disability leave as a reasonable accommodation. Despite understanding Mr. Tuvell's status on disability leave, Mr. Kime continues to express interest in Mr. Tuvell for the open posting.

90. On December 5, 2011, Mr. Tuvell informs Mr. Feldman of his upcoming interview for the transfer, and asks for physical access to IBM facilities, as his access had previously been cut off. In addition, Mr. Tuvell asks Mr. Feldman to let Mr. Tuvell know of any other job opportunities that are available for which Mr. Tuvell is qualified. This communication constitutes a request for reasonable accommodation. On December 6, 2011, Mr. Feldman ostensibly provides permission for Mr. Tuvell to attend the job interview.

91. On December 6, 2011, Robert Mantell, attorney for Mr. Tuvell, e-mails Mr. Larry Bliss, Esq., attorney for IBM, to confirm that Mr. Tuvell's utilization of STD is utilized as a reasonable accommodation, and that barring Mr. Tuvell from facilities and denying him access based on his use of STD leave is a violaton of the handicap discrimination laws, and will prevent him from attending an interview. This communication is protected conduct under c. 151B and the ADA.

92. On December 6, 2011, Mr. Bliss e-mails Mr. Mantell, falsely asserting that Mr. Tuvell's badge access was never turned off.

93. On December 8, 2011, Mr. Tuvell has an interview for the SWG-0436579 posting at IBM's Littleton facility, which went very positively. On this day, Mr. Tuvell's badge does not work, and he needs assistance to enter the building. Mr. Tuvell further undertakes significant efforts to get the badge activated, finally succeeding. The continued act of barring Mr. Tuvell from unrestricted access to IBM facilities pending his status on disability leave represents a continued violation of c. 151B and the ADA, as a tangible job action, as well as harassment.

94. On December 12, 2011, Mr. Kime e-mails Tuvell, stating that the job interview was "very positive, and I will be following up with my management chain, and will keep you posted of developments as they occur." On various occasions, Mr. Tuvell enthusiastically follows up on his application for reassignment. On December 16, 2011, Mr. Tuvell informs Mr. Kime and others considering his application for transfer that he had just been awarded a patent.

95. On December 16, 2011, Mr. Feldman writes to Mr. Tuvell, continuing to deny Mr. Tuvell the ability to have VPN computer access while he is on disability leave. Mr. Feldman states, "As for your email about systems access, since you continue to be on STD and therefore are not working[,] there is not a business need for you to have access to Netezza-specific systems." Furthermore, Mr. Feldman rejects Mr. Tuvell's request to end his STD leave prior to the end of the year, and to use his vacation days until the end

of the year. This conduct constitutes both tangible adverse actions, and/or continuing harassment based on retaliation, handicap, race, age and/or gender.

96. On or about December 19, 2011, Ms. Stephanie Ross, LICSW, Mr. Tuvell's psychotherapist, submits a Medical Treatment Report concerning Mr. Tuvell to IBM. The report states that Mr. Tuvell "continues to experience extreme triggering regarding workplace previously assigned," and that the "only modification that would be possible is a change of supervisor and setting." The report further states, "unable to return to previous setting w[ith] current supervisor and setting – PTSD symptoms exacerbate immediately." On the basis of this report, IBM extends Mr. Tuvell's disability leave. The report once again places IBM on clear notice that it was required to reassign Mr. Tuvell to a vacant position in order to comply with its duty to reasonably accommodate Mr. Tuvell.

97. On January 6, 2012, Mr. Kime noted Mr. Tuvell's "deep technical skills and ability to produce solid documentation." Mr. Kime also noted and apologized for his "earlier optimism" that Mr. Tuvell would be selected. However, Mr. Kime, at that time, rejected Mr. Tuvell's application for job posting SWG-0436579. Mr. Kime asserted that after consultation with his "up-line management," that "[w]e cannot move forward with taking you directly from being on short term disability." This rejection, based directly on Mr. Tuvell's availment of disability leave as a reasonable accommodation, constitutes discrimination based on handicap, and is retaliation per se. Furthermore, the rejection is a separate and independent violation of Defendant's affirmative obligation to provide reassignment to a vacant position as a reasonable accommodation.

98. In the January 6, 2012 e-mail, Mr. Kime gave a secondary justification for rejection, suggesting that Mr. Tuvell might not be satisfied with the work available in the position. However, that alleged "concern" is pretextual, as Mr. Tuvell gave every indication that he would be satisfied with the work responsibilities of that position. For example, on December 9, 2011, Mr. Tuvell had written to Mr. Kime, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." The second, pretextual reason given for rejection demonstrates that the true motive for the rejection was unlawful discrimination and/or retaliation, in violation of c. 151B and/or the ADA.

99. On January 10, 2012, Mr. Mantell e-mails Mr. Bliss, asserting that the rejection of Mr. Tuvell's application for reassignment constituted a retaliatory job action under the handicap discrimination laws, and that direct evidence proves the violation. This communication is protected under c. 151B and the ADA.

100. On January 11, 2012, Mr. Tuvell e-mails Mr. Feldman, complaining that his use of disability leave as a reasonable accommodation has been used to justify his rejection for reassignment, and that this action constitutes unlawful retaliation in violation of handicap discrimination law. Mr. Tuvell notes that the action appeared to foreclose the avenue that Mr. Feldman himself suggested on November 23, 2011 for seeking reassignment, and Mr. Tuvell requests other ideas for obtaining reasonable

accommodation. This communication constitutes protected opposition under c. 151B and the ADA, and likewise constitutes a request for reasonable accommodation.

101. On January 16, 2012, Mr. Feldman e-mails Mr. Tuvell, and provides Mr. Tuvell with a third, different reason for rejecting his application for reassignment. Mr. Feldman states that Mr. Tuvell was rejected because the "team" did not think that Mr. Tuvell was the "right fit for the position." This intentionally vague and pretextual reason given for rejection demonstrates that the true motive for the rejection was unlawful discrimination and/or retaliation, in violation of c. 151B and/or the ADA. Mr. Feldman again rejected the idea of changing managers as a reasonable accommodation, and again asserted that Mr. Tuvell could himself look for other positions on GOM. The repeated suggestion that Mr. Tuvell use GOM to find for himself a potential reassignment, rather than IBM taking affirmative steps to find Mr. Tuvell a vacant position for reassignment, independently constitutes a separate violation of the duty to reasonably accommodate. Furthermore, Mr. Feldman's proffer of a false explanation for the rejection constitutes continued harassment.

102. This paragraph purposefully left blank.

103. On January 18, 2012, Mr. Tuvell notes that Mr. Feldman's assertion that Mr. Tuvell was not the "right fit" for the transfer is false and pretextual. Mr. Tuvell notes that the rejection was expressly, and unambiguously based on Mr. Tuvell's availment of STD leave, and notes that his availment of disability leave was the reason behind other adverse actions taken against him, such as loss of system and building access, and delay in acting on Mr. Tuvell's internal complaint. Mr. Tuvell's communication is protected conduct under c. 151B and the ADA.

104. On January 19, 2012, Mr. Tuvell utilizes Ms. Adams' assistance to review job opportunities on GOM. Again, Defendant fails to offer Mr. Tuvell any reassignment, in violation of its obligation to reasonably accommodate Mr. Tuvell's disability.

105. On January 20, 2012, Mr. Feldman e-mails Mr. Tuvell, offering alleged, but clearly inadequate accommodations such as having a different person providing performance feedback, leave to go to doctor's appointments, and the opportunity to continue using GOM. Mr. Feldman's suggested accommodations are contrary to Mr. Tuvell's medical certifications, and Mr. Tuvell's repeated assertions that he needs to report to a different person as part of a reasonable accommodation.

106. On January 20, 2012, Tuvell e-mails Mr. Feldman, asserting that the accommodations Mr. Feldman proposed are insufficient, and notes that Mr. Feldman knew they were insufficient when they were proposed. Mr. Tuvell further notes that his continued mere access to the GOM process is insufficient as opposed to IBM's obligation to actively provide reasonable accommodation, and that Defendant's continued refusal to provide him with reasonable accommodation has forced him to apply for Long Term Disability (LTD). This communication is protected opposition to unlawful conduct, and a protected request for reasonable accommodation.

107. On January 20, 2012 and/or January 22, 2012, Mr. Tuvell files a second Open Door Complaint, relating to denial of transfer, and refusal to find him a new position as a reasonable accommodation. This communication is protected conduct under c. 151B and the ADA, and represents a continuing request for reasonable accommodation.

108. On January 23, 2012, Mr. Mantell e-mails Mr. Bliss, requesting that Mr. Tuvell be transferred to the open job posting SWG-0456125, which is the reposted version of SWG-0436579, noting that IBM is legally obligated, under its duty of reasonable accommodation, to do more than simply allow Mr. Tuvell to use GOM, and placing Defendant on notice that Mr. Tuvell is entitled to the requested reassignment under the ADA, citing to EEOC Guidance and cases. This communication constitutes protected opposition, as well as a protected request for reasonable accommodation.

109. On January 24, 2012, Mr. Bliss replies to Mr. Mantell, rejecting the request for reassignment. Mr. Bliss supports Defendant's failure to accord the reassignment as a reasonable accommodation by asserting, falsely, and contrary to Mr. Tuvell's medical documentation, that he was capable of performing his job in his current position under Mr. Feldman. The denial of the reassignment constitutes a violation of the duty to reasonably accommodate under c. 151B and the ADA. Furthermore, Mr. Bliss reasserts proposed accommodations that preserve work conditions that Mr. Tuvell and his health care provider have certified to be inconsistent with a return to work. The continued assertion of proposed accommodations that violate the terms of Mr. Tuvell's medical documentation and medical limitations, constitute a continued refusal to engage in a genuine interactive dialogue.

110. On or about January 25, 2012, Mr. Tuvell exhausts his STD benefits, and is transitioned to unpaid leave.

111. On January 25, 2012, Mr. Tuvell applies for job posting SWG-0456125, which is the reposted version of SWG-0436579. At this point, Mr. Tuvell is no longer on STD leave, thereby avoiding the reason that Mr. Kime initially used to reject him for the position.

112. On January 27, 2012, Mr. Mantell replies to Mr. Bliss' e-mail of January 24, 2012, stating that Mr. Tuvell is medically incapable of performing in his present position under his current supervisor, and that Mr. Tuvell and his health care provider have certified his medical incapacity. Mr. Mantell states that by according STD leave, IBM has explicitly recognized Mr. Tuvell's medical incapacity, which fact is inconsistent with Mr. Bliss' assertion to the contrary. Mr. Mantell also placed Mr. Bliss on notice that provision of a new supervisor may be a reasonable accommodation, but that in the absence of a new supervisor, Mr. Tuvell is seeking the only accommodation available, reassignment to a vacant position. Finally, Mr. Mantell placed Mr. Bliss on notice that the accommodations proposed by Defendant is inconsistent with Mr. Tuvell's medical limitations and medical certifications. This communication constituted protected conduct under c. 151B and the ADA.

113. On or about February 7, 2012, Mr. Tuvell applies for LTD benefits. Mr. Tuvell's application makes it clear that he is able to work if provided appropriate, non-harassing work conditions, within the limits of his medical certifications.

114. On February 8, 2012, Mr. Tuvell e-mails Mr. Feldman and Mr. Mandel, informing them of his LTD application, and attaching Stephanie Ross' addendum to the LTD certification. The Ross addendum confirms Mr. Tuvell's diagnosis of PTSD, and requests a reasonable accommodation of reassignment. Mr. Tuvell specifically requests prompt investigation and resolution of his January 2012 complaint, and prompt reassignment to SWG-0456125 as a reasonable accommodation. Mr. Tuvell places Defendant on notice of its legal obligation to accord him with reasonable accommodation, and the communication is protected conduct under c. 151B and the ADA.

115. On February 13, 2012, Mr. Mandel rejects Mr. Tuvell's January 2012 second Open Door Complaint based on the rejected reassignment, purportedly because of the "performance issues we discussed previously would present a problem to your success in the role to be filled." This fourth reason given for rejection is pretextual, which demonstrates that the true motive for the rejection was unlawful discrimination and/or retaliation, in violation of c. 151B and/or the ADA. This reason simply recalls the vague, false criticisms that Mr. Mandel asserted in the November 17, 2011 conversation, which were themselves knowingly pretextual, and were retaliatory per se in that the alleged criticisms were based on protected conduct.

116. On February 14, 2012, Mr. Tuvell requested a more substantive description of the alleged "performance issues" that formed the basis Mr. Mandel's fourth reason for rejection.

117. On February 15, 2012, Mr. John Metzger, manager over Mr. Knabe and Mr. Feldman, writes to Mr. Tuvell, holding open the option of having Mr. Tuvell return to his operational position under Mr. Feldman, though with Mr. Metzger in charge of formal performance evaluations. Apparently, Mr. Mandel's alleged performance issues preventing Mr. Tuvell's reassignment do not prevent Mr. Tuvell's return to his current job, thus further demonstrating that the fourth reason given for the rejection is pretextual. IBM's continued faux proposals of accommodations that are inconsistent with Mr. Tuvell's medical limitations and medical documentations represents both a failure to reasonable accommodate, and failure to engage in a bona fide interactive process.

118. On February 16, 2012, Mr. Tuvell replies to Mr. Metzger, asserting that Mr. Tuvell is medically incapable of returning to work under Mr. Feldman, and supports that position by attaching Ms. Ross' Addendum. This communication is protected as yet another request for reasonable accommodation.

119. On February 17, 2012, Mr. Mandel asserts a fifth and sixth reason for the rejection -- Mr. Tuvell's purported "inability to work cohesively with other members,"

and the "unprofessional conduct for which he was cited on July 5, 2011." This fifth and sixth pretextual reason given for rejection demonstrates that the true motive for the rejection was unlawful discrimination and/or retaliation, in violation of c. 151B and/or the ADA.

120. On February 28, 2012, Mr. Mandel refuses to respond substantively to Mr. Tuvell's request for a specific description of the reasons for his rejection of his application for reassignment. Mr. Mandel states that Mr. Tuvell's January 22, 2012 complaint had been rejected as of February 17, 2012. Mr. Mandel alleges that the interactive process is still open, but that Mr. Tuvell had rejected the proposed accommodations "because they did not satisfy your particular demands." Yet Mr. Mandel continues to refuse to propose any accommodation that is consistent with Mr. Tuvell's medical limitations and supporting medical documentation.

121. On February 28, 2012, Mr. Tuvell responds to Mr. Mandel's February 28 communication, again requesting specific reasons for his rejection for reassignment, and noting that Mr. Tuvell's requests for reasonable acommodations is supported by medical documentation, and not simply by his "demands."

122. On March 2, 2012, Tuvell files his third internal Open Door complaint of discrimination and retaliation with Mandel. This complaint constitutes protected conduct under G.L. c. 151B, § 4(4).

123. On March 6, 2012, Mr. Mandel accuses Mr. Tuvell of misusing IBM's "systems" by e-mailing his complaints of discrimination and retaliation to members of his team. Mr. Tuvell's e-mails constitute explicit opposition to IBM's unlawful conduct, seeking help for himself and warning others of the conduct. Based on Mr. Mandel's assertion of "abuse", IBM removes Mr. Tuvell's access to Lotus Notes. This false assertion of abuse and misuse of the systems constitutes harassment, and the recission of access to Lotus Notes constitutes both a tangible job action and/or harassment based on retaliation. Direct evidence demonstrates that the unlawful conduct was directly based on Mr. Tuvell's protected opposition.

124. On March 6, 2012, Mr. Tuvell writes to Mr. Mandel and objects to the withdrawal of access to Lotus Notes, complains that the recent action is retaliation, and denies that he had abused or misused IBM systems. Mr. Tuvell further asserts his willingness/efforts to engage in an interactive dialogue with respect to accommodating his disability. This communication constitutes protected activity.

125. On March 6, 2012, Mr. Tuvell discovers that he was not merely barred from Lotus Notes, but that his access to the whole of "w3" (IBM's internal corporate network) is rescinded. Rescinding Lotus Notes involves restricting only e-mail, although e-mail access is still available by alternate means. Rescinding w3 access means that Mr. Tuvell has no access whatsoever to corporate documents, such as the employee handbook, no access to the employee database, and he can no longer access GOM, which impairs his ability to find new career opportunities within IBM. The restriction constitutes an

adverse action, and/or continuing harassment, and an abandonment of any effort to find Mr. Tuvell a reasonable accommodation.

126. On March 6, 2012, Mr. Tuvell e-mails Mr. Mandel, objecting to the withdrawal of access from w3 as retaliation, and objecting to Mr. Mandel's misleading communication of March 6, 2010, which indicated that only Lotus Notes was affected. This is protected communication.

127. On or about March 8, 2012, Mr. Tuvell discovers that his badge access to IBM facilities was rescinded, again.

128. On March 6, 2012, Mr. Tuvell e-mails Mr. Mandel, objecting to the withdrawal of access from w3 as retaliation, and objecting to Mandel's misleading communication of March 6, 2012, which indicated that only Lotus Notes was affected.

129. On March 9, 2012, Mr. Tuvell e-mails Addendum II of his new Complaint to Mr. Mandel, and to other recipients within IBM, which contains further complaints of discrimination and retaliation. This was a protected communication under G.L. c. 151B, § 4(4).

130. On March 12, 2012, Mr. Tuvell files his first charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). This is protected conduct under G.L. c. 151B, § 4(4).

131. On March 13, 2012, Mr. Mandel e-mails Mr. Tuvell, saying that Mr. Tuvell has been disruptive for e-mailing his Addendum II to certain other recipients, and if he continues to do so, he will be terminated. Mr. Mandel asserts that Mr. Tuvell's access to IBM systems was terminated due to his disruptive conduct. In actuality, Mr. Tuvell's circulation of Addendum II is protected conduct, and Mr. Mandel's response demonstrates retaliatory hostility towards such conduct.

132. On April 25, 2012, Ms. Adams informs Mr. Tuvell that given MetLife's denial of his request for LTD benefits, that IBM would keep him on an unpaid leave of absence while the appeal of the LTD denial is pending. Mr. Tuvell responds by confirming that he will appeal the LTD denial, requesting an update on the response to his complaint of March 2, 2012, and reasserting his longstanding request for reasonable accommodation via transfer or reassignment.

133. On May 3, 2012, Ms. Joan Ackerstein, Esq., lawyer for Defendant, writes to demand that Tuvell deny any working affiliation with EMC, and threatening to assume such affiliation in the absence of a denial. Mr. Mantell, attorney for Plaintiff, writes in response that Tuvell has done nothing that would lead IBM to conclude that Tuvell works for EMC.

134. On May 7, 2012, Ms. Adams writes to Mr. Tuvell, stating that IBM believes he is working for EMC in violation of IBM's Business Conduct Guidelines, and threatening termination unless he confirms that he is not working for EMC.

135. On May 8, 2012, Mr. Tuvell responds to Ms. Adams, objecting to the inference that he is violating IBM Guidelines, and inviting IBM to produce evidence of conflicting employment. Mr. Tuvell objects to IBM's accusations as defamatory and motivated by retaliation. Mr. Tuvell requests that his response be considered as his Fourth Open Door internal complaint alleging unlawful discrimination and retaliation.

136. On May 8, 2012, Ms. Adams responds to Mr. Tuvell's request, asserting that Tuvell's LinkedIn page indicates that he is currently working for EMC.

137. On May 8, 2012 Mr. Tuvell writes to Ms. Adams, asserting that he is not working for EMC, and stating that the LinkedIn page had been unintentionally or intentionally altered to include misstatements, by LinkedIn or some other party, and that he has not edited his LinkedIn page since 2009. Mr. Tuvell had once worked for EMC in previous years, as IBM knew. Mr. Tuvell complains that the continued harping on this subject constitutes further harassment.

138. Even after Mr. Tuvell affirms that he is not working for EMC, IBM generated a new set of inquiries, and on May 9, 2012, Ms. Adams informs Tuvell to identify where he is working during his unpaid, extended leave of absence with IBM.

139. On May 10, 2012, Mr. Tuvell informs Ms. Adams that he has been complying with his contractual obligations, but that he will not tell IBM where he is working, out of fear that IBM's retaliatory strategies will interfere with his gainful employment, just as it interfered with his attempts at internal transfer.

140. On May 11, 2012, Ms. Adams writes to Tuvell, asserting that IBM's Personal Leave of Absence Policy requires Mr. Tuvell to tell IBM if he is working while on leave, and that Mr. Tuvell is in violation of that policy. However, that policy is plainly inapplicable, as Mr. Tuvell is plainly not on Personal Leave.

141. On May 14, 2012, Mr. Tuvell responds to Ms. Adams, stating that [1] he is not on a Personal Leave of Absence, and the accusation that he is violating the Personal Leave of Absence policy is retaliatory; [2] that this hostile conduct should be added to Tuvell's pending Fourth Open Door internal complaint of discrimination and retaliation; [3] reiterating that Mr. Tuvell is not working for EMC, and consenting to an inquiry to EMC to confirm this fact; [4] confirming that Mr. Tuvell is not in a conflict of interest, and offering to respond to questions about his employment to satisfy IBM's concerns about a conflict. Mr. Tuvell notes that he will not reveal the employer's identity, as that will provide a way for IBM to sabotage him, that there is no policy requiring him to reveal the identity of his employer, and that he is willing to work through a trusted third party to ease any lingering concerns on the part of IBM. Mr. Tuvell also complains that the continued inquires constitute harassment.

142. On May 15, 2012, Ms. Adams instructs Mr. Tuvell to identify the company that he is now working for by 5:00 pm the next day.

143. On May 16, 2012, Mr. Tuvell responds to Ms. Adams, stating that there is no obligation that he reveal his other employer, that IBM has forced him to accept concurrent employment for financial reasons by its refusal to pay him and failure to engage in the interactive process, and that IBM's conduct has made him feel that it is not safe to reveal information about the other employer. Mr. Tuvell complains that the repeated demands for information constitute continuing harassment and retaliation. Mr. Tuvell reasserts his request that IBM resolve his two pending Open Door complaints (Third and Fourth), and for the reasonable accommodation of transfer, and states that if IBM responds acceptably, that he will reveal the identity of the other employer.

144. On May 17, 2012, at 7:33 am, Mr. Tuvell forwards to Mandel the May 16, 2012 e-mail, and asks that it be added to Mr. Tuvell's Fourth Open Door C&A internal complaint. The May 16 and 17, 2012 e-mails constitute protected conduct under G.L. c. 151B.

145. On May 17, 2012, at 4:59 pm, Mr. Feldman writes to Mr. Tuvell, stating that Mr. Tuvell is fired, effective immediately. As reasons for the termination, Feldman stated that Tuvell had not explained why his LinkedIn page indicated that he had been consulting for EMC for the past five years, and that he was unwilling to inform IBM where Tuvell was currently working. In fact, Mr. Tuvell had explained that his LinkedIn page had been altered by LinkedIn and/or someone else, and he had explained that he did not feel safe informing IBM of his current employment due to IBM's harassing conduct.

146. In his May 17, 2012 e-mail, Mr. Feldman instructs Mr. Tuvell not to delete information from his laptop, supply all passwords to the laptop, and to make it available for pick-up by a courier. These demands about the data deletion and passwords are not usual practice, and represent retaliation or retaliatory harassment. (However, Mr. Tuvell had already sanitized his laptop the preceding Saturday, May 12, pursuant to standard usual and customary practice at Netezza/IBM.)

147. On May 22, 2012, Mr. Stephen Frazier, a consultant from the computer forensics company, AccessData, picks up the computer and two power supplies from Mr. Tuvell. On information and belief, the review of employees', or former employees' computers for forensic investigation is contrary to IBM's usual practice or policy, and constitutes a retaliatory investigation and/or retaliatory harassment.

COUNT I – FAILURE TO ENGAGE IN INTERACTIVE PROCESS – ADA AND CHAPTER 151B, §§ 4(16), 4(4A)

148. Plaintiff incorporates by reference all of the preceding allegations.

149. Plaintiff repeatedly asserted himself to be a qualified handicapped individual in need of reasaonable accommodation, repeatedly asserted a medical inability to continue working in his present position under Mr. Feldman, and repeatedly submitted medical documentation in support of workplace conditions that would allow him to work despite those medical limitations.

150. Despite the provision of this information, Defendant failed to provide or to propose reasonable accommodations that were consistent with the medical limitations, of which it was aware.

151. When Plaintiff repeatedly made the point that the accommodations suggested by Defendant were inconsistent with his medical limitations, Defendant refused to respond with any substance. Moreover, Defendant never questioned or disputed Mr. Tuvell's self-described medical limitations, or Mr. Tuvell's supporting medical documentation in any substantive fashion, and never requested any further information concerning Mr. Tuvell's medical condition, or ability to work within various accomodations.

152. Consequently, Defendant failed to engage in the interactive process.

153. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT II – FAILURE TO REASONABLY ACCOMMODATE PLAINTIFF – ADA AND CHAPTER 151B, §§ 4(16), 4(4A)

154. Plaintiff incorporates by reference all of the preceding allegations.

155. Plaintiff is an otherwise qualified handicapped individual who requires reasonable accommodation to perform his job.

156. On occasions described above and on other occasions, Plaintiff asserted himself to be a qualified handicapped individual in need of reasonable accommodation, repeatedly asserted a medical inability to continue working in his present position under Mr. Feldman, and repeatedly submitted medical documentation in support of workplace conditions that would allow him to work despite those medical limitations.

157. IBM's own written policies acknowledge the option of removing a supervisor from a situation when a supervisor has engaged in misconduct.

158. Defendant engaged in a continued practice of refusing to accord Plaintiff with reasonable accommodations, such as reassignment to a vacant position, or assignment to a different supervisor, or other accommodation whereby Mr. Tuvell would be separated from Mr. Feldman.

159. All alleged accommodations suggested by Defendant required Mr. Tuvell to continue under the day-to-day supervision of Mr. Feldman, which was contrary to medical limitations and medical documentation known to Defendant.

160. Defendant failed to engage in a bona fide interactive process, and refused to directly confront and address the medical limitations and documentation that they were provided. Defendant restricted Mr. Tuvell from access to its internal listings of career opportunities, and misleadingly suggested that he apply for jobs for which it had no intention of hiring him.

161. Instead of providing requested and required reasonable accommodation, Defendant forced Plaintiff to go out on short term disability leave, and then on unpaid leave, causing economic damages and harm to Plaintiff's professional career, and preventing him an equal opportunity to participate in the workplace, as well as physical and emotional pain and suffering.

162. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT III – FAILURE TO ASSIST IN HELPING MR. TUVELL OBTAIN THE REASONABLE ACCOMMODATION OF REASSIGNMENT TO A VACANT POSITION FOR WHICH HE IS QUALIFIED – ADA AND CHAPTER 151B, §§ 4(16), 4(4A)

163. Plaintiff incorporates by reference all of the preceding allegations.

164. While Defendant held out the potentiality of reassignment to a vacant position as a possible reasonable accommodation, Defendant made no effort beyond merely permitting Mr. Tuvell to apply for positions through the Global Opportunity Management (GOM) process, which was open and available to all IBM employees.

165. Merely making the GOM process available to Mr. Tuvell, and allowing him to apply for jobs on the same level playing field as any other IBM employee, was insufficient to satisfy Defendant's duty to affirmatively discover and offer Mr. Tuvell reassignment to a vacant position for which he qualified. Defendant should have affirmatively searched its inventory of open positions for which Mr. Tuvell qualified, and offered Mr. Tuvell such positions. Defendant wholly failed in its obligation to do so.

166. Defendant violated 42 U.S.C. section 12111(9)(B) in requiring Mr. Tuvell to undertake the GOM process to seek reassignment, and by refusing to take steps to locate open positions for which Mr. Tuvell qualified, and failing to offer Mr. Tuvell such positions.

167. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT IV – FAILURE TO REASSIGN PLAINTIFF TO OPEN JOB POSTINGS SWG-0456125 AND SWG-0436579 – ADA AND CHAPTER 151B, §§ 4(16), 4(4A)

168. Plaintiff incorporates by reference all of the preceding allegations.

169. Given the information available to Defendant, and given Defendant's refusal to accord the reasonable accommodation of having Mr. Tuvell separated from Mr. Feldman while continuing to work in Mr. Tuvell's current position, Defendant was obligated to provide the reasonable accommodation of reassigning Mr. Tuvell to a vacant position. Reassignment was the only viable alternative reassignment that preserved Mr. Tuvell's equality and career opportunities in the workplace.

170. Using the GOM process, Mr. Tuvell found positions for which he qualified, in open requisitions SWG-0456125 and SWG-0436579 (which are apparently both for the same position). Mr. Tuvell interviewed for the first posting, the interview was positive and Mr. Tuvell was deemed qualified by those charged with filling the position. IBM failed to provide Mr. Tuvell the reassignment to which he was entitled.

171. The position(s) remain unfilled, and so it is not the case that Mr. Tuvell was rejected in favor of a superior candidate.

172. Defendant violated 42 U.S.C. section 12111(9)(B) in refusing to provide these reassignments to vacant positions for which Mr. Tuvell is qualified.

173. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT V – FAILURE TO REASSIGN PLAINTIFF TO OPEN JOB POSTINGS SWG-0456125 AND SWG-0436579 ON THE BASIS OF HANDICAP DISCRIMINATION, RETALIATION FOR AVAILING HIMSELF OF THE REASONABLE ACCOMMODATION OF MEDICAL LEAVE, RETALIATION FOR ENGAGING IN OTHER PROTECTED CONDUCT, RACE, GENDER, AGE AND/OR ANY COMBINATION THEREOF – ADA AND CHAPTER 151B, §§ 4(16), 4(4A)

174. Plaintiff incorporates by reference all of the preceding allegations.

175. Mr. Tuvell applied for, and was qualified for open job posting SWG-0456125.

176. On January 6, 2012, Mr. Tuvell was rejected for the position, on the grounds that "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this

will receive very close scrutiny from the operations people in our organization." See Exhibit 1. This rejection, based expressly on Mr. Tuvell's availment of disability leave as a reasonable accommodation, constitutes overt discrimination based on handicap and is retaliation per se.

177. Defendant had additionally, on other occasions, subjected Mr. Tuvell to disadvantage based on his availment of disability leave, including without limitations disabling Mr. Tuvell's access to IBM facilities, limiting his computer access, and refusing to progress and finalize review of Mr. Tuvell's internal complaint, all explicitly because Mr. Tuvell was on disability leave. Furthermore, Defendant had penalized Mr. Tuvell for working at home due to his disability, by requiring to use up sick leave on those days.

178. On January 6, 2012 and subsequent occasions, Defendant provided a variety of shifting, false, and pretextual reasons for the rejection, demonstrating that the true reason(s) for rejection are discrimination and/or retaliation.

179. Mr. Tuvell was rejected for SWG-0456125 on the basis of retaliation for availing himself of the reasonable accommodation of disability leave, retaliation for taking other actions protected by the ADA and c. 151B, handicap, race, gender, age and/or any combination thereof.

180. Later, Mr. Tuvell applied for posting SWG-0436579, which apparently is the same job position. On February 28, 2012, Mr. Mandel informed Mr. Tuvell that he had been rejected for this posting for the same reasons that he had been rejected for SWG-0456125.

181. Mr. Tuvell was rejected for SWG-0436579 on the basis of retaliation for availing himself of the reasonable accommodation of disability leave, retaliation for taking other actions protected by the ADA and c. 151B, handicap, race, gender, age and/or any combination thereof.

182. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT VI – TANGIBLE JOB ACTIONS ON ACCOUNT OF HANDICAP, RETALIATION, GENDER, RACE, AGE AND/OR ANY COMBINATION THEREOF – ADA AND CHAPTER 151B, §§ 4(16), 4(4A)

183. Plaintiff incorporates by reference all of the preceding allegations.

184. In addition to the acts described in the above counts, Defendant engaged in various other tangible job actions in violation of c. 151B and the ADA.

185. Defendant demoted Mr. Tuvell within the Performance Architecture Group because of his handicap, race, gender, age and/or any combination thereof.

186. Mr. Feldman instructed Mr. Tuvell not to communicate with Mr. Feldman outside the presence of Human Resource representatives, because of his handicap, retaliation, race, gender, age and/or any combination thereof.

187. Defendant [1] issued Mr. Tuvell a Formal Warning Letter; [2] forced Mr. Tuvell out on a disability leave instead of accommodating him or preventing continued mistreatment (resulting in reduced compensation, and later, cessation of compensation); [3] curtailed Mr. Tuvell's computer access; [4] curtailed Mr. Tuvell's access from IBM facilities; [5] refused to finalize the investigation of Mr. Tuvell's internal complaint; [6] treated work-at-home days as sick days; [7] delayed investigating Mr. Tuvell's complaints; [8] refused to permit Mr. Tuvell to cut short his disability leave in order to avail himself of vacation benefits; [9] curtailed Mr. Tuvell's access to Lotus Notes (his ability to communicate by e-mail to IBM co-workers); [10] curtailed Mr. Tuvell's VPN access to IBM's internal w3 network (cutting off his ability to search IBM's internal listings, locate IBM peers, and review IBM internal documents and policies); [11] threatened Mr. Tuvell with termination for forwarding protected complaints to others within IBM; [12] repeatedly demanded that Mr. Tuvell reveal where he was working during the forced unpaid leave, despite the absence of a policy or contract clause requiring him to reveal such information; [13] threatened Mr. Tuvell with termination for failing to confirm whether he was employed at EMC; [14] threatened Mr. Tuvell with termination for failing to tell IBM where he was working; [15] falsely accused Tuvell of violating the Personal Leave of Absence policy; and [16] fired Tuvell.

188. Each of these actions, either singly or in combination, constitute tangible job actions that were undertaken based on handicap, retaliation, race, gender, age and/or any combination thereof, in violation of c. 151B and the ADA.

189. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT VII – HARASSMENT ON THE BASIS OF HANDICAP, RETALIATION, RACE, GENDER, AGE AND/OR ANY COMBINATION THEREOF – CHAPTER 151B, §§ 4(1), 4(4), 4(4A), 4(16) AND THE ADA

190. Plaintiff incorporates by reference all of the preceding allegations.

191. The prior Count lists tangible actions, each of which in isolation supports liability. However, even if those acts are not considered tangible job actions, and even if they are, they helped to form a hostile work environment, and/or, in combination, constitute one or more actionable adverse actions.

192. The harassing conduct is too voluminous to identify in its entirety in the Complaint, but much of it is described above. Defendant created a hostile work environment by victimizing Plaintiff through a series of tangible and/or non-tangible harassing acts, because of his handicap, retaliation for engaging in protected conduct, race, gender, age and/or any combination thereof.

193. Defendant failed in its ADA, c. 151B and contractual obligations to investigate and remediate and unlawful work environment brought to their attention.

194. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

COUNT VIII – FAILURE TO INVESTIGATE AND REMEDIATE HARASSMENT ON THE BASIS OF HANDICAP, RETALIATION, RACE, GENDER, AGE AND/OR ANY COMBINATION THEREOF – CHAPTER 151B, §§ 4(1), 4(4), 4(4A), 4(16) AND THE ADA

195. Plaintiff incorporates by reference all of the preceding allegations.

196. Once Mr. Tuvell brought unlawful harassment and/or tangible job actions resulting in a hostile work environment to the attention of IBM and its agents, Defendant had the obligation to fully and fairly investigate and remediate the situation.

197. Sometimes, Defendant failed to even acknowledge Mr. Tuvell's complaints of discrimination and/or retaliation, which reflects Defendant's contempt for the complaint process and its obligation to comply with the discrimination laws, and reflects a practice that would dissuade a reasonable person from complaining.

198. Defendant continued its campaign of refusing to progress and/or resolve Plaintiff's pending internal complaints of harassment, and failed to adequately remedy the conduct, and permitted it to continue unabated. In the instances in which it did act, Defendant instead conducted biased, inadequate and deferential sham investigations and failed to cure or remediate the misconduct brought to their attention.

199. As a result of Defendant's misconduct, Mr. Tuvell suffered lost wages and benefits, lost reputation and career opportunities, and experienced physical and mental suffering for which he seeks compensation.

WHEREFORE, Plaintiff requests:

a. that the Defendant compensate Plaintiff for any loss of wages and/or benefits, including back pay and front pay;

b. that the Plaintiff be awarded an amount of money which will fairly compensate his emotional and physical pain and suffering;

c. that the Plaintiff be compensated for loss of reputation and loss of career opportunities, caused by Defendant's conduct.

d. that the Plaintiff be awarded attorney's fees and costs.

e. that the Plaintiff be awarded punitive and/or multiplied damages.

f. that the Defendant pay the Plaintiff pre- and post-judgment interest;

g. that the Plaintiff be reinstated to his position, or to a different position at IBM for which he qualifies, under conditions that are consistent with his medical limitations, and otherwise be made whole;

h. equitable relief to prevent future misconduct;

i. that Plaintiff's personnel file should be expunged of improper, harassing criticisms of his work performance;

j. any other relief as may be just and proper and/or which will make the Plaintiff whole.

Respectfully submitted,

The Plaintiff,
By his Attorneys

/s/ Robert S. Mantell

Robert S. Mantell
BBO# 559715
Rodgers, Powers & Schwartz LLP
18 Tremont Street
Suite 500
Boston, MA 02108
(617) 742-7010
RMantell@TheEmploymentLawyers.com

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on June 6, 2013

/s/ Robert S. Mantell
Rodgers, Powers & Schwartz LLP

Tuvell complaint3

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| WALTER TUVELL,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES, INC.,<br><br>Defendant | Civil Action No. 13-11292-DJC |

**STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC.**

Pursuant to Local Rule 56.1, Defendant International Business Machines, Inc. ("IBM") submits the following Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried in support of IBM's Motion for Summary Judgment:

**BACKGROUND ON PLAINTIFF**

1. Plaintiff Walter Tuvell is a white male who was born in 1947. First Amended Complaint ("FAC") ¶ 1, attached to the Affidavit of Joan Ackerstein ("Ackerstein Aff.") as **Exhibit 41**.

2. Plaintiff claims that he suffers from Post-Traumatic Stress Disorder ("PTSD"). Plaintiff's PTSD allegedly stems from an incident in the Spring of 1997, in which Plaintiff claims that he was offered a job with Microsoft Corporation, but Microsoft rescinded the offer after Plaintiff and his wife visited Seattle, Washington to meet with Microsoft employees. See Deposition of Walter Tuvell ("Pl. Dep."), Day 1, pp. 23-24, Ackerstein Aff., **Ex. 1.**

3. Plaintiff described Microsoft's alleged treatment of him and his family as the equivalent of a physical "rape," recounting the situation in a complaint he submitted to Microsoft

entitled, "Sleepless in Boston. How Microsoft Raped My Family While Recruiting Me, January 24 - April 20, 1997." Pl. Dep., Day 1, pp. 53-56; Ackerstein Aff., **Ex. 1**; King Dep., p. 101, Ex. 10; Ackerstein Aff., **Ex. 8, 31**. See also Walter Tuvell v. Microsoft Corporation, U.S.D.C., D. Mass., No. 97-12286-NG, and 99-11082-NG.

**PLAINTIFF'S EMPLOYMENT WITH NETEZZA CORPORATION AND IBM**

4. On November 3, 2010, Plaintiff was hired by Netezza Corporation in the Performance Architecture Group, reporting directly to Daniel Feldman and reporting on a dotted line to Fritz Knabe. FAC ¶ 8.

5. In or around January of 2011, IBM acquired Netezza and Plaintiff, Mr. Feldman, and Mr. Knabe all became IBM employees. FAC ¶ 9; Deposition of Daniel Feldman ("Feldman Dep."), pp. 11-14; Ackerstein Aff., **Ex. 6**.

**PLAINTIFF'S CONFLICTS WITH MR. KNABE ON MAY 18 AND JUNE 8, 2011**

6. Until May 18, 2011, Plaintiff had no serious issues with either Mr. Feldman or Mr. Knabe. Pl. Dep., Day 1, pp. 144-45; Ackerstein Aff., **Ex. 1**.

7. On or about May 18, 2011, Mr. Knabe advised Mr. Feldman that Plaintiff had failed to complete a work assignment in a timely fashion. Mr. Feldman relayed Mr. Knabe's concern to Plaintiff, who described Mr. Knabe as a "liar." FAC ¶ 14; Pl. Dep., Day 2, pp. 21-27, Ackerstein Aff., **Ex. 2**; Deposition of Frederick C. Knabe ("Knabe Dep."), pp. 37-38, Ackerstein Aff., **Ex. 36**.

**MR. FELDMAN REASSIGNS PLAINTIFF TO A DIFFERENT PROJECT BECAUSE OF PLAINTIFF'S DIFFICULTY WORKING WITH MR. KNABE**

8. On June 8, 2011, Mr. Knabe asked Plaintiff about an outstanding work assignment in front of other employees and, according to Plaintiff's colleague Steve Lubars, who witnessed the incident, in the ensuing discussion voices were raised by both Plaintiff and Mr.

Knabe. FAC ¶ 15; Pl. Dep., Day 1, pp. 148-153, Ackerstein Aff., **Ex. 1**; Deposition of Lisa Due ("Due Dep."), pp. 141-142; Ackerstein Aff., **Ex. 9**.

9. On June 9, 2011, Mr. Knabe told Mr. Feldman that he did not think he could have a good working relationship with Plaintiff. On June 10, 2011, Mr. Feldman advised Plaintiff that he did not believe that Mr. Knabe and Plaintiff could continue working effectively together on the Wahoo project that Mr. Knabe was managing. FAC ¶ 17; Feldman Dep., pp. 51-53, 57-59, Ex. 9, Ackerstein Aff., **Ex. 6, 18**.

10. Therefore, Mr. Feldman assigned Plaintiff to a different project in place of another employee, Sujatha Mizar, and in turn assigned Ms. Mizar to work with Mr. Knabe on the Wahoo project. The switch did not result in any change in Plaintiff's pay or rank. FAC ¶¶ 17, 18; Feldman Dep., pp. 57-59, Ex. 9, Ackerstein Aff., **Ex. 6, 18**.

11. Plaintiff claims that Mr. Knabe's decision to complain to Mr. Feldman about Plaintiff's work on May 18, 2011, constituted discrimination against Plaintiff based on his age, sex, and race because he believes Mr. Knabe was lying about Plaintiff's work, which meant that "something bigger" was "at play" and "it had to be illegal." Pl. Dep. Day 2, pp. 27-28, Ackerstein Aff., **Ex. 2**.

12. Plaintiff claims that Mr. Feldman's decision to have him and Ms. Mizar switch project responsibilities constituted discrimination based on Plaintiff's disability, age, sex, and race because Plaintiff believes that Ms. Mizar, who is Asian, female, and younger than Plaintiff, is "far less qualified" than him. FAC ¶ 18, 19; Pl. Dep., Day 2, pp. 152-156, Ackerstein Aff., **Ex. 2**.

13. At the time, Plaintiff contended that he instead should have been replaced with a colleague (Ashish Deb), who was male, over 40, and Asian. King Dep., Ex. 9, Ackerstein Aff., **Ex. 30.**

14. On June 14, 2011, Mr. Feldman sent both Plaintiff and Ms. Mizar an email asking that they submit a daily report on their transition work. While Ms. Mizar submitted a transition report to Mr. Feldman that day, Plaintiff did not. The next day, June 15, 2011, Mr. Feldman sent Plaintiff an email reiterating his request for a daily report and clarifying that he required a report from both Plaintiff and Ms. Mizar. FAC ¶ 22; Feldman Dep., pp. 92-92, Ex. 13-15, Ackerstein Aff., **Ex. 6, 19, 20, 21**.

15. In response, on June 15, 2011, Plaintiff sent several emails to Mr. Feldman, and Human Resources Specialists Kelli-ann McCabe and Diane Adams, complaining that Mr. Feldman's request that Plaintiff file a daily report constituted "blatant" and "snide harassment/retaliation," even though Mr. Feldman was also requiring Ms. Mizar to complete such a report. FAC ¶ 23; Feldman Dep., pp. 84-89, Ex. 13-15, Ackerstein Aff., **Ex. 6, 19, 20, 21**.

16. On June 16, 2011, Plaintiff sent several emails to Ms. Adams and Ms. McCabe complaining of harassment by Mr. Feldman based on Mr. Feldman's decision to change his assignment and his request that Plaintiff submit weekly reports, and told Ms. Adams and Ms. McCabe that he believed it was infeasible for him to work with Mr. Feldman. FAC ¶¶ 24, 25; Due Tr. pp. 33-35, Ex. 1, Ackerstein Aff., **Ex. 9, 33**.

**IBM CONDUCTS INVESTIGATATION INTO PLAINTIFF'S WORK SITUATION**

17. On June 16, 2011, Ms. Adams forwarded an email from Plaintiff stating that he could not work with Mr. Feldman to Lisa Due, a Senior Case Manager in IBM's Human Resources Department. Ms. Due conducted an investigation by interviewing five individuals,

including Plaintiff, who described his experience with Mr. Feldman and Mr. Knabe as the equivalent of "torture" and "rape". After completing her investigation, Ms. Due concluded that Plaintiff's concerns were unsupported. Due Dep., pp. 33-37, 75, 114. Ex. 1, 3, Ackerstein Aff., **Ex. 9, 33, 34**.

18. Based on Ms. Due's findings, IBM determined that moving Plaintiff to another supervisor was not warranted. Due Tr. pp. 146-147; Ackerstein Aff., **Ex. 9**.

19. On June 29, 2011, Ms. Due sent Plaintiff an email informing him of the results of her investigation, and advised him of his appeal rights if he was dissatisfied with Ms. Due's findings. FAC ¶ 32; Due Dep., Ex. 12; Ackerstein Aff., **Ex. 35**.

**PLAINTIFF RECEIVES A WARNING FOR INAPPROPRIATE COMMUNICATIONS WITH HIS COLLEAGUES**

20. In early July of 2010, Plaintiff went on medical leave for an elective cosmetic surgery on his eye-lids, and then took a vacation before returning to work in early August of 2011. Pl. Dep. Day 1, p. 36; Ackerstein, Aff., **Ex. 1**.

21. On July 11, 2011, Mr. Feldman informed Plaintiff that Plaintiff's communication style in a July 6, 2011 email to Mr. Feldman and another colleague, Garth Dickie, was "the sort of thing you want to avoid." FAC ¶ 44; Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

22. Initially, Plaintiff sent an email to Mr. Feldman and Mr. Dickie apologizing for his use of language that could have been interpreted as offensive. Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

23. On July 20, 2011, Plaintiff sent Mr. Feldman and Mr. Dickie another email, retracting his earlier apology because he had concluded that "no apology was necessary" for the July 6, 2011 email. FAC ¶ 45; Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

24. On August 3, 2011, shortly after Plaintiff returned from medical leave, Mr. Feldman met with him to discuss his pending and future work assignments and to discuss Plaintiff's recent behavior, which Mr. Feldman characterized as inappropriate. FAC ¶¶ 46, 47.

25. During the August 3, 2011 meeting, Mr. Feldman also gave Plaintiff a Warning Letter for his disruptive conduct, including Plaintiff's July 2011 emails to Mr. Feldman and Mr. Dickie. FAC ¶ 48; Pl. Dep., Day 1, Ex. 9; Ackerstein Aff., **Ex. 11**. Plaintiff received no further discipline in connection with that matter.

26. On August 11, 2011, Plaintiff advised Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") leave due to a "sudden condition" and Ms. Dean responded by providing him with information concerning how to apply for STD leave. On August 15, Plaintiff informed Mr. Feldman that he was taking sick days until his request for short term disability was acted on. FAC ¶¶ 53, 54; Dean Dep., pp. 48-49, Ex. 3; Ackerstein Aff., **Ex. 5, 15**.

27. On or about August 18, 2011, Plaintiff submitted an Open Door complaint, which is an internal IBM mechanism by which an employee can raise a concern and request an investigation. Plaintiff's Open Door complaint was titled "Claims of Corporate and Legal Misconduct" and was submitted in two parts; the first part of the Complaint was 129 pages long and titled "Acts of Fritz Knabe," the second part of the Complaint was 153 pages long and titled "Acts of Dan Feldman." Due Dep., p. 76; Ackerstein Aff., **Ex. 9**.

28. Plaintiff estimated that he spent over 22 hours per day on these documents over the course of 2-3 weeks, and has spent at least 10 hours per week on his claims in this case ever since. Pl. Dep., Day 1, pp. 28-29; Ackerstein Aff., **Ex. 1**.

29. Russell Mandel, the Program Director for IBM's Concerns and Appeals, investigated Plaintiff's first Open Door complaint. On or around September 15, 2011, Mr. Mandel issued a 19-page report based on his interviews of nine people, including Plaintiff. The report concluded that Plaintiff was not subjected to any adverse or unfair employment actions. Deposition of Russell Mandel ("Mandel Dep."), p. 92; Ackerstein Aff., **Ex. 10**.

30. During Plaintiff's medical leave, on or around November 9, 2011, Plaintiff's counsel wrote Mr. Mandel a letter identifying Plaintiff's PTSD as a disability and requesting, as a reasonable accommodation, that Plaintiff report to a supervisor other than Mr. Feldman. FAC ¶ 80.

31. On November 23, 2011, IBM informed Plaintiff that it did not consider changing his management team to be a reasonable accommodation, but that it was receptive to hearing Plaintiff's proposals about restructuring his work as a possible accommodation and, further, that he was free to look for vacant positions using IBM's Global Opportunity Marketplace ("GOM"). Feldman Dep., p. 150, Ex. 31; Ackerstein Aff., **Ex. 6, 23**.

**PLAINTIFF IS GRANTED A SHORT TERM DISABILITY LEAVE BY IBM**

32. On or about August 15, 2011, Plaintiff provided a Medical Treatment Report ("MTR") to Ms. Dean, which indicated that Plaintiff suffered from a sleep disorder and stress reaction and that he was totally impaired for work. FAC ¶ 55; Deposition of Victoria Vazquez ("Vazquez Dep."), pp. 128-132 Ex. 2; Ackerstein Aff., **Ex. 37, 38**.

33. The August 15, 2011 MTR indicated that Plaintiff suffered severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities, and that Plaintiff suffered serious impairment in his ability to maintain attention, concentrate on a specific task and

complete it in a timely manner, set realistic goals, and have good autonomous judgment. Vazquez Dep., Ex. 2; Ackerstein Aff., **Ex. 38**.

34. On or about August 17, 2011, IBM approved Plaintiff's STD leave as a reasonable accommodation. FAC ¶ 56.

35. Plaintiff submitted another MTR dated September 9, 2011, which again indicated that he was totally impaired for work. Vazquez Dep., pp. 132-134, Ex. 3; Ackerstein Aff., **Ex. 37, 39**.

36. After receiving the September 9, 2011 MTR, Ms. Dean emailed Plaintiff and informed him that because the MTR indicated a Sleep Disorder and Acute Stress Reaction, it would have to be completed by a specialist, not his family physician (in Plaintiff's case, a nurse practitioner). In response, Plaintiff sent Ms. Dean three emails within 24 hours, challenging her request that his MTR be completed by a specialist. Ms. Dean informed Plaintiff that she would accept the September MTR by his physician for one month while she consulted with IBM's physician about Plaintiff's questions. Deposition of Kathleen Dean ("Dean Dep."), p. 83-84, Ex. 7; Ackerstein Aff., **Ex. 5, 16**.

37. Ms. Dean subsequently contacted Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, who explained that IBM's process for psychological disorders required an MTR form to be completed by a psychiatrist if an employee is out for 6-8 weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." Dean Dep., pp. 83-84, Ex. 7; Ackerstein Aff., **Ex. 5, 16**.

38. Ms. Dean conveyed Dr. Snyder's explanation to Plaintiff and informed him that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to

complete his MTR if he was not able to return to work in the next month. Dean Dep., Ex. 9; Ackerstein Aff., **Ex. 17**.

39. Plaintiff responded to Ms. Dean's request for proper medical certification by insisting that there was nothing a psychiatrist could do to help him because there was nothing wrong with him and characterized the Short Term Disability process as intentionally psychologically abusive. Dean Dep., Ex. 9; Ackerstein Aff., **Ex. 17**.

40. Given Plaintiff's resistance to seeing a psychiatrist, Ms. Dean ultimately informed him that IBM would accept a completed MTR from the Licensed Social Worker ("LSW") who treated him. Snyder Dep., pp. 79-84, Ex. 6; Ackerstein Aff., **Ex. 4, 14**.

41. Plaintiff subsequently provided IBM with MTRs completed by Stephanie Ross, the LSW he was seeing, for October and November of 2011, all stating that Plaintiff was totally impaired for work. FAC ¶ 65; Deposition of Stephanie Ross ("Ross Dep."), pp. 70-80, Ex. 4, 5; Ackerstein Dep., **Ex. 7, 26, 27**.

42. The October MTR completed by Ms. Ross indicated that Plaintiff suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety." Ms. Ross also rated Plaintiff as having serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising. Ross Dep., pp. 73-74, Ex. 4; Ackerstein Aff., **Ex. 7, 26**.

43. In or around that time, Plaintiff was in close proximity to IBM on a weekend and stopped at a gas station with his wife and daughter and proceeded to "blow up" and hit the dashboard, the interior of the roof of the car and door frame as hard as he could and then yelled as loud as he could for as long as he could, describing himself as "full-blown crazy" because he

was "triggered by being that close to [IBM] and that gas station." Pl. Dep., Day 2, pp. 127-128; Ackerstein Aff., **Ex. 2**.

44. The MTR completed by Ms. Ross in November identified for the first time PTSD as Plaintiff's purported diagnosis, and indicated that Plaintiff was still totally impaired for work. The MTR also indicated that Plaintiff continued to have serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities, and continued to have serious impairment as well with respect to managing conflict with others, negotiating, compromise, setting realistic goals, and having good autonomous judgment. Ross Dep., pp. 75-77, Ex. 5; Ackerstein Aff., **Ex. 7, 27**.

45. Ms. Ross testified during her deposition that, at the time she completed the MTR, in November 2011, "any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Plaintiff] was triggered into a state that involved hyper-reactivity, hyper-arousal. He was in a state of very difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded." Ross Dep., p. 79; Ackerstein Aff., **Ex. 7**.

46. Ms. Ross further testified that, at the time, she was concerned for his mental health stability and believed that just going into the building where he worked and seeing Mr. Feldman or Mr. Knabe could trigger his obsessive thoughts, depression, or other strong reactions. Ross Dep., p. 80; Ackerstein Aff., **Ex. 7**.

47. Plaintiff provided another MTR on December 16, 2011, again completed by Ms. Ross, which stated that Plaintiff was "unable to return to previous setting with current supervisor and setting – PTSD symptoms exacerbate immediately" and continued to rate him "totally

impaired for work," adding "for current job assignment." FAC ¶ 96; Ross Dep., pp. 86-89, Ex. 6; Ackerstein Aff., **Ex. 7, 28**.

48. In the December 16 MTR, Ms. Ross indicated that Plaintiff had serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, and setting realistic goals and having good autonomous judgment. Ross Dep., Ex. 6; Ackerstein Aff., **Ex. 28**.

49. Ms. Ross did not affirmatively check off the section of the MTR that asked if the employee could work with temporary modifications but did write that "only modification that would be possible is a change of supervisor and setting." This was the first time Plaintiff submitted forms from a health care provider specifically requesting a change in supervisor as an accommodation. Ross Dep., Ex. 6; Ackerstein Aff., **Ex. 28**.

50. Ms. Ross testified that it was only "possible" that a new supervisor and setting would enable Plaintiff's return to work. Ross. Dep., p. 88; Ackerstein Aff., **Ex. 7**.

51. For his part, Plaintiff could not and did not identify anyone who could serve as his manager in place of Mr. Feldman. Pl. Dep., Day 2, pp. 97-98; Ackerstein Aff., **Ex. 2**.

52. In or around that time, Ms. Ross explained that Plaintiff was "unable to drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical," a description she included in Plaintiff's appeal of the denial of long term disability benefits from MetLife, specifically writing that Plaintiff's "symptoms would return if [he] had to drive near the facility, and he would have to pull over and manage intense anxiety symptoms and emotional overwhelm." Ross Dep., pp. 143, 146-148, Ex. 28; Ackerstein Aff., **Ex. 7, 29**.

53. While Plaintiff was on medical leave, IBM restricted Plaintiff's VPN access to IBM's internet and Plaintiff's access to IBM facilities for the pendency of his leave given IBM's position that because Plaintiff was on STD leave and not working, there was no need for access to those systems. FAC ¶¶ 62, 66, 95; Feldman Dep., p. 158, Ex. 37; Ackerstein Aff., **Ex. 6, 24**.

54. During this time, Plaintiff also continued emailing complaints using IBM's Lotus Notes to Human Resources and other IBM employees and executives, including the CEO of IBM. IBM subsequently restricted Plaintiff's access to Lotus Notes and IBM's internal corporate network based on his misuse of those systems. FAC ¶¶ 123, 125.

55. Plaintiff exhausted his STD leave on January 25, 2012, at which time he remained out of work on an approved, unpaid medical leave. FAC ¶ 110.

56. On or around April 25, 2012, IBM learned that Met Life denied Plaintiff's claim for Long Term Disability benefits and informed Plaintiff that they would continue to accommodate him by granting him unpaid leave while he appealed the denial of Long Term Disability benefits. FAC ¶ 132.

**PLAINTIFF'S APPLICATION FOR ANOTHER POSITION WITH IBM**

57. On December 8, 2011, Plaintiff was interviewed for an open position he had applied for through IBM's Global Opportunity Marketplace ("GOM") with Christopher Kime, one of the decisionmakers tasked with filling the position. Prior to the interview, Plaintiff advised Mr. Kime that he had a "completely clean bill of health" and was "symptom free," notwithstanding the fact that Ms. Ross submitted MTRs which described him as "totally impaired" for work in both November and December of 2011. Deposition of Christopher Kime ("Kime Dep."), pp. 58-59, Ex. 3; Ackerstein Aff., **Ex. 3, 12;** Ross Dep., Ex. 5, 6; Ackerstein Aff., **Ex. 27, 28**.

58. Mr. Kime, for his part, had no knowledge of Plaintiff's medical condition nor did he make any inquiry into the circumstances surrounding Plaintiff's STD leave. Kime Dep., p. 60; Ackerstein Aff., **Ex. 3**.

59. After the interview, Mr. Kime informed Plaintiff that he had to discuss the interview with his management team and that he would keep Plaintiff posted on any developments. FAC ¶¶ 85, 88, 93, 94.

60. While considering Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance review history but was unable to find anything on IBM's internal website and therefore reached out to Mr. Feldman, who explained that Plaintiff's leave had prevented Mr. Feldman from providing Plaintiff with a performance review. Kime Dep., p. 114; Ackerstein Aff., **Ex. 3**.

61. When Mr. Kime asked him about Plaintiff's performance, Mr. Feldman informed him that Plaintiff had the technical skills for his position but had difficulties working with other people in his group and had been moved from one team to another and still had not found a role that appeared to work for him and the team. Kime Dep., pp. 98-100, 111-112; Ackerstein Aff., **Ex. 3**.

62. Mr. Kime testified that at no point during his telephone conversation with Mr. Feldman did Mr. Feldman mention that Plaintiff had filed any internal complaints with IBM regarding harassment or discrimination and that he was not aware of Plaintiff's complaints at that time. Kime Dep., pp. 115-116; Ackerstein Aff., **Ex. 3**.

63. Mr. Kime was not aware at the onset of the interviewing process that the fact that Plaintiff was on STD leave would prevent him from providing a performance review, known as a

PBC, to present to his management chain for a discussion on Plaintiff's qualifications. Kime Dep., p. 128; Ackerstein Aff., **Ex. 3**.

64. On January 6, 2012, Mr. Kime emailed Plaintiff to tell him that he would not be offering him the open position. Mr. Kime testified that he could not move forward with taking Plaintiff directly from short term disability leave based on the difficulty of assessing his work performance without any PBC. Mr. Kime also explained to Plaintiff that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." FAC ¶¶ 97-98; Kime Dep., p. 128, Ex. 11; Ackerstein Aff., **Ex. 3, 13.**

65. Mr. Kime testified that he concluded that Plaintiff was not an appropriate candidate for the position because Plaintiff appeared to be interested in development work, while the position involved software maintenance for a mature product and involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in such an environment. As such, Mr. Kime concluded that Plaintiff would not be a good fit for the position. Kime Dep., pp. 142-145; Ackerstein Aff., **Ex. 3**.

66. On January 11, 2012, Plaintiff emailed Mr. Feldman and accused him of retaliation based on his failure to receive an offer for the position with Mr. Kime in Littleton and asked Mr. Feldman to provide him with other ideas for a reasonable accommodation. FAC ¶ 100.

67. Mr. Feldman responded to Plaintiff's request by offering a variety of accommodations, including having someone other than Mr. Feldman provide Plaintiff with performance feedback, allowing Plaintiff to leave work as necessary to attend any doctor's

appointments, and ongoing access to GOM to look for open positions under a different supervisor. FAC ¶ 105.

68. Plaintiff rejected all of Mr. Feldman's proposed accommodations and, on January 23, 2012, Plaintiff's counsel requested as a reasonable accommodation that IBM transfer Plaintiff to the position in Littleton with Mr. Kime, for which he had previously applied and been rejected, and which had been reposted after the first posting for the position expired. FAC ¶¶ 106, 108.

69. IBM subsequently denied Plaintiff's request for reassignment, stating its belief that Plaintiff was capable of performing his current position under Mr. Feldman and again proposing alternative accommodations, including receiving feedback from a different manager. FAC ¶ 109.

70. Plaintiff independently applied for the reposted position with Mr. Kime on January 25, 2012, but was not considered for the position for the same reasons he had not been selected for the identical, previously-posted position. FAC ¶ 112; Kime Dep., pp. 150-151; Ackerstein Aff., **Ex. 3**.

71. On February 15, 2012, John Metzger, Mr. Feldman's supervisor, wrote to Plaintiff directly and offered him as an accommodation the possibility of receiving his performance evaluations from Mr. Metzger directly, instead of Mr. Feldman. FAC ¶ 117.

72. The next day, February 16, 2012, Plaintiff rejected Mr. Metzger's proposed accommodation, claiming that he was medically incapable of returning to work under Mr. Feldman and opting instead to remain out on medical leave. FAC ¶ 118.

**PLAINTIFF'S NEW EMPLOYMENT AND TERMINATION FROM IBM**

73. While Plaintiff was communicating with Mr. Feldman and Mr. Metzger about potential accommodations, Plaintiff was also interviewing for a full-time job with Imprivata, from whom he received an offer of employment on February 28, 2012, and for whom he began working on March 12, 2012, while still on medical leave from IBM. Plaintiff did not disclose this to IBM. Pl. Dep., Day 1, pp. 95-97, 102-103; Ackerstein Aff., **Ex. 1**.

74. On May 7, 2012, while Plaintiff was still out on leave, Ms. Adams wrote Plaintiff asking him to confirm that he was not working for EMC Corporation while on medical leave from his employment with IBM. Plaintiff responded by accusing IBM of defamation and asking for evidence that he was violating IBM's Guidelines. FAC ¶¶ 134, 135.

75. IBM's Business Conduct Guidelines require employees on leave to inform IBM if they begin working for another company so IBM can run a conflict check and ensure that the company is not a competitor. FAC ¶ 140.

76. In response, Ms. Adams wrote to Plaintiff that his LinkedIn page listed EMC as his current employer and asked him to confirm that he was not currently working for EMC. FAC ¶ 136.

77. Plaintiff responded by informing Ms. Adams that he was not employed by EMC, and that by continuing to ask him if he was, Ms. Adams was harassing and defaming him. Ms. Adams responded by thanking Plaintiff for his response and asked Plaintiff to advise where he has been working during his leave. Plaintiff responded to Ms. Adams's request by telling her that he was in compliance with his contractual obligations and refusing to provide her with the name of the company he began working for while on unpaid leave from IBM. When Ms. Adams responded to Plaintiff that IBM's Personal Leave of Absence Policy required him to tell IBM if

he was working while on leave, Plaintiff accused Ms. Adams of retaliation and harassment and continued to refuse to provide the name of his new employer. FAC ¶¶ 139 – 141.

78. On May 15, 2012, Ms. Adams informed Plaintiff that he had to identify the company he was working for by 5:00 PM the following day or IBM would be forced to terminate his employment. FAC ¶ 142.

79. Plaintiff continued to refuse to provide IBM with the name of the company he was working for while on medical leave and, on May 17, 2012, Plaintiff's employment from IBM was terminated based on his refusal to advise IBM of where he was working, despite repeated requests that he do so. FAC ¶¶ 143, 145; Feldman Dep., Ex. 44; Ackerstein Aff., **Ex. 25**.

80. IBM later learned that Plaintiff interviewed for a job with Imprivata, which develops and sells software products, in January of 2012, received an offer of employment on February 28, 2012, and began working for Imprivata on March 12, 2012, while still on medical leave from IBM. Pl. Tr. Day 1, pp. 95-97, 111; Ackerstein Aff., **Ex. 1**.

81. Plaintiff's salary at Imprivata is greater than what he was earning at IBM. Plaintiff is claiming lost wages of $21,510. Pl. Dep., Day 1, pp. 97-102; Ackerstein Aff. 1; Plaintiff's Automatic Disclosures, Ackerstein Aff., **Ex. 40**.

Respectfully submitted,

INTERNATIONAL BUSINESS MACHINES, INC.,

By its attorneys,

/s/ Joan Ackerstein
Joan Ackerstein (BBO No. 348220)
Matthew A. Porter (BBO No. 630625)
JACKSON LEWIS P.C.
75 Park Plaza, 4th Floor
Boston, MA 02116
(617) 367-0025
(617) 367-2155 fax
ackerstj@jacksonlewis.com
porterm@jacksonlewis.com

**CERTIFICATE OF SERVICE**

This is to certify that on December 15, 2014, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Matthew A. Porter
Jackson Lewis P.C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| WALTER TUVELL,<br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES, INC.<br>Defendant. | C.A. No. 13-CV-11292-DJC |

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC.**

Pursuant to Fed. R. Civ. P. 56, Defendant International Business Machines, Inc. ("IBM") submits this Memorandum of Law in support of its Motion for Summary Judgment. For the reasons set forth below, IBM submits that there are no genuine issues of material fact and IBM is entitled to judgment in its favor on all Counts of the First Amended Complaint as a matter of law.

## INTRODUCTION

On June 6, 2013, Plaintiff filed a 31-page, 199-paragraph, 8-count First Amended Complaint ("FAC")[1], alleging a myriad of discrimination and retaliation claims, including handicap, race, gender, age, "or any combination thereof," arising out of an employment relationship with IBM that lasted for less than a year and a half. Plaintiff performed actual work for just over seven months, with the rest of his tenure spent on IBM-approved leaves of absence (even though, unbeknownst to IBM, he was working for an IBM competitor during the last two months of his employment).

[1] The Eight Counts in the FAC are as follows: (I) "Failure to Engage in the Interactive Process – ADA and Chapter 151B"; (II) "Failure to Reasonably Accommodate Plaintiff – ADA and Chapter 151B"; (III) "Failure to Assist In Helping Mr. Tuvell Obtain the Reasonable Accommodation of Reassignment to a Vacant Position for Which He Was Qualified – ADA and Chapter 151B"; (IV) "Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 – ADA and Chapter 151B"; (V) "Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 On the Basis of Handicap Discrimination, Retaliation For Availing Himself of the Reasonable Accommodation of Medical Leave, Retaliation for Engaging in Other Protected Conduct, Race, Gender, Age, and/or Any Combination Thereof – ADA and Chapter 151B"; (VI) "Tangible Job Actions on Account of Handicap, Retaliation, Race, Age, and/or Any Combination Thereof – ADA and Chapter 151B"; (VII) "Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – ADA and Chapter 151B"; and (VIII) "Failure to Investigate and Remediate Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – Chapter 151B and the ADA".

While Plaintiff has sought to complicate this matter, the undisputed facts are simple. Plaintiff's employment began in January 2011, and was uneventful until May 2011, when a manager whom Plaintiff was supporting, Fritz Knabe, expressed concern about an aspect of Plaintiff's work product to Plaintiff's direct manager, Dan Feldman. When Mr. Feldman raised the issue, Plaintiff became defensive and denied any error on his part. A few weeks later, when Mr. Knabe asked Plaintiff about another assignment, Plaintiff became very upset at what he perceived as criticism of his work. Because it was clear that Plaintiff and Mr. Knabe could not work effectively together, Mr. Feldman assigned Plaintiff to another project, reporting to Mr. Feldman. This was not a demotion, as Plaintiff alleges: his title, salary, and terms of employment all remained unchanged.

Plaintiff was unhappy with Mr. Feldman's handling of this situation, and shortly after receiving a warning from Mr. Feldman, he took a leave from which he did not return. Plaintiff thereafter submitted over 500 pages of complaints to Human Resources, claiming that Messrs. Knabe and Feldman were "liars and bullies," and describing what had occurred as "torture" and "rape." SOF[2] ¶ 17. Plaintiff's internal complaints were first investigated by Senior HR Case Manager Lisa Due, and then by Concerns & Appeals Program Director Russell Mandel, both of whom concluded that Plaintiff's claims were unfounded. SOF ¶¶ 17, 29.

Plaintiff remained on leave from IBM until May of 2012, when he was terminated for repeatedly refusing to tell IBM where he had been working while on his IBM leave of absence. Plaintiff's personal LinkedIn webpage indicated that he was working for EMC, an IBM competitor. While Plaintiff denied working for EMC, he refused to tell IBM where he was working. As a result he was terminated. In fact, IBM learned that he had actually been working for another competitor, Imprivata, since March of 2012, while on his leave from IBM.

Over the course of extensive discovery, Plaintiff has produced no evidence that he was subjected to discrimination or retaliation based upon his alleged handicap, race, age, gender, "or any

[2] "SOF" refers to IBM's Statement of Material Facts as to Which There Is No Genuine Issued to be Tried, which is being filed herewith.

combination thereof." Plaintiff remained on leave with the option of returning to his job until IBM terminated him because he refused to tell IBM where he was working (even though at the time he was an IBM employee on a leave of absence), and IBM had expressed concerns about his working for a competitor. In sum, there was nothing discriminatory or retaliatory about any of IBM's actions towards Plaintiff, and thus judgment should enter for IBM.

## ARGUMENT & AUTHORITIES

It is settled that summary judgment is proper if there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The mere existence of some alleged factual dispute will not defeat a properly supported summary judgment motion, however. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-252 (1986). Rather, the plaintiff must "affirmatively point to specific facts that demonstrate the existence of an authentic dispute," Melanson v. Browning-Ferris Indus., 281 F.3d 272, 276 (1st Cir. 2002), and cannot avoid summary judgment merely by speculating that his treatment by his employer was based on impermissible considerations of handicap, age, or gender. Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(party resisting summary judgment cannot rely on hearsay, conjecture, or "unsupported statements of belief"); Dorman v. Norton Co., 64 Mass. App. Ct. 1, 10 (2005)(affirming summary judgment on discrimination claim).

As set forth below, the undisputed facts demonstrate that Plaintiff cannot make out a *prima facie* case of discrimination or retaliation of any kind, nor can he refute IBM's legitimate, nondiscriminatory/nonretaliatory reasons for its actions regarding his employment. Therefore, his claims must fail as a matter of law.

### I. PLAINTIFF'S FAILURE TO ACCOMMODATE CLAIMS MUST BE DISMISSED BECAUSE HE WAS NOT A QUALIFIED HANDICAPPED PERSON AND IBM REASONABLY ACCOMMODATED HIS ALLEGED DISABILITY.

The gravamen of Counts I-V is that IBM purportedly failed to accommodate Plaintiff's alleged disability in violation of M.G.L. c. 151B and the ADA, either by changing his supervisor or

his job. See Tobin v. Liberty Mutual, 553 F.3d 121, 126 n.4 (1st Cir. 2009)(claim for failure to engage in "interactive process" is actually subsidiary theory of "reasonable accommodation argument"). These claims must fail because Plaintiff was not a qualified handicapped person within the meaning of c. 151B or the ADA, and because IBM engaged in the interactive process and provided Plaintiff with reasonable accommodations for his alleged disability.

**A. Background on Plaintiff's Alleged Disability.**

Plaintiff's asserted disability is based on a purported diagnosis of Post-Traumatic Stress Disorder ("PTSD").[3] SOF ¶¶ 2-3. The "traumatic" event that precipitated Plaintiff's alleged PTSD had nothing to do with IBM. Rather, it was the alleged withdrawal of a job offer from Microsoft in 1997, which he described as a "rape" of him and his family. Id. Plaintiff alleges that his PTSD was then "triggered" while working at IBM by the two relatively mundane workplace interactions described above, in which Plaintiff received mild constructive criticism regarding his work, which he again described as a "rape" and the equivalent of being "tortured." SOF ¶ 17. Specifically, in May of 2011, Mr. Knabe, who was running a development project on which Plaintiff was assisting, advised Mr. Feldman that Plaintiff had not completed an assignment in a timely fashion. SOF ¶ 7. When Mr. Feldman asked Plaintiff about the issue, Plaintiff flatly denied any error, and called Mr. Knabe a "liar." Id. A few weeks later, Mr. Knabe asked Plaintiff about another work assignment, and during that discussion both Mr. Knabe and Plaintiff raised their voices. SOF ¶ 8.[4]

In light of these events, in mid-June of 2011, Mr. Knabe told Mr. Feldman that he did not think he and Plaintiff could work together effectively. As a result, Mr. Feldman assigned Plaintiff to a project reporting to him, while another employee, Sujatha Mizar (who is female and Asian), was assigned to work on Mr. Knabe's project. SOF ¶ 10. There was nothing adverse about this

[3] For purposes of this Motion only, IBM is not challenging Plaintiff's claimed disability because it is not material to the disposition of this Motion. Plaintiff was examined by an expert, Dr. Ronald Schouten of Harvard Medical School, who concluded that while Plaintiff exhibits symptoms of one or more personality disorders, he does not suffer from PTSD. Regardless of the label used, Plaintiff is not a qualified handicapped individual.

[4] Plaintiff contends that only Mr. Knabe raised his voice, which is contradicted by a co-worker who heard both raising their voices. SOF, ¶ 9. That is not material dispute for purposes of this Motion, however, because regardless of whose voice was raised the incident itself certainly did not rise to the level of harassment or discrimination of any kind.

switch in assignments, which did not impact Plaintiff's pay, title, or terms of employment. Rather, Mr. Feldman was simply trying to create productive working relationships between IBM colleagues. Plaintiff, however, refused to accept the transition, and unleashed a torrent of inappropriate and increasingly hostile emails at Mr. Feldman and Human Resources during June and early July of 2011, and eventually received a written warning from Mr. Feldman in early August of 2011. SOF ¶¶ 15-17, 25.[5]

Shortly thereafter, in mid-August 2011, Plaintiff took a medical leave of absence from which he never returned, claiming that he was totally impaired from working. SOF ¶ 26. According to his provider's report, Plaintiff had a severe impairment in his ability to manage conflicts with others and participate in group activities, and a serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. SOF ¶¶ 32-33.

While Plaintiff told Human Resources that he could not work with Mr. Feldman, the medical documentation Plaintiff provided stated that he could not work at all, did not provide any estimate of when Plaintiff might be able to return to work, and did not propose any modifications to enable that return. SOF ¶¶ 32-36, 41-52. Indeed, Plaintiff's Medical Treatment Reports ("MTR") for September, October, and November of 2011 all stated unequivocally that Plaintiff was totally impaired to work and failed to suggest any modifications that would enable Plaintiff to return to work. Id. In December of 2011, Plaintiff submitted a MTR from Stephanie Ross, a social worker who has treated him for over 20 years, stating that he continued to be totally impaired from working but adding the contradictory caveat, "for current job assignment." SOF ¶ 47. The December MTR continued to note that Plaintiff had serious impairment in multiple areas, including getting along

[5] Plaintiff was out of the office for most of July of 2011, first on a medical leave of absence for cosmetic surgery, followed by a previously scheduled vacation. He returned briefly in August before going on another leave of absence from which he never returned. SOF ¶ 19.

well with others without behavior extremes, managing conflicts with others, interacting in group activities, and having good autonomous judgment. SOF ¶ 48.[6]

Further, Plaintiff's own testimony demonstrates his inability to work for IBM in any capacity, as he admitted that during this time period he was unable even to be in close proximity to the IBM facilities. SOF ¶ 43. Specifically, Plaintiff testified that in or around December of 2011, he happened to be near the IBM facilities on a weekend and stopped with his wife and daughter at a gas station. This was the gas station he usually patronized while commuting to IBM. According to Plaintiff, because he was "triggered by being that close to [IBM] and that gas station," he proceeded to "blow up" and hit the dashboard, the interior of the roof of the car and the door frame as hard as he could, and then yelled as loud as he could for as long as he could, describing himself as "full-blown crazy." Id. Again, he was not even interacting with anyone from IBM at this point; merely being near IBM's facilities triggered this violent episode.

In sum, while Plaintiff makes much of his demand for a new supervisor as a reasonable accommodation that would have enabled him to return to work at IBM, the MTRs from Plaintiff's medical providers and his own admissions flatly refute that assertion.

**B. Plaintiff Is Not A Qualified Handicapped Person.**

To prevail on Count II, his failure to accommodate claim, Plaintiff must show that: "(1) he is a handicapped person within the meaning of the statute; (2) he is qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) the employer knew of his disability but did not reasonably accommodate it upon a request." Henry v. United Bank, 686 F.3d 50, 59-60 (1st Cir. 2012); Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010)(reciting the legal standard for a failure to accommodate claim under the ADA and c. 151B). Plaintiff must first demonstrate that he is a qualified handicapped person, that is, one who "is capable of performing

[6] While the December MTR indicated that Plaintiff could return to work if he had a different supervisor in a different setting, Ms. Ross testified that it was only "possible" that a new supervisor and setting would enable Plaintiff's return to work. SOF ¶ 50.

the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." G.L. c. 151B, § 1(16); see Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 381-384 (1993).

In determining whether an individual is able to perform the "essential functions" of his job and is, thus, a qualified handicapped person, courts have looked to, among other things, an individual's own characterization of his disability and the findings of the individual's physician. Beal v. Board of Selectman, 646 N.E.2d 131, 136 (1995)(plaintiff's own assertion that she could not return to work and doctor's statement of permanent disability supported employer's contention that she was unable to perform essential functions of job); Pesterfield v. Tennessee Valley Authority, 941 F.2d 437, 442 (6th Cir. 1991)(determination that employee was not "qualified" individual under Rehabilitation Act supported by employee's doctor's medical opinion that employee was incapable of functioning if there was slightest hint of criticism).

Plaintiff cannot succeed on his claim of disability discrimination because he has not established that he was capable of performing his job with or without a reasonable accommodation. Instead, the evidence provided by Plaintiff's own medical providers, as well as Plaintiff's own testimony, establishes that he was totally impaired to work from August through December of 2011, after which time he remained on leave while applying for long term disability benefits. Indeed, by his own admission Plaintiff could not even be in the vicinity of IBM without becoming "full-blown crazy" and engaging in violent outbursts. SOF ¶ 43. Because Plaintiff was certified as "totally incapacitated to work," he was unable to perform any aspects of his or any other job and thus not a qualified handicapped person. See August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992)(plaintiff's statement on disability insurance forms that he was totally disabled along with psychiatrist's statements demonstrate that plaintiff was not capable of performing essential functions of job); Beal, 646 N.E.2d at 137 (police officer not a qualified handicapped person

because her inability to respond to stressful situations rendered her unable perform the essential functions of job).

Moreover, from January through May of 2012, despite not providing any additional medical forms to IBM, aside from notification that he was applying for long term disability benefits, Plaintiff refused to return to his job at IBM. SOF ¶¶ 55-56, 67-72. Plaintiff's refusal – or inability – to return to his position rendered him incapable of performing the essential functions of his job. Mulloy v. Acushnet Co., 460 F.3d 141, 150 n. 5 (1st Cir. 2006)("Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise."). As a result, Plaintiff was not, as a matter of law, a "qualified handicapped person" and his disability discrimination claims under c. 151B and the ADA must be dismissed.

**C. IBM Provided Plaintiff With A Reasonable Accommodation.**

Even assuming *arguendo* that Plaintiff were a qualified handicapped person, his failure to accommodate claims cannot succeed for the simple reason that *IBM granted him a reasonable accommodation when it permitted him to take medical leave until such time as he was able to return to his position.* SOF ¶ 55. Plaintiff was not terminated, nor did he suffer any other adverse actions, as a result of his extended leave of absence due to his claimed disability. Rather, IBM still considered Plaintiff to be an employee even after, unbeknownst to IBM, Plaintiff had taken a permanent, full-time position with an IBM competitor while Plaintiff was still claiming to be disabled and seeking long term disability benefits from IBM. SOF ¶¶ 73-81.[7] In addition to granting him extended medical leave, IBM made a further attempt to reasonably accommodate Plaintiff by offering to have him receive his performance reviews from a different manager (Mr. Feldman's manager John Metzger), while also giving him the continued ability to take leave for

[7] Plaintiff's eventual termination had nothing to do with his purported disability; rather, he was ultimately terminated after he refused to respond to IBM's inquiries about the identity of his employer, and whether it was an IBM competitor, while he was still employed at IBM. SOF ¶ 79.

medical appointments whenever necessary. SOF ¶¶ 67, 71. Plaintiff, however, continued to insist that the only accommodation he would accept was a new supervisor and/or transfer to a new position. SOF ¶ 72.

Merely because Plaintiff insisted that a new supervisor was the only accommodation he would accept does not make his unilateral demand a required or reasonable accommodation as a matter of law. Neither the ADA nor c. 151B entitles a disabled employee to the accommodation of his choice, including that of a reassignment to a new supervisor. See Bryant v. Caritas Norwood Hospital, 345 F. Supp. 2d 155, 170 (D. Mass. 2004)(ADA "does not require the employer to grant its disabled employee's accommodation of choice, even if it is reasonable one, and instead provides the employer with 'the ultimate discretion to choose between effective accommodations'"); Litovich v. Somascan, Inc., 2008 U.S. Dist. LEXIS 108627 at * 25 (D. Mass. Dec. 17, 2008)(a disabled employee is "not entitled to the accommodation of her choice, but only to a reasonable accommodation"); Darian v. University of Massachusetts Boston, 980 F. Supp. 77, 89 (D. Mass. 1997)(nursing student's refusal to accept university's reasonable accommodation in lieu of the accommodation she requested doomed her failure to accommodate claim).

On this point, the U.S. Supreme Court's analogous decision in Ansonia Bd. of Educ. v. Philbrook is instructive. There, the Court examined Title VII's religious accommodation clause, which mirrors the ADA's reasonable accommodation clause, to determine whether a school was obligated to provide a teacher with the accommodation of his choice, instead of the unpaid leave the school allowed. Philbrook, 479 U.S. 60, 68-69 (1986). The Second Circuit had ruled that, while the employer's unpaid leave policy was a reasonable accommodation, Title VII required the employer to accept the employee's requested accommodation unless it posed an undue hardship. Id. at 66. The Court disagreed, explaining that "[b]y its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."

Id. Elaborating based on statutory language nearly identical to that found in the ADA, the Court explained:

> [t]he employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.' 42 U.S.C. 2000e(j). Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. . . . the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.

Id. at 68-69 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)). The Court also noted that unpaid leave was likely a reasonable accommodation because "generally speaking, the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either the employment opportunities or job status." Id. at 71. The bottom line is that IBM provided Plaintiff with a reasonable accommodation and, as a matter of law, it was not obliged to provide Plaintiff with the accommodation of his choice. Therefore, IBM complied with its obligations under the ADA and c. 151B and Plaintiff's failure to accommodate claims must be dismissed.

**D. Plaintiff's Demand For A New Supervisor Was Not A Reasonable Accommodation.**

Laying aside the fact that Plaintiff was not entitled to the accommodation of his choice, Plaintiff's insistence on a new supervisor was not a reasonable accommodation as a matter of law.[8] See Cailler v. Care Alternatives of Massachusetts, LLC, 2012 U.S. Dist. LEXIS 39414 at *23 (D. Mass. March 23, 2012)("A reasonable accommodation provided to an employee with a handicap is to allow her to perform the essential functions 'of the position involved,' . . . *i.e.*, the plaintiff's original position."); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 384 (2nd Cir. 1996)(holding that employee's request for a new supervisor was not required under the ADA).

[8] In addition to not being reasonable as a matter of law, Plaintiff himself did not and could not identify anyone who could appropriately serve as his manager in place of Mr. Feldman. SOF ¶ 51.

In recognizing an employer's right to define the essential functions of a job, including reporting to a particular supervisor, the Wernick court explained that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." Id.; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 33, (EEOC Notice No. 915.002)("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation."); Weiler v. Household Finance Corp., 101 F.3d 519, 526 (7th Cir. 1996)(ruling that the ADA does not require an employer to transfer an employee to work for another supervisor, or to transfer the supervisor); Bradford v. City of Chicago, 121 Fed. Appx. 137, 139 (7th Cir. 2005)(holding that employer was not required to change employee's supervisor as a reasonable accommodation even though that supervisor exacerbated employee's preexisting bipolar disorder). Moreover, even if a change in supervisor had been required, IBM in fact offered Plaintiff the accommodation of having Mr. Metzger provide him with his performance reviews, instead of Mr. Feldman. Plaintiff, however, refused this proposed reasonable accommodation as well.

In sum, Plaintiff's demand for a new supervisor – at the same time that he provided certifications indicating he was wholly disabled and unable to work – was not a reasonable accommodation as a matter of law under either c. 151B or the ADA.

### E. IBM Was Not Required To Transfer Plaintiff To An Open Position For Which He Was Not Qualified.

In Counts III, IV, and V, Plaintiff claims that he was denied the reasonable accommodation of transfer to an open position based on his request to be transferred to a different position within IBM. As with Plaintiff's demand for a new supervisor, to the extent that Plaintiff is claiming that he was entitled to a transfer to a different position, the Supreme Judicial Court has ruled that assignment to a new position is not a "reasonable accommodation" under c. 151B. See Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 336 (Mass. 2010)(citing Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 454 (2002)(reasonable accommodation does not require employer to

"fashion a new position")); Beal, 419 Mass. at 541-542 (employer may refuse to accommodate handicap that "necessitates the substantial modification of employment standards"); Cox, 414 Mass. at 390 ("reasonable accommodation does not include waiving or excluding an inability to perform an essential job function"). Accordingly, Plaintiff's claim that IBM was required to transfer him to an open position as a reasonable accommodation under c. 151B is not supported by Massachusetts law and summary judgment should be entered as to that claim.

Under federal law, "reassignment to a vacant position" may be a reasonable accommodation in certain circumstances, but only if the employee is qualified for the position. 42 U.S.C. §§ 12111(9),(10)(B). While courts are split on how active employers must be in assisting a *qualified* handicapped person to relocate to an open position within the company, no court has held that an employer is required to relocate an employee to an open position if that employee is not capable of performing the essential functions of the position. Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012)(accommodation not reasonable where employee cannot demonstrate it would enable him to perform essential functions of job); Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 24, (EEOC Notice No. 915.002)("An employee must be 'qualified' for the new position").

In the present case, on December 8, 2011 Plaintiff applied for a position with Christopher Kime's group (the "SWG-0436579" position). SOF ¶ 57. In the course of evaluating Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance history on IBM's internal website but was unable to locate it, later learning that Plaintiff's leave prevented his supervisor from giving him a performance review. SOF ¶ 60. Mr. Kime then contacted Mr. Feldman in an effort to get an idea about Plaintiff's work performance history at IBM and learned of Plaintiff's difficulties working with other people in Mr. Feldman's group. SOF ¶ 61. After reviewing his credentials, Mr. Kime concluded Plaintiff was not an appropriate candidate for the position because Plaintiff appeared to be more interested in development work than the position offered, which was more of a software

maintenance role for a mature product, and because the position involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in that setting. SOF ¶ 62-65. None of that had anything to do with Plaintiff's alleged disability. Id. Given that he was deemed to be not qualified for the position with Mr. Kime, IBM was under no obligation to transfer Plaintiff to a new position as a reasonable accommodation. Ladenheim v. American Airlines, 115 F. Supp. 2d 225, 231 (D.P.R. 2000)("a plaintiff is not entitled to be reassigned to the position of his choice."); Jones, 696 F.3d at 91.

**F. IBM Attempted To Engage In The Interactive Process But Plaintiff Refused.**

Count I of Plaintiff's Complaint alleges that IBM failed to engage in the interactive process. In fact, IBM made numerous attempts to engage in the interactive process, but Plaintiff refused to participate, insisting that only the accommodations he demanded would be acceptable. Plaintiff's unilateral demands do not constitute engaging in the interactive process. It is settled that "a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." Rennie v. United Parcel Service, 139 F. Supp. 2d 159, 168 (D. Mass. 2001); Feliberty v. Kemper Corp., 98 F.3d 274, 280 (7th Cir. 1996)). As the ADA's regulatory scheme provides, "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 App. § 1630.9. The obligation to find a reasonable accommodation, therefore, is mutual and incumbent upon both the employee and the employer. Calero-Cerezo v. United States, 355 F.3d 6, 24 (1st Cir. 2004); Mengine v. Runyon, 114 F.3d 415, 420 (3rd Cir. 1997)("We agree that both parties have a duty to assist in the search for an appropriate reasonable accommodation and to act in good faith.").

In contrast to the interactive process just described, Plaintiff's only effort to engage with IBM's overtures was to repeatedly demand transfer to a new supervisor and/or a new position. SOF ¶¶ 67-72. When IBM asked Plaintiff to find a psychiatrist after the nurse practitioner treating him

indicated that he needed to remain on leave past six weeks, Plaintiff refused to consider seeking appropriate treatment, insisting there was nothing medically wrong with him and that he was only ill because of IBM's alleged actions. SOF ¶¶ 35-40. In an effort to accommodate Plaintiff and return him to his job, IBM offered to have Mr. Metzger provide Plaintiff with performance-related feedback and reviews instead of Mr. Feldman. SOF ¶ 71. Plaintiff refused that accommodation as well and declined to suggest any alternatives other than transfer to a new position under a different supervisor, which was not, as a matter of law, a reasonable accommodation. SOF ¶ 72.

In short, Plaintiff's "participation" in the interactive process consisted of repeatedly demanding that IBM acquiesce to the only accommodation he would accept, while consistently refusing to consider any alternatives set forth by IBM. Nonetheless, even while he was refusing to engage in the interactive process, IBM continued to provide Plaintiff with leave until such time as he was able to return to work (and during that leave Plaintiff began working for an IBM competitor without advising IBM). In so doing, IBM satisfied its obligation to engage in the interactive process and provide Plaintiff with a reasonable accommodation. Phelps, 251 F.3d at 28 n.7 (employer's decision to provide medical leave to employee unable to work satisfied its obligations to engage in the interactive process, despite employee's requests for other accommodations). Therefore, judgment should enter in IBM's favor with respect to Count I.

## II. IBM IS ENTITLED TO JUDGMENT ON PLAINTIFF'S DISABILITY DISCRIMINATION CLAIMS BECAUSE PLAINTIFF HAS NOT MADE OUT A *PRIMA FACIE* CASE OR REFUTED IBM'S LEGITIMATE BUSINESS REASONS.

Plaintiff has failed to make out a *prima facie* case of disability discrimination or provide any evidence demonstrating that the legitimate business reasons proffered by IBM are pretext for discrimination and, as such, his disability discrimination claims – Counts V-VIII – must fail.

**A. Plaintiff's Disability Discrimination Claims Fail Because He Has Offered No Proof Of Any Discriminatory Animus By IBM**

To establish a *prima facie* disability discrimination claim, a plaintiff "must prove 'that (1) he suffers from a disability or handicap, as defined by the ADA; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and (3) the defendant took an adverse employment action against him because of, in whole or in part, his protected disability.'" Kinghorn v. Massachusetts General Hospital, slip op. No. 11-12078 at *11 (D. Mass. July 1, 2014) (quoting Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91 n. 7 (1st Cir. 2007)).[9] If a plaintiff is able to set forth a *prima facie* case of discrimination, the well-known burden shifting framework applies, but "the ultimate burden of proving unlawful discrimination rests at all times with the plaintiff." Id. (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000)).

As an initial matter, Plaintiff's disability discrimination claims fail for the same reason as his failure to accommodate claims, namely, the fact that Plaintiff was not a qualified handicapped individual. Furthermore, Plaintiff's claims should be dismissed because of the two arguably adverse actions he experienced – his failure to get a job with Mr. Kime's group and his termination. The former is not legally an adverse action and neither one of them had any connection to his alleged disability.

First, Plaintiff identifies his failure to get a position with Christopher Kime's group as an adverse action based on both his disability and retaliation. While Plaintiff was certainly disappointed by his failure to get the position, those feelings alone do not render the action adverse. See King v. Boston, 71 Mass. App. Ct. 460, 468 (2008)(discrimination claim requires "real harm" as opposed to subjective feelings of "disappointment and disillusionment"). In contrast, the rejection from the position is not adverse because it did not materially or otherwise adversely

[9] As "Chapter 151B is considered the state analogue to the [ADA], Massachusetts courts look to cases decided under the federal counterpart to inform its interpretation." Henry v. United Bank, 68 F.3d 50, 59 (1st Cir. 2012).

impact Plaintiff's conditions of employment with IBM, which at all times remained unchanged. That is, Plaintiff already had a job with IBM which remained open for him. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1988)(an adverse employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). Nor did Plaintiff's rejection from the new position "inflict[] direct economic harm", because Plaintiff remained employed by IBM and has not alleged, or demonstrated, that the position with Mr. Kime's group would have resulted in a promotion, greater benefits or prestige. Id. at 762; Freeman v. Potter, 200 Fed. Appx. 439, 442 (6th Cir. 2006). Indeed, Plaintiff never suffered any change in his employment status at IBM until he refused to identify the company he was working for while on leave from IBM: his salary, benefits, title, and overall responsibilities all remained the same.

To the extent the failure to get the position could be considered an adverse action, Plaintiff has not demonstrated that he was denied the position based on his alleged disability. As an initial matter, while Mr. Kime was aware that Plaintiff was on short term disability leave at the time he chose him to interview for the position, he had no knowledge of Plaintiff's medical condition and did not make any inquiry into the circumstances surrounding Plaintiff's leave. SOF ¶ 58. Indeed, Plaintiff (falsely) advised Mr. Kime that he had a "completely clean bill of health." SOF ¶ 57. In the course of evaluating Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance history on IBM's internal website but was unable to locate it, later learning that Plaintiff's leave prevented his supervisor from giving him a performance review for the relevant period. SOF ¶ 60. Mr. Kime then contacted Mr. Feldman in an effort to get an idea about Plaintiff's work performance history at IBM and learned of Plaintiff's difficulties working with other people in Mr. Feldman's group. SOF ¶ 61.

After reviewing his credentials, Mr. Kime concluded Plaintiff was not an appropriate candidate for the position, not because of any discriminatory motive, but rather because Plaintiff

appeared to be more interested in development work than the position offered, which was more of a software maintenance role for a mature product, and because the position involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in that setting. SOF ¶ 61. None of that had anything to do with Plaintiff's alleged disability. Id. Plaintiff has not established that Mr. Kime's testimony regarding the legitimate business reasons for not offering him the position were pretext. Indeed, instead of presenting specific facts demonstrating a discriminatory reason, Plaintiff continues to assert vaguely that he was not accepted for the position based on, not only his disability, but also his age, race, gender, and as retaliation. Such groundless speculation cannot counter IBM's proffered legitimate business reason. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991) (stating that "[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive" (internal quotations omitted)).

Second, while Plaintiff alleges that he was terminated from IBM based on his disability, the undisputed facts do not support that claim. Plaintiff had been on extended leave from IBM for approximately ten months when IBM learned that he may have been working for a competing company in violation of IBM's Business Conduct Guidelines. SOF ¶¶ 73-81. According to Plaintiff's personal LinkedIn web page, he was working for IBM competitor EMC while working at IBM. Id. In response, IBM contacted Plaintiff and simply asked him to confirm that he was not working for EMC while on leave from IBM. Id. Plaintiff responded by repeatedly and inexplicably refusing to tell IBM for which company he was working while he was still an IBM employee, and accusing IBM of harassment and defamation. Id. As a result of his refusal to disclose his new employer's identity, IBM terminated Plaintiff's employment.[10] Plaintiff has not offered any evidence contradicting IBM's stated reason for his termination. Plaintiff's specious assertions of

[10] IBM subsequently learned that Plaintiff had begun working for another company, IBM competitor Imprivata, in March of 2012, while still on extended medical leave from IBM. SOF ¶ 79.

disability discrimination, grounded in nothing more than Plaintiff's suppositions, are not sufficient to establish a claim of discrimination. Accordingly, IBM's motion for summary judgment with respect to these claims should be allowed. See Mesnick, 950 F.2d at 824.

**B. Plaintiff's Other Purported "Tangible Acts" Are Not Adverse Actions Or Harassment Under Chapter 151B or the ADA.**

As for the other "tangible acts" identified by Plaintiff in Count VI and VII, they do not constitute adverse employment action as a matter of law. An adverse employment action "refer[s] to the effects on working terms, conditions, or privileges that are material, and thus governed by [c. 151B, § 4(1)], as opposed to those effects that are trivial and so not properly the subject of a discrimination action. . . . There must be 'real harm'; 'subjective feelings of disappointment and disillusionment' will not suffice." King, 71 Mass. App. Ct. at 468; MacCormack v. Boston Edison Co., 423 Mass. 652, 664 (1996); Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 157 (1st Cir. 2009)(an adverse action has been defined as "any material disadvantage[] in respect to salary, grade, or other objective terms and conditions of employment").

In the FAC, Plaintiff points to an assortment of acts he deems adverse under the ADA and Chapter 151B, including: disabling his access to IBM facilities and its computer systems while he was on medical leave, refusing to progress and finalize review of his internal complaint, Mr. Feldman's issuance of a formal warning letter, and treating work at home days as sick days. None of the above actions are "adverse" under either Massachusetts or federal law.

First, IBM only limited Plaintiff's access to facilities and computer networks while he was on medical leave and "totally incapacitated to work." SOF ¶¶ 53-54. As such, there was no business reason for Plaintiff to have access to the facilities or networks and his limited access to both resulted in no "real harm" to his ability to not work during his medical leave.

Second, Plaintiff has provided no evidence in support of his claim that IBM failed to progress and finalize his internal complaint, or somehow delayed it. To the contrary, both Ms. Due and Mr. Mandel testified that they each conducted separate investigations, which included

interviewing multiple witnesses, including Plaintiff, and reviewing relevant internal documents. After completing their respective investigations, each of them concluded that Plaintiff's allegations were unfounded. SOF ¶¶ 17, 29. In any event, failure to properly investigate a complaint is not an adverse action as a matter of law. See Symonds v. Federal Express Corp., 2011 U.S. Dist. 150056 at *53 (D. Me. Dec. 31, 2011)("Failure to investigate complaints of discrimination cannot be considered an adverse employment action.").

Third, the formal warning letter Mr. Feldman gave Plaintiff, warning him of inappropriate behavior also failed to affect – materially or otherwise – the terms or conditions of Plaintiff's employment, as neither Plaintiff's pay grade, benefits, nor his title were affected by the letter. SOF ¶ 25. Finally, Plaintiff's "work at home" days were treated as sick days only after he had advised that he was unable to work and, as such, IBM reasonably treated such days that he did not come to work as sick days.

Accordingly, to the extent Plaintiff's discrimination and retaliation claims are based on any of the above "tangible acts," those claims must fail, as such acts are not adverse employment actions under state or federal law. See, e.g., Butler v. Wellington Mgmt. Co., LLP, 2011 Mass. App. Unpub. LEXIS 823 (Mass. App. Ct. Jun. 22, 2011) (summary judgment for employer affirmed where employee failed to demonstrate that she was adversely affected by multiple employment actions, including: supervisor's decision to stop meeting with her one-on-one; removal from a work assignment; assignment to an office away from her peers; and, assignment to an inaccessible mentor).

### C. Plaintiff Was Not Subjected To A Hostile Work Environment

Plaintiff also alleges, in Count VII, that the "tangible" actions created a hostile work environment on the basis of his disability, age, gender, race, and retaliation. To rise to the level of harassment or a hostile work environment, as Plaintiff appears to allege, "the alleged harassment must be severe or pervasive." Alvarado v. Donahoe, 687 F.3d 453, 461 (1st Cir. 2012) (citing

Gómez-Pérez v. Potter, 452 Fed. Appx. 3, 9 (1st Cir. 2011). In addition, "any abuse must be both objectively offensive (as viewed from a reasonable person's perspective) and subjectively so (as perceived by the plaintiff)." Id. As just explained, the "tangible acts" Plaintiff characterizes are neither adverse nor, even viewed collectively, objectively offensive, and Plaintiff's hostile work environment claim should be dismissed. Id. (taunting and mocking comments about employee's psychiatric condition, while callous and objectionable, did not rise to level of severe and pervasive). See also Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17, 44 (1st Cir. 2011) (appellant could not show hostile work environment where, *inter alia*, supervisor regularly refused to meet with appellant, yelled at her, and limited her movements around workplace).

## III. PLAINTIFF CANNOT ESTABLISH A CLAIM FOR RETALIATION.

Plaintiff's claims for retaliation, Counts VI-VIII, are based upon the same alleged adverse actions as his discrimination claims and are equally without merit. A plaintiff seeking to establish a *prima facie* case of retaliation under 151B and the ADA must show, by a preponderance of the evidence, "that (1) he engaged in protected conduct; (2) suffered an adverse employment action; and (3) [that] there was a causal connection between the protected conduct and the adverse action." Jones v. Walgreen Co., 679 F.3d 9, 28 n. 7 (1st Cir. 2012) (Colón-Fontánez v. San Juan, 660 F.3d 17, 36 (1st Cir. 2011)). If a plaintiff establishes these factors, the *McDonnell Douglas* burden shifting scheme follows, ultimately requiring Plaintiff to demonstrate that the adverse action was the result of discriminatory animus. Id.

First, as already described, Plaintiff's failure to get an offer from Mr. Kime was not an adverse action under state or federal law. Moreover, IBM has provided a legitimate reason for not offering Plaintiff the position for which he interviewed. Indeed, Mr. Kime was not even aware of what Plaintiff's disability was and had no reason to disbelieve Plaintiff's (false) assurance that he had a clean bill of health and was able to return to work without restrictions. SOF ¶¶ 57-58. Nor

was Mr. Kime aware, at the time Plaintiff applied for the position, that Plaintiff had filed any complaints regarding his disability either internally or externally. SOF ¶ 62.

Second, to the extent Plaintiff's retaliation claim is based on Mr. Feldman's comments to Mr. Kime regarding Plaintiff's difficulties working well with the individuals in his group, that claim must fail as such comments were not an adverse action, did not lead to an adverse action, and were not motivated by discriminatory animus. Mr. Feldman's comments were based on his experience managing Plaintiff during his time at IBM and his honest assessment of Plaintiff's performance based on that experience. His comments were offered in response to a legitimate request for an assessment of Plaintiff's performance, rendered necessary by the fact that Plaintiff did not have a written performance review on file. See, e.g. Dickenson v. UMass Mem. Medical Group, 2011 U.S. Dist. LEXIS 30932 (D. Mass. Mar. 24, 2011)(Plaintiff's mediocre performance was legitimate, non-retaliatory reason for his poor performance review and less than full raise). Moreover, there is no evidence that Mr. Feldman's assessment of Plaintiff's interpersonal difficulties, while candid, was in any way false or exaggerated and was only one part of Mr. Kime's assessment of Plaintiff's candidacy. SOF ¶ 65.

Third, IBM had a legitimate reason for Plaintiff's termination, given Plaintiff's refusal to provide information to IBM concerning where he was working while was on a medical leave of absence from IBM. SOF ¶ 79. As set forth above, Plaintiff had been on extended leave from IBM for approximately ten months when IBM learned that he may have been working for IBM competitor EMC in violation of IBM's Business Conduct Guidelines. SOF ¶¶ 73-81. When IBM contacted Plaintiff and simply asked him to confirm that he was not working for EMC, or another competitor, Plaintiff refused. Instead, he accused IBM of harassment and defamation. Id. As a result of his refusal to disclose his new employer's identity (which turned out not to be EMC, but another IBM competitor Imprivata), IBM made the legitimate decision to terminate Plaintiff's employment. There was nothing discriminatory or retaliatory about IBM's actions in this regard.

Finally, even if Plaintiff could satisfy his *prima facie* case with respect to these actions, his claim still fails because he has provided no evidence that IBM's stated reason for either was pretext, and that the real reason was retaliation. Plaintiff's protected activity did not immunize him from "the same risks that confront virtually every employee every day in every work place," including recommendations reflective of his performance and an expectation that he abide by IBM's policies and procedures. See Blackie v. Maine, 75 F.3d 716, 723 (1st Cir. 1996) (affirming summary judgment in favor of employer on FLSA retaliation claim where employees failed to show that adverse action stemmed from retaliatory motive). As mere speculation or inferences of retaliatory motive are insufficient to satisfy a plaintiff's burden of establishing pretext, Plaintiff's claims must fail. See e.g., Karathy, 84 Mass. App. Ct. at 256-57 (in affirming summary judgment for employer on plaintiff's retaliation claim, Court observed that the Massachusetts SJC has held that "the bare assertion of inferences … raises no genuine issue of material fact.").

## IV. IBM'S ALLEGED FAILURE TO INVESTIGATE CLAIM FAILS BECAUSE THERE WAS NO UNDERLYING DISCRIMINATION.

Count VIII of the FAC, for alleged failure to investigate, also must be dismissed because no independent claim of failure to investigate exists absent underlying proof of discrimination. See Keeler v. Putnam Fiduciary Trust Co., 238 F.3d 5, 13 (1st Cir. 2001). Nor is there support for the notion that a failure to investigate is a distinct adverse action for purposes of retaliation or discrimination claims. See Fincher v. Depository Trust and Clearing Corp., 604 F.3d 712, 721 (2nd Cir. 2010) ("an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint"); Symonds v. Federal Express Corp., 2011 U.S. Dist. 150056 at *53 (D. Me. Dec. 31, 2011) ("Failure to investigate complaints of discrimination cannot be considered an adverse employment action."); Cook v. CTC Comm. Corp., 2007 U.S. Dist. LEXIS 80849, at *8 (Oct. 15, 2007) ("Evidence of a flawed investigation is relevant only if [the plaintiff] proves that [human

resources] intentionally failed to investigate properly in order to concoct a pretext for her termination.").

Moreover, to the extent Plaintiff's failure to investigate claim is relevant to any consideration of damages, such a claim still fails in light of ample evidence that IBM conducted appropriate investigations and determined that Plaintiff's claims of harassment and/or discrimination were unfounded. SOF ¶¶ 17, 29. Aside from his own conclusion that the investigations must have been flawed because they did not result in his preferred outcome, Plaintiff has offered no evidence that such investigations did not take place or that they were conducted in bad faith. [11] See, e.g., Parra v. Four Seasons Hotel, 605 F. Supp. 2d 314, 336 (D. Mass. 2009) (finding acceptable an employer's testimony that an investigation took place, consisting of a discussion with the plaintiff and a review of the customer complaint upon which plaintiff's complaint was based, despite plaintiff's claim that no investigative action was taken whatsoever, and concluding that "while the [employer's] response could surely have been more robust and better documented, it does not amount to a failure to investigate wide-ranging claims of discrimination"); Verdrager v. Mintz, Levin et al., 2013 Mass. Super. LEXIS 206 at *28-29 (Mass. Super. Ct. 2013) (allowing motion for summary judgment on failure to investigate claim where there was no underlying discrimination and in light of evidence that employer investigated complaint by reviewing complaint and conducting interviews related to complaint).

## V. PLAINTIFF'S CLAIMS OF AGE, GENDER, AND RACE DISCRIMINATION MUST BE DISMISSED AS THEY ARE ENTIRELY BASED UPON CONJECTURE AND UNSUPPORTED SPECULATION.

To the extent Plaintiff alleges age, gender, and race discrimination under Chapter 151B in Counts V-VIII, IBM is entitled to summary judgment because Plaintiff cannot demonstrate that any action taken by IBM was based on discriminatory animus. Thompson v. Coca-Cola Co., 522 F.3d

[11] Plaintiff has hired an expert, Julie Moore, an attorney who has never worked in human resources, to offer her opinion as to purported deficiencies in IBM's investigation. Ms. Moore's report, however, is irrelevant at this stage in the proceedings and will be the subject of a motion to strike given its lack of relevance, unreliability, and overall failure to conform to the requirements of Fed. R. Evid. 702.

168, 176 (1st Cir. 2008) (holding that to make out a *prima facie* case of age, gender, or race discrimination, an employee must show that the determinative cause of the challenged employment decision was discriminatory animus) (citing Weber v. Cmty. Teamwork, Inc., 434 Mass. 761, 775 (2001)).

For purposes of addressing Plaintiff's discrimination claims as succinctly as possible, IBM assumes that Plaintiff has satisfied the first prongs of his *prima facie* case, that is, that Plaintiff is a member of a protected class (*i.e.*, white, male, and over 40). As explained above, the only legally cognizable adverse employment action Plaintiff arguably experienced was his termination for failing to disclose the identity of his full-time employer while he was still employed by IBM.[12]

Regardless of what adverse actions Plaintiff believes he experienced, Plaintiff has provided no evidence of discriminatory animus motivating any of IBM's employment decisions. Indeed, Plaintiff was not able to articulate any basis for his race, gender, and age discrimination claims, testifying during his deposition that the basis of his age, gender, and race claims was his belief that one of the individuals to whom he reported – Mr. Knabe – "lied" about Plaintiff's work, which means that "something bigger" was "at play" and "it had to be illegal." SOF ¶ 11. Plaintiff did not offer any more specific testimony, or produce any evidence, that his termination or failure to be hired for a new position was in any way based on his age, race, or gender.

As these facts demonstrate, Plaintiff's claims of age, race, and gender discrimination "rest[] merely upon conclusory allegations, improbable inferences, and unsupported speculation." de la Cruz, 218 F.3d at 5. Plaintiff's kitchen-sink approach to his allegations of discrimination, none of which have any basis in fact, have produced exactly the kind of claims for which summary judgment is appropriate, as they amount to nothing more than "groundless accusations by [a] disgruntled . . . employee[] . . . us[ing] the claim of discrimination as an excuse for deficiency or as

[12]While Plaintiff points to, as an adverse action, the fact that Mr. Feldman switched his and a co-worker's job assignments and that the co-worker was Asian, female, and under 40, the switch did not result in a downgrade of Plaintiff's pay or any other material aspect of his employment and is not, therefore, an adverse employment action.

an instrument of revenge." Poon v. Massachusetts Institute of Technology, 74 Mass. App. Ct. 185, 194-195 (2009) (affirming summary judgment for employer on discrimination and retaliation claims where employee had a history of interpersonal conflicts and plaintiff could offer no evidence of pretext).

## VI. CONCLUSION

For the foregoing reasons, IBM submits that summary judgment should enter in its favor and all Counts of the FAC should be dismissed as a matter of law.

Respectfully submitted,
INTERNATIONAL BUSINESS
MACHINES, INC.,

By its attorneys,

/s/ Joan Ackerstein
Joan Ackerstein (BBO No. 348220)
Matthew A. Porter (BBO No. 630625)
JACKSON LEWIS P.C.
75 Park Plaza, 4th Floor
Boston, MA 02116
(617) 367-0025
(617) 367-2155 fax
ackerstj@jacksonlewis.com
porterm@jacksonlewis.com

## CERTIFICATE OF SERVICE

This is to certify that on December 15, 2014, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Matthew A. Porter
Jackson Lewis P.C.

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| WALTER TUVELL,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES, INC.,<br><br>Defendant | Civil Action No. 13-11292-DJC |

**PLAINTIFF'S RESPONSES TO DEFENDANT IBM'S STATEMENT OF MATERIAL FACTS**

Plaintiff hereby responds to the Statement of Material Facts submitted by Defendant International Business Machines, Inc. ("IBM"), with reference to Defendant's motion for summary judgment.

**BACKGROUND ON PLAINTIFF**

1. Plaintiff Walter Tuvell is a white male who was born in 1947. First Amended Complaint ("FAC") ¶ 1, attached to the Affidavit of Joan Ackerstein ("Ackerstein Aff.") as **Exhibit 41**.

Response: Admitted.

2. Plaintiff claims that he suffers from Post-Traumatic Stress Disorder ("PTSD"). Plaintiff's PTSD allegedly stems from an incident in the Spring of 1997, in which Plaintiff claims that he was offered a job with Microsoft Corporation, but Microsoft rescinded the offer after Plaintiff and his wife visited Seattle, Washington to meet with Microsoft employees. See Deposition of Walter Tuvell ("Pl. Dep."), Day 1, pp. 23-24, Ackerstein Aff., **Ex. 1.**

Response: Admitted.

3. Plaintiff described Microsoft's alleged treatment of him and his family as the equivalent of a physical "rape," recounting the situation in a complaint he submitted to Microsoft entitled, "Sleepless in Boston. How Microsoft Raped My Family While Recruiting Me, January 24 - April 20, 1997." Pl. Dep., Day 1, pp. 53-56; Ackerstein Aff., **Ex. 1**; King Dep., p. 101, Ex. 10; Ackerstein Aff., **Ex. 8, 31**. See also Walter Tuvell v. Microsoft Corporation, U.S.D.C., D. Mass., No. 97-12286-NG, and 99-11082-NG.

Response: Denied as to "equivalent." Rather, Plaintiff described what had happened as a "rape" because Microsoft had blamed his wife as the reason why it did not hire Plaintiff, and Plaintiff's wife was "devastated" by Microsoft's conduct as was Plaintiff. Tuvell Dep., at 54-55, 172, Exhibit 98. Plaintiff nowhere described what had happened as an equivalent to a physical rape. Id. The communication of Def.'s Exh. 31 refers to the "Webster's" definition of rape, which includes as a definition, "an outrageous violation." Webster's Third New International Dictionary, Unabridged. In an email of June 23, 2011, Tuvell wrote, "Yes, 'rape' isn't too strong a word, even though it's not the sexual kind," shows that Tuvell makes a clear distinction between physical rape, and an outrageous violation. Due Dep., at 200, Exhibit 50; Due Dep. Exh. 3, at TUVELL279, Exhibit 91.

**PLAINTIFF'S EMPLOYMENT WITH NETEZZA CORPORATION AND IBM**

4. On November 3, 2010, Plaintiff was hired by Netezza Corporation in the Performance Architecture Group, reporting directly to Daniel Feldman and reporting on a dotted line to Fritz Knabe. FAC ¶ 8.

Response: Admitted, except that his reporting relationship to Knabe commenced at some point after November 3, 2010. Tuvell Aff., ¶ 8, Exhibit 47.

5. In or around January of 2011, IBM acquired Netezza and Plaintiff, Mr. Feldman, and Mr. Knabe all became IBM employees. FAC ¶ 9; Deposition of Daniel Feldman ("Feldman Dep."), pp. 11-14; Ackerstein Aff., **Ex. 6**.

Response: Admitted.

**PLAINTIFF'S CONFLICTS WITH MR. KNABE ON MAY 18 AND JUNE 8, 2011**

6. Until May 18, 2011, Plaintiff had no serious issues with either Mr. Feldman or Mr. Knabe. Pl. Dep., Day 1, pp. 144-45; Ackerstein Aff., **Ex. 1**.

Response: Admitted.

7. On or about May 18, 2011, Mr. Knabe advised Mr. Feldman that Plaintiff had failed to complete a work assignment in a timely fashion. Mr. Feldman relayed Mr. Knabe's concern to Plaintiff, who described Mr. Knabe as a "liar." FAC ¶ 14; Pl. Dep., Day 2, pp. 21-27, Ackerstein Aff., **Ex. 2**; Deposition of Frederick C. Knabe ("Knabe Dep."), pp. 37-38, Ackerstein Aff., **Ex. 36**.

Response: First sentence is denied as it relies on the testimony of a biased witness that a jury is not required to believe. It is denied that Plaintiff called Knabe a liar on or about May 18, 2011, and such a statement is unsupported by Defendant's materials, although Plaintiff did say that Knabe was lying about the incident when Plaintiff was deposed on June 24, 2014. Def.'s Exh. 2, at 27. At the time, on or about May 18, 2011, Plaintiff complained to Feldman that Knabe expected Plaintiff to be a "mind-reader." Tuvell Aff., ¶ 9, Exhibit 47.

**MR. FELDMAN REASSIGNS PLAINTIFF TO A DIFFERENT PROJECT BECAUSE OF PLAINTIFF'S DIFFICULTY WORKING WITH MR. KNABE**

8. On June 8, 2011, Mr. Knabe asked Plaintiff about an outstanding work assignment in front of other employees and, according to Plaintiff's colleague Steve Lubars, who witnessed the incident, in the ensuing discussion voices were raised by both Plaintiff and Mr.

Knabe. FAC ¶ 15; Pl. Dep., Day 1, pp. 148-153, Ackerstein Aff., **Ex. 1**; Deposition of Lisa Due ("Due Dep."), pp. 141-142; Ackerstein Aff., **Ex. 9**.

Response: Admitted.

9. On June 9, 2011, Mr. Knabe told Mr. Feldman that he did not think he could have a good working relationship with Plaintiff. On June 10, 2011, Mr. Feldman advised Plaintiff that he did not believe that Mr. Knabe and Plaintiff could continue working effectively together on the Wahoo project that Mr. Knabe was managing. FAC ¶ 17; Feldman Dep., pp. 51-53, 57-59, Ex. 9, Ackerstein Aff., **Ex. 6, 18**.

Response: First sentence is denied as it relies on the testimony of a biased witness that a jury is not required to believe. The rest is admitted.

10. Therefore, Mr. Feldman assigned Plaintiff to a different project in place of another employee, Sujatha Mizar, and in turn assigned Ms. Mizar to work with Mr. Knabe on the Wahoo project. The switch did not result in any change in Plaintiff's pay or rank. FAC ¶¶ 17, 18; Feldman Dep., pp. 57-59, Ex. 9, Ackerstein Aff., **Ex. 6, 18**.

Response: Admitted with respect to everything but the word "Therefore", which carries a connotation of causation. Instead, the reasons for the demotion or reassignment are alleged to be gender and/or age discrimination, emanating from Mr. Knabe, Mr. Feldman, or a combination of both. Plaintiff is a white, male individual who was born in 1947, and who suffers from PTSD. DSOF1, 9; Def.'s Mem. at 4 n.3. Mr. Feldman was aware of Plaintiff's PTSD at least as early as May 26, 2011. PSOF10. Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Mr. Feldman, and IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; PSOF11. Mr. Feldman regarded Plaintiff's

work in the Performance Architecture area as competent and his interactions with others to be professional. PSOF11. On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned from performing the highest level work within the Performance Architecture Group to the lowest, resulting in public humiliation, lower prestige, a lower level of assignment, lowered opportunity for future job prospects, and a disadvantageous change in work location. PSOF8, 12, 14-16. Mr. Feldman assigned Mr. Tuvell to switch roles with Ms. Sujatha Mizar, a less qualified female of East Asian heritage. PSOF8. Mr. Tuvell was decades older that Ms. Mizar, who was well under forty, and he had decades more relevant experience for the position. PSOF8. Ms. Mizar had no Ph.D. PSOF8. Such evidence constitute a prima facie case of discrimination based on age, race, gender and handicap.

IBM takes the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." PSOF58. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." PSOF58. A prima facie case, as well as the fact that one or more reasons given by IBM are pretextual, generates an inference of discrimination to be resolved by the jury. Lipchitz, 434 Mass. at 501, 506-507.

Another, competing justification given by IBM for the demotion arises in part over Plaintiff's alleged failure to produce Excel graphics, as allegedly required by Mr. Knabe. Def.'s Mem., at 4; PSOF2. However, that justification was clearly pretextual, as Mr. Tuvell was never asked to produce Excel graphics. PSOF1. Moreover, the justification was absurd, because Mr. Feldman and Mr. Knabe knew that Mr. Feldman did not use Excel, and therefore logically would never have asked him to complete such an assignment. PSOF 3. Finally, Defendant's

descriptions of the May 18 incident as "failure to produce" are shifting and inconsistent with other occasions where IBM describes Plaintiff's alleged misconduct as working "too slowly." PSOF4. Changing justifications may be determined by a reasonable jury to be pretextual justifications. Velez v. Thrermo King, Inc., 585 F.3d 441, 449 (1st Cir. 2009).

IBM's other justification for the demotion was an incident on June 8, 2011 in which IBM falsely claims that "Mr. Knabe asked Plaintiff about another work assignment, and during that discussion both Mr. Knabe and Plaintiff raised their voices." Def.'s Mem., at 4. In actuality, Mr. Knabe yelled at Plaintiff and with knowing falsity, accused him of not producing work. PSOF8.

Further evidence that these conflicts were ginned up, and pretextual, was shown by the fact that Mr. Feldman failed to take action to resolve any alleged difficulties involving Knabe and Tuvell. PSOF59. For example, Mr. Feldman refused to investigate, and refused to respond to Mr. Tuvell's repeated inquiries for more detail concerning his alleged misconduct. Id. Mr. Feldman repeatedly denied Mr. Tuvell's requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Id. While Mr. Feldman claimed to have rejected that option of a meeting as it would create an unhealthy "habit," he had conducted such a meeting just months before, in March 2011, concerning a different issue. Id. Rather, a reasonable jury could find that Feldman was not proactive in resolving the underlying issues, because he realized that the grievances against Plaintiff were pretextual and there was no actual merit to them.

Plaintiff was treated worse than similarly situated individual who were outside of relevant protected categories. Mr. Knabe, who was not disabled, acknowledged yelling at Plaintiff, and yet he did not get reassigned or disciplined, whereas Plaintiff was disciplined for far more innocuous, indeed completely faultless, comments. PSOF50; DSOF22, 25. Plaintiff was

disciplined for missing a transition status update, but when the younger, female, Mizar missed an update, she was not disciplined or counselled. PSOF19-22, 26.

Just three days after to the demotion, on June 13, 2011, Mr. Feldman, the decision-maker with respect to the demotion, had written an email claiming Plaintiff to be "irrational and potentially dangerous" in conjunction with his PTSD, relying solely on stereotyping and stigmatization of PTSD, and advocated barring Plaintiff from the workplace and firing him. DSOF25. There is much additional direct evidence demonstrating discriminatory animus with respect to Plaintiff's handicap, as described above. Resp. DSOF25.

11. Plaintiff claims that Mr. Knabe's decision to complain to Mr. Feldman about Plaintiff's work on May 18, 2011, constituted discrimination against Plaintiff based on his age, sex, and race because he believes Mr. Knabe was lying about Plaintiff's work, which meant that "something bigger" was "at play" and "it had to be illegal." Pl. Dep. Day 2, pp. 27-28, Ackerstein Aff., **Ex. 2**.

Response: Admitted.

12. Plaintiff claims that Mr. Feldman's decision to have him and Ms. Mizar switch project responsibilities constituted discrimination based on Plaintiff's disability, age, sex, and race because Plaintiff believes that Ms. Mizar, who is Asian, female, and younger than Plaintiff, is "far less qualified" than him. FAC ¶ 18, 19; Pl. Dep., Day 2, pp. 152-156, Ackerstein Aff., **Ex. 2**.

Response: Admitted.

13. At the time, Plaintiff contended that he instead should have been replaced with a colleague (Ashish Deb), who was male, over 40, and Asian. King Dep., Ex. 9, Ackerstein Aff., **Ex. 30.**

Response: It is denied that Plaintiff contended that he should have been replaced by Ashish Deb, and Defendant's materials do not support the matter asserted. Plaintiff does not contend he "should have been replaced" by anyone. Instead, Plaintiff was making the point that if the demotion was truly non-discriminatory, and not merely an effort to elevate a younger, less qualified female to a higher level position, it would have made much more sense to replace Tuvell with Ashish Deb, who has a PhD, and because "the work Ashish is doing is much more compatible with my background that Sujatha [Mizar]'s work is." Def.'s Exh. 30, at IBM4672. Thus, Plaintiff was not saying that he should have been replaced by Mr. Deb. He is saying that eschewing the obvious choice of Deb highlights the fact that the job action was a pretext to elevate the less-qualified, younger female. Id.

14. On June 14, 2011, Mr. Feldman sent both Plaintiff and Ms. Mizar an email asking that they submit a daily report on their transition work. While Ms. Mizar submitted a transition report to Mr. Feldman that day, Plaintiff did not. The next day, June 15, 2011, Mr. Feldman sent Plaintiff an email reiterating his request for a daily report and clarifying that he required a report from both Plaintiff and Ms. Mizar. FAC ¶ 22; Feldman Dep., pp. 92-92, Ex. 13-15, Ackerstein Aff., **Ex. 6, 19, 20, 21**.

Response: The first sentence is denied to the extent that it implies that Plaintiff and Mizar were to submit separate reports. Def.'s Exh. 19, at TUVELL267. The email, addressed to "Sujatha and Walt" jointly, asks for a brief email detailing the transition, whereby each would trade job duties. Id. The email nowhere states that the transition updates need to be separate. Id. The second sentence is denied, as Mizar submitted an update describing the activities of both, intended to be joint, which she submitted to Feldman and Tuvell, and which further stated, "Walt

– please feel free to add anything I might have forgotten. Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43. The third sentence is admitted.

15. In response, on June 15, 2011, Plaintiff sent several emails to Mr. Feldman, and Human Resources Specialists Kelli-ann McCabe and Diane Adams, complaining that Mr. Feldman's request that Plaintiff file a daily report constituted "blatant" and "snide harassment/retaliation," even though Mr. Feldman was also requiring Ms. Mizar to complete such a report. FAC ¶ 23; Feldman Dep., pp. 84-89, Ex. 13-15, Ackerstein Aff., **Ex. 6, 19, 20, 21**.

Response: Denied. Plaintiff sent a number of emails on June 15, 2011, but only one complained of "blatant" and "snide harassment/retaliation." Def.'s Exh. 19, at TUVELL265. It is further denied that the complaint about harassment and retaliation of June 15, 2011 related solely to the warning to Plaintiff for not submitting a separate status report that simply mimicked the one submitted by Mizar (see Resp. to Def.'s SOF 14. ("I'll give you a status report. It is identical to Sujatha's." Def.'s Exh. 19, at TUVELL265). Instead, Plaintiff also alleged in this email that he was being harassed and retaliated against, based on the fact that the reasons given for the "transition" were "false grounds," that Feldman refused to engage in meetings to try to resolve any differences that Knabe might have had with Tuvell, and that replacing Tuvell with a younger, female employee with qualifications far inferior to his constituted a prima face case of discrimination based upon age and sex. Id., at TUVELL265-266.

16. On June 16, 2011, Plaintiff sent several emails to Ms. Adams and Ms. McCabe complaining of harassment by Mr. Feldman based on Mr. Feldman's decision to change his assignment and his request that Plaintiff submit weekly reports, and told Ms. Adams and Ms. McCabe that he believed it was infeasible for him to work with Mr. Feldman. FAC ¶¶ 24, 25; Due Tr. pp. 33-35, Ex. 1, Ackerstein Aff., **Ex. 9, 33**.

Response: Admitted, except that it is denied that Plaintiff complained about submitting weekly reports, and nothing in the materials cited by Defendant supports such assertion.

**IBM CONDUCTS INVESTIGATATION INTO PLAINTIFF'S WORK SITUATION**

17. On June 16, 2011, Ms. Adams forwarded an email from Plaintiff stating that he could not work with Mr. Feldman to Lisa Due, a Senior Case Manager in IBM's Human Resources Department. Ms. Due conducted an investigation by interviewing five individuals, including Plaintiff, who described his experience with Mr. Feldman and Mr. Knabe as the equivalent of "torture" and "rape". After completing her investigation, Ms. Due concluded that Plaintiff's concerns were unsupported. Due Dep., pp. 33-37, 75, 114. Ex. 1, 3, Ackerstein Aff., **Ex. 9, 33, 34**.

Response: Admitted, except denied as to the final sentence, with respect to Ms. Due's conclusions. Ms. Due is an interested party who remains employed by IBM, and receives her only paycheck from IBM, and who has been alleged to have engaged in wrongdoing in the instant case. Due Dep., at 201-202, Exhibit 50, Verified Complaint, ¶ 32, 196-198, Exhibit 42, and a jury would be free on that basis to reject her testimony. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Due confirmed Tuvell's complaint that Knabe raised his voice at Tuvell. Due Dep., at 141-142. Circumstantial evidence undercuts the "concluded" assertion, as Due failed to generate a report giving factual support for her alleged "conclusions," even though a full report would usually be generated under the circumstances. Due Dep. Exh. 12, at IBM8283, Exhibit 76; Due Dep., at 72-74, 76, 164-165, Exhibit 50. Due's statement to Tuvell merely states, without revealing the materials of her investigation or the rationale by which she "concluded" anything therefrom, that she completed her investigation "and found that there was

insufficient factual information to support your allegations." Def.'s Exh. 35. Furthermore, Due's report indicates that she only investigated Plaintiff's "concerns raised regarding your treatment by your manager Mr. Daniel Feldman," and thus, a reasonable jury could conclude that she failed completely in investigating Plaintiff's complaints relating to Mr. Knabe's conduct. Def.'s Exh. 35; Feldman Dep. Exh. 13, Exhibit 15 (raising complaints about Mr. Knabe), Due Dep., at 39-42, Exhibit 50.

18. Based on Ms. Due's findings, IBM determined that moving Plaintiff to another supervisor was not warranted. Due Tr. pp. 146-147; Ackerstein Aff., **Ex. 9**.

Response: Denied that the move was deemed "not warranted." The cited transcript reflects a conversation between Ms. Due and Mr. Mandel, in which they discussed the fact that there was "no need" to move Tuvell to another role. Due Dep., at 146-147, Exhibit 50. A reasonable jury could disbelieve that statement, because at the same time, Mr. Mandel acknowledged the fact that Feldman was having a "tantrum," and that Mandel stated, "I prefer respect but fear is not a bad second choice." Due Dep. Exh. 21, at IBM11054, Exhibit 108; Due Dep., at 142, 147, Exhibit 50. A jury could also disbelieve Ms. Due's statement as Ms. Due is an interested party who remains employed by IBM, and receives her only paycheck from IBM, and who has been alleged to have engaged in wrongdoing in the instant case. Due Dep., at 201-202, Exhibit 50, Verified Complaint, ¶ 32, 196-198, Exhibit 42, and a jury would be free on that basis to reject her testimony. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). According to Due, her investigation was initiated based on Feldman's complaint about Tuvell, and not Tuvell's complaint about Feldman. Due Dep., at 62-65, 70-71, 144, Exhibit 50; Due Dep. Exh. 2, at IBM8832, Exhibit 52. Due's alleged conclusion about not transferring Tuvell did not take into

account his various requests for reasonable accommodation based on handicap. Due Dep., at 55, Exhibit 50.

19. On June 29, 2011, Ms. Due sent Plaintiff an email informing him of the results of her investigation, and advised him of his appeal rights if he was dissatisfied with Ms. Due's findings. FAC ¶ 32; Due Dep., Ex. 12; Ackerstein Aff., **Ex. 35**.

Response: Admitted.

**PLAINTIFF RECEIVES A WARNING FOR INAPPROPRIATE COMMUNICATIONS WITH HIS COLLEAGUES**

20. In early July of 2010, Plaintiff went on medical leave for an elective cosmetic surgery on his eye-lids, and then took a vacation before returning to work in early August of 2011. Pl. Dep. Day 1, p. 36; Ackerstein, Aff., **Ex. 1**.

Response: Admitted.

21. On July 11, 2011, Mr. Feldman informed Plaintiff that Plaintiff's communication style in a July 6, 2011 email to Mr. Feldman and another colleague, Garth Dickie, was "the sort of thing you want to avoid." FAC ¶ 44; Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

Response: Admitted.

22. Initially, Plaintiff sent an email to Mr. Feldman and Mr. Dickie apologizing for his use of language that could have been interpreted as offensive. Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

Response: Admitted that an apology was sent by Tuvell, but denied as to acknowledging that his statement could have been interpreted as offensive. The statement alleged to be offensive by IBM is "if you're lazy you can just click this link." Def.'s Exh. 22, at IBM10504. Tuvell never acknowledged that this statement could have been interpreted as offensive. Rather, Tuvell's

apology email states, "My use of the word "lazy" in this context was intended to be jocular . . . and never in my wildest dreams did I ever think it could/would be interpreted as offensive." Def.'s Exh. 22, at IBM10502.

23. On July 20, 2011, Plaintiff sent Mr. Feldman and Mr. Dickie another email, retracting his earlier apology because he had concluded that "no apology was necessary" for the July 6, 2011 email. FAC ¶ 45; Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

Response: Admitted, except that Plaintiff did not "retract his earlier apology." Instead, Plaintiff apologized for the apology, along with presenting an emoticon smiley face. Def.'s Exh. 22, at IBM10505.

24. On August 3, 2011, shortly after Plaintiff returned from medical leave, Mr. Feldman met with him to discuss his pending and future work assignments and to discuss Plaintiff's recent behavior, which Mr. Feldman characterized as inappropriate. FAC ¶¶ 46, 47.

Response: Admitted, with the limitation that the "recent behavior" of Tuvell refers only to his statement, "if you're lazy you can just click this link." Def.'s Exh. 22, at IBM10504; Verified Complaint, ¶ 47, Exhibit 42.

25. During the August 3, 2011 meeting, Mr. Feldman also gave Plaintiff a Warning Letter for his disruptive conduct, including Plaintiff's July 2011 emails to Mr. Feldman and Mr. Dickie. FAC ¶ 48; Pl. Dep., Day 1, Ex. 9; Ackerstein Aff., **Ex. 11**. Plaintiff received no further discipline in connection with that matter.

Response: It is admitted that on August 3, 2011, Mr. Feldman gave plaintiff the warning letter provided as Def.'s Exh. 11. It is denied that the warning is (even notionally) based on "Plaintiff's July 2011 emails," as the warning letter itself refers only to a single email, the July 20, 2011 email, upon which it is purportedly based. Def.'s Exh. 11. It is admitted that Mr.

Tuvell was never again formally disciplined (notionally) based on his July 20, 2011 email. Furthermore, to the extent that the statement of fact purports to identify the true motive for which the warning letter was issued, that statement of fact is disputed, as Plaintiff alleges that the true motive was retaliation for his Complaints about discrimination and his handicap.

Threat of termination for innocuous behavior demonstrates discriminatory and/or retaliatory animus: On July 6, 2011, Plaintiff wrote to coworkers, "if you're lazy you can just click this link." Verified Complaint, ¶ 44, Exhibit 42. On July 11, 2011, Mr. Feldman asserted that this innocent use of the word "lazy" was inappropriate. Verified Complaint, ¶ 44, Exhibit 42. Plaintiff initially apologized for this remark. Id. ¶ 45, Exhibit 42. On July 20, 2011, Plaintiff realized that his statement was in no way disrespectful, and he apologized for his earlier apology, as it had the effect of misleadingly implying that he had done something wrong. Id., ¶ 45, Exhibit 42. Plaintiff's July 20, 2011 email was compelled by IBM policies, which requires the correction of misleading communications, whether his own or Mr. Feldman's. Mandel Dep. Exh. 43, at IBM2367, Exhibit 103; Mandel Dep., at 160-161, Exhibit 55. The July 20, 2011 email, in which Plaintiff properly and politely apologized for his own earlier apology, newly seen to be inappropriate, along with presenting an emoticon smiley face indicating politeness (Def.'s Exh. 22, at IBM10505), thus actively accorded with IBM policy, and hence is not a colorable basis for a formal warning letter and threat of "immediate dismissal." Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 576-577 (6th Cir. 2003) (*en banc*) ("the reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation").

Further Evidence of Retaliation: As of June 16, 2011, and indeed, earlier than that, Lisa Due and Feldman knew that Tuvell was engaging in protected complaints of discrimination and

retaliation. Due Dep., at 35, Exhibit 50. As early as June 30, 2011, Mr. Feldman and Ms. Due were planning on providing Mr. Tuvell with a warning letter, and indeed, were trading drafts of the letter, long before the July 20, 2011 email on which the warning was purportedly based. Feldman Dep. Exh. 17, at IBM7800-7804, Exhibit 109; Feldman Dep., at 98-99, Exhibit 43. Tuvell's internal complaints of discrimination and retaliation were discussed by the decision-makers when Tuvell's application for internal transfer was denied, indicating that the consideration was a factor in the rejection. Kime Dep. Exh. 9, Exhibit 73, Kime Dep., at 109-110, 120-121, Exhibit 65. Clearly, Feldman and Kime discussed Tuvell's internal complaints of discrimination, which were pending at that point, and were considered a negative factor. Id.

Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints, claimed that the following passage provided by Tuvell in support of one such complaint, was "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 38-40, 198-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM has asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." IBM Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never

identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82; Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of

harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence that handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having Post Traumatic Stress Disorder (PTSD), considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50; Feldman Dep., at 91, Exhibit 43; See also Due Dep., at 140, Exhibit 50 (urging care when walking to car). At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer, based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. On January 6, 2012, Kime gave as the following the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system, given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit

74; Tuvell Aff., ¶ 29, Exhibit 47. Indeed, IBM curtailed Plaintiff's access to computer systems for the express purpose of undermining Mr. Tuvell's access to the reasonable accommodation of working at home and away from the direct supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working. It is easy to return access once you return from STD [short term disability]." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy ("While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee." Tuvell Aff., ¶ 14, Exhibit 47).

26. On August 11, 2011, Plaintiff advised Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") leave due to a "sudden condition" and Ms. Dean responded by providing him with information concerning how to apply for STD leave. On August 15, Plaintiff informed Mr. Feldman that he was taking sick days until his request for short term disability was acted on. FAC ¶¶ 53, 54; Dean Dep., pp. 48-49, Ex. 3; Ackerstein Aff., **Ex. 5, 15**.

Response: Admitted.

27. On or about August 18, 2011, Plaintiff submitted an Open Door complaint, which is an internal IBM mechanism by which an employee can raise a concern and request an

investigation. Plaintiff's Open Door complaint was titled "Claims of Corporate and Legal Misconduct" and was submitted in two parts; the first part of the Complaint was 129 pages long and titled "Acts of Fritz Knabe," the second part of the Complaint was 153 pages long and titled "Acts of Dan Feldman." Due Dep., p. 76; Ackerstein Aff., **Ex. 9**.

Response: Denied that the Complaint was a mere "Open Door" complaint. In actuality, it was a "Corporate Open Door Complaint." Verified Complaint, ¶ 57, Exhibit 42. To the extent that the statement of fact implies that Mr. Tuvell "wrote" 282 pages, such assertion is denied. The first part of the complaint contains 22 pages of narrative written by Mr. Tuvell, plus 107 pages of subsidiary materials, including copies of supporting documentation. Tuvell Aff., ¶ 12, Exhibit 47. The second part of the complaint contains 31 pages of narrative written by Mr. Tuvell, plus an additional 122 pages subsidiary materials. Tuvell Aff., ¶ 12, Exhibit 47.

28. Plaintiff estimated that he spent over 22 hours per day on these documents over the course of 2-3 weeks, and has spent at least 10 hours per week on his claims in this case ever since. Pl. Dep., Day 1, pp. 28-29; Ackerstein Aff., **Ex. 1**.

Response: Admitted, except it is denied that Plaintiff has spent 10 hours a week on his lawsuit since the date of the deposition to the present date. Defendant has no support for any assertion of Plaintiff's time commitment occurring after the date of Mr. Tuvell's May 16, 2014 deposition. Def.'s Exh. 1, at 1.

29. Russell Mandel, the Program Director for IBM's Concerns and Appeals, investigated Plaintiff's first Open Door complaint. On or around September 15, 2011, Mr. Mandel issued a 19-page report based on his interviews of nine people, including Plaintiff. The report concluded that Plaintiff was not subjected to any adverse or unfair employment actions. Deposition of Russell Mandel ("Mandel Dep."), p. 92; Ackerstein Aff., **Ex. 10**.

Response: It is denied that on September 15, 2011, that Mr. Mandel "issued" a report. Rather, he simply created a version of a draft report on that date. Def.'s Exh. 10, at 92. To the extent that the word "issued" implies that such report was provided to Plaintiff, that is denied, and is not supported by the Defendant's record cite. Instead, on August 25, 2011, Plaintiff complained that IBM's refusal to finalize its investigation of the First Corporate Open Door Complaint pending his return to work constituted harassment. Verified Complaint, ¶ 58, 59, Exhibit 42. Plaintiff complained again about IBM's failure to complete the investigation again on October 19, 2011. Verified Complaint, ¶ 18, Exhibit 42. Plaintiff was first verbally informed of the negative results of Mr. Mandel's "investigation" on November 17, 2011, approximately four and a half months after his investigation was initiated. Verified Complaint, ¶¶ 33, 81, Exhibit 42. On November 25, 2011, Mr. Mandel only provided Mr. Tuvell with a one paragraph response to Mr. Tuvell's complaint. Verified Complaint, ¶ 84, Exhibit 42. The assertion about what the report concluded and the number of people "interviewed" is denied, as Defendant has failed to support that statement with any cite to the record.

30. During Plaintiff's medical leave, on or around November 9, 2011, Plaintiff's counsel wrote Mr. Mandel a letter identifying Plaintiff's PTSD as a disability and requesting, as a reasonable accommodation, that Plaintiff report to a supervisor other than Mr. Feldman. FAC ¶ 80.

Response: Admitted.

31. On November 23, 2011, IBM informed Plaintiff that it did not consider changing his management team to be a reasonable accommodation, but that it was receptive to hearing Plaintiff's proposals about restructuring his work as a possible accommodation and, further, that

he was free to look for vacant positions using IBM's Global Opportunity Marketplace ("GOM"). Feldman Dep., p. 150, Ex. 31; Ackerstein Aff., **Ex. 6, 23**.

Response: Admitted.

**PLAINTIFF IS GRANTED A SHORT TERM DISABILITY LEAVE BY IBM**

32. On or about August 15, 2011, Plaintiff provided a Medical Treatment Report ("MTR") to Ms. Dean, which indicated that Plaintiff suffered from a sleep disorder and stress reaction and that he was totally impaired for work. FAC ¶ 55; Deposition of Victoria Vazquez ("Vazquez Dep."), pp. 128-132 Ex. 2; Ackerstein Aff., **Ex. 37, 38**.

Response: Admitted.

33. The August 15, 2011 MTR indicated that Plaintiff suffered severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities, and that Plaintiff suffered serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. Vazquez Dep., Ex. 2; Ackerstein Aff., **Ex. 38**.

Response: Admitted.

34. On or about August 17, 2011, IBM approved Plaintiff's STD leave as a reasonable accommodation. FAC ¶ 56.

Response: Admitted.

35. Plaintiff submitted another MTR dated September 9, 2011, which again indicated that he was totally impaired for work. Vazquez Dep., pp. 132-134, Ex. 3; Ackerstein Aff., **Ex. 37, 39**.

Response: Admitted.

36. After receiving the September 9, 2011 MTR, Ms. Dean emailed Plaintiff and informed him that because the MTR indicated a Sleep Disorder and Acute Stress Reaction, it would have to be completed by a specialist, not his family physician (in Plaintiff's case, a nurse practitioner). In response, Plaintiff sent Ms. Dean three emails within 24 hours, challenging her request that his MTR be completed by a specialist. Ms. Dean informed Plaintiff that she would accept the September MTR by his physician for one month while she consulted with IBM's physician about Plaintiff's questions. Deposition of Kathleen Dean ("Dean Dep."), p. 83-84, Ex. 7; Ackerstein Aff., **Ex. 5, 16**.

Response: Denied as to "challenged her request that his MTR be completed by a specialist." Ms. Dean's email required Mr. Tuvell's next MTR be completed "by a specialist not your family physician" and encourages Mr. Tuvell to have his "psychotherapist" fill out the form. Def.'s Exh. 16, at IBM3483. Mr. Tuvell at first misconstrued Ms. Due's characterization of the requirement, but later understood that he was being asked to provide an MTR from the person from whom he was receiving "psychotherapy," that is, the licensed social worker that he had been seeing. Def.'s Exh. 16, at IBM3483. Based on this revised understanding, Mr. Tuvell agreed to "schedule a session with my LSW, and consult with her about this matter, and ask her to submit an MTR to you." Def.'s Exh. 16, at IBM3480. The last sentence is admitted.

37. Ms. Dean subsequently contacted Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, who explained that IBM's process for psychological disorders required an MTR form to be completed by a psychiatrist if an employee is out for 6-8 weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." Dean Dep., pp. 83-84, Ex. 7; Ackerstein Aff., **Ex. 5, 16**.

Response: Admitted.

38. Ms. Dean conveyed Dr. Snyder's explanation to Plaintiff and informed him that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR if he was not able to return to work in the next month. Dean Dep., Ex. 9; Ackerstein Aff., **Ex. 17**.

Response: Admitted.

39. Plaintiff responded to Ms. Dean's request for proper medical certification by insisting that there was nothing a psychiatrist could do to help him because there was nothing wrong with him and characterized the Short Term Disability process as intentionally psychologically abusive. Dean Dep., Ex. 9; Ackerstein Aff., **Ex. 17**.

Response: It is denied that Mr. Tuvell indicated that there is nothing wrong with him, given the context of the statement that "The ONLY reason I'm out on STD is that I am being SUBJECTED TO ABUSE AT WORK." Def.'s Exh. 17, at IBM3468. Mr. Tuvell states that there is "NOTHING 'WRONG' WITH ME", with the word "wrong" in quotes, as he is indicating that his medical leave is due to the harassment that he is receiving from a third party, and that but for that harassment, he would be able to work. Id. It is also denied that Plaintiff characterized his short term disability leave as abusive. Rather, Plaintiff's point was that IBM's failure to progress his complaints of discrimination and retaliation, while he was on leave, was abusive. Id. Plaintiff wrote, "the corrupt C&A program refuses to process ('discuss') my case until AFTER I return to the abusive workplace. The reason this is corrupt is that the C&A program itself says the C&A process is open to people on STD leave, yet Russell Mandel refuses to progress my C&A complaint for the very reason that I [am] on STD leave. This is intentionally psychologically abusive." Id.

40. Given Plaintiff's resistance to seeing a psychiatrist, Ms. Dean ultimately informed him that IBM would accept a completed MTR from the Licensed Social Worker ("LSW") who treated him. Snyder Dep., pp. 79-84, Ex. 6; Ackerstein Aff., **Ex. 4, 14**.

Response: The phrase "resistance to seeing a psychiatrist" is denied, as Plaintiff understood that his treatment by a licensed social worker to be consistent with Ms. Dean's request. See Resp. DSOF36. The rest of this statement is admitted.

41. Plaintiff subsequently provided IBM with MTRs completed by Stephanie Ross, the LSW he was seeing, for October and November of 2011, all stating that Plaintiff was totally impaired for work. FAC ¶ 65; Deposition of Stephanie Ross ("Ross Dep."), pp. 70-80, Ex. 4, 5; Ackerstein Dep., **Ex. 7, 26, 27**.

Response: Admitted, except that Ms. Ross's title should be "LICSW".

42. The October MTR completed by Ms. Ross indicated that Plaintiff suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety." Ms. Ross also rated Plaintiff as having serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising. Ross Dep., pp. 73-74, Ex. 4; Ackerstein Aff., **Ex. 7, 26**.

Response: Admitted.

43. In or around that time, Plaintiff was in close proximity to IBM on a weekend and stopped at a gas station with his wife and daughter and proceeded to "blow up" and hit the dashboard, the interior of the roof of the car and door frame as hard as he could and then yelled as loud as he could for as long as he could, describing himself as "full-blown crazy" because he

was "triggered by being that close to [IBM] and that gas station." Pl. Dep., Day 2, pp. 127-128; Ackerstein Aff., **Ex. 2**.

Response: It is denied that Mr. Tuvell's episode was triggered by being close to "IBM" (and indeed IBM misquotes the deposition. Def.'s Exh. 2, at 128. Rather, the deposition states that "I was triggered by being that close to Netezza and that gas station." Id. Therefore, the trigger was the specific IBM/Netezza facility in Marlborough, and not to IBM buildings in general. Id.

44. The MTR completed by Ms. Ross in November identified for the first time PTSD as Plaintiff's purported diagnosis, and indicated that Plaintiff was still totally impaired for work. The MTR also indicated that Plaintiff continued to have serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities, and continued to have serious impairment as well with respect to managing conflict with others, negotiating, compromise, setting realistic goals, and having good autonomous judgment. Ross Dep., pp. 75-77, Ex. 5; Ackerstein Aff., **Ex. 7, 27**.

Response: Denied that the November 2011 MTR was the first time Ms. Ross "identified" PTSD as Plaintiff's diagnosis. Rather, Defendant was told of Plaintiff's PTSD diagnosis as early as May 26, 2011. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43; PSOF10. The rest is admitted.

45. Ms. Ross testified during her deposition that, at the time she completed the MTR, in November 2011, "any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Plaintiff] was triggered into a state that involved hyper-reactivity, hyper-arousal. He was in a state of very

difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded." Ross Dep., p. 79; Ackerstein Aff., **Ex. 7**.

Response: Admitted.

46. Ms. Ross further testified that, at the time, she was concerned for his mental health stability and believed that just going into the building where he worked and seeing Mr. Feldman or Mr. Knabe could trigger his obsessive thoughts, depression, or other strong reactions. Ross Dep., p. 80; Ackerstein Aff., **Ex. 7**.

Response: Admitted.

47. Plaintiff provided another MTR on December 16, 2011, again completed by Ms. Ross, which stated that Plaintiff was "unable to return to previous setting with current supervisor and setting – PTSD symptoms exacerbate immediately" and continued to rate him "totally impaired for work," adding "for current job assignment." FAC ¶ 96; Ross Dep., pp. 86-89, Ex. 6; Ackerstein Aff., **Ex. 7, 28**.

Response: Admitted.

48. In the December 16 MTR, Ms. Ross indicated that Plaintiff had serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, and setting realistic goals and having good autonomous judgment. Ross Dep., Ex. 6; Ackerstein Aff., **Ex. 28**.

Response: Admitted.

49. Ms. Ross did not affirmatively check off the section of the MTR that asked if the employee could work with temporary modifications but did write that "only modification that would be possible is a change of supervisor and setting." This was the first time Plaintiff

submitted forms from a health care provider specifically requesting a change in supervisor as an accommodation. Ross Dep., Ex. 6; Ackerstein Aff., **Ex. 28**.

Response: Admitted, but pointing out that the MTR form itself, by its own terms, prevented Ms. Ross from checking "yes" to the identified section, based on her assessment of "total impairment." Def.'s Exh. 28. IBM's form itself precludes a health care provider from identifying a reasonable accommodation (or workplace modification that would permit return to work), to the extent that disabled worker at issue is deemed totally impaired for work. Id.

50. Ms. Ross testified that it was only "possible" that a new supervisor and setting would enable Plaintiff's return to work. Ross. Dep., p. 88; Ackerstein Aff., **Ex. 7**.

Response: Denied, as to "only 'possible'". Ms. Ross answered, "It would be possible," to the question of, "but you thought if he had a different supervisor and a different setting, it would be feasible." Def.'s Exh. 7, at 88. Ms. Ross' statement is thus more affirmative than the one asserted in Defendant's version. Indeed, elsewhere she wrote, "in a new setting with different people it was possible that Mr. Tuvell could function quite well and attend his work. This is not at all unusual with clients with this primary diagnosis." Def.'s Exh. 29, at 3.

51. For his part, Plaintiff could not and did not identify anyone who could serve as his manager in place of Mr. Feldman. Pl. Dep., Day 2, pp. 97-98; Ackerstein Aff., **Ex. 2**.

Response: Admitted.

52. In or around that time, Ms. Ross explained that Plaintiff was "unable to drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical," a description she included in Plaintiff's appeal of the denial of long term disability benefits from MetLife, specifically writing that Plaintiff's "symptoms would return if [he] had to drive near the facility, and he would have to pull over and manage intense anxiety

symptoms and emotional overwhelm." Ross Dep., pp. 143, 146-148, Ex. 28; Ackerstein Aff., **Ex. 7, 29**.

Response: Denied as to "In or around that time," which is unsupported by the record. Admitted as to the rest. Further clarifying, that the term "would" applied to symptoms that appeared in the past, and is not describing the future. Def.'s Exh. 29, at 3.

53. While Plaintiff was on medical leave, IBM restricted Plaintiff's VPN access to IBM's internet and Plaintiff's access to IBM facilities for the pendency of his leave given IBM's position that because Plaintiff was on STD leave and not working, there was no need for access to those systems. FAC ¶¶ 62, 66, 95; Feldman Dep., p. 158, Ex. 37; Ackerstein Aff., **Ex. 6, 24**.

Response: It is admitted that Plaintiff was denied VPN access and access to IBM facilities while he was on medical leave. It is denied that Plaintiff's medical condition required that his access be restricted, or that the medical leave, and the fact that he was not working, were the only reasons for such curtailment. For example, when Mr. Feldman was on short term disability, his access to computer systems were not curtailed. Feldman Dep., at 134, Exhibit 43. Moreover, when Plaintiff had surgery in July 2011, his access to computer systems, and his entitlement to enter IBM buildings was not changed. Tuvell Aff., ¶ 25, Exhibit 47. IBM policy with respect to its "Short-Term Disability Income Plan" states that "While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee", and active employees do not have their access curtailed. Tuvell Aff., ¶ 14, 25, Exhibit 47. Moreover, during the time of his medical leave, Mr. Tuvell was seeking a transfer at IBM, and actively interviewed at IBM's Littleton facility in December, 2011. Tuvell Dep., at 215-216, 220-221, 224, Exhibit 98. The curtailment of Mr. Tuvell's privileges temporarily prevented him from entering the facility for the purpose of his interview. Tuvell Dep., at 217-218, Exhibit 98.

Moreover, even though he was on medical leave, Mr. Tuvell was capable of and attempting to perform productive work for IBM. Tuvell Dep., at 228, Exhibit 98; Tuvell Aff., ¶ 29, Exhibit 47. Mr. Tuvell sought to work from home, as he was capable of doing, so long as he did not have to deal with harassers, such as Mr. Feldman. Tuvell Dep., at 231-232, Exhibit 98. However, he was actively prevented from doing so, and the evidence shows that Mr. Tuvell's access to computer systems were rescinded for the purpose of undermining one of his requests for reasonable accommodation. Indeed, on August 22, 2011, Mr. Feldman observed that Mr. Tuvell had continued to perform work while on leave, and urged IBM that Mr. Tuvell be prohibited from doing so, because

> if we don't continue to notify him that he can't work during his leave then we are allowing Walt to create a track record of IBM using work product created by him while on leave and from home to establish a prima facie basis for a claim of accommodation – that is, he can do his work from home and without significant managerial supervision and so he should be allowed to. My personal preference is to suspend all of Walt's access to systems on the heritage Netezza network during his leave.

Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. Mr. Feldman was the instigator of the recessions (Feldman Dep., at 130-133, Exhibit 43), and he had long advocated for curtailing Plaintiff's access to IBM premises and computer systems on account of Plaintiff's diagnosis of PTSD. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43; Due Dep., at 135-136, Exhibit 50. There is much further evidence that the recession of access was based on handicap discrimination and/or retaliation. Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints, claimed that the following passage provided by Tuvell in support of one such complaint, was "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 38-40, 198-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81-82: Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a previously-agreed reasonable

amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence of handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having PTSD, considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50; Feldman Dep., at 91, Exhibit 43; See also Due Dep., at 140, Exhibit 50 (urging care when walking to car). At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer,

based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. On January 6, 2012, Kime gave as the following the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system, given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. Indeed, IBM expressly curtailed access to computer systems for the express purpose of sabotaging Mr. Tuvell's access to the reasonable accommodation of working at home and away from the direct supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working. It is easy to return access once you return from STD [short term disability]." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy ("While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee." Tuvell Aff., ¶ 14, Exhibit 47).

54. During this time, Plaintiff also continued emailing complaints using IBM's Lotus Notes to Human Resources and other IBM employees and executives, including the CEO of IBM. IBM subsequently restricted Plaintiff's access to Lotus Notes and IBM's internal corporate network based on his misuse of those systems. FAC ¶¶ 123, 125.

Response: The first sentence is admitted. The second sentence is admitted except for the phrase, "misuse of those systems," which is denied. There is no record citation that Plaintiff in fact misused the systems. The emails that Plaintiff submitted at this time were complaints of retaliation, discrimination and failure to accommodate, which were protected under the ADA and c. 151B, and he had every right under the law to forward those complaints to those who he thought could help. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'").

55. Plaintiff exhausted his STD leave on January 25, 2012, at which time he remained out of work on an approved, unpaid medical leave. FAC ¶ 110.

Response: Admitted.

56. On or around April 25, 2012, IBM learned that Met Life denied Plaintiff's claim for Long Term Disability benefits and informed Plaintiff that they would continue to accommodate him by granting him unpaid leave while he appealed the denial of Long Term Disability benefits. FAC ¶ 132.

Response: Admitted.

**PLAINTIFF'S APPLICATION FOR ANOTHER POSITION WITH IBM**

57. On December 8, 2011, Plaintiff was interviewed for an open position he had applied for through IBM's Global Opportunity Marketplace ("GOM") with Christopher Kime, one of the decision-makers tasked with filling the position. Prior to the interview, Plaintiff advised Mr. Kime that he had a "completely clean bill of health" and was "symptom free," notwithstanding the fact that Ms. Ross submitted MTRs which described him as "totally impaired" for work in both November and December of 2011. Deposition of Christopher Kime ("Kime Dep."), pp. 58-59, Ex. 3; Ackerstein Aff., **Ex. 3, 12;** Ross Dep., Ex. 5, 6; Ackerstein Aff., **Ex. 27, 28**.

Response: Admitted.

58. Mr. Kime, for his part, had no knowledge of Plaintiff's medical condition nor did he make any inquiry into the circumstances surrounding Plaintiff's STD leave. Kime Dep., p. 60; Ackerstein Aff., **Ex. 3**.

Response: Denied. Mr. Kime had express knowledge of Plaintiff STD leave. Def.'s Exh. 3, at 60. The statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

59. After the interview, Mr. Kime informed Plaintiff that he had to discuss the interview with his management team and that he would keep Plaintiff posted on any developments. FAC ¶¶ 85, 88, 93, 94.

Response: Admitted.

60. While considering Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance review history but was unable to find anything on IBM's internal website and therefore reached out to Mr. Feldman, who explained that Plaintiff's leave had prevented Mr. Feldman from providing Plaintiff with a performance review. Kime Dep., p. 114; Ackerstein Aff., **Ex. 3**.

Response: Denied. The cited page does not support the statement asserted. Moreover, the statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

61. When Mr. Kime asked him about Plaintiff's performance, Mr. Feldman informed him that Plaintiff had the technical skills for his position but had difficulties working with other people in his group and had been moved from one team to another and still had not found a role that appeared to work for him and the team. Kime Dep., pp. 98-100, 111-112; Ackerstein Aff., **Ex. 3**.

Response: Denied. The statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097,

2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

62. Mr. Kime testified that at no point during his telephone conversation with Mr. Feldman did Mr. Feldman mention that Plaintiff had filed any internal complaints with IBM regarding harassment or discrimination and that he was not aware of Plaintiff's complaints at that time. Kime Dep., pp. 115-116; Ackerstein Aff., **Ex. 3**.

Response: Denied. For example, long before the January 2012 rejection, on December 15, 2011, when Feldman was continuing his attempts to undermine Mr. Tuvell's candidacy, Messrs. Feldman and Kime conversed, and both noted that IBM's HR and Legal team were involved (which reflected IBM's response to Plaintiff's complaints of discrimination, harassment and retaliation). Kime Dep. Exh. 9, Exhibit 73; Kime Dep., at 121, Exhibit 65 (Kime wrote, "I do not envy you having to deal with HR and lawyers at this point"). Such discussion is only relevant if the underlying complaints were discussed. Id. Furthermore, the statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

63. Mr. Kime was not aware at the onset of the interviewing process that the fact that Plaintiff was on STD leave would prevent him from providing a performance review, known as a PBC, to present to his management chain for a discussion on Plaintiff's qualifications. Kime Dep., p. 128; Ackerstein Aff., **Ex. 3**.

Response: Denied. The statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

64. On January 6, 2012, Mr. Kime emailed Plaintiff to tell him that he would not be offering him the open position. Mr. Kime testified that he could not move forward with taking Plaintiff directly from short term disability leave based on the difficulty of assessing his work performance without any PBC. Mr. Kime also explained to Plaintiff that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." FAC ¶¶ 97-98; Kime Dep., p. 128, Ex. 11; Ackerstein Aff., **Ex. 3, 13.**

Response: The first and third sentence are admitted. The second sentence is denied as it is unsupported by the record cited.

65. Mr. Kime testified that he concluded that Plaintiff was not an appropriate candidate for the position because Plaintiff appeared to be interested in development work, while

the position involved software maintenance for a mature product and involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in such an environment. As such, Mr. Kime concluded that Plaintiff would not be a good fit for the position. Kime Dep., pp. 142-145; Ackerstein Aff., **Ex. 3**.

Response: The first sentence is admitted, solely to the extent that it accurately reflects what Mr. Kime testified to, but is denied to the extent that the statement purports to accurately reflect what Mr. Kime concluded. The second sentence is denied. On January 6, 2012, Mr. Kime wrote Mr. Tuvell an email, which explained the reasons for the rejection. Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. Mr. Kime wrote that the primary reason for the rejection was "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. While Mr. Kime alleges that he was concerned about Mr. Tuvell's interest in the position, that is contrary to the communication he received from Plaintiff, which stated, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." Kime Dep. Exh. 6, at 1, Exhibit 70; Kime Dep., at 73-74, Exhibit 65. Mr. Kime's assertion that the position was not sufficiently developmental enough to hold Mr. Tuvell's interest is shown to be pretextual by the fact that job description, drafted by Kime, formally designated the position as "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." Kime Dep. Exh. 12, at 1, Exhibit 68; Kime Dep., at 28, 32-33, Exhibit 65. The assertion is likewise shown to be pretextual, as Mr. Tuvell's consideration as a candidate was rejected immediately upon Mr. Kime's discussion with

Mr. Feldman, and that discussion did not touch upon Mr. Tuvell's alleged exclusive interest in developmental work. Kime Dep., at 118-119, Exhibit 65; Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. Pretext is further established by the fact that Mr. Tuvell's alleged non-interest in work was not mentioned at all in IBM's February 14, 2012 explanation for the rejection, which vaguely mentioned "performance issues." Mandel Dep. Exh. 30, at TUVEL1213, Exhibit 112; Mandel Dep., at 150, Exhibit 55. Furthermore, there was much direct evidence that Plaintiff was subject to retaliatory and discriminatory animus.

Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination claimed that the following passage provided by Tuvell in support of one such complaint, was "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 38-40, 198-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task (for none exists) that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination,

retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82: Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence that handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having PTSD, considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50; Feldman Dep., at 91, Exhibit 43; See also Due Dep., at 140, Exhibit 50 (urging care when walking to car). At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer, based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. On January 6, 2012, Kime gave as the following the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system, given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. IBM curtailed Plaintiff's access to computer systems for the express purpose of sabotaging Mr. Tuvell's access to the reasonable accommodation of working at home and away from the direct

supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working. It is easy to return access once you return from STD [short term disability]." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy ("While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee." Tuvell Aff., ¶ 14, Exhibit 47).

66. On January 11, 2012, Plaintiff emailed Mr. Feldman and accused him of retaliation based on his failure to receive an offer for the position with Mr. Kime in Littleton and asked Mr. Feldman to provide him with other ideas for a reasonable accommodation. FAC ¶ 100.

Response: It is denied that the January 11, 2012 email accused Mr. Feldman of retaliation, and there is no record support for this assertion. In actuality, Plaintiff accused IBM of retaliation. Feldman Dep. Exh. 38, at 1039-1040, Exhibit 93; Feldman Dep., at 158-159, Exhibit 43. The rest of the statement is admitted.

67. Mr. Feldman responded to Plaintiff's request by offering a variety of accommodations, including having someone other than Mr. Feldman provide Plaintiff with performance feedback, allowing Plaintiff to leave work as necessary to attend any doctor's

appointments, and ongoing access to GOM to look for open positions under a different supervisor. FAC ¶ 105.

Response: It is denied that Mr. Feldman's proposals were authentic "accommodations," as they were contrary to documented medical limitations of Mr. Tuvell that were reported to Defendant. The proposals were suggested by IBM only after Tuvell's health care provider certified on December 19, 2011, that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. Defendant fails to address how its proposal, which was contrary to Plaintiff's medical limitations, could be construed as an accommodation, much less a reasonable one. It is admitted that the various proposals were communicated to Plaintiff.

68. Plaintiff rejected all of Mr. Feldman's proposed accommodations and, on January 23, 2012, Plaintiff's counsel requested as a reasonable accommodation that IBM transfer Plaintiff to the position in Littleton with Mr. Kime, for which he had previously applied and been rejected, and which had been reposted after the first posting for the position expired. FAC ¶¶ 106, 108.

Response: Admitted, although it is denied that Mr. Feldman's proposals were "accommodations." Resp. DSOF67.

69. IBM subsequently denied Plaintiff's request for reassignment, stating its belief that Plaintiff was capable of performing his current position under Mr. Feldman and again proposing alternative accommodations, including receiving feedback from a different manager. FAC ¶ 109.

Response: Admitted, except that it is denied that Defendant at that point believed that Plaintiff was capable of performing his current position under Mr. Feldman. At that point, IBM

had received documentation from Plaintiff's medical provider that that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. Tuvell additionally indicated that he was medically unable to work under Feldman or any similar harasser many times, including on January 18, 2012, when he wrote, "[b]ased on my handicap of PTSD and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with you [Feldman] or under you." TUVELL1027, Exhibit 113, Def.'s Further Resp. to Req. for Adm. 69, Exhibit 87. See also PSOF60-63. Consequently, a jury would be free to reject IBM's self-serving assertion of "belief" that Tuvell was medically capable of returning to work under Mr. Feldman. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe").

70. Plaintiff independently applied for the reposted position with Mr. Kime on January 25, 2012, but was not considered for the position for the same reasons he had not been selected for the identical, previously-posted position. FAC ¶ 112; Kime Dep., pp. 150-151; Ackerstein Aff., **Ex. 3**.

Response: Admitted, with the proviso that the reasons Mr. Tuvell was rejected for the earlier position was based on handicap, his availment of reasonable accommodation, and retaliation. Resp. DSOF65.

71. On February 15, 2012, John Metzger, Mr. Feldman's supervisor, wrote to Plaintiff directly and offered him as an accommodation the possibility of receiving his performance evaluations from Mr. Metzger directly, instead of Mr. Feldman. FAC ¶ 117.

Response: It is admitted that the proposal was communicated to Plaintiff on February 15, 2012. It is denied that the proposal constituted an authentic "accommodation," reasonable or

otherwise, because the proposal was inconsistent with Mr. Tuvell's medical limitations as was reported to IBM directly by Mr. Tuvell and by Mr. Tuvell's medical provider. At that point, IBM had received documentation from Plaintiff's medical provider that that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. Tuvell additionally indicated that he was medically unable to work under Feldman many times, including on January 18, 2012, when he wrote, "[b]ased on my handicap of PTSD and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with you [Feldman] or under you." TUVELL1027, Exhibit 113, Def.'s Further Resp. to Req. for Adm. 69, Exhibit 87. Consequently, a jury would be free to reject IBM's self-serving assertion of "belief" that Tuvell was medically capable of returning to work under Mr. Feldman. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe").

72. The next day, February 16, 2012, Plaintiff rejected Mr. Metzger's proposed accommodation, claiming that he was medically incapable of returning to work under Mr. Feldman and opting instead to remain out on medical leave. FAC ¶ 118.

Response: Admitted, except as to the point where it is claimed that Plaintiff "opted" to remain out on medical leave. The statement is unsupported by the citation, and wrongly implies that there was a medically feasible alternative to leave, which there was not. Def.'s Exh. 28; TUVELL1027, Exhibit 113, Def.'s Further Resp. to Req. for Adm. 69, Exhibit 87. After February 16, 2012, it is admitted that Plaintiff remained out on medical leave.

**PLAINTIFF'S NEW EMPLOYMENT AND TERMINATION FROM IBM**

73. While Plaintiff was communicating with Mr. Feldman and Mr. Metzger about potential accommodations, Plaintiff was also interviewing for a full-time job with Imprivata, from whom he received an offer of employment on February 28, 2012, and for whom he began working on March 12, 2012, while still on medical leave from IBM. Plaintiff did not disclose this to IBM. Pl. Dep., Day 1, pp. 95-97, 102-103; Ackerstein Aff., **Ex. 1**.

Response: Admitted, except the portion that says "while," which implies that the interview process was directly contemporaneous with the unspecified communications with Mr. Feldman and Mr. Metzger. The record citation does not support the assertion.

74. On May 7, 2012, while Plaintiff was still out on leave, Ms. Adams wrote Plaintiff asking him to confirm that he was not working for EMC Corporation while on medical leave from his employment with IBM. Plaintiff responded by accusing IBM of defamation and asking for evidence that he was violating IBM's Guidelines. FAC ¶¶ 134, 135.

Response: Admitted, except that Plaintiff's response was not directed towards the request for confirmation about working at EMC, but instead was directed at the unfounded assertion that he was violating IBM Guidelines, and threatening him with termination. Verified Complaint, ¶¶ 134, 135, Exhibit 42.

75. IBM's Business Conduct Guidelines require employees on leave to inform IBM if they begin working for another company so IBM can run a conflict check and ensure that the company is not a competitor. FAC ¶ 140.

Response: Denied. The record citation fails to support this statement, entirely, and IBM was and is unable to identify any policy containing such a requirement for individuals on short term disability leave. IBM's Personal Leave of Absence (PLOA) Policy was inapplicable to Mr. Tuvell, as he was not on personal leave, and was rather on medical leave. Verified Complaint, ¶

140, Exhibit 42. Plaintiff explained why the PLOA policy was inapplicable to him, and provided IBM with a screen shot of its own policy statements, which distinguished personal leaves from medical leaves, and established different sections for access policies relating to each. TUVELL1468, 1474, Exhibit 88; Tuvell Aff., ¶ 16, Exhibit 47.

76. In response, Ms. Adams wrote to Plaintiff that his LinkedIn page listed EMC as his current employer and asked him to confirm that he was not currently working for EMC. FAC ¶ 136.

Response: Admitted.

77. Plaintiff responded by informing Ms. Adams that he was not employed by EMC, and that by continuing to ask him if he was, Ms. Adams was harassing and defaming him. Ms. Adams responded by thanking Plaintiff for his response and asked Plaintiff to advise where he has been working during his leave. Plaintiff responded to Ms. Adams's request by telling her that he was in compliance with his contractual obligations and refusing to provide her with the name of the company he began working for while on unpaid leave from IBM. When Ms. Adams responded to Plaintiff that IBM's Personal Leave of Absence Policy required him to tell IBM if he was working while on leave, Plaintiff accused Ms. Adams of retaliation and harassment and continued to refuse to provide the name of his new employer. FAC ¶¶ 139 – 141.

Response: Admitted, except it is denied that IBM's Personal Leave of Absence (PLOA) Policy was applicable to Mr. Tuvell, as he was not on personal leave, and was rather on medical leave. Verified Complaint, ¶ 140, Exhibit 42. Plaintiff explained why the PLOA policy was inapplicable to him, and provided IBM with a screen shot of its own policy statements, which distinguished personal leaves from medical leaves, and established different sections for access policies relating to each. TUVELL1468, 1474, Exhibit 88; Tuvell Aff., ¶ 16, Exhibit 47.

78. On May 15, 2012, Ms. Adams informed Plaintiff that he had to identify the company he was working for by 5:00 PM the following day or IBM would be forced to terminate his employment. FAC ¶ 142.

Response: It is admitted that on May 15, 2012, Ms. Adams wrote to Plaintiff stating, "Please advise IBM where you currently are working by 5pm tomorrow." TUVELL1482, Exhibit 89; Def.'s Further Resp. to Req. for Adm. 97, Exhibit 87. It is denied that IBM would be forced to terminate Mr. Tuvell based on non-compliance, and it is denied that Mr. Tuvell was told that IBM would be forced to fire him based on non-compliance. Id. The Defendant's statement is unsupported by the record cite, and is contradicted by the actual communication which Plaintiff hereby attaches. Id.

79. Plaintiff continued to refuse to provide IBM with the name of the company he was working for while on medical leave and, on May 17, 2012, Plaintiff's employment from IBM was terminated based on his refusal to advise IBM of where he was working, despite repeated requests that he do so. FAC ¶¶ 143, 145; Feldman Dep., Ex. 44; Ackerstein Aff., **Ex. 25**.

Response: Admitted, except that the asserted reason for the termination is denied. In actuality, Plaintiff was terminated not for failing to identify his other employer, but instead based on retaliation and handicap discrimination, and/or for availing himself of reasonable accommodation. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that there was no competition. Verified Complaint, ¶ 141, Exhibit 42; TUVELL1468-1469, Exhibit 88;

Tuvell Aff., ¶ 11, Exhibit 47. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2014. Verified Complaint, ¶ 145, Exhibit 42. The termination occurred within days of Tuvell engaging in protected conduct. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. ¶ 95, Exhibit 87.

There is an enormous amount of additional evidence that the termination was based on retaliation. Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination claimed that the following passage provided by Tuvell in support of one such complaint, was "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 199-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's

access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82: Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence that handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having PTSD,

considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110; Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50. At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer, based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. On January 6, 2012, Kime gave as the following the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system, given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. IBM curtailed Plaintiff's access to computer systems for the express purpose of sabotaging Mr. Tuvell's access to the reasonable accommodation of working at home and away from the direct supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your

concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working. It is easy to return access once you return from STD [short term disability]." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75, Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy ("While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee." Tuvell Aff., ¶ 14, Exhibit 47).

80. IBM later learned that Plaintiff interviewed for a job with Imprivata, which develops and sells software products, in January of 2012, received an offer of employment on February 28, 2012, and began working for Imprivata on March 12, 2012, while still on medical leave from IBM. Pl. Tr. Day 1, pp. 95-97, 111; Ackerstein Aff., **Ex. 1**.

Response: Admitted.

81. Plaintiff's salary at Imprivata is greater than what he was earning at IBM. Plaintiff is claiming lost wages of $21,510. Pl. Dep., Day 1, pp. 97-102; Ackerstein Aff. 1; Plaintiff's Automatic Disclosures, Ackerstein Aff., **Ex. 40**.

Response: Admitted.

Plaintiff Walter Tuvell,
By his attorneys,

/s/ Robert S. Mantell
Robert S. Mantell (BBO #559715)
RODGERS, POWERS & SCHWARTZ LLP
111 Devonshire St.
4th Floor
Boston, MA 02109
(617) 742-7010
RMantell@TheEmploymentLawyers.com

**CERTIFICATE OF SERVICE**

This is to certify that on February 12, 2015, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Robert S. Mantell
Robert S. Mantell

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | |
|---|---|
| WALTER TUVELL,<br><br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES, INC.,<br><br>Defendant | Civil Action No. 13-11292-DJC |

**PLAINTIFF'S STATEMENT OF FACTS IN MATERIAL DISPUTE**

Pursuant to LR 56.1, Plaintiff hereby submits his Statement of Facts in Material Dispute, which is being filed to support his Opposition to Defendant's Motion for Summary Judgment.

1. On or about May 18, 2011, Mr. Knabe asserted to Mr. Feldman, in Mr. Tuvell's absence, that Mr. Tuvell had failed to produce that day certain Microsoft Excel graphics as instructed. Verified Complaint, ¶ 14, Exhibit 42. These assertions were entirely false. Verified Complaint, ¶ 14, Exhibit 42. In fact, Mr. Knabe had not instructed Mr. Tuvell to produce any work at all that day, much less produce any Excel graphics. Verified Complaint, ¶ 14, Exhibit 42.

2. IBM has taken the position that the May 18, 2011 incident was one of the justifications for the demotion/reassignment of June 10, 2011. Def.'s Mem., at 4; Feldman Dep., at 26-27, 38-40, 59, Exhibit 43.

3. The assertion that Plaintiff was even asked to produce Excel graphics is patently pretextual, given that both Mr. Feldman and Mr. Knabe knew that Mr. Tuvell did not even use or have a copy of Excel or the Microsoft operating system, but instead he used different more

advanced software tools for all his work at IBM. Feldman Dep., at 40-41, Exhibit 43; Knabe Dep., at 102-103, Exhibit 44.

4. Defendant's assertions of what happened on May 18, 2011 are inconsistent, and therefore pretextual, as on other occasions, Plaintiff's alleged misconduct was identified as that he was working "too slowly." IBM Ans. to Int. 4, at 4-5, Exhibit 45; May 11, 2012, Position Statement, at 3, ¶ 2, Exhibit 46.

5. In response to Mr. Knabe's May 18, 2011 complaints, Plaintiff denied any wrongdoing, sought more detail concerning his alleged misconduct, and requested a three-way meeting amongst the three individuals, multiple times, to establish what exactly happened and to clear the air. Verified Complaint, ¶¶ 15, 16, Exhibit 42. Mr. Feldman repeatedly denied Plaintiff's requests to have a three-way meeting, refused to investigate the false assertion about Plaintiff's work performance, and refused to respond to the requests for more information. Verified Complaint, ¶ 16, Exhibit 42.

6. While Mr. Feldman claims he rejected the option of a three-way meeting for the reason that it would create an unhealthy "habit," he had in fact conducted just such a three-way meeting shortly before, in March 2011, concerning a different issue. Compare Feldman Dep., at 46, Exhibit 43, with Tuvell Aff., ¶ 17, Exhibit 47.

7. On June 8, 2011, Mr. Knabe yelled loudly at Mr. Tuvell in front of co-workers, asserting that Mr. Tuvell failed to produce certain specified work items that day as ordered. Verified Complaint, ¶ 15, Exhibit 42. These assertions were entirely false. Verified Complaint, ¶ 15, Exhibit 42. In fact, Mr. Knabe had ordered Mr. Tuvell to produce certain different specified work items that day, and Mr. Tuvell had indeed produced these latter work items that day, as Mr. Knabe was already fully aware. Verified Complaint, ¶ 15, Exhibit 42. On June 10, 2011, Mr. Knabe

acknowledged in writing that he had indeed raised his voice at Mr. Tuvell. Verified Complaint, ¶ 15, Exhibit 42.

8. On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned or demoted from performing the highest level ("lead") work within the Performance Architecture Group to the lowest. Verified Complaint, ¶ 18, Exhibit 42. IBM asserts that the job action was based on the May 18 and June 8 incidents. Verified Complaint, ¶ 16, Exhibit 42. Mr. Feldman assigned Mr. Tuvell to switch the high-level work role of Mr. Tuvell with the low-level work role of Ms. Sujatha Mizar, a less qualified female of East Asian heritage. Verified Complaint, ¶ 18, Exhibit 42; Feldman Dep., at 57-59, Exhibit 43. Mr. Tuvell was decades older that Ms. Mizar, who was well under forty, and he had decades more relevant experience for the position. Verified Complaint, ¶ 18-19, Exhibit 42. Ms. Mizar had no Ph.D, while Plaintiff had one in Mathematics. Feldman Dep., at 16, Exhibit 43; Verified Complaint, ¶ 1, Exhibit 42. Plaintiff was being paid approximately $35,000 more than Ms. Mizar. Feldman Dep., at 58, Exhibit 43.

9. Plaintiff suffers from Post Traumatic Stress Disorder. Verified Complaint, ¶ 10, Exhibit 42.

10. Mr. Feldman was aware of Plaintiff's PTSD at least as early as May 26, 2011. Feldman Dep., at 47, Exhibit 43.

11. Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Mr. Feldman, and IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; Verified Complaint, ¶ 1, Exhibit 42; Feldman Dep. Exhs. 2&3, Exhibit 48; Feldman Dep., at 18-22, Exhibit 43. Mr. Feldman regarded Plaintiff's work in the

Performance Architecture area as competent and his interactions with others to be professional. Feldman Dep., at 17, 26, Exhibit 43.

12. Plaintiff was working at a "Band 8" level, and Ms. Mizar was working at a "Band 7" level, and so the Mizar position was a "lesser role." Due Dep. Exh. 19, at IBM11041, Exhibit 49; Due Dep., at 119, Exhibit 50.

13. Plaintiff regarded his Performance Architecture position on the "Wahoo" project to be a very highly valued position. He wrote, "I truly thought I was extremely fortunate to be in the best possible project at Netezza." Feldman Dep. Exh. 8, at TUVELL255, Exhibit 51; Feldman Dep., at 55-56, Exhibit 43. Plaintiff noted that Mr. Feldman told him that it was a "plum" position, and that there was "almost no other job like this for a performance professional in the country." Due Dep. Exh. 2, at IBM8848, Exhibit 52; Tuvell Aff., ¶ 19, Exhibit 47.

14. The June 10, 2011 reassignment meant that Plaintiff was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower level work. Tuvell Aff., ¶ 20, Exhibit 47. The reassignment to a lower position meant lesser job opportunities in future, and also by its high visibility reflected what Plaintiff considered to be public humiliation. Feldman Dep. Exh. 10, at TUVELL261, Exhibit 53; Feldman Dep., at 68, Exhibit 43.

15. IBM's own policies considers an "undesirable reassignment" to be a tangible adverse employment action. Mandel Dep. Exh. 47, at IBM2309, Exhibit 54; Mandel Dep., at 169-170, Exhibit 55.

16. The June 10, 2011 reassignment meant change of assigned work office from Cambridge to Marlborough, resulting in a much longer commute (15 miles vs. 45 miles), and which Tuvell

regarded as a less preferable location. Feldman Dep., at 57, 63-64, Exhibit 43; Tuvell Aff., ¶ 18, Exhibit 47.

17. On June 12, 2011, Tuvell complains to Feldman in his weekly report about Mr. Knabe's "harassment and yelling," an "'illegal' adverse job action (in the IBM sense, and perhaps even in the civil sense)." Tuvell further complained about the "public humiliation of unilateral removal from the most excellent high-profile position on Wahoo to what seems . . . a highly symbolic deportation to Siberia." Finally, Tuvell noted that his multiple requests for three-way meetings with Knabe have been refused. Feldman Dep. Exh. 10, at TUVELL261, Exhibit 53; Feldman Dep., at 68, Exhibit 43.

18. On June 12, 2011, Feldman responded by email to Tuvell's June 12, 2011 email. After months of addressing Mr. Tuvell as the familiar "Walt," Mr. Feldman addresses his June 12, 2011 e-mail with stiff formality to "Dr. Tuvell." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In that June 12, 2011 email, Mr. Feldman requires that all of Mr. Tuvell's further written and verbal communications with him must be made in the presence of, or copied to, Human Resources representatives. Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. Mr. Feldman states, "I go down this path regretfully. You have twice now made clear to me your history of suing when you feel you've been wronged in the office and I see no choice." Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56; Verified Complaint, ¶ 20, Exhibit 42.

19. On June 14, 2011, Feldman wrote to Tuvell and Mizar, asking that they provide Feldman with a brief email at the end of every business day detailing the transition of tasks between them that have been completed and providing alerts of any problem. Feldman Dep. Exh. 13, at

TUVELL267, Exhibit 57; Feldman Dep., at 85-86, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56; Verified Complaint, ¶ 22, Exhibit 42.

20. On June 14, 2011, Mizar provided to Feldman a brief but complete status update of the transition, which was copied to Tuvell:

1) Finished transition of the Block IO tracing project. (Sujatha to Walter)
2) Finished transition of the WaltBar performance tool (Walter to Sujatha)

Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43. Mizar's email further stated, "Walt – please feel free to add anything I might have forgotten. Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43.

21. Despite the fact that the email from Mizar purported to describe the transition status from the point of view of both Tuvell and Mizar, and despite the fact that Feldman had not specified that both Mizar and Tuvell were to each submit a separate (identical) report, Feldman asserted that he had concluded that Plaintiff's failure to provide him a separate report regurgitating the same information found in Mizar's report to be inappropriate. Feldman Dep., at 86, 88-89, Exhibit 43.

22. On June 15, 2011, prior to the beginning of the day's normal work hours, Mr. Feldman emailed a demand to Mr. Tuvell to submit a separate individual transition report, falsely stating that he had previously "asked you to provide … a report from each of you daily". Feldman Dep. Exh. 13, at TUVELL266, Exhibit 57; Feldman Dep., at 86, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56; Verified Complaint, ¶ 22, Exhibit 42.

23. On June 15, 2011, Tuvell replied to Feldman, and copied Ms. McCabe and Ms. Adams, stating that he did not provide a separate report because it would have been redundant, as he knew Mizar's report already contained everything that he would have reported. Feldman Dep. Exh. 13, at TUVELL265, Exhibit 57; Feldman Dep., at 86-87, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56. In this email, Tuvell complains of age and sex discrimination with respect to his replacement by Ms. Mizar, a less qualified, younger, female individual, and Tuvell expresses his opinion Feldman's picky requirements reflect "blatant . . . harassment/retaliation." Feldman Dep. Exh. 13, at TUVELL265, Exhibit 57; Feldman Dep., at 86-87, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56.

24. On June 16, 2011, at 10:25 am, Feldman emailed Tuvell, asking by the next day a "detailed (one-day granularity) schedule for your work on the assigned projects between now and the beginning of your medical leave." TUVELL272, Exhibit 59; Resp. to Pl.'s Req. for Adm. 6, Exhibit 56. Tuvell's medical leave was scheduled to begin July 7, 2011, three weeks in the future. IBM8840, Exhibit 60; Tuvell Aff., ¶ 28, Exhibit 47. Mr. Tuvell reports that it "turns my stomach (literally, not figuratively) to contemplate working with him." TUVELL271, Exhibit 59; Resp. to Pl.'s Req. for Adm. 6, Exhibit 56.

25. On June 17, 2011, Mr. Tuvell complains of continuing harassment to Mr. Feldman, Ms. McCabe and Ms. Adams. Verified Complaint, ¶ 27, Exhibit 42. Tuvell complained, among other things, that Tuvell was being required to establish an independent daily schedule for the next three weeks on all four projects he was taking over from Mizer, based solely on her short one-line descriptions of her projects. TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56. Tuvell complained that he was still on a learning curve with respect for the new projects, and has never set a daily schedule for three weeks in the future, let alone for unfamiliar projects.

TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56. Mr. Tuvell requests an example of such a schedule from Mr. Feldman, but none is forthcoming. Verified Complaint, ¶¶ 26, 30, 43, Exhibit 42; TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56.

26. On June 17, 2011, Mizar provides Feldman with a transition status update for the prior two days, demonstrating that she missed the previous day's update. Feldman Dep. Exh. 15, Exhibit 62; Feldman Dep., at 92-93, Exhibit 43. However, Mizar was not disciplined or counselled for missing that update. Feldman Dep., at 92-93, Exhibit 43.

27. Feldman forbids Tuvell from spending an earlier agreed-upon reasonable working time on his internal complaint of harassment, and then threatened Tuvell with termination when Tuvell responded by saying, "Now wait a minute, Dan." Verified Complaint, ¶ 46, Exhibit 42.

28. Based on the harassment that Plaintiff experienced, and the severe PTSD symptoms that resulted, including a fainting episode, Plaintiff went out on sick leave on August 11, 2011. Verified Complaint, ¶¶ 49, 53-54, Exhibit 42. Mr. Tuvell reported to IBM's Russell Mandel that: "The very REASON I'm on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse being heaped upon me by Dan Feldman, and yourself . . . The ONLY way for me to recover sufficient to return to work from STD is to settle this case. Properly and correctly." Mandel Dep. Exh. 10, at TUVELL744, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55.

29. Instead, Mandel initially refused to progress the investigation during the leave. Though Plaintiff objected, Mandel didn't complete his "investigation" until four and a half months after initial Plaintiff's request. Verified Complaint, ¶¶ 33, 81, Exhibit 42; Resp. DSOF29.

30. On or about October 19 and 20, 2011, Mr. Tuvell objects to Mr. Feldman falsely characterizing work at home days as sick days, asks for citation to the policy that supports the

practice, and notes that it is inconsistent with his work-at-home days pre-June 30, 2011. Verified Complaint, ¶ 77, Exhibit 42. On November 2, 2011, Mr. Feldman made knowingly false statement mischaracterizing Mr. Tuvell's work situation with respect to sick days — casting work-at-home days as refusal to work in the office days. Verified Complaint, ¶ 78, Exhibit 42.

31. On January 6, 2012, Chris Kime sent Plaintiff an email explaining the following was the primary reason for rejecting Plaintiff's application for transfer to a Software Developer position under Kime: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. Kime acknowledged that Feldman's input was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman. Kime Dep., at 118-119, Exhibit 65; Further Supp. Ans. to Ints., at 10, Exhibit 66 (Kime relied on discussions with Feldman in rejecting Tuvell); Due Dep., at 135-136, Exhibit 50.

32. Plaintiff requested Mr. Mandel to conduct an investigation into his allegations of discrimination, retaliation and harassment on or about June 29, 2011. Tuvell Aff., ¶ 21, Exhibit 47. The harassment Plaintiff experienced caused him to be sick from PTSD symptoms, and Plaintiff was unable to return to work, as of August 11, 2011, to work under Mr. Feldman. Tuvell Aff., ¶ 21, Exhibit 47; Ross Dep., at 78-79, Exhibit 67. During the time of his medical leave, Plaintiff was hoping that Mr. Mandel's investigation of his complaint would progress, such that he could resolve Plaintiff's workplace difficulties, and permit Plaintiff, medical condition and all, to return back to work. Tuvell Aff., ¶ 21, Exhibit 47; Mandel Dep. Exh. 10, at TUVELL744, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55. Instead, Mr. Mandel did not inform Plaintiff of the

conclusion of his investigation until November 17, 2011, and the results were disfavorable. Tuvell Aff., ¶ 21, Exhibit 47.

33. SWG-0436579 was a posted position for a Software Developer in IBM's Littleton office. Kime Dep., at 32, Exhibit 65. The position was open, and Tuvell applied for it on or about November 28, 2011. Kime Dep., at 45-48, Exhibit 65; Verified Complaint, ¶ 85, Exhibit 42.

34. The job requisition for SWG-0436579 contained a list of four minimum qualifications for the position, including [1] a Bachelor's Degree; [2] at least 3 years experience in the "C" programming language, debugging and unit testing; [3] at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements; and [4] fluency in English. Kime Dep. Exh. 12, at 2, Exhibit 68; Kime Dep., at 28-29, 33-34, 38-40, Exhibit 65 .

35. Plaintiff satisfied all of the minimum qualification for the SWG-0436579 position. Tuvell had a Bachelor's degree from MIT, and a MS and Ph.D in mathematics from the University Chicago. PSOF11. He had the required qualification of at least three years experience in the "C" programming language, debugging and unit testing, and in fact he had over twenty years of such experience. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 1, Exhibit 47. He had the required qualification of at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements, because he had over two decades of such experience. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 2, Exhibit 47. Finally, Tuvell met the required qualification that he be fluent in English. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 3, Exhibit 47. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. Kime Dep. Exh. 12, at 1-2, Exhibit 68; Tuvell Aff.. ¶ 4-7, Exhibit 47.

36. Christopher Kime, as of 2010, was Development and Solutions Manager, and he acted as Hiring Manager for the SWG-0436579 position. Kime Dep., at 19-20, 29, Exhibit 65. Kime drafted the posting himself, including what he regarded to be the minimum qualifications. Kime Dep., at 32-34, Exhibit 65. Kime reviewed Tuvell's resume and other documentation, and concluded he had "little doubt that you [Tuvell] have technical skills that we could use on the project." Kime Dep. Exh. 2, Exhibit 69; Kime Dep., at 51-53, Exhibit 65. On or about December 1, 2011, Kime interviewed Tuvell by phone, which touched upon Tuvell's background and qualifications. Kime Dep., at 60-62, Exhibit 65. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team. Kime Dep., at 64, Exhibit 65. As a result of the interview, Kime asked his support lead, and also the next most senior member of the Littleton team, to interview Tuvell. Kime Dep., at 68-69, Exhibit 65.

37. Tuvell was interviewed by these other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive." Kime Dep., at 77, Exhibit 65; Kime Dep. Exh. 6. Kime acknowledged that the interviews with the management team did not exclude Tuvell as a candidate. Kime Dep., at 83, 97-98. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." Feldman Dep., at 157, Exhibit 43. Kime considered Tuvell's technical knowledge and ability to be a strength. Kime Dep., at 93, Exhibit 65. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for the position. Kime Dep., at 105, Exhibit 65. Kime believed Tuvell had "deep technical skills and ability to produce solid documentation." Kime Dep. Exh. 11, Exhibit 64; Kime Dep., at 132-133, Exhibit 65.

38. Mr. Tuvell's December 9, 2011 email to Kime and the other interviewers states, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." Kime Dep. Exh. 6, at 1, Exhibit 70; Kime Dep., at 73-74, Exhibit 65.

39. The posting for the SWG-0436579 position calls for a "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." Kime Dep. Exh. 12, at 1, Exhibit 68; Kime Dep., at 28, 32-33, Exhibit 65.

40. IBM now asserts that Plaintiff was rejected for the position because he had demonstrated difficulty working with team members, based on the input of Mr. Feldman. Kime Dep., at 100, Exhibit 65. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." Kime Dep. Exh. 8, Exhibit 71; Kime Dep., at 108-109, Exhibit 65. Feldman verbally rated Tuvell a "3", which represents a low ranking, but above those facing termination. Kime Dep. Exh. 8, Exhibit 71; Kime Dep., at 118, Exhibit 65. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." Kime Dep., at 111, 112, Exhibit 65. As of December 13, 2011, Kime no longer considered hiring Tuvell for the position. Kime Dep., at 118-120, Exhibit 65. On January 6, 2012, Kime formally rejected Tuvell for the position, stating as reasons primarily the difficulties inherent in "taking you directly from being on short term disability," and secondarily "concern about the work being to your liking." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 133, Exhibit 65.

41. Plaintiff went out on Short Term Disability effective on or about August 11, 2011. Verified Complaint, ¶ 54, Exhibit 42. After 13 weeks on STD, or sometime in November 2011,

Plaintiff's benefits were reduced to 66 2/3 % of his usual salary. Verified Complaint, ¶ 69, Exhibit 42. On or about January 25, 2012, Mr. Tuvell exhausted his STD benefits, and is transitioned to unpaid leave. Verified Complaint, ¶ 125, Exhibit 42.

42. After Plaintiff was rejected for the Software Developer position, the position remained open, and IBM continued to seek applicants. Kime Dep., at 147, Exhibit 65. After Kime decided to not hire Tuvell, and after the posting lapsed, Kime re-posted the identical position for the new year to seek new candidates, this time with the identifying number SWG-0456125. Kime Dep., at 147-151, Exhibit 65. The reposted position also lapsed without being filled. Kime Dep., at 149-151, Exhibit 65.

43. While Kime explained to Plaintiff, on January 6, 2012, that his application for the Software Developer position was due to the inability to take him directly "from being on short term disability," after the fact, IBM takes the position that this was a false reason, and that indeed, Kime was counselled for identifying a false reason for the rejection. Mandel Dep., at 147-148, 150-151, Exhibit 55; Mandel Dep. Exh. 31, at TUVELL1225, Exhibit 72; Kime Dep., at 154-155, Exhibit 65.

44. There is sufficient evidence upon which a jury could infer that Mr. Kime knew of Plaintiff's internal complaints of handicap discrimination and retaliation as of the time of the January 6, 2012 rejection. For, on or about December 15, 2011, Mr. Kime and Mr. Feldman were messaging each other about Plaintiff's application for the transfer, after having discussed the matter by telephone, and Kime wrote, "I do not envy you having to deal with HR and lawyers at this point." Kime Dep. Exh. 9, Exhibit 73, Kime Dep., at 109-110, 120-121, Exhibit 65.

45. There was yet additional evidence of handicap animus, as Defendant expressly curtailed Plaintiff's access to its computer systems, and IBM facilities, and further refused to

advance or otherwise delayed finalization of its investigation of Plaintiff's complaints of discrimination and retaliation, based on Plaintiff's availment of the reasonable accommodation of disability leave. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system), given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [because of STD]. It is easy to return access once you return from STD." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55.

46. Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination claimed that the following passage provided by Tuvell in support of one such complaint, was "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 199-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much", as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe."

Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM has asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id.

47. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶¶ 122, 123, Exhibit 42; TUVELL 1230, 1235-1236, Exhibit 80; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 10, 29, Exhibit 47.

48. On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which, again is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82: Mandel Dep., at 156-157, Exhibit 55; Verified Complaint, ¶¶ 129, 131, Exhibit 42.

49. On August 3, 2011, Plaintiff was prohibited from using a previously agreed-upon reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42.

50. On August 3, 2011, Plaintiff was given a formal discipline, with threat of termination, for innocently writing, "if you're lazy you can just click this link;" meanwhile, Mr. Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Mr. Tuvell. Feldman Dep., at 53-55, Exhibit 43; Verified

Complaint, ¶ 44, 48, Exhibit 42; Due Dep., at 110, 141-142, Exhibit 50 (concluding that Mr. Knabe raised his voice). Mr. Mandel testified that he, too, found the "lazy" comment to be inappropriate. Mandel Dep., at 54, Exhibit 55.

51. On June 12, 2011, Feldman told Plaintiff that he was required to copy HR on all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56.

52. In response to one of Tuvell's complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

53. On January 25, 2012, after exhausting all of his STD benefits, and with no indication that he would ever be provided with reasonable accommodation, IBM transitioned Tuvell to unpaid leave, where he is kept until his termination on May 17, 2012. Verified Complaint, ¶ 110, 132, Exhibit 42.

54. At about this time, and thereafter, IBM attempted to hire a replacement for Plaintiff's position, asserting that "key investigation necessary to support the correct development of future generations of the Netezza appliance have stopped making progress pending Dr. Tuvell's return to work." Feldman Dep., at 163-164, Exhibit 43.

55. On May 8, 2012, Plaintiff submits his Fourth Open Door Complaint alleging unlawful discrimination and retaliation. Verified Complaint, ¶ 135, Exhibit 42; TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87. On May 14, 2012,

Plaintiff likewise complained of unlawful harassment and retaliation. Verified Complaint, ¶ 141, Exhibit 42.

56. On May 7, 2012, IBM wrote to Plaintiff, stating that it believed Plaintiff to be working for EMC, a competitor, and threatening termination. Verified Complaint, ¶ 134, Exhibit 42; TUVELL1461, Exhibit 86; Def.'s Further Resp. to Req. for Adm. 94, Exhibit 87. On May 8, 2012, Tuvell responds, and denies working for EMC. Verified Complaint, ¶ 137, Exhibit 42. Also, on May 8, 2012, Tuvell files another formal complaint, with IBM, complaining of retaliation and discriminatory harassment. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87. Tuvell explains that he does not wish to inform IBM where he is working, as he fears a retaliatory response. Verified Complaint, ¶ 139, Exhibit 42.

57. On May 11, 2012, IBM demands to know where Tuvell is working, citing an inapplicable policy, and its need to confirm that Tuvell is not working for a competitor. Verified Complaint, ¶¶ 140-141, Exhibit 42; TUVELL 1468-1470, Exhibit 88; Tuvell Aff., ¶ 11, Exhibit 47. On May 15, 2011, IBM demanded to know Tuvell's new employer, based on its duty to confirm that Tuvell is not working for a competitor. Verified Complaint, ¶ 142, Exhibit 42; TUVELL1482, Exhibit 89; Def.'s Further Resp. to Req. for Adm. 97, Exhibit 87. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that there was no competition. Verified Complaint, ¶ 141, Exhibit 42; TUVELL1468-1469, Exhibit 87; Tuvell Aff., ¶ 11, Exhibit 47. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2014. Verified Complaint, ¶ 145,

Exhibit 42. The termination occurred within days after Tuvell engaged in protected conduct. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87.

58. Before the Massachusetts Commission Against Discrimination, Defendant took the position that Plaintiff's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." IBM Position Statement, at 4, Exhibit 46. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." Snyder Dep., at 85, Exhibit 90. Moreover, Plaintiff actively opposed the demotion. Def.'s Exh. 19, at TUVELL265-266.

59. The May 18 and June 8 incidents were not the true reasons for the June 10, 2011 demotion/transfer. Mr. Feldman failed to take action to resolve any alleged difficulties involving Knabe and Tuvell. Verified Complaint, ¶ 16, Exhibit 42. For example, Mr. Feldman refused to investigate, and refused to respond to Mr. Tuvell's repeated inquiries for more detail concerning his alleged misconduct. Verified Complaint, ¶ 16, Exhibit 42. Mr. Feldman repeatedly denied Mr. Tuvell's requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Feldman Dep., at 46-47, Exhibit 43; Verified Complaint, ¶ 16, Exhibit 42. While Mr. Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had conducted such a meeting shortly before, in March 2011, concerning a different issue. Compare Feldman Dep., at 46, Exhibit 43, with Tuvell Aff., ¶ 17, Exhibit 47.

60. In order to remain a productive employee of IBM, Plaintiff required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Mr. Feldman. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and

setting." DSOF49. Plaintiff, on a variety of occasions informed IBM that he could no longer work in any capacity with Mr. Feldman, for medical reasons, and requested that Plaintiff be accorded a new supervisor, or a transfer to a different position. On June 23, 2011, Plaintiff wrote that the continuing harassment he experienced exacerbated his medical symptoms, and that he was then nearly incapacitated by PTSD symptoms. Verified Complaint, ¶ 28, Exhibit 42; Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50. Mr. Tuvell informed IBM, "I am nearly incapacitated now by recurrence of PTSD . . . I've started seeing my psychological health-care professionals again about this problem, including . . . medication." Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50. Continuing at this point, and many times thereafter, Plaintiff expressly requested the reasonable accommodation of either a new supervisor, or transfer to a new department entirely. Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50.

61. On June 24 and June 28, 2011, Plaintiff requested job modification that he no longer interact with Mr. Feldman, as a reasonable accommodation to his disability. Verified Complaint, ¶ 29, Exhibit 42. Plaintiff notes that such accommodation would be a preferable reasonable accommodation to the grant of disability leave. Verified Complaint, ¶ 29, Exhibit 42. On October 17, 2011, Mr. Tuvell asserted that he was not medically capable of continuing to work with Mr. Feldman, and requested the reasonable accommodation of no longer working with him. Verified Complaint, ¶ 72, Exhibit 42. IBM rejected these repeated requests. Verified Complaint, ¶¶ 73, 74, Exhibit 42.

62. On November 9, 2011, Plaintiff provided a letter to IBM, describing Mr. Tuvell's disability, his need for reasonable accommodation, and seeking the accommodation of transfer and/or new supervisor. Verified Complaint, ¶ 80, Exhibit 42. On November 28, 2011, Plaintiff

wrote, "I will be unable to return to work . . . In fact, the thought of returning to work under your [Feldman's] supervision is leading me to experience extremely high levels of anxiety and an abnormal measure of fear. I intend absolutely no disrespect or rancor in this statement. It is simply my medical reality. .. . It is for this reason that I have pressed for transfer of some sort as a reasonable accommodation." Feldman Dep. Exh. 32, at TUVELL984, Exhibit 92; Feldman Dep., at 152, Exhibit 43.

63. On January 18, 2012, Plaintiff informed IBM, "Based on my handicap of PTSD, and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with, or under [Mr. Feldman]." Tuvell Aff., ¶ 22, Exhibit 47; Mandel Dep. Exh. 38, at TUVELL1038, Exhibit 93; Mandel Dep., at 159-160, Exhibit 55. On January 27, 2012, IBM was again informed that Plaintiff was medically incapable of continuing to work under Mr. Feldman. Verified Complaint, ¶ 112, Exhibit 42; TUVELL1197-1198, Def.'s Further Resp. to Req. for Adm. 78, Exhibit 87. Plaintiff necessarily rejected IBM's faux proposal of his returning to work under Mr. Feldman, precisely pointing out that it was contrary to Plaintiff's medical limitations as documented by his health care provider, and was contrary to his own reports about what triggers his medical condition. TUVELL1197-1198, Exhibit 94; Def.'s Further Resp. to Req. for Adm. 78, Exhibit 87. When Tuvell expressly declined IBM's proposal for this reason, IBM failed to return with any other dialog for accommodation. Tuvell Aff., ¶ 23, Exhibit 47.

64. IBM repeatedly rejected Plaintiff's requests for reasonable accommodation to provide him with a different supervisor, and/or to transfer him to another position away from Mr. Feldman, including on October 10, 2011, November 23, 2011, January 6, 2012, January 16, 2012, January 24, 2012. Verified Complaint, ¶¶ 70, 82, 97, 101, 109, Exhibit 42.

65. Even after IBM repeatedly rejected Plaintiff's requests for reasonable accommodation, Plaintiff continued to seek interactive dialogue for reasonable accommodation. Mandel Dep. Exh. 31, at TUVELL1221, 1222-1223, Exhibit 72; Mandel Dep., at 150-151, Exhibit 55. On January 11, 2012, after Plaintiff's application for transfer was rejected, he wrote "Is there any other option, any other positions, any other reporting structures, that you can think of that would help me return to IBM as a productive employee?" Tuvell Aff., ¶ 22, Exhibit 47; Mandel Dep. Exh. 38, at TUVELL1040, Exhibit 93, Mandel Dep., at 159-160, Exhibit 55. On January 18, 2012, Plaintiff said, "I am at a loss as to what I can suggest by way of reasonable accommodation that would permit me to work under you. Do you have any ideas?" Id.; Mandel Dep. Exh. 38, at TUVELL1038, Exhibit 93; Mandel Dep., at 159-160, Exhibit 55. IBM did not respond with anything of substance (Id.); it was IBM who shut down the interactive process, and not Plaintiff.

66. Mr. Tuvell has seen Stephanie Ross, LICSW, professionally since 1993. Ross Aff., ¶ 3, Exhibit 95. Ms. Ross has a Masters degree in social work from the University of Pennsylvania, and was licensed to practice social work (LICSW) in Massachusetts continuously since about 1984. Ross Aff., ¶ 1, Exhibit 95. Ms. Ross is qualified to diagnose and treat PTSD. Ross Aff., ¶ 2, Exhibit 95. Ms. Ross formally diagnosed Mr. Tuvell as suffering from PTSD in or about 2001, but understood Mr. Tuvell to be suffering from PTSD for some time before that. Ross Aff., ¶ 5, Exhibit 95; Ross Dep., at 58, 60, 137, Exhibit 67.

67. Over 10% of Ross' patients in last 24-25 years she has diagnosed with PTSD. Ross Dep., at 57-58, Exhibit 67.

68. Mr. Tuvell's diagnosis is based on a variety of symptoms, including lost weight, trouble sleeping, difficulty eating, triggered state, and every symptom of stress, including anxiety and depression. He has experienced hyper-vigilance, and has obsessive, recurrent, intrusive

thoughts. He has suffered flashbacks and has fainted, has experienced prolonged psychological distress, has experienced an altered sense of surroundings and self, and has engaged in strong efforts to avoid distressing feelings and reminders. In Ms. Ross', he has wept uncontrollably when describing his experiences. Mr. Tuvell is subject to irritability and outbursts. Ross Aff., ¶ 5, Exhibit 95.

69. To manage his PTSD, Mr. Tuvell has been treated by Ms. Ross with psychotherapy, as well as Eye Movement Densitization and Reprocessing (EMDR, which is a qualified technique used to treat PTSD patients). Ross Aff., ¶¶ 2, 8, Exhibit 95. Mr. Tuvell has seen Ms. Ross professionally approximately 250 times, alone, and has seen Ms. Ross along with his spouse on many other occasions. Ross Aff., ¶ 3, Exhibit 95.

70. On October 19, 2011, Kathleen Dean of IBM spoke with Ms. Ross about Mr. Tuvell, and Ms. Dean's notes, contained at Dean Dep. Exh. 16, at 2 (Exhibit 96), accurately reflect the conversation. Dean Dep., at 115-117, Exhibit 79.

71. On January 23, 2012, Ms. Ross stated that while she advised Tuvell "not to return to specific job environment," that also "Patient has good functioning in the absence of trauma related stimuli." Ross Dep. Exh. 8, at 1-2, Exhibit 97; Ross Dep., at 91-94, Exhibit 67. On January 31, 2012, Ms. Ross reiterated that "the only course to recovery for Mr. Tuvell required a reassignment by the company." Def.'s Exh. 29, at 2. On September 28, 2012, Ms. Ross stated, "in a new setting with different people it was possible that Mr. Tuvell could function quite well and attend his work." Def.'s Exh. 29, at 3.

72. Ms. Ross testified that she believed that Mr. Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. Ross Dep., at 176-177, Exhibit 67. She reported that Mr. Tuvell was very positive when interviewing for a new position at IBM, and

that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. Ross Dep., at 177, Exhibit 67.

73. In December 2011, Mr. Tuvell went to IBM's Littleton facility in order to interview for a transfer that he affirmatively pursued. Tuvell Dep., at 217-218, Exhibit 98. Mr. Tuvell was not triggered with respect to his efforts to obtain a new position, and the interview process attending it. Ross Dep., at 182, Exhibit 67; Tuvell Aff., ¶ 15, Exhibit 47. Mr. Tuvell reported no psychological difficulty in returning to that IBM building for an interview. Ross Dep., at 183, Exhibit 67.

74. Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. Kime Dep., at 65, Exhibit 65. Tuvell's was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. Kime Dep., at 77, 144, Exhibit 65; Kime Dep. Exh. 6, Exhibit 70. Tuvell's many communications with Mr. Kime concerning the position were "cordial and professional." Kime Dep., at 132, Exhibit 65.

75. In this case, change of reporting relationship to a different supervisor is entirely reasonable under these facts. IBM's own policies embrace the notion of transferring a supervisor in cases of the supervisor's harassment and misconduct. Mandel Dep. Exh. 47, at IBM2310, Exhibit 54; Mandel Dep., at 169-170, Exhibit 55 ("In certain circumstances, it may be appropriate to transfer the offender to another department or location"). Plaintiff had amply reported that Feldman had been harassing Plaintiff, and consequently a change of supervisor is reasonable as it is absolutely consistent with IBM's written policy. DSOF ¶¶ 12, 15, 16, 27. IBM takes the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from

being under the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." IBM Position Statement, at 4, Exhibit 46.

76. Plaintiff provided to IBM protected complaints of discrimination, retaliation and requests for reasonable accommodation on October 5, 2011, October 10, 2011, October 17, 2011, October 19, 2011, November 9, 2011, November 28, 2011, December 6, 2011. Verified Complaint, ¶¶ 69, 71, 72, 76, 80, 87, 91, Exhibit 42.

77. On August 5, 2011, Plaintiff communicated to IBM indicating that a disrespectful statement was made to a non-Caucasian coworker, and indicating that the coworker could be the subject of discrimination. TUVELL448-451, Exhibit 99; Resp. to Pl.'s Request for Adm. 21, Exhibit 56. On August 5, 2011, Mr. Mandel replied, stating that IBM does not accept third party complaints, and that if the coworker is offended, he would have to file a complaint himself. Id.; Verified Complaint, ¶ 52, Exhibit 42. Mr. Mandel's statement to Plaintiff was false, as IBM would investigate third party complaints, and IBM documents encourage employees to bring third party complaints. Mandel Dep., at 55-56, Exhibit 55; Due Dep., at 187-188, Exhibit 50; IBM11395, Exhibit 100; October 23, 2014 Stipulation, Exhibit 101 (training materials suggesting asking, "do you believe this alleged discrimination and/or retaliation happened to others as well as yourself?").

78. On or about August 28, 2011, Plaintiff submitted Addendum I to his Corporate Open Door filing, in which he accused Mr. Mandel, based on delays in the investigation to be contributing to a hostile work environment and engaging in handicap discrimination. Mandel Dep. Exh. 11, at 757-758, Exhibit 102; Mandel Dep., at 72-73, Exhibit 55. Mr. Mandel reviewed the complaints during the investigation. Mandel Dep., at 72-73, Exhibit 55.

79. IBM policy requires that investigators "must not have been involved in the issue being investigated . . .." Mandel Dep. Exh. 43, at TUVELL2562, Exhibit 103; Mandel Dep., at 161-162, Exhibit 55.

80. On November 23, 2011, Mr. Tuvell requested a written response to his internal complaint, pursuant to Section 2.8 of the Concerns and Appeals Program. Verified Complaint, ¶ 84, Exhibit 42. Mr. Mandel replies with a non-substantive answer, saying only that after investigation, Mr. Mandel concluded that "management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you." Verified Complaint, ¶ 84, Exhibit 42.

81. On March 2, 2012, Plaintiff filed a third Corporate Open Door Complaint, alleging that Mr. Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. Mandel Dep., at 151-152, Exhibit 55; Mandel Dep. Exh. 34, at 5-6, Exhibit 104. Mr. Mandel never opened up an investigation to respond to this Complaint, and there was no formal response. Mandel Dep., 152-153, Exhibit 55; Tuvell Aff., ¶ 24, Exhibit 47.

82. Lisa Due conducted the initial investigation of Plaintiff's discrimination allegations in June 2011. DSOF17. When conducting that investigation, Ms. Due knew Plaintiff to be alleging that Mr. Feldman and/or Mr.Knabe to have discriminated against him on the basis of age and/or gender when he was required to switch job functions with Ms. Mizar. Def.'s Exh. 19, at TUVELL265-266; Due Dep., at 38-40, Exhibit 50. Ms. Due considered these allegations of age and sex discrimination to be part of her investigation. Due Dep., at 42-43, Exhibit 50.

83. As part of her investigation, Ms. Due did not explore the qualifications of Ms. Mizar as part of her investigation, nor did she explore whether Mr. Feldman or Mr. Knabe had a history of engaging in sexist or ageist behavior or comments in the workplace. Due Dep., at 43-44,

Exhibit 50. Ms. Due did nothing to inquire of Tuvell's PTSD, or to speak with Feldman about his attitudes towards Plaintiff's PTSD. Due Dep., at 87, Exhibit 50. Prior to the Ms. Due's completion of the investigation, she met with Mr. Mandel, who instructed her to inform Plaintiff that Ms. Due had no reason to conclude that Plaintiff had been mistreated. Due Dep., at 145-146, Exhibit 50.

84. In addition to never seriously investigating Mr. Tuvell's complaints of discrimination, Ms. Due also never investigated, nor did she come to a determination, of whether Mr. Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. Due Dep. Exh. 12, at IBM8283, Exhibit 76; Due Dep., at 164-165, Exhibit 50 (finding insufficient information to support allegations with respect to Mr. Feldman, and not addressing allegations with respect to Mr. Knabe at all).

85. Plaintiff was advised of his rights to appeal the conclusion of the investigation, which he did, to Mr. Russell Mandel. DSOF19; Mandel Dep., at 43-44, Exhibit 55. However, Mr. Mandel was biased as an appeal investigator, rendering him a patently inappropriate choice to take a fresh look at the complaint. Due Dep., at 145-146, Exhibit 50. Moreover, Mr. Mandel was an inappropriate investigator, under IBM's own conflict-of-interest policy, as he, personally, had been accused by Plaintiff of wrongdoing and discrimination, based on his failure to advance the investigation, and false assertions about IBM's practice of investigating third party complaints. PSOF77, 78, 79.

86. On August 25, 2011, Mr. Mandel wrote to Plaintiff, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55. On August 30, 2011, Mr. Mandel wrote Plaintiff, stating, "I am simply not going to discuss with you the concerns

raised while you are out on STD." Mandel Dep. Exh. 12, at TUVELL1518, Exhibit 105, Mandel Dep., at 73, Exhibit 55.

87. Mr. Mandel accorded Mr. Knabe and Mr. Feldman the opportunity to review his draft report and make suggestions about his version of events, but Mr. Mandel did not accord Plaintiff with the same courtesy, demonstrating the one-sided nature of the investigation. Mandel Dep., at 87, 91, Exhibit 55; IBM10266-10275, Exhibit 106.

88. While Mr. Mandel understood that Plaintiff's complaint included the allegations that his demotion/transfer in June 2011 was discriminatory and/or retaliatory, he never investigated whether that demotion/transfer was appropriate, and he failed to inquire as to whether Mr. Feldman exhibited any animus in the workplace based on handicap and/or retaliation. Mandel Dep., at 26, 97-98, Exhibit 55.

89. On January 22, 2012, Mr. Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Plaintiff a requested transfer on January 6, 2012, based on handicap discrimination, availment of reasonable accommodation, denial of the obligation to reasonably accommodate and/or retaliation Mandel Dep., at 142-144, Exhibit 55; Mandel Exh. 33, at TUVELL1105, Exhibit 107. Mr. Mandel assigned himself the investigation of this Complaint, however, in performing these duties, Mr. Mandel admitted never investigating whether rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate the Plaintiff. Mandel Dep., at 145, 147, Exhibit 55.

90. Since May 12, 2012, Plaintiff has been working at Imprivata, in a high level, technical capacity. He is able to perform these functions, despite his PTSD, because he is not being harassed. Tuvell Aff., ¶ 26, Exhibit 47.

91. It is denied that Plaintiff's current employer is a competitor of IBM. In fact, Imprivata is part of a "strategic provisioning partnership" with IBM, such that its product is integrated with IBM's corresponding product. Tuvell Aff., ¶ 27, Exhibit 47.

Respectfully submitted,

The Plaintiff,
By his Attorney

/s/ Robert S. Mantell

Robert S. Mantell
BBO# 559715
Rodgers, Powers & Schwartz LLP
111 Devonshire Street
4th Floor
Boston, MA 02109
(617) 742-7010
RMantell@TheemploymentLawyers.com

RULE 5.2 CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 12, 2015.

/s/ Robert S. Mantell

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| WALTER TUVELL,<br>Plaintiff,<br><br>v.<br><br>INTERNATIONAL BUSINESS MACHINES, INC.,<br>Defendant. | ) | C. A. No. 13-cv-11292-DJC<br><br><br>LEAVE TO FILE 25 PAGE BRIEF GRANTED BY ORDER OF FEBRUARY 5, 2015 |

**PLAINTIFF WALTER TUVELL'S AMENDED MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. PLAINTIFF WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT BASED ON DISABILTY, RETALIATION, AGE, OR A COMBINATION THEREOF

The harassment experienced by Plaintiff Walter Tuvell rises to the level of a hostile work environment. Def.'s Mem., at 19-20. Numerous courts have held that as few as three or four incidents may constitute severe or pervasive conduct sufficient to create a hostile work environment.[1] On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted to agents of IBM that Plaintiff reported suffering from Post-Traumatic Stress Disorder (PTSD), that Feldman considered Tuvell to be "irrational and potentially dangerous," and he petitioned IBM to fire Tuvell and disable his access to IBM buildings. Resp. DSOF25.[2] On June 20, 2011, Feldman again referred to Tuvell's diagnosis of PTSD and claimed that Tuvell was "potentially dangerous." Resp. DSOF25. However, Plaintiff did not engage in any threatening conduct. Id. These communications are direct evidence of animus against Plaintiff's PTSD.

[1] Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 16-17 (1st Cir. 1999) (three incidents of harassment demonstrate hostile work environment); Thomas O'Connor Constr., Inc. v. MCAD, 72 Mass. App. 549, 567 (2008) (four incidents are sufficient to generate liability for harassment); Gerald v. University of Puerto Rico, 707 F.3d 7, 22 (1st Cir. 2013) (three incidents); McAuliffe v. Suffolk Co. Sheriff's Dept., 1999 Mass. Comm. Discrim. Lexis 7, 15 (three incidents).

[2] Plaintiff shall hereinafter refer to Defendant's Statement of Facts as "DSOF", Plaintiff's statement of facts as "PSOF", and Plaintiff's Response to Defendant's Statement of Facts as "Resp. DSOF."

During this time and thereafter, Feldman and IBM engaged in a number of harassing acts, which in any combination constitutes a hostile work environment. Among them: (1) on May 8, 2011, Fritz Knabe, supervisor, falsely accused Plaintiff of failing to perform work, and Feldman failed to investigate (PSOF1,3,4,5); (2) on June 8, 2011, Knabe yelled at Plaintiff and falsely accused him of failing to provide work, and again Feldman refused to investigate and refused Plaintiff's request for a three-way meeting to clear the air (PSOF5,6,7); (3) Feldman demoted Plaintiff's level of work from that of a "Band 8" employee to that of a lesser "Band 7", and simultaneously he switched a much younger, much less qualified, Asian female, Sujatha Mizar, into Plaintiff's position (PSOF8-16); (4) Feldman required communications with Plaintiff be copied to HR, based on his past history of litigation and engaging in protected complaints about harassment (PSOF17-18); (5) Feldman disciplined Plaintiff for failing to provide a status update on the transition of his work to Sujatha Mizar, even though Mizar had already submitted the applicable joint report (PSOF19-22); (6) Feldman imposed on Tuvell the impossible task of piecing together, independently of Mizar and Feldman, on a single day's notice, a detailed day-by-day schedule for three weeks, reflecting his taking over of Mizar's four duties on his reassignment, which was unachievable given that Tuvell had no acquaintance of his four entirely new responsibilities in the transition, and Feldman refused to provide Tuvell an example of such a schedule (PSOF24-25);[3] (7) reflecting a preexisting secret plan to write up Tuvell for something, Feldman issued a Formal Written Warning with a threat of termination, because Tuvell wrote, "or if you're lazy you can just click this link;" (PSOF22, 25); (8) Feldman forbade Tuvell from spending pre-agreed time on his internal complaint of harassment, and then threatened Tuvell with termination when he said, "Now wait a minute, Dan." (PSOF27).

[3] Laster v. Kalamazoo, 746 F.3d 714, 732 (6th Cir. 2014) (heightened scrutiny may constitute a Title VII violation).

Plaintiff went out on short term disability (STD) due to severe PTSD symptoms caused by Feldman's harassment. PSOF28. While out on leave, the harassment continued, including: (9) refusal to appropriately act on Plaintiff's internal complaints of harassment while he was on medical leave, and delaying resolution by four and a half months; (PSOF29); (10) curtailing Tuvell's computer access based expressly on his being on medical leave (Resp. DSOF25); (11) curtailing Tuvell's use of the IBM email system because he forwarded his complaints of harassment and discrimination to others within IBM (Id.); (12) barring Tuvell from IBM facilities because he was out on disability leave (Id.); (13) counting as sick days Plaintiff's work at home (PSOF30); (14) denying Tuvell a transfer based on his being on STD (PSOF31, Resp. DSOF25); (15) threatening to fire Plaintiff for circulating his protected complaints of discrimination to certain IBM employees (PSOF48); (16) threatening to fire Plaintiff when he declined to reveal where he worked at a second job, and falsely accusing Plaintiff of violating an inapplicable internal policy (PSOF57; Resp. DSOF75; DSOF78); (17) consistently rejecting Plaintiff's requests for reasonable accommodation, which would have allowed Plaintiff to return to work and be paid (PSOF41,53, DSOF49, Resp. DSOF69). A reasonable jury could find that IBM's conduct could be severe or pervasive, such that a hostile work environment was created.

II. PLAINTIFF SUFFERED A NUMBER OF ADVERSE ACTIONS

In addition to constituting a link in a chain of harassment constituting an unlawful hostile work environment, a number of the actions just enumerated are sufficient, in and of themselves, or in combination, to constitute tangible adverse actions, such that they "well might have dissuaded a reasonable worker from" engaging in protected activities, such as opposing discrimination or unlawful retaliation. Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2415 (2006).

Access Truncated: IBM's curtailment of Tuvell's access to IBM's buildings, computer networks, and email systems with which he could communicate with coworkers was an adverse action, and indeed, interfered with his ability to enter an IBM building to interview for a job (though Plaintiff surmounted that difficulty). Resp. DSOF53; Billings v. Town of Grafton, 515 F.3d 39, 54 n.13 (1st Cir. 2008) (combination of slights may together rise to the level of an adverse action, including barring access to selectman's office). Courts have held such denials of access to be adverse actions, even when access is only denied during non-work hours. Dahms v. Cognex Corp., 14 Mass. L. Rep. 193 (2001), 2001 Mass. Super. Lexis 581, at 5-6, 11.

Discipline: The August 3, 2011 formal warning letter, with the threat to discharge, may constitute an adverse action, based on its falsity. Def.'s Exh. 11; Alvarez v. Lowell, 2011 Mass. App. Unpub. Lexis 1332, at 8 n.3; Ritchie v. Department of State Police, 60 Mass. App. 655, 665 (2004) (false reprimands and evaluations are adverse actions for purposes of a Rule 12 motion); Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 97 (1st Cir. 2006).

Demotion: The reassignment of Tuvell from doing the highest level work within the Performance Architecture group to the lowest could be considered an adverse action by a reasonable jury, and where Tuvell, a Band 8 employee, was thereafter responsible for work that had been performed by a Band 7 employee. PSOF8,12. Due acknowledged the reassignment to be to a "lesser role." PSOF12. Tuvell was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower level work. PSOF14. The change also constituted a "public humiliation." PSOF14. IBM's own policies considers an "undesirable reassignment" to be a tangible adverse employment action. PSOF15. Finally the reassignment meant change of worksite to Marlborough from (mostly) Cambridge, which Tuvell regarded as a preferable location, and an increase in commuting

distance of thirty miles each direction. PSOF16; Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2416 (2006) (reassignment of job functions are adverse, even if they fell within the worker's pre-existing job description).

Denial of Transfer: The rejections of Tuvell's applications for transfer, on January 6, 2012 and thereafter, were adverse actions, under both c. 151B and the ADA. Tuvell was medically incapable due to his PTSD of continuing to serve in his then current position under Feldman, and at the time of his application for the transfer he had been on short term disability for months, and was exhausting his benefits. Resp. DSOF50, 69; PSOF41. He was already on 2/3 compensation, and within three weeks of the January 6, 2012 rejection, he was placed on completely unpaid leave. PSOF41. Transfer was identified as one of the only avenues that would successfully accommodate Tuvell, and allow him to continue working at IBM and earning a living. Resp. DSOF50, 69. The denial of the transfer directly inflicted financial harm on Plaintiff, because IBM reduced and eventually stopped paying him while on leave, because he was not medically able to continue in active service under Feldman. Id.; PSOF 41. Therefore, many cases support the proposition that the rejection of the transfer was an adverse action.[4,5]

II. PLAINTIFF WAS NOT PROVIDED REASONABLE ACCOMMODATION

A genuine issue of material fact exists as to whether Defendant adequately offered or provided reasonable accommodation. The "accommodation" offered by IBM, to continue an unpaid medical leave indefinitely until Plaintiff was able to return to work under Feldman, was inadequate for two reasons. See Def.'s Mem., at 8-9; Resp. DSOF50, 69; PSOF41. First, the

[4] Lewis v. City of Chicago, 496 F.3d 645, 655 (7th Cir. 2007) (refusal to transfer away from harasser is an adverse action); Taylor v. Roche, 196 Fed. Appx. 799, 803 (11th Cir. 2006) (same); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (denial of hardship transfer could be an adverse action).

[5] On December 1, 2011, Plaintiff accurately indicated to Kime that he had a "clean bill of health," as he had no medical limitations prevented him from working under Kime. Def.'s Exhs. 12, 27, 28 & 29; Resp. DSOF 50, 69.

indefinitely long, uncompensated leave that IBM proposed is not a valid, effective or acceptable reasonable accommodation, for there were acceptable options that would have returned Plaintiff to work immediately, and accorded him equal career opportunities. Second, the requirement that Tuvell return to working below Feldman was contrary to Tuvell's medical limitations.

The harassment that Plaintiff experienced at the hands of Feldman triggered serious symptoms of PTSD. PSOF28; Def.'s Exh. 26-28. In order to remain a productive employee of IBM, Plaintiff medically required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Feldman. PSOF60-63. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." DSOF49. Plaintiff on many occasions informed IBM that he could no longer work in any capacity with Feldman, for medical reasons, and requested that Plaintiff be accorded a new supervisor, or a transfer to a different position. PSOF60-63. IBM repeatedly rejected Plaintiff's requests. PSOF64. Beginning on or about August 11, 2011, Tuvell went onto medical leave, and ultimately his pay was lowered, and eventually completely curtailed, until he was terminated more than eight months later. Resp. DSOF 50, 69; PSOF28, 32, 41. As will be shown, the accommodation suggested by IBM could be found by a jury to be unreasonable and inadequate.

A. LEAVE WITH NO PAY IS NOT A REASONABLE ACCOMMODATION

It is not a reasonable accommodation to exclude Plaintiff from the workplace indefinitely, and pay him nothing, when other reasonable accommodations are available that would permit him to fully participate in the workplace. Resp. DSOF 50, 69; PSOF28, 32, 41; 29 C.F.R. 1630.2(o)(2)&(3). Reasonable accommodations are acts that permit an employee to perform the essential functions of a desired position, or enable the disabled to "enjoy equal

benefits and privileges of employment as are enjoyed by employees without disabilities." Id.; MCAD Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B (1998), at 26 (same standard). A reasonable accommodation is a "change in the work environment . . . that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. 1630.2(o). The accommodation must allow the employee an opportunity for an equal level of achievement, opportunity and participation. 29 C.F.R. Pt. 1630, @ 1630.9; Keil v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999).

As numerous cases have held, a reasonable jury could find that forcing Plaintiff to stay out of work, without compensation, when transfer to gainful employment under a different supervisor is an available option, fails to satisfy IBM's legal obligations to provide a reasonable accommodation.[6] While Plaintiff's initial medical leave may be termed a reasonable accommodation, in response to his major, immediate symptoms, eventually the extended, indefinite and uncompensated medical leave ceased being reasonable, when acceptable alternatives for gainful employment were available.[7] Resp. DSOF50, 69; PSOF41.

B. REQUIRING PLAINTIFF TO WORK UNDER CONDITIONS CONTRARY TO HIS MEDICAL LIMITATIONS IS NOT REASONABLE

Defendant's proposed accommodation of forced leave until he could return to work under Feldman is not reasonable, given that continued working with Feldman was directly contrary to Plaintiff's medical limitation. Resp. DSOF68. IBM submitted its proposal after Tuvell's health care provider certified on December 19, 2011, that "the only modification that would be possible

[6] Williams v. Phila. Housing Auth. Police Dept., 380 F.3d 751, 771-772 (3rd Cir. 2004); Noon v. IBM, 2013 U.S. Dist. Lexis 174172 (E.D.N.Y), at 35; Walters v. Mayo Clinic, 998 F. Supp. 2d 750, 764 (W.D. Wisc. 2014) (leave not sufficient where other accommodations available).

[7] Just because an employer has attempted one type of accommodation does not divest it of its responsibility to provide another, if the first attempt is not effective. Ralph v. Lucent Technologies, 135 F.3d 166, 172 (1st Cir. 1998); Smith v. Bell Atlantic, 63 Mass. App. 702, 721 (2005).

[to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. On other occasions, Tuvell informed IBM that he was medically incapable of returning to work under Feldman, and described his symptoms. PSOF60-63; Resp. DSOF69. IBM's proposals were not reasonable accommodations, because they were contrary to Tuvell's medical limitations.

Defendant argues that Plaintiff failed to engage in an interactive process, because Plaintiff rejected Defendant's proposal of continuing to report to Feldman on a day-to-day basis. Def.'s Mem., at 13-14. A reasonable jury would easily find this assertion to be false. Plaintiff rejected the proposal by precisely pointing out that it was contrary to Plaintiff's medical limitations as documented by his health care provider, and was contrary to his own reports about what triggers his medical condition. PSOF63. Tuvell was free to reject proposals inconsistent with his medical limitations, where he had identified a number of effective accommodations. PSOF63. When Tuvell expressly declined IBM's proposal for this reason, IBM failed to continue the dialog with any other proposals for accommodation. PSOF63. Even after Defendant IBM's contemptible recalcitrance, Plaintiff continued to invite the interactive process and to seek input from IBM about options for returning him to work. PSOF65. A reasonable jury could find that it was IBM and not Tuvell, who abandoned the interactive process. PSOF65.

Defendant argues that Plaintiff failed to engage in an interactive process, in that he failed to obtain treatment from someone other than a nurse practitioner. Def.'s Mem., at 13-14. In actuality, Plaintiff was treated by Stephanie Ross, LICSW (not a nurse practitioner), who had treated him for 18 years, over 250 visits, and who was very qualified and experienced in treating victims of trauma. PSOF66-69. IBM interviewed Ross with Plaintiff's consent, and IBM accepted her medical documentation without issue. DSOF40; PSOF70.

III. PLAINTIFF WAS A QUALIFIED, HANDICAPPED INDIVIDUAL

A reasonable jury could find Tuvell, a long time sufferer of PTSD, to be a qualified handicapped individual.[8] Defendant argues that Plaintiff was not qualified, because his initial medical documentation indicated that he was "totally incapacitated." Def.'s Mem., at 7. Actually, Plaintiff took the position that he was medically able to perform work for IBM if he was provided the reasonable accommodation of a different supervisor, or a transfer to a new position away from Feldman. Resp. DSOF 69; DSOF 30. The availability of at least two possible reasonably accommodations distinguishes the "total disability" defense.

Massachusetts and Federal law confirms that employees may be considered qualified handicap individuals, even if they claim "total disability" on medical documentation, so long as they claim that they can return to work with reasonable accommodation. Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997). The evidence demonstrates that Tuvell could continue working at IBM, if only he was provided with reasonable accommodation.

Ross's December 19, 2011 Medical Treatment Form states that "the only modification that would be possible [to return Plaintiff to work] is a change of supervisor and setting." Def.'s Exh. 28. On January 23, 2012, Ross stated that while she advised Tuvell "not to return to specific job environment," that "Patient has good functioning in the absence of trauma related stimuli." PSOF71. On January 31, 2012, Ross reiterated that "the only course to recovery for Tuvell required a reassignment by the company." PSOF71. On September 28, 2012, Ross stated, "in a new setting with different people it was possible that Tuvell could function quite well and attend his work." PSOF71; see Cargill v. Harvard University, 60 Mass. App. 585, 603

[8] Defendant does not challenge that Tuvell had PTSD, and does not challenge Tuvell's status as a handicapped person entitled to protection under the ADA and c. 151B. Def.'s Mem., at 4 n.3.

(2004) (plaintiff's burden is merely to show that a reasonable accommodation is "possible"); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985).

Ross, a highly qualified social worker with many years of experience working with trauma victims, testified that she believed that Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. PSOF66-69, 71.[9] In December 2011, Tuvell went to IBM's Littleton facility in order to interview for a transfer that he affirmatively pursued, and was not triggered by the interview or other efforts to pursue a transfer. PSOF73.[10] Since leaving IBM, Plaintiff has been able to work for years at a high level, thereby demonstrating the effectiveness that reasonable accommodation would have had. PSOF90. Because Tuvell took the position that he could return to work at IBM with reasonable accommodation, he was a qualified handicapped person.

## IV. PLAINTIFF'S REQUEST FOR A NEW SUPERVISOR WAS A VALID REQUEST FOR REASONABLE ACCOMMODATION

Plaintiff sought at least two accommodations that would satisfy the medical limitations placed on him: stay in the same position working under a different supervisor, or transfer to a new position working under a different supervisor. PSOF60-63; DSOF49. Looking solely to the first request, for a new supervisor in the same position, Defendant is incorrect when it states that a request for a different supervisor is unreasonable. Def.'s Mem., at 10-11. In actuality, transfer to a different supervisor, depending on the facts, may be a valid reasonable accommodation.

---

[9] Ross reported that Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. PSOF71. While IBM asserts that Tuvell could not be in the vicinity of "IBM" without "engaging in violent outbursts," this statement is false. Resp. DSOF43.

[10] Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. PSOF74. Tuvell's was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. PSOF74. Tuvell's many communications with Kime concerning the position were "cordial and professional." PSOF74.

Ralph v. Lucent Technologies, 135 F.3d 166, 171-172 (1st Cir. 1998) (employer changed supervisors as a reasonable accommodation); Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-123 (2nd Cir. 1999) (change of supervisor may be reasonable accommodation).

In this case, change of reporting relationship to a different supervisor is reasonable under the facts. IBM's own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. PSOF75. Plaintiff had amply reported that Feldman had been harassing Plaintiff, and consequently, a change of supervisor is reasonable as it is absolutely consistent with IBM's promulgated policy. PSOF75. Moreover, Plaintiff has medical documentation that required him to report to a different person. DSOF49. In fact, IBM takes the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." PSOF75. Therefore, a genuine issue of fact exists as to whether Plaintiff's request to report to a different supervisor was a viable request for reasonable accommodation.

## IV. PLAINTIFF SOUGHT REASSIGNMENT TO A VACANT POSITION, FOR WHICH HE WAS QUALIFIED

The ADA requires employers to reassign employees to a vacant position, to reasonably accommodate their handicaps. 42 U.S.C. § 12111(9)(B). If the employee is qualified, he or she must be transferred to a vacant, appropriate position, if required as a reasonable accommodation. Duvall v. Georgia-Pacific Consumer Prods., L.P., 607 F.3d 1255, 1260 (10th Cir. 2010). There is no need for the employee to prove that he or she is the "best" qualified applicant to obtain the reassignment. EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment. Rather the Plaintiff need only show himself to be **minimally qualified** in order to establish entitlement to reassignment.

Contrary to Defendant's argument (Def.'s Mem., at 12-13), there is ample evidence to conclude that Plaintiff was qualified (minimally and much more) for the position for which he applied, SWG-0436579 (hereinafter, the "position"), in IBM's Littleton office. PSOF33. The position was open, and Tuvell applied for it on November 28, 2011. PSOF33. The Plaintiff met all of the "minimal qualifications" listed in the job requisition, including advanced academic degree, fluency in English, and he exceeded the amount of required experience with "C" programming language and software design, by decades. PSOF34, 35, 11. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. Id.[11]

IBM now claims that Tuvell was not qualified, because he was more interested in "development work" than the position entailed. Def.'s Mem., at 12-13. That assertion is false. Tuvell specifically asserted to Kime, prior to the rejection, that he understood what the position entailed, and that he would be very happy to perform in that position. PSOF38 ("You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing"). Thus, Plaintiff adequately expressed an interest in the work, to meet the standard for "minimal qualification" under the reasonable accommodation burden. Moreover, a jury could find that Tuvell's alleged interest in development work to be a pretextual justification, since

[11] Kime, as of 2010 was Development and Solutions Manager, and he acted as Hiring Manager for the position, and he drafted the posting himself. PSOF36. Kime reviewed Tuvell's resumes, and concluded they had had "little doubt that you [Tuvell] have technical skills that we could use on the project." Id. On or about December 1, 2011, Kime interviewed Tuvell by phone, which screened Tuvell's background and qualifications. Id. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team. Id. As a result of the interview, Kime asked his support lead, and also the next most senior member, of the Littleton team to interview Tuvell. Id. Tuvell's was interviewed by these other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive." PSOF37. Kime acknowledged that the interviews with his own management team did not exclude Tuvell as a candidate. Id. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." Id. Kime considered Tuvell's technical knowledge and ability to be a strength. Id. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for the position. Id. Kime believed Tuvell had "deep technical skills and ability to produce solid documentation." Id. Consequently, a jury could reasonably find that Plaintiff met the minimal qualifications for the position.

Kime authored the posting, wherein he formally designated the position as "Software Developer," and he described the position as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." PSOF39. Therefore, a jury could find that Kime's asserted reason for lack of qualification is pretextual, as well as irrelevant to the concept of "minimal qualification."

IBM next claims that Tuvell was not qualified, because he had demonstrated difficulty working with team members, based on the input of Feldman. PSOF40. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." Id. Feldman verbally rated Tuvell a "3", which represents a low ranking, but above those facing termination. Id. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." Id. As of December 13, 2011, Kime no longer considered hiring Tuvell for the position. Id. On January 6, 2012, Kime formally rejected Tuvell for the position, stating as reasons primarily the difficulties inherent in "taking you directly from being on short term disability," and secondarily "concern about the work being to your liking." Id.

The concerns about working with the team do not demonstrate lack of minimal qualification as a matter of law. Feldman's rating of "3", even if discriminatory or retaliatory, reflects a rating consistent with continued employment. Id. Furthermore, this reason is pretextual in that it was not mentioned in Kime's formal January 6, 2012 explanation for the reasons for rejection. Id.; Def.'s Exh. 13. Moreover, Plaintiff's continued minimal qualification with respect to his ability to get along with others is demonstrated by Defendant's continuing offer to employ Plaintiff in his then-current position, so long as he was supervised by Feldman.

DSOF67, 69. Finally, the fact that Plaintiff is unable to get along with people who are harassing him, based on the negative evaluation proffered by the primary harasser (and one who has directly expressed animus against Plaintiff based on PTSD), cannot be considered a disqualification as a matter of law, and such circular reasoning is pretext.

## VI. PLAINTIFF TRANSFER WAS REJECTED BECAUSE OF HIS DISABILITY (AND/OR HIS TAKING REASONABLE ACCOMMODATON) OR RETALIATION

Tuvell alleges that he was denied a transfer to a Software Developer position based on retaliation, and/or based on his handicap or availment of reasonable accommodation. Tuvell has satisfied his prima facie burdens to demonstrate that the rejection of his application for the position was due to retaliation, handicap, or his availment of reasonable accommodation based on that handicap. Plaintiff was handicapped in that he had PTSD (a fact IBM does not challenge). Def.'s Mem., at 4 n.3. It is unquestioned that just prior to his rejection for transfer, Plaintiff had engaged in protected conduct by complaining about unlawful harassment and discrimination, and failure to reasonably accommodate his handicap. PSOF76. As established above, Plaintiff was qualified for the transfer, exceeding by decades the experience and credentials required of the position. Supra at 12. As shown above, the rejection was an adverse employment action. Supra at 5. The final element of the prima facie case is satisfied by the fact that after rejecting Tuvell, IBM held the position open (and indeed reposted it after rejecting Tuvell), and continued seeking a candidate to fill it. PSOF42; Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003).

Tuvell satisfies the final element of the prima facie case, because after he was rejected, the position remained open, with IBM continuing to seek applicants. PSOF42. After Kime decided to not hire Tuvell, and after the posting lapsed, Kime re-posted the identical position for the new year to seek new candidates. PSOF42. The reposted position also lapsed without being

filled. PSOF42. In addition, the rejection took place in close temporal proximity, well within three months, to a number of Tuvell's protected oppositions to unlawful conduct and requests for reasonable accommodation. PSOF76.[12]

Moreover, there was ample direct evidence that Tuvell's handicap was the primary factor in the rejection. On January 6, 2012, Kime gave as the following the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." DSOF31. This is direct evidence of discriminatory animus, as Defendant acknowledges that Tuvell was on short term disability for the purposes of accommodating his disability. Def.'s Mem., at 8.

Defendant now claims that the STD justification was a lie, and that, a different reason, Tuvell's past inability to work with his harassers, is the true reason for the rejection. PSOF43. A jury would be free to reject this second explanation as pretextual, as it is inconsistent with the reasons given to Tuvell at the time of the rejection. Compare Def.'s Exh. 13.[13] However, even if it were true, the evidence shows that Kime relied on the negative evaluation of Feldman, and that Feldman explicitly and discriminatorily wanted to fire Tuvell, as early as June 13, 2011, because of Tuvell's diagnosis of PTSD. PSOF25 31. Kime acknowledges that Feldman's input was

[12] Jones v. Walgreen Co., 679 F.3d 9, 21 (1st Cir. 2012) (three and a half month gap between protected conduct and adverse action may raise an inference of retaliation); Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39 50 (1st Cir. 2010) (three months between protected act and termination may raise inference of retaliation); Ritchie v. Dept. of State Police, 60 Mass. App. 655, 666 (2004).

[13] See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 431-432 (1st Cir. 2000) (pretext established where reasons given for employment action during litigation differ from reasons given at the time of the action); NLRB v. Hotel Employees, 446 F.3d 200, 208 (1st Cir. 2006) (same); Carrion v. Hashem, 2014 Mass. App. Unpub. Lexis 151.

significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman, sufficient to establish the "cat's paw" theory. PSOF31.[14]

Pretext, and the reasonable jury's inference of discriminatory animus arising therefrom, is further established by the fact that Defendant now claims the rejection was based on Tuvell's alleged disinterest in the work. Def.'s Mem., at 12. This is shown to be pretextual, given that, after he was fully informed of the nature of the job, Tuvell wrote to Kime, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." DSOF38. Defendant's next assertion, that the position did not entail development work (Def.'s Mem., at 12-13), is shown to be pretextual by the actual job description, which was drafted by Kime, and which formally designated the position as "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." DSOF39.

There is additional evidence of handicap animus. IBM curtailed Plaintiff's access to IBM's email system, because "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." PSOF45. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." PSOF45. Even though Plaintiff made it clear that he would be medically unable to return to work until the investigation was properly completed (PSOF28), IBM refused to complete the investigation until four and a half months after it commenced.

[14] Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-9 (1st Cir. 1999) (where a non-discriminatory employee makes a rejection based on an evaluation conducted by someone motivated by discriminatory animus, the employer is liable for discriminatory motives of the evaluator); Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 570 (1981); Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011).

PSOF32. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [due to STD leave]. It is easy to return access once you return from STD." PSOF45.

The prima facie case, and the proof of pretext via false and changing justifications for the rejection, likewise support Plaintiff's claim based on retaliation. However, Plaintiff also has ample direct evidence of retaliatory animus to support his retaliation claim. The record indicates that Feldman and Kime were discussing Plaintiff's protected internal complaints of discrimination, at the precise moment when the rejection was decided. After the two spoke verbally, Kime wrote to Feldman, stating "I do not envy you having to deal with HR and lawyers at this point." PSOF44. That is, the two discussed Tuvell's internal complaints of discrimination, which were pending at that point, and were considered a negative factor. Id.

Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination, claimed that the following protected sentences provided by Tuvell in support of one such complaint, were "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

PSOF46. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much", as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." PSOF46. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." PSOF46. Yet, IBM has

never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id.; Buckner v. Lew, 2014 WL 1118428 (E.D.N.C. 2014) (employer's assertion that Plaintiff's work would suffer due to his lodging of EEO complaint).

In March 2012, IBM curtailed Plaintiff's access to IBM emails systems, and later threatened Plaintiff with termination, precisely because Plaintiff had forwarded his protected complaints to others at IBM. PSOF47, 48; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 (protest to company President is protected).

On August 3, 2011, Plaintiff was prohibited from using a previously-agreed reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. PSOF49. Also, on August 3, 2011, Plaintiff was given a formal discipline, with threat of termination, for innocently penning the innocuous phrase "if you're lazy you can just click this link"; meanwhile, Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Tuvell. PSOF50. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." PSOF51. In response to one of Tuvell's protected complaints of harassment, Feldman threatened, "assertions of bad faith . . . are inconsistent with success." PSOF52. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based directly on that complaint. PSOF52. Thus, there is sufficient evidence for a reasonable jury to conclude that Plaintiff was rejected for the transfer based on handicap discrimination, his availment of reasonable accommodation, and/or retaliation.

VII. THE TERMINATION WAS DISCRIMINATORY AND/OR RETALIATORY

There is sufficient evidence that Plaintiff's May 17, 2012 termination (DSOF79) was based on retaliation and/or handicap discrimination. On January 25, 2012, after exhausting all of his STD benefits, and with no indication that he would be provided with reasonable accommodation, IBM transitioned Tuvell to unpaid leave. PSOF53. In March 2012, without any salary coming in, out of economic necessity Tuvell obtained another job. DSOF73.

There is a prima facie case that Plaintiff was terminated based on handicap discrimination and/or retaliation. At the time of discharge, Plaintiff was handicapped (PTSD), and his handicap was known to Defendant. Def.'s Mem., at 4 n.3; Resp. DSOF25. Plaintiff had lodged repeated, recent protected complaints of discrimination and retaliation. PSOF55. There is sufficient evidence that Plaintiff was qualified for the position, as Defendant kept offering to reinstate him to that position once he returned from sick leave, and that work had previously been performed by a more junior level employee with fewer qualifications. DSOF10; PSOF8, 12. The May 17, 2012 termination was an adverse action. DSOF79. The final element of the prima facie case is established because Defendant attempted to fill Plaintiff's position. PSOF54. The final element of the prima facie retaliation case is established because the termination occurred within days of Plaintiff's making protected complaints about unlawful harassment and retaliation. PSOF55.

In addition, there is evidence of pretext specific to the termination. On May 7, 2012, IBM wrote to Tuvell, stating that it believed Tuvell to be working for EMC, a competitor, and threatening termination. PSOF56. On May 8, 2012, Tuvell denied working for EMC. Id. Tuvell explained that he does not wish to inform IBM where he was working, as he feared a retaliatory response. Id. On May 11, 2012, IBM demanded to know where Tuvell is working, citing an inapplicable policy, and its need to confirm that Tuvell is not working for a competitor. PSOF57; Resp. DSOF75. On May 15, 2011, IBM demanded to know Tuvell's employer,

purportedly based on its duty to confirm that Tuvell is not working for a competitor. Id. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. Id. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2014. Id. The evidence of pretext, along with the prima facie case, establishes an inference of discriminatory or retaliatory motive sufficient to reach the jury.[15]

In addition, the direct evidence of animus based on handicap and retaliation described above at Supra 14-18 applies equally here, and establishes a genuine issue of material fact that Plaintiff's termination was based on handicap discrimination and/or retaliation for complaining of discrimination and/or seeking or availing himself of reasonable accommodation.

VIII. DEMOTION WAS BASED ON AGE, HANDICAP, RACE AND/OR GENDER

There is sufficient evidence that Plaintiff's demotion of June 10, 2011 was based on his age and/or gender. A prima facie case of age, race, handicap and/or gender discrimination is established by the following. Plaintiff is a white, male individual who was born in 1947, and who suffers from PTSD. DSOF1, 9; Def.'s Mem. at 4 n.3. Feldman was aware of Plaintiff's PTSD at least as early as May 26, 2011. PSOF10. Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Feldman, and

[15] Lipchitz v. Raytheon Co., 434 Mass. 493, 501, 506-7 (2001) (showing that one or more articulated reasons are false generates inference of discrimination); Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000).

IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; PSOF11. Feldman regarded Plaintiff's work in the Performance Architecture area as competent and his interactions with others to be professional. PSOF11. On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned from performing the highest level work within the Performance Architecture Group to the lowest. PSOF8; Supra 4-5. Feldman assigned Tuvell to switch roles with Sujatha Mizar, a less qualified female of East Asian heritage. PSOF8. Tuvell was decades older that Mizar, who was well under forty, and he had decades more relevant experience for the position. PSOF8. Mizar had no Ph.D. PSOF8. Such evidence constitute a prima facie case of discrimination based on age, race, gender and handicap.

IBM takes the position that the June 10, 2011 demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." PSOF58. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." PSOF58. Evidence of pretext generates an inference of discrimination to be resolved by the jury. Lipchitz, 434 Mass. at 501, 506-507.

IBM also justified the demotion based on Plaintiff's alleged failure to produce Excel graphics, as required by Knabe. Def.'s Mem., at 4; PSOF2. However, that justification is pretextual, as Tuvell was never asked to produce Excel graphics. PSOF1. Moreover, Feldman and Knabe both knew that Feldman did not use Excel, so could not have logically asked him to complete such an assignment. PSOF3. Finally, Defendant's descriptions of the Excel incident are inconsistent, as IBM elsewhere described as Plaintiff performing his work "too slowly," as opposed to not providing the work at all. PSOF4; Velez v. Thrermo King, Inc., 585 F.3d 441, 449 (1st Cir. 2009) (pretext based on changing explanations).

IBM's other justification for the demotion was an incident on June 8, 2011 in which IBM claims that "Knabe asked Plaintiff about another work assignment, and during that discussion both Knabe and Plaintiff raised their voices." Def.'s Mem., at 4. In actuality, Knabe yelled at Plaintiff and with knowing falsity, accused him of not producing work. PSOF8.

Further evidence that these conflicts were ginned up, and pretextual, was shown by the fact that Feldman failed to take any action to resolve any of the difficulties involving Knabe and Tuvell. PSOF59. For example, Feldman refused to investigate, and refused to respond to Tuvell's repeated inquiries for more detail concerning his alleged misconduct. Id. Feldman repeatedly denied Tuvell's requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Id. While Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had convened just such a three-way meeting in March 2011, concerning a different issue. Id. A reasonable jury could find that Feldman was not proactive in resolving the underlying issues, because he realized that the grievances against Plaintiff had no actual merit. Just three days after to the demotion, on June 13, 2011, Feldman, the decision-maker with respect to the demotion, had written a letter claiming Plaintiff to be "irrational and potentially dangerous" in conjunction with his PTSD, and advocated barring Plaintiff from the workplace and firing him. DSOF25. There is much other direct evidence demonstrating discriminatory animus with respect to Plaintiff's handicap, as described above. Supra 15-17.[16] Thus, there is ample evidence that the demotion was based on age, gender, handicap, and/or race.

## IX. IBM'S INVESTIGATIONS WERE UNLAWFUL AND/OR INADEQUATE

A reasonable jury could find that IBM's investigations of Plaintiff's complaints of discrimination were inadequate, delayed, biased and unlawful. An inadequate response to an

[16] Plaintiff was treated worse than similarly situated individuals who were outside of relevant protected categories. Knabe, who was not disabled, acknowledged yelling at Plaintiff, and yet he did not get

internal complaint "could itself foster a hostile environment and so give rise to liability therefor." Lightbody v. Wal-Mart Stores East, L.P., 2014 U.S. Dist. Lexis 148134 (D. Mass.), at 11. Also, a failure to properly investigate, in addition to supporting a hostile work environment claim, may form an independent basis for liability. College-Town v. MCAD, 400 Mass. 156, 167-168 (1987); Kenney v. R&R Corp., 20 MDLR 29, 31 (1998).

Lisa Due conducted the initial investigation in June 2011. DSOF17. When conducting that investigation, Due knew Plaintiff to be alleging that Feldman and/or Knabe to have discriminated against him on the basis of age and/or gender when he was required to switch job functions with Mizar. PSOF82. Yet Due did not explore the qualifications of Mizar as part of her investigation, nor did she explore whether Feldman or Knabe had a history of engaging in sexist or ageist behavior or comments in the workplace. PSOF83. Due did nothing to inquire of Feldman about his attitudes towards Plaintiff's PTSD. PSOF83. Prior to Due's completion of the investigation, she met with Mandel, who instructed her to inform Plaintiff that Due had no reason to conclude that Plaintiff had been mistreated. PSOF83. In addition to never seriously investigating Tuvell's complaints of discrimination, Due also never investigated whether Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. PSOF84.

Plaintiff appealed Due's conclusion to Russell Mandel. DSOF19; PSOF85. However, Mandel was biased as an appeal investigator, because he had already instructed Due how to respond with respect to her initial investigation. PSOF83. Moreover, Mandel was an inappropriate investigator under IBM's own conflict-of-interest policy, as he, personally, had been accused by Plaintiff of wrongdoing and discrimination, based on his failure to advance the

---

reassigned or disciplined, whereas Plaintiff was disciplined for innocuous comments. PSOF50; DSOF22, 25. Plaintiff was disciplined for missing a transition status update, but when the younger, female, Mizar missed an update, she was not disciplined. PSOF19-22, 26.

investigation during the pendency of Plaintiff's disability leave, and his false assertions to Plaintiff about IBM's practice of investigating third party complaints. PSOF77, 78, 79.

In August 2011, Mandel repeatedly, and over Plaintiff's objections, refused to advance the investigation because Plaintiff was on medical leave. PSOF28, 86. Mandel informed Plaintiff of the negative conclusion of his investigation on November 17, 2011, 19 weeks after the investigation had been requested. PSOF32; Resp. DSOF29. Given that IBM takes the position that Mandel completed his investigation already by September 15, 2011 (DSOF19), with no explanation for the additional two month delay in informing Plaintiff of the result, a jury could conclude that that IBM intentionally used the delay to keep Plaintiff out of the workplace.

Mandel's investigation was biased and one-sided, as Knabe and Feldman, but not Plaintiff, were accorded the opportunity to review Mandel's draft conclusions, and offer suggestions. PSOF87. Though Mandel understood that Plaintiff's complaint included the allegations that his demotion was discriminatory and/or retaliatory, Mandel never investigated whether that demotion was appropriate, and he failed to inquire as to whether Feldman exhibited any animus based on handicap and/or retaliation. PSOF88. Mandel's conclusions did not address Plaintiff's allegations of wrongdoing against Knabe or Mandel. PSOF3, 80.

On January 22, 2012, Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Plaintiff a requested transfer based on retaliation and in violation of the obligation to reasonably accommodate. PSOF89. Mandel, the investigator, never looked into whether the rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate the Plaintiff. PSOF89. On March 2, 2011, Plaintiff filed a third Corporate Open Door Complaint, alleging that Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. PSOF81. Mand+el never opened up an investigation to

respond to this Complaint, and there was no formal response. PSOF81. For these and for many other reasons (see Exhibits 115 & 116), A reasonable jury could conclude that IBM's investigation and response to Plaintiff's complaints were inadequate.

## CONCLUSION

For the aforestated reasons, Plaintiff respectfully requests that IBM's motion for summary judgment be denied in its entirety.

Respectfully submitted,

The Plaintiff, by his Attorney

/s/ Robert S. Mantell

Robert S. Mantell
BBO# 559715
Rodgers, Powers & Schwartz LLP
111 Devonshire Street, 4th Floor
Boston, MA 02109
(617) 742-7010
RMantell@TheemploymentLawyers.com

RULE 5.2 CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 12, 2015.

/s/ Robert S. Mantell

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,
Defendant

Civil Action No. 13-11292-DJC

**REPLY OF DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC. TO PLAINTIFF'S OPPOSITION TO IBM'S MOTION FOR SUMMARY JUDGMENT**

Defendant International Business Machines, Inc. ("IBM"), submits this Reply to Plaintiff Walter Tuvell's Opposition To IBM's Motion For Summary Judgment. IBM replies to demonstrate that there are no material facts in dispute in this matter, as Plaintiff admitted virtually all of IBM's facts not in dispute. IBM replies further to demonstrate that Plaintiff's Opposition ("Plf.'s Opp.") does not establish that he is a qualified handicapped person or that he was subjected to a hostile work environment or adverse action.

1. **IBM Is Entitled To Summary Judgment Because Plaintiff's Opposition Relies on Speculation Rather Than Fact And He Admits There Are No Material Facts In Dispute**

It is well settled that a plaintiff cannot avoid the entry of summary judgment merely by speculating that his treatment by his employer was based on impermissible considerations of handicap, age, gender, or other protected characteristic. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000) (party resisting summary judgment cannot rely on "conclusory allegations, improbable inferences, and unsupported speculation"). That is, however, precisely what Plaintiff has submitted to this Court. In his Opposition, Plaintiff continues to cite to a series of ordinary workplace interactions, but because he perceived the outcome of those interactions to be unfavorable to him – *i.e.*, not everyone agreed

with everything he said or did everything he wanted – he speculates that they must have been motivated by some kind of discriminatory animus. Even at this late stage of the litigation, however, Plaintiff remains hopelessly vague as to the nature of IBM's supposed discrimination, variously claiming that it was based upon age, gender, disability, retaliation, or "any combination thereof." Likewise, the factual basis for Plaintiff's discrimination/retaliation claims remains equally conclusory, resting on, *inter alia*, what he contends was IBM's "preexisting secret plan," which purportedly included assigning him "impossible tasks," "falsely accusing" him of violating an "inapplicable internal policy," as well as IBM's "refusal to appropriately act" on Plaintiff's "internal complaints of harassment." (Plf.'s Opp. at 2, 3). Such speculation is not admissible evidence, however, and is insufficient to defeat summary judgment.

That Plaintiff relies on speculation rather than fact in his effort to defeat IBM's motion for summary judgment is confirmed by his admission of essentially all of the material facts not in dispute claimed by IBM. In his response to the statement of facts, Plaintiff admitted 32 of the 81 facts outright and virtually admitted another 46 facts, attempting to overcome his admission of the latter group by saying a witness will not be believed, setting forth his opinion without citing to evidence or disputing a statement in a non-material way.[1]

Plaintiff attempted to mask the highly speculative nature of his case by proffering over 63 pages of what he contends are "disputed facts," but which are primarily argument and conclusory spin on the undisputed facts of record set forth in IBM's Statement of Material Facts.[2] Given the

[1] In reality, Plaintiff disputes only three of IBM's stated facts not in dispute and even those disputes are inconsequential. In paragraph 44, IBM stated that the first MTR on which Ms. Ross indicated a diagnosis of PTSD is the November MTR, which Plaintiff disputes only because he expanded the assertion to include anyone's mention of PTSD, citing his own earlier assertion of his condition. In paragraph 65, Plaintiff admits the testimony of the witness, taking issue only with the conclusion the witness claimed to have reached. In paragraph 75, Plaintiff disputes that the IBM Business Conduct Guidelines specifically address leave or that he was on Personal Leave of Absence. However, Plaintiff admitted in the FAC that the Business Conduct Guidelines preclude an employee from engaging in conflicting employment, disputing only that his employment was conflicting. FAC ¶¶ 134, 135.

[2] Plaintiff submitted 35 pages of responses to IBM's Statement of Facts, as well as his own 28 page Statement of Facts, both of which improperly contain conclusory argument and legal citations in violation of L.R. 56.1.

convoluted and argumentative nature of Plaintiff's recitation of events – in flagrant violation of Local Rule 56.1 – it is essential to return to the foundation of Plaintiff's claims, which is, quite simply, a workplace disagreement about work. Even a cursory review of Plaintiff's numerous, hyper-aggressive emails and his hundreds of pages of "Claims of Corporate and Legal Misconduct" reveal a wholly disproportionate reaction to two benign workplace interactions. (See, e.g. Plf. Ex. Nos. 53, 57-59, 61, 80, 83, 102, 104, 107). Plaintiff's response was so disproportionate that it caused his supervisor and at least one of his colleagues to report his alarming and irrational conduct to Human Resources out of concern for their safety. (Plf. Ex. Nos. 52, 50 (at 140), and 108). Plaintiff's inability to accept any constructive criticism led him to conclude that his IBM colleagues were involved in a conspiracy, which, *ipso facto*, must have been motivated by a discriminatory bias against him. At bottom, Plaintiff's claims must fail because he cannot demonstrate that any decision makers acted out of retaliatory or discriminatory animus, that he was subject to a hostile work environment or suffered adverse employment action, or that he was a qualified handicapped individual. Accordingly, summary judgment should enter for IBM.

**2. Plaintiff Is Not A Qualified Handicapped Person And Has Not Demonstrated That A New Supervisor Or New Position Would Enable Him To Perform The Essential Functions of His Job.**

As a preliminary matter, Plaintiff's entire case remains fundamentally flawed because Plaintiff is not a qualified handicapped individual within the meaning of the ADA and M.G.L. c. 151B, given that he was not capable of performing his job with or without a reasonable accommodation. Indeed, Plaintiff cannot dispute that his own medical providers described him as totally impaired from working: Plaintiff admits that the MTRs submitted by his social worker Stephanie Ross were accurate and that Ms. Ross "was concerned for his mental health stability and believed that just going into the building where he worked and seeing Mr. Feldman or Mr. Knabe could trigger his obsessive thoughts, depression, or other strong reactions." (PRSOF ¶ 46). Indeed,

the MTR submitted on December 16, 2011, described Plaintiff as "totally impaired for work," with *serious impairments* in getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, setting realistic goals and having good autonomous judgment. (PRSOF ¶ 48). As such, based upon his "total impairment," Plaintiff was not qualified for his or any other job, despite his insistence to the contrary. See Beal v. Board of Selectman, 646 N.E.2d 131, 136 (Mass. 1995)(plaintiff's own assertion that she could not return to work and doctor's statement of permanent disability supported employer's contention that she was unable to perform the essential functions of her job); August v. Offices Unlimited Inc., 981 F.2d 576 (1st Cir. 1992)(employee was not a qualified individual where assessment of "total disability" by psychiatrist rendered him "simply incapable of performing the essential functions of any job," including his own).

In the face of these admissions, Plaintiff argues that contemporaneously claiming that he was "totally disabled" on his IBM MTRs does not contradict his assertion in this lawsuit that he was capable of performing his job with a reasonable accommodation. (Plf.'s Opp. at 9). Plaintiff's position demonstrates a clear misunderstanding of the cases on which he relies. See Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997). In both Sullivan and Labonte, the courts expressly allow for an opportunity for employees to demonstrate why claims of total disability on *Social Security Disability applications* are distinguishable from claims to their employers that they are qualified handicapped individuals capable of performing their jobs with reasonable accommodation. Id. In contrast to the scenario addressed by the Sullivan and Labonte courts, Plaintiff certified that he was totally impaired from *performing this job for this employer*. (PRSOF ¶¶ 33, 35, 41, 47). Plaintiff offered no objective evidence to explain this contradiction, other than insisting that a new supervisor or a new job would

somehow eradicate all of the impairments listed on his MTRs. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 798 (1999) ("To survive a defendant's motion for summary judgment, [the plaintiff] must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'").

Plaintiff also misstates the law when he argues that "reasonable accommodations are acts that permit an employee to perform the essential functions of a *desired* position." (Plf.'s Opp. at 6) (emphasis added). Rather, "a reasonable accommodation provided to an employee with a handicap is to allow her to perform the essential functions 'of the position involved,' . . . i.e., the plaintiff's original position." Cailler v. Care Alternatives of Massachusetts, LLC, 2012 U.S. Dist. LEXIS 39414 at *23 (D. Mass. Mar. 23, 2012)(emphasis added). Plaintiff was not, as he continues to believe, entitled to the position or supervisor of his choice merely because that was the only accommodation he would accept. Bryant v. Caritas Norwood Hospital, 345 F. Supp. 2d 155, 170 (D. Mass. 2004) (ADA "does not require the employer to grant its disabled employee's accommodation of choice, even if it is a reasonable one, and instead provides the employer with 'the ultimate discretion to choose between effective accommodations'").

Plaintiff argues that leave with no pay is not a reasonable accommodation, citing to 20 CFR 1630.2(o)(2) & (3). (Plf.'s Opp. at 6-7). As a preliminary matter, Plaintiff's leave became unpaid only after he received six months of short term disability benefits and his long term disability claim was denied by the insurer. Additionally, the regulation Plaintiff cites as support merely describes a variety of accommodations and says nothing about leave with or without pay.

More significantly, Plaintiff's argument fails because it was the only accommodation which was feasible at that point. While Plaintiff argues that he should have been afforded a new supervisor or a new position, he fails to demonstrate that either a transfer or a new supervisor would

have been reasonable accommodations that effectively addressed all of his stated impairments.[3] Importantly, "[o]ne element in the reasonableness equation is the likelihood of success," and at the same time Plaintiff insisted a new supervisor was the only accommodation that could enable his return to work, his medical limitations prevented him from, among other things, negotiating and compromising, managing conflicts with others, or having good autonomous judgment, all of which were essential functions of his and any other job that involved working with people. Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012); Evans v. Fed. Express Corp., 133 F.3d 137, 140 (1st Cir. 1998); Halpern v. Wake Forest Univ. Health Sciences., 669 F.3d 454, 465 (4th Cir. 2012)("[T]he indefinite duration and uncertain likelihood of success of [plaintiff]'s proposed accommodation renders it unreasonable."); Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202 (6th Cir. 2010)(holding proposed accommodation unreasonable where plaintiff failed to show how proposal would allow him to overcome a "key obstacle" to performing an essential function); Pesterfield v. Tennessee Valley Authority, 941 F.2d 437, 442 (6th Cir. 1991)(employee not a qualified handicapped person where he "presented himself as an individual incapable of performing the normal, interactive functions of his job and incapable of functioning if there was the slightest hint of criticism").

Plaintiff's failure to demonstrate that he would be able to successfully interact with a small group of individuals and appropriately deal with conflict and criticism – where the only change in his working conditions would be removal of a supervisor who did not harass Plaintiff or otherwise subject him to treatment outside of normal workplace interactions – dooms his assertion that he is a

[3] Nor does Plaintiff have support for this contention from the decisions he cites because in none of those cases did the plaintiffs certify to their employers that they were "totally impaired" from work. (Plf.'s Opp. at 7, n. 6). See Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751, 771-72 (3d Cir. 2004) (work restriction only foreclosed carrying firearms); Walters v. Mayo Clinic, 998 F. Supp. 2d 750, 764 (W.D. Wis. 2014) (employee could perform all job duties); Noon v. IBM, 2013 U.S. Dist. LEXIS 174172 (S.D.N.Y. Dec. 11, 2013) (employee with back problems not precluded from all work). Further, Plaintiff's assertion that IBM "forced" him to stay out of work also misstates the facts, which demonstrate that Plaintiff failed to seek appropriate psychiatric help or consider alternative reasonable accommodations that could have enabled his return, choosing instead to remain on medical leave. (PRSOF ¶¶ 38, 39, 67-69).

qualified individual who would have been capable of performing the essential functions of any job even with his requested accommodation.

**3. Plaintiff Was Not Subjected to a Hostile Work Environment.**

In his Opposition, Plaintiff continues to insist that he endured a hostile work environment based on what he characterizes as "harassing acts" by Mr. Feldman and other IBM personnel. (Plf.'s Opp. at 2-3). The fundamental problem for Plaintiff is that the acts he describes, even if credited, fall far short of creating a hostile work environment as a matter of law. In considering a hostile work environment claim, courts must examine "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Danco v. Walmart Stores, Inc., 178 F.3d 8, 16-17 (1st Cir. 1999)(affirming jury verdict of racially hostile work environment where the plaintiff was subjected to racial slurs, racist graffiti, was physically assaulted, and verbally threatened). Any fair reading of the undisputed facts of this case demonstrates that the alleged incidents Plaintiff has characterized as "harassment" do not meet the hostile work environment standard set forth in Danco.[4]

While Plaintiff plainly took personal offense to job-related criticism and personnel decisions, as evidenced by his voluminous, incendiary email communications with various IBM personnel (at one point copying dozens of people, including IBM's CEO), his personal sensitivity falls far short of establishing a claim for hostile work environment. See Suarez v. Pueblo Int'l Inc., 229 F.3d 49, 54 (1st Cir. 2000)("[t]he workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world."). In fact, the incidents of

[4] The investigations of Plaintiff's complaints demonstrate the absence of conduct rising to the level of a hostile work environment. See Lisa Due's notes of her 2011 investigation, Plf. Ex. No. 49. Mr. Mandel's investigation, set forth in his 19- page report based on interviews of nine individuals, including Plaintiff's co-workers, confirms the same. IBM's Response to Plaintiff's Statement of Facts ¶ 80, Ackerstein Supp. Aff. Ex. 118.

"harassment" cited by Plaintiff were merely run-of-the-mill workplace interactions which would not have been objectively offensive to anyone with even marginally thick skin, and Plaintiff's subjective perception that such interactions were "severe and pervasive" is simply not enough to support a claim for hostile work environment. See Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678 (1993)("To constitute actionable harassment, the claimed conduct must be both objectively and subjectively offensive.").

Indeed, the cases Plaintiff cites to support his position are revealing by comparison, in that those cases involved racial slurs, vulgar sex harassment, and physical assaults. See Thomas O'Connor Constr., Inc. v. MCAD, 72 Mass. App. 549, 567 (2008)(affirming MCAD decision finding hostile work environment based on race where African American employee endured "repeated, offensive, racist remarks . . . [which] intimidated, humiliated, and stigmatized" the plaintiff); Gerald v. University of Puerto Rico, 707 F.3d 7, 22 (1st Cir. 2013)(finding both subjectively and objectively offensive conduct that included unwelcome come-ons, lewd remarks, and physically threatening incident involving unwelcome fondling); Danco, 178 F.3d 8. In contrast to the cases on which he relies, Plaintiff was never exposed to offensive utterances implicating a protected category, physical threats or violence, or any incident that comes close to the level of severity alleged by the employees in those cases. The fact that Plaintiff has analogized his experience at IBM to situations such as these is telling, in that it demonstrates the wide gulf between his subjective view and what is objectively offensive.[5] Simply put, Plaintiff has not established that he was subject to a hostile work environment as a matter of law.

**4. None of the Actions Listed By Plaintiff Constitute Adverse Employment Action.**

Nor has Plaintiff demonstrated that he suffered any material effects on the "working terms conditions, or privileges" of his employment, and therefore his adverse employment action claim

[5] By way of example only, Plaintiff insists that his supervisor's "picky requirements reflect . . . 'blatant harassment/retaliation.'" PSOF ¶ 23.

must also fail. See Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 157 (1st Cir. 2009)(an adverse action must be a "material disadvantage[] in respect to salary, grade, or other objective terms and conditions of employment"); King v. Boston, 71 Mass. App. Ct. 460, 468 (2008)(plaintiff must suffer "real harm" and "subjective feelings of disappointment will not suffice").

Plaintiff identified the restriction of access to IBM's network and facilities while on leave, his reassignment to a different project within Mr. Feldman's group, his failure to get a job with Mr. Kime's group, and his receipt of a warning from Mr. Feldman as adverse employment actions. (Plf.'s Opp. at. 4-5). None of the alleged incidents rise to the level of an adverse employment action as a matter of law. As for IBM's restriction of access to its network and facilities, it is not disputed that Plaintiff was on a leave of absence at the time and "totally incapacitated to work," and therefore there was no business reason for him to access IBM's premises or network. (IBM SOF, ¶¶ 53-54); compare Dahms v. Cognex Corp., 14 Mass. L. Rep. 193 (2001)(plaintiff's claim that she experienced several adverse actions after rejecting a supervisor's sexual advance, including restricted access to her building *while she was an active employee*, was enough to survive summary judgment). As for the reassignment of his job responsibilities on one particular project to Ms. Mizar, Plaintiff failed to offer any objective evidence that the re-assignment had any tangible impact on the material conditions of his employment. Indeed, Plaintiff admitted that his move to a different project did not result in any change in his rank or pay. (Plf.'s Opp. at 4-5). Finally, the warning letter that Mr. Feldman issued to Plaintiff did not affect the terms and conditions of Plaintiff's employment, and simply set forth IBM's expectations for him going forward. (IBM SOF

¶ 25). Accordingly, because Plaintiff has not identified any adverse employment actions to which he was subjected, summary judgment must enter for IBM.[6]

**5. IBM Did Not Violate The ADA When It Failed to Transfer Plaintiff to a Different Position**

Plaintiff does not dispute IBM's citation to the Supreme Judicial Court's ruling that assignment to a new position is not a "reasonable accommodation" under c. 151B. (IBM Memo. at 11). Rather, in his opposition, Plaintiff disputes only IBM's position on federal law, contending that the ADA required that he be transferred to a vacant position (Plf.'s Opp. at 11-13). Plaintiff's argument fails because he ignores the very premise he cites, which is that a transfer may be required only where the employee is "qualified." The fact is that no court has held that an employer is required to relocate an employee to an open position if that employee is not capable of performing the essential functions of the position. Jones v. Nationwide Life Ins. Co., 696 F.2d 78, 91 (1st Cir. 2012) (accommodation not reasonable where employee cannot demonstrate it would enable him to perform the essential functions of job); Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 24 (EEOC Notice No. 915.002) ("An employee must be 'qualified' for the new position."). In this case, the serious impairments which Plaintiff's health care providers described on the MTR's they submitted, such as the inability to get along with others without behavioral extremes, to interact and actively participate in group activities, to manage conflicts with others, to set realistic goals, and to have

[6] While Plaintiff's termination was an adverse employment action, Plaintiff has not proffered any evidence that it resulted for any reason other than IBM's stated reason, which is that Plaintiff refused to tell IBM whether he was working for a competitor. Plaintiff argues that this is pretext and states that his current employer is not a competitor, submitting in support a screen shot of a webpage from 2009 stating that the two companies have a "strategic provisioning partnership." PSOF ¶ 91. As explained in IBM's Business Conduct Guidelines, with which Plaintiff was undisputedly well-versed, an employee "may not, without IBM's consent, work for an organization that markets products or services in competition with IBM's current or potential product or service offerings." IBM's Response to Plaintiff's Statement of Facts ¶ 91, Ackerstein Supp. Aff. Ex. 117. The Business Conduct Guidelines further explain that "organizations have multiple relationships with IBM. An IBM Business Partner may be both a client and a competitor," and therefore IBM employees are obligated to consult with IBM to determine whether their activities "will compete with any of IBM's actual or potential business." Id. Plaintiff was terminated because he was obligated but refused to consult with IBM to determine whether his employment would compete with IBM's actual or potential business, in direct violation of IBM's policies, and Plaintiff not provided any evidence to the contrary. Id.

good autonomous judgment, precluded Plaintiff from being a qualified handicapped individual with respect to the position he sought.

**6. Conclusion.**

For the foregoing reasons, as well as the reasons in IBM's initial supporting Memorandum, IBM respectfully submits that its motion for summary judgment should be granted and that judgment should enter for IBM on the complaint in its entirety.

Respectfully submitted,
INTERNATIONAL BUSINESS
MACHINES, INC.,

By its attorneys,

/s/ Joan Ackerstein
Joan Ackerstein (BBO No. 348220)
Matthew A. Porter (BBO No. 630625)
JACKSON LEWIS P.C.
75 Park Plaza, 4th Floor
Boston, MA 02116
(617) 367-0025
(617) 367-2155 fax
ackerstj@jacksonlewis.com
porterm@jacksonlewis.com

**CERTIFICATE OF SERVICE**

This is to certify that on March 2, 2015, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/Matthew A. Porter
Jackson Lewis P.C.

*{This page intentionally left blank.}*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,
Defendant

Civil Action No. 13-11292-DJC

**RESPONSE OF IBM TO PLAINTIFF'S "STATEMENT OF FACTS IN MATERIAL DISPUTE"**

Defendant International Business Machines, Inc. ("IBM"), responds to Plaintiff's Statement of Facts in Material Dispute as follows.

**A. Plaintiff's Statement of Facts Violates Local Rule 56.1.**

As a preliminary matter, IBM objects to Plaintiff's purported Statement of Facts on the grounds that it violates Local Rule 56.1. L.R. 56.1 permits a party opposing a Motion for Summary Judgment to include a "concise statement of the material facts as to which it is contended there exists a genuine issue to be tried." As explained by the First Circuit, L.R. 56.1, and others like it, were adopted because without them, "summary judgment practice could too easily become a game of cat-and-mouse. Such rules are designed to function as a means of focusing a district court's attention on what is -- and what is not -- genuinely controverted. When complied with, they serve to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide and greatly reduce the possibility that the district court will fall victim to an ambush." Hernandez v. Philip Morris USA, Inc., 486 F.3d 1, 7 (1st Cir. 2007) (internal quotations, citations omitted).

Plaintiff's "Statement of Facts", which is 28 pages long, includes 91 separate paragraphs and is anything but concise. It is in large part merely a re-presentation of Plaintiff's initial Response to

IBM's Statement of Facts, a Response that was in and of itself largely argumentative and conclusory. To illustrate, IBM's Statement of Facts was 18 pages when filed, but ballooned to 53 pages once Plaintiff submitted his Response, which included responses that stretched over multiple pages and included legal argument and citations. See, e.g., Response No. 10, 25, 53, 65, 79. Apparently that was not sufficient, as Plaintiff has supplemented his Response to IBM's Statement of Facts with his own Statement of Facts, which consists of an additional 28 pages that in many instances merely replicates, verbatim, Plaintiff's responses to IBM's Statement of Material Facts. Compare, e.g., Plaintiff's Statement of Material Facts ¶¶ 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 with Plaintiff's Responses to IBM's Statement of Material Facts ¶ 10. In total, Plaintiff has submitted *63 pages* of "facts" purportedly in dispute, in an attempt to manufacture a factual dispute where none exists, by burying the Court and IBM under a mountain of paper.

IBM's Statement of Facts set forth in concise form the undisputed facts that are material to the disposition of IBM's Motion for Summary Judgment. In his Response, Plaintiff admitted 32 of IBM's 81 undisputed facts outright, and virtually admitted another 46 facts (attempting to overcome his admission of the latter group by saying a witness will not be believed, setting forth his opinion without citing to evidence or disputing a statement in a non-material way). Plaintiff's Statement of Facts is merely another attempt by Plaintiff to re-argue his case, either by restating IBM's Statement of Facts in an argumentative way by placing his own "spin" on the facts, or by setting forth other facts which are not material to the disposition of IBM's Motion. As such, Plaintiff's Statement of Facts violates LR 56.1 and should not be considered by the Court.

Nevertheless, IBM hereby responds to Plaintiff's Statement of Facts as follows:

**B. Responses to Specific Paragraphs of Plaintiff's Statement of Facts**[1]

1. On or about May 18, 2011, Mr. Knabe asserted to Mr. Feldman, in Mr. Tuvell's absence, that Mr. Tuvell had failed to produce that day certain Microsoft Excel graphics as instructed. Verified Complaint, ¶ 14, Exhibit 42. These assertions were entirely false. Verified Complaint, ¶ 14, Exhibit 42. In fact, Mr. Knabe had not instructed Mr. Tuvell to produce any work at all that day, much less produce any Excel graphics. Verified Complaint, ¶ 14, Exhibit 42.

IBM Response to 1. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that on or about May 18, 2011, Mr. Knabe did advise Mr. Feldman that Plaintiff had failed to complete a work assignment in a timely fashion. See IBM Statement of Facts ("SOF") ¶ 6.

2. IBM has taken the position that the May 18, 2011 incident was one of the justifications for the demotion/reassignment of June 10, 2011. Def.'s Mem., at 4; Feldman Dep., at 26-27, 38-40, 59, Exhibit 43.

IBM Response to 2. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff was not demoted, but rather was reassigned to a different project because Mr. Feldman did not believe Plaintiff and Mr. Knabe could continue working effectively together on the Wahoo project that Mr. Knabe was managing. Neither Plaintiff's pay nor rank changed as a result, a fact admitted by Plaintiff. See IBM Statement of Facts, ¶¶ 8-9; Plaintiff's Response to IBM Statement of Facts, ¶10.

3. The assertion that Plaintiff was even asked to produce Excel graphics is patently pretextual, given that both Mr. Feldman and Mr. Knabe knew that Mr. Tuvell did not even use or have a copy of Excel or the Microsoft operating system, but instead he used different more advanced software tools for all his work at IBM. Feldman Dep., at 40-41, Exhibit 43; Knabe Dep., at 102-103, Exhibit 44.

IBM Response to 3. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

[1] The majority of facts that comprise Plaintiff's Statement of Facts in Material Dispute are supported by reference to Plaintiff's Verified Complaint (Pl. Ex. 42). While a verified complaint should be treated as the "functional equivalent of an affidavit" to the extent it complies with Rule 56(e), "conclusory allegations" – with which Plaintiff's Statement of Facts is replete – "do not pass muster, and hence, must be disregarded." Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991) (disregarding portions of Verified Complaint that were mere "conclusory allegations"). To the extent Plaintiff's Facts are supported only by conclusory allegations from his Verified Complaint, they too should be stricken from the record.

4. Defendant's assertions of what happened on May 18, 2011 are inconsistent, and therefore pretextual, as on other occasions, Plaintiff's alleged misconduct was identified as that he was working "too slowly." IBM Ans. to Int. 4, at 4-5, Exhibit 45; May 11, 2012, Position Statement, at 3, ¶ 2, Exhibit 46.

IBM Response to 4. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

5. In response to Mr. Knabe's May 18, 2011 complaints, Plaintiff denied any wrongdoing, sought more detail concerning his alleged misconduct, and requested a three-way meeting amongst the three individuals, multiple times, to establish what exactly happened and to clear the air. Verified Complaint, ¶¶ 15, 16, Exhibit 42. Mr. Feldman repeatedly denied Plaintiff's requests to have a three-way meeting, refused to investigate the false assertion about Plaintiff's work performance, and refused to respond to the requests for more information. Verified Complaint, ¶ 16, Exhibit 42.

IBM Response to 5. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman declined to hold an additional meeting with Mr. Knabe and Plaintiff because he deemed it would not be productive to conduct meetings between them each time there was a dispute over a work issue. Feldman Dep., p. 46, Pl. Ex. 43.

6. While Mr. Feldman claims he rejected the option of a three-way meeting for the reason that it would create an unhealthy "habit," he had in fact conducted just such a three-way meeting shortly before, in March 2011, concerning a different issue. Compare Feldman Dep., at 46, Exhibit 43, with Tuvell Aff., ¶ 17, Exhibit 47.

IBM Response to 6. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman declined to hold an additional meeting with Mr. Knabe and Plaintiff because he deemed it would not be productive to conduct meetings between them each time there was a dispute over a work issue. Feldman Dep., p. 46, Pl. Ex. 43.

7. On June 8, 2011, Mr. Knabe yelled loudly at Mr. Tuvell in front of co-workers, asserting that Mr. Tuvell failed to produce certain specified work items that day as ordered. Verified Complaint, ¶ 15, Exhibit 42. These assertions were entirely false. Verified Complaint, ¶ 15, Exhibit 42. In fact, Mr. Knabe had ordered Mr. Tuvell to produce certain different specified work items that day, and Mr. Tuvell had indeed produced these latter work items that day, as Mr. Knabe was already fully aware. Verified Complaint, ¶ 15, Exhibit 42. On June 10, 2011, Mr.

Knabe acknowledged in writing that he had indeed raised his voice at Mr. Tuvell. Verified Complaint, ¶ 15, Exhibit 42.

IBM Response to 7. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that on June 8, 2011, Mr. Knabe asked Plaintiff about an outstanding work assignment in front of other employees, and according to Plaintiff's colleague Steve Lubars, who witnessed the incident, in the ensuing discussion voices were raised by both Plaintiff and Mr. Knabe. See IBM SOF ¶ 8, Supp. Ackerstein Aff. Ex. 118 at 7.

8. On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned or demoted from performing the highest level ("lead") work within the Performance Architecture Group to the lowest. Verified Complaint, ¶ 18, Exhibit 42. IBM asserts that the job action was based on the May 18 and June 8 incidents. Verified Complaint, ¶ 16, Exhibit 42. Mr. Feldman assigned Mr. Tuvell to switch the high-level work role of Mr. Tuvell with the low-level work role of Ms. Sujatha Mizar, a less qualified female of East Asian heritage. Verified Complaint, ¶ 18, Exhibit 42; Feldman Dep., at 57-59, Exhibit 43. Mr. Tuvell was decades older that Ms. Mizar, who was well under forty, and he had decades more relevant experience for the position. Verified Complaint, ¶ 18-19, Exhibit 42. Ms. Mizar had no Ph.D, while Plaintiff had one in Mathematics. Feldman Dep., at 16, Exhibit 43; Verified Complaint, ¶ 1, Exhibit 42. Plaintiff was being paid approximately $35,000 more than Ms. Mizar. Feldman Dep., at 58, Exhibit 43.

IBM Response to 8. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff was not demoted. Rather, Plaintiff was assigned to a different project in place of another employee, Sujatha Mizar, and in turn Ms. Mizar was assigned to work with Mr. Knabe on the Wahoo project. The switch did not result in any change in Plaintiff's pay or rank and was not a demotion. See IBM SOF ¶ 10.

9. Plaintiff suffers from Post Traumatic Stress Disorder. Verified Complaint, ¶ 10, Exhibit 42.

IBM Response to 9. IBM admits that Plaintiff claims to suffer from Post-Traumatic Stress Disorder ("PTSD").

10. Mr. Feldman was aware of Plaintiff's PTSD at least as early as May 26, 2011. Feldman Dep., at 47, Exhibit 43.

IBM Response to 10. IBM admits that Plaintiff advised Mr. Feldman that he claimed to have PTSD on or about May 26, 2011. Feldman Dep., p. 47, Pl. Ex. 43.

11. Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Mr. Feldman, and IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; Verified Complaint, ¶ 1, Exhibit 42; Feldman Dep. Exhs. 2&3, Exhibit 48; Feldman Dep., at 18-22, Exhibit 43. Mr. Feldman regarded Plaintiff's work in the Performance Architecture area as competent and his interactions with others to be professional. Feldman Dep., at 17, 26, Exhibit 43.

IBM Response to 11. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM does not dispute Plaintiff's academic credentials and states that Plaintiff had no serious issues with either Mr. Knabe or Mr. Feldman prior to May 18, 2011. IBM SOF, ¶ 6.

12. Plaintiff was working at a "Band 8" level, and Ms. Mizar was working at a "Band 7" level, and so the Mizar position was a "lesser role." Due Dep. Exh. 19, at IBM11041, Exhibit 49; Due Dep., at 119, Exhibit 50.

IBM Response to 12. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff was a Band 8 and Ms. Mizar was a Band 7 employee, but denies that Ms. Mizar's responsibilities constituted a "lesser role" or that the citation provided for this fact, which are notes of Plaintiff's own comments to Lisa Due, reflect an adoption by IBM of Plaintiff's belief. See IBM SOF ¶ 10.

13. Plaintiff regarded his Performance Architecture position on the "Wahoo" project to be a very highly valued position. He wrote, "I truly thought I was extremely fortunate to be in the best possible project at Netezza." Feldman Dep. Exh. 8, at TUVELL255, Exhibit 51; Feldman Dep., at 55-56, Exhibit 43. Plaintiff noted that Mr. Feldman told him that it was a "plum" position, and that there was "almost no other job like this for a performance professional in the country." Due Dep. Exh. 2, at IBM8848, Exhibit 52; Tuvell Aff., ¶ 19, Exhibit 47.

IBM Response to 13. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff's cited email communications speak for themselves.

14. The June 10, 2011 reassignment meant that Plaintiff was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower level work. Tuvell Aff., ¶ 20, Exhibit 47. The reassignment to a lower position meant lesser job opportunities in future, and also by its high visibility reflected what

Plaintiff considered to be public humiliation. Feldman Dep. Exh. 10, at TUVELL261, Exhibit 53; Feldman Dep., at 68, Exhibit 43.

IBM Response to 14. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that Plaintiff's new assignment was a demotion or that it was "lower level work" and admits that Plaintiff wrote the cited email, which speaks for itself. See IBM SOF, ¶ 10.

15. IBM's own policies considers an "undesirable reassignment" to be a tangible adverse employment action. Mandel Dep. Exh. 47, at IBM2309, Exhibit 54; Mandel Dep., at 169-170, Exhibit 55.

IBM Response to 15. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that the cited policy, which deals primarily with sex harassment, is material to the issues to be determined on summary judgment, or applies to the reassignment of Plaintiff's and Ms. Mizar's job responsibilities. IBM submits that the cited policy speaks for itself. Pl. Ex. 54.

16. The June 10, 2011 reassignment meant change of assigned work office from Cambridge to Marlborough, resulting in a much longer commute (15 miles vs. 45 miles), and which Tuvell regarded as a less preferable location. Feldman Dep., at 57, 63-64, Exhibit 43; Tuvell Aff., ¶ 18, Exhibit 47.

IBM Response to 16. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff was hired in November of 2010, to work in Marlborough, Massachusetts, and after IBM's acquisition of Netezza, including the time he worked on the Yahoo project, Plaintiff continued to work out of the Marlborough office one day a week. Plaintiff cannot point to any complaint he made about the difference in commuting time between Marlborough and Cambridge at any time during his tenure with IBM.

17. On June 12, 2011, Tuvell complains to Feldman in his weekly report about Mr. Knabe's "harassment and yelling," an "'illegal' adverse job action (in the IBM sense, and perhaps even in the civil sense)." Tuvell further complained about the "public humiliation of unilateral removal from the most excellent high-profile position on Wahoo to what seems . . . a highly symbolic deportation to Siberia." Finally, Tuvell noted that his multiple requests for three-way

meetings with Knabe have been refused. Feldman Dep. Exh. 10, at TUVELL261, Exhibit 53; Feldman Dep., at 68, Exhibit 43.

IBM Response to 17. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff wrote the cited email, which speaks for itself.

18. On June 12, 2011, Feldman responded by email to Tuvell's June 12, 2011 email. After months of addressing Mr. Tuvell as the familiar "Walt," Mr. Feldman addresses his June 12, 2011 e-mail with stiff formality to "Dr. Tuvell." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In that June 12, 2011 email, Mr. Feldman requires that all of Mr. Tuvell's further written and verbal communications with him must be made in the presence of, or copied to, Human Resources representatives. Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. Mr. Feldman states, "I go down this path regretfully. You have twice now made clear to me your history of suing when you feel you've been wronged in the office and I see no choice." Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56; Verified Complaint, ¶ 20, Exhibit 42.

IBM Response to 18. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman wrote the cited emails, which speak for themselves.

19. On June 14, 2011, Feldman wrote to Tuvell and Mizar, asking that they provide Feldman with a brief email at the end of every business day detailing the transition of tasks between them that have been completed and providing alerts of any problem. Feldman Dep. Exh. 13, at TUVELL267, Exhibit 57; Feldman Dep., at 85-86, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56; Verified Complaint, ¶ 22, Exhibit 42.

IBM Response to 19. IBM admits that Mr. Feldman wrote the referenced email to Ms. Mizar and Plaintiff, which speaks for itself.

20. On June 14, 2011, Mizar provided to Feldman a brief but complete status update of the transition, which was copied to Tuvell:

(1) Finished transition of the Block IO tracing project. (Sujatha to Walter)
(2) Finished transition of the WaltBar performance tool (Walter to Sujatha)

Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43. Mizar's email further stated, "Walt – please feel free to add anything I might have forgotten. Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43.

IBM Response to 20. IBM admits that Ms. Mizar wrote the cited email, which speaks for itself.

21. Despite the fact that the email from Mizar purported to describe the transition status from the point of view of both Tuvell and Mizar, and despite the fact that Feldman had not specified that both Mizar and Tuvell were to each submit a separate (identical) report, Feldman asserted that he had concluded that Plaintiff's failure to provide him a separate report regurgitating the same information found in Mizar's report to be inappropriate. Feldman Dep., at 86, 88-89, Exhibit 43.

IBM Response to 21. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman considered Plaintiff's failure to provide a status report as Mr. Feldman had requested was inappropriate. Feldman Dep., pp. 88-89 (Pl. Ex. 43).

22. On June 15, 2011, prior to the beginning of the day's normal work hours, Mr. Feldman emailed a demand to Mr. Tuvell to submit a separate individual transition report, falsely stating that he had previously "asked you to provide … a report from each of you daily". Feldman Dep. Exh. 13, at TUVELL266, Exhibit 57; Feldman Dep., at 86, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56; Verified Complaint, ¶ 22, Exhibit 42.

IBM Response to 22. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman wrote the cited email, which speaks for itself, and IBM specifically denies that Mr. Feldman made a "false statement." See IBM SOF, ¶ 14.

23. On June 15, 2011, Tuvell replied to Feldman, and copied Ms. McCabe and Ms. Adams, stating that he did not provide a separate report because it would have been redundant, as he knew Mizar's report already contained everything that he would have reported. Feldman Dep. Exh. 13, at TUVELL265, Exhibit 57; Feldman Dep., at 86-87, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56. In this email, Tuvell complains of age and sex discrimination with respect to his replacement by Ms. Mizar, a less qualified, younger, female individual, and Tuvell expresses his opinion Feldman's picky requirements reflect "blatant . . . harassment/retaliation." Feldman Dep. Exh. 13, at TUVELL265, Exhibit 57; Feldman Dep., at 86-87, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56.

IBM Response to 23. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff wrote the referenced email, which speaks for itself. See IBM SOF, ¶ 15.

24. On June 16, 2011, at 10:25 am, Feldman emailed Tuvell, asking by the next day a "detailed (one-day granularity) schedule for your work on the assigned projects between now and the beginning of your medical leave." TUVELL272, Exhibit 59; Resp. to Pl.'s Req. for Adm. 6, Exhibit 56. Tuvell's medical leave was scheduled to begin July 7, 2011, three weeks in the future. IBM8840, Exhibit 60; Tuvell Aff., ¶ 28, Exhibit 47. Mr. Tuvell reports that it "turns my stomach (literally, not figuratively) to contemplate working with him." TUVELL271, Exhibit 59; Resp. to Pl.'s Req. for Adm. 6, Exhibit 56.

IBM Response to 24. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff and Mr. Feldman authored the referenced emails, which speak for themselves, and that Plaintiff took a medical leave for cosmetic surgery in early July of 2011. See IBM SOF, ¶¶ 16-17, 20.

25. On June 17, 2011, Mr. Tuvell complains of continuing harassment to Mr. Feldman, Ms. McCabe and Ms. Adams. Verified Complaint, ¶ 27, Exhibit 42. Tuvell complained, among other things, that Tuvell was being required to establish an independent daily schedule for the next three weeks on all four projects he was taking over from Mizer, based solely on her short one-line descriptions of her projects. TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56. Tuvell complained that he was still on a learning curve with respect for the new projects, and has never set a daily schedule for three weeks in the future, let alone for unfamiliar projects. TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56. Mr. Tuvell requests an example of such a schedule from Mr. Feldman, but none is forthcoming. Verified Complaint, ¶¶ 26, 30, 43, Exhibit 42; TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56.

IBM Response to 25. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff wrote the referenced email, which speaks for itself. Pl. Ex. 61.

26. On June 17, 2011, Mizar provides Feldman with a transition status update for the prior two days, demonstrating that she missed the previous day's update. Feldman Dep. Exh. 15, Exhibit 62; Feldman Dep., at 92-93, Exhibit 43. However, Mizar was not disciplined or counselled for missing that update. Feldman Dep., at 92-93, Exhibit 43.

IBM Response to 26. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Ms. Mizar wrote the referenced email, which speaks for itself, in compliance with Mr. Feldman's request. Pl. Ex. 62.

27. Feldman forbids Tuvell from spending an earlier agreed-upon reasonable working time on his internal complaint of harassment, and then threatened Tuvell with termination when Tuvell responded by saying, "Now wait a minute, Dan." Verified Complaint, ¶ 46, Exhibit 42.

IBM Response to 27. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies Plaintiff's characterization of the incident, which is not supported by any documents aside from Plaintiff's Complaint.

28. Based on the harassment that Plaintiff experienced, and the severe PTSD symptoms that resulted, including a fainting episode, Plaintiff went out on sick leave on August 11, 2011. Verified Complaint, ¶¶ 49, 53-54, Exhibit 42. Mr. Tuvell reported to IBM's Russell Mandel that: "The very REASON I'm on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse being heaped upon me by Dan Feldman, and yourself . . . The ONLY way for me to recover sufficient to return to work from STD is to settle this case. Properly and correctly." Mandel Dep. Exh. 10, at TUVELL744, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55.

IBM Response to 28. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff wrote the referenced email, which speaks for itself, and that Plaintiff went out on a leave of absence on or about August 11, 2011. See IBM SOF, ¶ 26; Pl. Ex. 63.

29. Instead, Mandel initially refused to progress the investigation during the leave. Though Plaintiff objected, Mandel didn't complete his "investigation" until four and a half months after initial Plaintiff's request. Verified Complaint, ¶¶ 33, 81, Exhibit 42; Resp. DSOF29.

IBM Response to 29. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel issued a 19-page report regarding Plaintiff's Open Door Complaint on or about September 15, 2011, concluding that Plaintiff was not subjected to any adverse or unfair employment actions. IBM SOF, ¶ 29.

30. On or about October 19 and 20, 2011, Mr. Tuvell objects to Mr. Feldman falsely characterizing work at home days as sick days, asks for citation to the policy that supports the practice, and notes that it is inconsistent with his work-at-home days pre-June 30, 2011. Verified Complaint, ¶ 77, Exhibit 42. On November 2, 2011, Mr. Feldman made knowingly false statement mischaracterizing Mr. Tuvell's work situation with respect to sick days — casting work-at-home days as refusal to work in the office days. Verified Complaint, ¶ 78, Exhibit 42.

IBM Response to 30. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies Plaintiff's characterization of these incidents, which are not supported by any documents aside from Plaintiff's Complaint.

31. On January 6, 2012, Chris Kime sent Plaintiff an email explaining the following was the primary reason for rejecting Plaintiff's application for transfer to a Software Developer position under Kime: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. Kime acknowledged that Feldman's input was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman. Kime Dep., at 118-119, Exhibit 65; Further Supp. Ans. to Ints., at 10, Exhibit 66 (Kime relied on discussions with Feldman in rejecting Tuvell); Due Dep., at 135-136, Exhibit 50.

IBM Response to 31. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. IBM admits that Mr. Kime authored the cited email. Further responding, IBM denies that Mr. Feldman recommended that Mr. Kime not hire Plaintiff. See IBM SOF, ¶¶ 60-65.

32. Plaintiff requested Mr. Mandel to conduct an investigation into his allegations of discrimination, retaliation and harassment on or about June 29, 2011. Tuvell Aff., ¶ 21, Exhibit 47. The harassment Plaintiff experienced caused him to be sick from PTSD symptoms, and Plaintiff was unable to return to work, as of August 11, 2011, to work under Mr. Feldman. Tuvell Aff., ¶ 21, Exhibit 47; Ross Dep., at 78-79, Exhibit 67. During the time of his medical leave, Plaintiff was hoping that Mr. Mandel's investigation of his complaint would progress, such that he could resolve Plaintiff's workplace difficulties, and permit Plaintiff, medical condition and all, to return back to work. Tuvell Aff., ¶ 21, Exhibit 47; Mandel Dep. Exh. 10, at TUVELL744, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55. Instead, Mr. Mandel did not inform Plaintiff of the conclusion of his investigation until November 17, 2011, and the results were disfavorable. Tuvell Aff., ¶ 21, Exhibit 47.

IBM Response to 32. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel issues a 19-page report regarding Plaintiff's Open Door Complaint on or about September 15, 2011, concluding that Plaintiff was not subjected to any adverse or unfair employment actions. See IBM SOF, ¶ 29.

33. SWG-0436579 was a posted position for a Software Developer in IBM's Littleton office. Kime Dep., at 32, Exhibit 65. The position was open, and Tuvell applied for it on or about November 28, 2011. Kime Dep., at 45-48, Exhibit 65; Verified Complaint, ¶ 85, Exhibit 42.

IBM Response to 33. IBM admits that Plaintiff applied for the SWG-0436579 position with Mr. Kime's group. See IBM SOF, ¶ 57.

34. The job requisition for SWG-0436579 contained a list of four minimum qualifications for the position, including [1] a Bachelor's Degree; [2] at least 3 years experience in the "C" programming language, debugging and unit testing; [3] at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements; and [4] fluency in English. Kime Dep. Exh. 12, at 2, Exhibit 68; Kime Dep., at 28-29, 33-34, 38-40, Exhibit 65.

IBM Response to 34. IBM admits that the SWG-0436579 job requisition includes the cited qualifications. Pl. Ex. 68.

35. Plaintiff satisfied all of the minimum qualification for the SWG-0436579 position. Tuvell had a Bachelor's degree from MIT, and a MS and Ph.D in mathematics from the University Chicago. PSOF11. He had the required qualification of at least three years experience in the "C" programming language, debugging and unit testing, and in fact he had over twenty years of such experience. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 1, Exhibit 47. He had the required qualification of at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements, because he had over two decades of such experience. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 2, Exhibit 47. Finally, Tuvell met the required qualification that he be fluent in English. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 3, Exhibit 47. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. Kime Dep. Exh. 12, at 1-2, Exhibit 68; Tuvell Aff.. ¶ 4-7, Exhibit 47.

IBM Response to 35. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that the SWG-0436579 job requisition includes the cited qualifications, among others. Pl. Ex. 68.

36. Christopher Kime, as of 2010, was Development and Solutions Manager, and he acted as Hiring Manager for the SWG-0436579 position. Kime Dep., at 19-20, 29, Exhibit 65. Kime drafted the posting himself, including what he regarded to be the minimum qualifications. Kime Dep., at 32-34, Exhibit 65. Kime reviewed Tuvell's resume and other documentation, and concluded he had "little doubt that you [Tuvell] have technical skills that we could use on the project." Kime Dep. Exh. 2, Exhibit 69; Kime Dep., at 51-53, Exhibit 65. On or about December 1, 2011, Kime interviewed Tuvell by phone, which touched upon Tuvell's background and qualifications. Kime Dep., at 60-62, Exhibit 65. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team. Kime Dep., at 64, Exhibit 65. As a result of the interview, Kime asked his support lead, and also the next most senior member of the Littleton team, to interview Tuvell. Kime Dep., at 68-69, Exhibit 65.

IBM Response to 36. IBM admits that Mr. Kime, one of the decision makers for the SWG-0436579 position, interviewed Plaintiff, and had other members of his team interview Plaintiff. IBM further states that Mr. Kime wrote the cited email to Plaintiff, which speaks for itself. Pl. Ex. 69.

37. Tuvell was interviewed by these other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive." Kime Dep., at 77, Exhibit 65; Kime Dep. Exh. 6. Kime acknowledged that the interviews with the management team did not exclude Tuvell as a candidate. Kime Dep., at 83, 97-98. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." Feldman Dep., at 157, Exhibit 43. Kime considered Tuvell's technical knowledge and ability to be a strength. Kime Dep., at 93, Exhibit 65. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for the position. Kime Dep., at 105, Exhibit 65. Kime believed Tuvell had "deep technical skills and ability to produce solid documentation." Kime Dep. Exh. 11, Exhibit 64; Kime Dep., at 132-133, Exhibit 65.

IBM Response to 37. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Kime wrote the cited email, which speaks for itself. Pl. Ex. 64.

38. Mr. Tuvell's December 9, 2011 email to Kime and the other interviewers states, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." Kime Dep. Exh. 6, at 1, Exhibit 70; Kime Dep., at 73-74, Exhibit 65.

IBM Response to 38. IBM admits that Plaintiff wrote the referenced email, which speaks for itself.

39. The posting for the SWG-0436579 position calls for a "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." Kime Dep. Exh. 12, at 1, Exhibit 68; Kime Dep., at 28, 32-33, Exhibit 65.

IBM Response to 39. IBM admits that the cited job requisition for the SWG-0436579 contains the cited language.

40. IBM now asserts that Plaintiff was rejected for the position because he had demonstrated difficulty working with team members, based on the input of Mr. Feldman. Kime Dep., at 100, Exhibit 65. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." Kime Dep. Exh. 8, Exhibit 71; Kime Dep., at 108-109, Exhibit 65. Feldman verbally rated Tuvell a "3", which represents a low ranking, but above those facing termination. Kime Dep. Exh. 8, Exhibit 71; Kime Dep., at 118,

Exhibit 65. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." Kime Dep., at 111, 112, Exhibit 65. As of December 13, 2011, Kime no longer considered hiring Tuvell for the position. Kime Dep., at 118-120, Exhibit 65. On January 6, 2012, Kime formally rejected Tuvell for the position, stating as reasons primarily the difficulties inherent in "taking you directly from being on short term disability," and secondarily "concern about the work being to your liking." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 133, Exhibit 65.

IBM Response to 40. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the communications between Mr. Feldman and Mr. Kime speak for themselves and IBM specifically denies that Mr. Feldman recommended that Mr. Kime not hire Plaintiff. See IBM SOF, ¶¶ 60-65.

41. Plaintiff went out on Short Term Disability effective on or about August 11, 2011. Verified Complaint, ¶ 54, Exhibit 42. After 13 weeks on STD, or sometime in November 2011, Plaintiff's benefits were reduced to 66 2/3 % of his usual salary. Verified Complaint, ¶ 69, Exhibit 42. On or about January 25, 2012, Mr. Tuvell exhausted his STD benefits, and is transitioned to unpaid leave. Verified Complaint, ¶ 125, Exhibit 42.

IBM Response to 41. IBM admits the statements in this paragraph.

42. After Plaintiff was rejected for the Software Developer position, the position remained open, and IBM continued to seek applicants. Kime Dep., at 147, Exhibit 65. After Kime decided to not hire Tuvell, and after the posting lapsed, Kime re-posted the identical position for the new year to seek new candidates, this time with the identifying number SWG-0456125. Kime Dep., at 147-151, Exhibit 65. The reposted position also lapsed without being filled. Kime Dep., at 149-151, Exhibit 65.

IBM Response to 42. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that the SWG-0456125 was a reposting of the SWG-0436579 job requisition, which had lapsed without having been filled, and that the SWG-0456125 job requisition also lapsed without having been filled. See IBM SOF, ¶ 70.

43. While Kime explained to Plaintiff, on January 6, 2012, that his application for the Software Developer position was due to the inability to take him directly "from being on short term disability," after the fact, IBM takes the position that this was a false reason, and that indeed, Kime was counselled for identifying a false reason for the rejection. Mandel Dep., at 147-148, 150-151, Exhibit 55; Mandel Dep. Exh. 31, at TUVELL1225, Exhibit 72; Kime Dep., at 154-155, Exhibit 65.

IBM Response to 43. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that when considering

Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance history but was unable to find anything on IBM's internal website and therefore reached out to Mr. Feldman, who explained that Plaintiff's leave had prevented Mr. Feldman from providing Plaintiff with a performance review. Mr. Kime was not aware at the onset of the interviewing process that the fact that Plaintiff was on STD would prevent him from providing a performance review, known as a PBC, to present to his management chain for a discussion on Plaintiff's qualifications. Accordingly, on January 6, 2012, Mr. Kime emailed Plaintiff to tell him that he would not be offering him the position. Mr. Kime testified that he could not move forward with taking Plaintiff directly from short term disability based upon the difficulty of assessing his work performance without a PBC. Mr. Kime also explained to Plaintiff that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." IBM SOF, ¶¶ 60-65.

44. There is sufficient evidence upon which a jury could infer that Mr. Kime knew of Plaintiff's internal complaints of handicap discrimination and retaliation as of the time of the January 6, 2012 rejection. For, on or about December 15, 2011, Mr. Kime and Mr. Feldman were messaging each other about Plaintiff's application for the transfer, after having discussed the matter by telephone, and Kime wrote, "I do not envy you having to deal with HR and lawyers at this point." Kime Dep. Exh. 9, Exhibit 73, Kime Dep., at 109-110, 120-121, Exhibit 65.

IBM Response to 44. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the cited text messages between Mr. Kime and Mr. Feldman speak for themselves.

45. There was yet additional evidence of handicap animus, as Defendant expressly curtailed Plaintiff's access to its computer systems, and IBM facilities, and further refused to advance or otherwise delayed finalization of its investigation of Plaintiff's complaints of discrimination and retaliation, based on Plaintiff's availment of the reasonable accommodation of disability leave. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system), given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings

was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [because of STD]. It is easy to return access once you return from STD." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55.

IBM Response to 45. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the emails were written by Mr. Mandel and speak for themselves and IBM states that Plaintiff's VPN access to IBM's systems and facilities was restricted because Plaintiff was on a leave of absence and not working, and therefore had no need to access those systems, and his access to IBM's Lotus Notes and internal corporate network were restricted because of his misuse of those systems. See IBM SOF, ¶¶ 54, 55.

46. Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination claimed that the following passage provided by Tuvell in support of one such complaint, was "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 199-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much", as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM has asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id.

IBM Response to 46. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the referenced emails and Interrogatory responses speak for themselves.

47. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶¶ 122, 123, Exhibit 42; TUVELL 1230, 1235-1236, Exhibit 80; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 10, 29, Exhibit 47.

IBM Response to 47. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel's March 6, 2012 email to Plaintiff concerning the reasons for curtailing his Lotus Notes access, speaks for itself. See IBM SOF, ¶¶ 54, 55.

48. On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which, again is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82: Mandel Dep., at 156-157, Exhibit 55; Verified Complaint, ¶¶ 129, 131, Exhibit 42.

IBM Response to 48. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel's email to Plaintiff concerning Plaintiff's use of his personal email to forward HR-related issues to numerous IBM employees speaks for itself. Pl. Ex. 82.

49. On August 3, 2011, Plaintiff was prohibited from using a previously agreed-upon reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42.

IBM Response to 49. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies this paragraph.

50. On August 3, 2011, Plaintiff was given a formal discipline, with threat of termination, for innocently writing, "if you're lazy you can just click this link;" meanwhile, Mr. Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Mr. Tuvell. Feldman Dep., at 53-55, Exhibit 43; Verified Complaint, ¶ 44, 48, Exhibit 42; Due Dep., at 110, 141-142, Exhibit 50 (concluding that Mr. Knabe raised his voice). Mr. Mandel testified that he, too, found the "lazy" comment to be inappropriate. Mandel Dep., at 54, Exhibit 55.

IBM Response to 50. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that on August 3, 2011, Plaintiff was given a Warning Letter for his disruptive conduct, which included his July, 2011 emails to Mr. Feldman and Garth Dickie, including the email cited by Plaintiff. IBM SOF ¶¶ 24-25.

51. On June 12, 2011, Feldman told Plaintiff that he was required to copy HR on all written and verbal communications with Feldman, based on "your history of suing when you feel

you've been wronged." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56.

IBM Response to 51. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states the email exchange between Plaintiff and Mr. Feldman cited by Plaintiff speaks for itself. Pl. Ex. 53.

52. In response to one of Tuvell's complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

IBM Response to 52. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states the emails written by Plaintiff and Mr. Feldman speaks for themselves, and IBM denies that Mr. Feldman sought disciplinary action against Plaintiff based upon any complaint of discrimination or harassment. Pl. Ex. 83, 84.

53. On January 25, 2012, after exhausting all of his STD benefits, and with no indication that he would ever be provided with reasonable accommodation, IBM transitioned Tuvell to unpaid leave, where he is kept until his termination on May 17, 2012. Verified Complaint, ¶ 110, 132, Exhibit 42.

IBM Response to 53. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff exhausted his STD on January 25, 2012, and remained on an approved, unpaid medical leave until May 17, 2012. See IBM SOF, ¶ 55.

54. At about this time, and thereafter, IBM attempted to hire a replacement for Plaintiff's position, asserting that "key investigation necessary to support the correct development of future generations of the Netezza appliance have stopped making progress pending Dr. Tuvell's return to work." Feldman Dep., at 163-164, Exhibit 43.

IBM Response to 54. IBM admits that it sought to hire a replacement for Plaintiff's position. Feldman Dep. p. 163-64.

55. On May 8, 2012, Plaintiff submits his Fourth Open Door Complaint alleging unlawful discrimination and retaliation. Verified Complaint, ¶ 135, Exhibit 42; TUVELL1464-

1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87. On May 14, 2012, Plaintiff likewise complained of unlawful harassment and retaliation. Verified Complaint, ¶ 141, Exhibit 42.

IBM Response to 55. IBM states that Plaintiff's May 8, 2012 Open Door Complaint speaks for itself.

56. On May 7, 2012, IBM wrote to Plaintiff, stating that it believed Plaintiff to be working for EMC, a competitor, and threatening termination. Verified Complaint, ¶ 134, Exhibit 42; TUVELL1461, Exhibit 86; Def.'s Further Resp. to Req. for Adm. 94, Exhibit 87. On May 8, 2012, Tuvell responds, and denies working for EMC. Verified Complaint, ¶ 137, Exhibit 42. Also, on May 8, 2012, Tuvell files another formal complaint, with IBM, complaining of retaliation and discriminatory harassment. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87. Tuvell explains that he does not wish to inform IBM where he is working, as he fears a retaliatory response. Verified Complaint, ¶ 139, Exhibit 42.

IBM Response to 56. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that it communicated with Plaintiff in an effort to confirm that he was not working for a competitor of IBM, but Plaintiff refused to identify where he was working. When he continued to refuse IBM's requests for clarification as to his current employer so IBM could confirm whether or not it was a competitor, he was terminated. IBM SOF, ¶¶ 74-79. IBM further states that the cited communications between IBM and Plaintiff speak for themselves.

57. On May 11, 2012, IBM demands to know where Tuvell is working, citing an inapplicable policy, and its need to confirm that Tuvell is not working for a competitor. Verified Complaint, ¶¶ 140-141, Exhibit 42; TUVELL 1468-1470, Exhibit 88; Tuvell Aff., ¶ 11, Exhibit 47. On May 15, 2011, IBM demanded to know Tuvell's new employer, based on its duty to confirm that Tuvell is not working for a competitor. Verified Complaint, ¶ 142, Exhibit 42; TUVELL1482, Exhibit 89; Def.'s Further Resp. to Req. for Adm. 97, Exhibit 87. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that there was no competition. Verified Complaint, ¶ 141, Exhibit 42; TUVELL1468-1469, Exhibit 87; Tuvell Aff., ¶ 11, Exhibit 47. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2014. Verified Complaint, ¶ 145, Exhibit 42. The termination occurred within days after Tuvell engaged in protected conduct. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87.

IBM Response to 57. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that it communicated with Plaintiff in an effort to confirm that he was not working for a competitor of IBM, which was prohibited without IBM's express permission as set forth in IBM's Business Conduct Guidelines, but Plaintiff refused to identify where he was working. When he continued to refuse IBM's requests for clarification as to his current employer so IBM could confirm whether or not it was a competitor, he was terminated. IBM SOF, ¶¶ 74-79; Supp. Ackerstein Aff. Ex. 117 at 26. IBM further states that the cited communications between IBM and Plaintiff speak for themselves.

58. Before the Massachusetts Commission Against Discrimination, Defendant took the position that Plaintiff's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." IBM Position Statement, at 4, Exhibit 46. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." Snyder Dep., at 85, Exhibit 90. Moreover, Plaintiff actively opposed the demotion. Def.'s Exh. 19, at TUVELL265-266.

IBM Response to 58. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

59. The May 18 and June 8 incidents were not the true reasons for the June 10, 2011 demotion/transfer. Mr. Feldman failed to take action to resolve any alleged difficulties involving Knabe and Tuvell. Verified Complaint, ¶ 16, Exhibit 42. For example, Mr. Feldman refused to investigate, and refused to respond to Mr. Tuvell's repeated inquiries for more detail concerning his alleged misconduct. Verified Complaint, ¶ 16, Exhibit 42. Mr. Feldman repeatedly denied Mr. Tuvell's requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Feldman Dep., at 46-47, Exhibit 43; Verified Complaint, ¶ 16, Exhibit 42. While Mr. Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had conducted such a meeting shortly before, in March 2011, concerning a different issue. Compare Feldman Dep., at 46, Exhibit 43, with Tuvell Aff., ¶ 17, Exhibit 47.

IBM Response to 59. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

60. In order to remain a productive employee of IBM, Plaintiff required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Mr. Feldman. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." DSOF49. Plaintiff, on a variety of occasions informed IBM that he could no longer work

in any capacity with Mr. Feldman, for medical reasons, and requested that Plaintiff be accorded a new supervisor, or a transfer to a different position. On June 23, 2011, Plaintiff wrote that the continuing harassment he experienced exacerbated his medical symptoms, and that he was then nearly incapacitated by PTSD symptoms. Verified Complaint, ¶ 28, Exhibit 42; Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50. Mr. Tuvell informed IBM, "I am nearly incapacitated now by recurrence of PTSD . . . I've started seeing my psychological health-care professionals again about this problem, including . . . medication." Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50. Continuing at this point, and many times thereafter, Plaintiff expressly requested the reasonable accommodation of either a new supervisor, or transfer to a new department entirely. Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50.

IBM Response to 60. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the communications cited by Plaintiff speak for themselves. IBM admits that Plaintiff stated on a number of occasions that he could not work with Mr. Feldman, but IBM denies that Plaintiff was a qualified handicapped individual or that IBM failed to provide Plaintiff with a reasonable accommodation or otherwise failed to engage in the interactive process.

61. On June 24 and June 28, 2011, Plaintiff requested job modification that he no longer interact with Mr. Feldman, as a reasonable accommodation to his disability. Verified Complaint, ¶ 29, Exhibit 42. Plaintiff notes that such accommodation would be a preferable reasonable accommodation to the grant of disability leave. Verified Complaint, ¶ 29, Exhibit 42. On October 17, 2011, Mr. Tuvell asserted that he was not medically capable of continuing to work with Mr. Feldman, and requested the reasonable accommodation of no longer working with him. Verified Complaint, ¶ 72, Exhibit 42. IBM rejected these repeated requests. Verified Complaint, ¶¶ 73, 74, Exhibit 42.

IBM Response to 61. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the emails cited by Plaintiff speak for themselves, and IBM denies that Plaintiff's requests for a new supervisor were reasonable.

62. On November 9, 2011, Plaintiff provided a letter to IBM, describing Mr. Tuvell's disability, his need for reasonable accommodation, and seeking the accommodation of transfer and/or new supervisor. Verified Complaint, ¶ 80, Exhibit 42. On November 28, 2011, Plaintiff wrote, "I will be unable to return to work . . . In fact, the thought of returning to work under your [Feldman's] supervision is leading me to experience extremely high levels of anxiety and an abnormal measure of fear. I intend absolutely no disrespect or rancor in this statement. It is simply my medical reality. .. . It is for this reason that I have pressed for transfer of some sort as a reasonable accommodation." Feldman Dep. Exh. 32, at TUVELL984, Exhibit 92; Feldman Dep., at 152, Exhibit 43.

IBM Response to 62. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that the communication cited by Plaintiff speaks for itself.

63. On January 18, 2012, Plaintiff informed IBM, "Based on my handicap of PTSD, and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with, or under [Mr. Feldman]." Tuvell Aff., ¶ 22, Exhibit 47; Mandel Dep. Exh. 38, at TUVELL1038, Exhibit 93; Mandel Dep., at 159-160, Exhibit 55. On January 27, 2012, IBM was again informed that Plaintiff was medically incapable of continuing to work under Mr. Feldman. Verified Complaint, ¶ 112, Exhibit 42; TUVELL1197-1198, Def.'s Further Resp. to Req. for Adm. 78, Exhibit 87. Plaintiff necessarily rejected IBM's faux proposal of his returning to work under Mr. Feldman, precisely pointing out that it was contrary to Plaintiff's medical limitations as documented by his health care provider, and was contrary to his own reports about what triggers his medical condition. TUVELL1197-1198, Exhibit 94; Def.'s Further Resp. to Req. for Adm. 78, Exhibit 87. When Tuvell expressly declined IBM's proposal for this reason, IBM failed to return with any other dialog for accommodation. Tuvell Aff., ¶ 23, Exhibit 47.

IBM Response to 63. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that it made a "faux proposal" to Plaintiff**.**

64. IBM repeatedly rejected Plaintiff's requests for reasonable accommodation to provide him with a different supervisor, and/or to transfer him to another position away from Mr. Feldman, including on October 10, 2011, November 23, 2011, January 6, 2012, January 16, 2012, January 24, 2012. Verified Complaint, ¶¶ 70, 82, 97, 101, 109, Exhibit 42.

IBM Response to 64. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that Plaintiff's repeated requests for a new supervisor or to be transferred away from Mr. Feldman was a reasonable accommodation.

65. Even after IBM repeatedly rejected Plaintiff's requests for reasonable accommodation, Plaintiff continued to seek interactive dialogue for reasonable accommodation. Mandel Dep. Exh. 31, at TUVELL1221, 1222-1223, Exhibit 72; Mandel Dep., at 150-151, Exhibit 55. On January 11, 2012, after Plaintiff's application for transfer was rejected, he wrote "Is there any other option, any other positions, any other reporting structures, that you can think of that would help me return to IBM as a productive employee?" Tuvell Aff., ¶ 22, Exhibit 47; Mandel Dep. Exh. 38, at TUVELL1040, Exhibit 93, Mandel Dep., at 159-160, Exhibit 55. On January 18, 2012, Plaintiff said, "I am at a loss as to what I can suggest by way of reasonable accommodation that would permit me to work under you. Do you have any ideas?" Id.; Mandel Dep. Exh. 38, at TUVELL1038, Exhibit 93; Mandel Dep., at 159-160, Exhibit 55. IBM did not respond with anything of substance (Id.); it was IBM who shut down the interactive process, and not Plaintiff.

IBM Response to 65. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the emails cited by Plaintiff, including IBM's responses to his inquiries, speak for themselves. IBM denies Plaintiff characterization that it "shut down" the interactive process and failed to offer alternatives**.**

66. Mr. Tuvell has seen Stephanie Ross, LICSW, professionally since 1993. Ross Aff., ¶ 3, Exhibit 95. Ms. Ross has a Masters degree in social work from the University of Pennsylvania, and was licensed to practice social work (LICSW) in Massachusetts continuously since about 1984. Ross Aff., ¶ 1, Exhibit 95. Ms. Ross is qualified to diagnose and treat PTSD. Ross Aff., ¶ 2, Exhibit 95. Ms. Ross formally diagnosed Mr. Tuvell as suffering from PTSD in or about 2001, but understood Mr. Tuvell to be suffering from PTSD for some time before that. Ross Aff., ¶ 5, Exhibit 95; Ross Dep., at 58, 60, 137, Exhibit 67.

IBM Response to 66. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits Ms. Ross' testimony about her background and her diagnosis of Plaintiff as suffering from PTSD in 2001.

67. Over 10% of Ross' patients in last 24-25 years she has diagnosed with PTSD. Ross Dep., at 57-58, Exhibit 67.

IBM Response to 67. IBM objects to this paragraph as not material conclusory, argumentative, and in violation of L.R. 56.1.

68. Mr. Tuvell's diagnosis is based on a variety of symptoms, including lost weight, trouble sleeping, difficulty eating, triggered state, and every symptom of stress, including anxiety and depression. He has experienced hyper-vigilance, and has obsessive, recurrent, intrusive thoughts. He has suffered flashbacks and has fainted, has experienced prolonged psychological distress, has experienced an altered sense of surroundings and self, and has engaged in strong efforts to avoid distressing feelings and reminders. In Ms. Ross', he has wept uncontrollably when describing his experiences. Mr. Tuvell is subject to irritability and outbursts. Ross Aff., ¶ 5, Exhibit 95.

IBM Response to 68. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

69. To manage his PTSD, Mr. Tuvell has been treated by Ms. Ross with psychotherapy, as well as Eye Movement Densitization and Reprocessing (EMDR, which is a qualified technique used to treat PTSD patients). Ross Aff., ¶¶ 2, 8, Exhibit 95. Mr. Tuvell has seen Ms. Ross professionally approximately 250 times, alone, and has seen Ms. Ross along with his spouse on many other occasions. Ross Aff., ¶ 3, Exhibit 95.

IBM Response to 69. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

70. On October 19, 2011, Kathleen Dean of IBM spoke with Ms. Ross about Mr. Tuvell, and Ms. Dean's notes, contained at Dean Dep. Exh. 16, at 2 (Exhibit 96), accurately reflect the conversation. Dean Dep., at 115-117, Exhibit 79.

IBM Response to 70. IBM admits that the referenced document reflects the notes of a telephone call between Ms. Ross and Ms. Dean, which speak for themselves. Pl. Ex. 96.

71. On January 23, 2012, Ms. Ross stated that while she advised Tuvell "not to return to specific job environment," that also "Patient has good functioning in the absence of trauma related stimuli." Ross Dep. Exh. 8, at 1-2, Exhibit 97; Ross Dep., at 91-94, Exhibit 67. On January 31, 2012, Ms. Ross reiterated that "the only course to recovery for Mr. Tuvell required a reassignment by the company." Def.'s Exh. 29, at 2. On September 28, 2012, Ms. Ross stated, "in a new setting with different people it was possible that Mr. Tuvell could function quite well and attend his work." Def.'s Exh. 29, at 3.

IBM Response to 71. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the cited documents prepared by Ms. Ross speak for themselves. Pl. Ex. 97; IBM Ex. 29.

72. Ms. Ross testified that she believed that Mr. Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. Ross Dep., at 176-177, Exhibit 67. She reported that Mr. Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. Ross Dep., at 177, Exhibit 67.

IBM Response to 72. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff has misstated Ms. Ross' cited testimony.

73. In December 2011, Mr. Tuvell went to IBM's Littleton facility in order to interview for a transfer that he affirmatively pursued. Tuvell Dep., at 217-218, Exhibit 98. Mr. Tuvell was not triggered with respect to his efforts to obtain a new position, and the interview process attending it. Ross Dep., at 182, Exhibit 67; Tuvell Aff., ¶ 15, Exhibit 47. Mr. Tuvell reported no psychological difficulty in returning to that IBM building for an interview. Ross Dep., at 183, Exhibit 67.

IBM Response to 73. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff interviewed at the Littleton location in or about December of 2011 with Mr. Kime's subordinates.

74. Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. Kime Dep., at 65, Exhibit 65. Tuvell's was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. Kime Dep., at 77, 144, Exhibit 65; Kime Dep. Exh. 6, Exhibit 70. Tuvell's many communications with Mr. Kime concerning the position were "cordial and professional." Kime Dep., at 132, Exhibit 65.

IBM Response to 74. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff's interactions with Mr. Kime were professional.

75. In this case, change of reporting relationship to a different supervisor is entirely reasonable under these facts. IBM's own policies embrace the notion of transferring a supervisor in cases of the supervisor's harassment and misconduct. Mandel Dep. Exh. 47, at IBM2310, Exhibit 54; Mandel Dep., at 169-170, Exhibit 55 ("In certain circumstances, it may be appropriate to transfer the offender to another department or location"). Plaintiff had amply reported that Feldman had been harassing Plaintiff, and consequently a change of supervisor is reasonable as it is absolutely consistent with IBM's written policy. DSOF ¶¶ 12, 15, 16, 27. IBM takes the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from being under the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." IBM Position Statement, at 4, Exhibit 46.

IBM Response to 75. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

76. Plaintiff provided to IBM protected complaints of discrimination, retaliation and requests for reasonable accommodation on October 5, 2011, October 10, 2011, October 17, 2011, October 19, 2011, November 9, 2011, November 28, 2011, December 6, 2011. Verified Complaint, ¶¶ 69, 71, 72, 76, 80, 87, 91, Exhibit 42.

IBM Response to 76. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

77. On August 5, 2011, Plaintiff communicated to IBM indicating that a disrespectful statement was made to a non-Caucasian coworker, and indicating that the coworker could be the subject of discrimination. TUVELL448-451, Exhibit 99; Resp. to Pl.'s Request for Adm. 21, Exhibit 56. On August 5, 2011, Mr. Mandel replied, stating that IBM does not accept third party complaints, and that if the coworker is offended, he would have to file a complaint himself. Id.;

Verified Complaint, ¶ 52, Exhibit 42. Mr. Mandel's statement to Plaintiff was false, as IBM would investigate third party complaints, and IBM documents encourage employees to bring third party complaints. Mandel Dep., at 55-56, Exhibit 55; Due Dep., at 187-188, Exhibit 50; IBM11395, Exhibit 100; October 23, 2014 Stipulation, Exhibit 101 (training materials suggesting asking, "do you believe this alleged discrimination and/or retaliation happened to others as well as yourself?").

IBM Response to 77. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies Plaintiff's assertion that an alleged statement about another IBM employee was "disrespectful" and further states that the referenced emails between Mr. Mandel and Plaintiff and IBM's internal communications speak for themselves.

78. On or about August 28, 2011, Plaintiff submitted Addendum I to his Corporate Open Door filing, in which he accused Mr. Mandel, based on delays in the investigation to be contributing to a hostile work environment and engaging in handicap discrimination. Mandel Dep. Exh. 11, at 757-758, Exhibit 102; Mandel Dep., at 72-73, Exhibit 55. Mr. Mandel reviewed the complaints during the investigation. Mandel Dep., at 72-73, Exhibit 55.

IBM Response to 78. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff's referenced Open Door Filing speaks for itself.

79. IBM policy requires that investigators "must not have been involved in the issue being investigated . . .." Mandel Dep. Exh. 43, at TUVELL2562, Exhibit 103; Mandel Dep., at 161-162, Exhibit 55.

IBM Response to 79. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM submits that its internal communications speak for themselves.

80. On November 23, 2011, Mr. Tuvell requested a written response to his internal complaint, pursuant to Section 2.8 of the Concerns and Appeals Program. Verified Complaint, ¶ 84, Exhibit 42. Mr. Mandel replies with a non-substantive answer, saying only that after investigation, Mr. Mandel concluded that "management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you." Verified Complaint, ¶ 84, Exhibit 42.

IBM Response to 80. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel investigated Plaintiff's

concerns and concluded, in a 19-page report based on interviews with nine individuals, that he had not been subject to any adverse or unfair employment actions. Supp. Ackerstein Aff. Ex. 118.

81. On March 2, 2012, Plaintiff filed a third Corporate Open Door Complaint, alleging that Mr. Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. Mandel Dep., at 151-152, Exhibit 55; Mandel Dep. Exh. 34, at 5-6, Exhibit 104. Mr. Mandel never opened up an investigation to respond to this Complaint, and there was no formal response. Mandel Dep., 152-153, Exhibit 55; Tuvell Aff., ¶ 24, Exhibit 47.

IBM Response to 81. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff filed a third Open Door Complaint on or about March 2, 2012, which speaks for itself.

82. Lisa Due conducted the initial investigation of Plaintiff's discrimination allegations in June 2011. DSOF17. When conducting that investigation, Ms. Due knew Plaintiff to be alleging that Mr. Feldman and/or Mr.Knabe to have discriminated against him on the basis of age and/or gender when he was required to switch job functions with Ms. Mizar. Def.'s Exh. 19, at TUVELL265-266; Due Dep., at 38-40, Exhibit 50. Ms. Due considered these allegations of age and sex discrimination to be part of her investigation. Due Dep., at 42-43, Exhibit 50.

IBM Response to 82. IBM admits that Ms. Due conducted a thorough investigation into the concerns raised by Plaintiff. See IBM SOF, ¶¶ 17-19; Plf. Ex. No. 49.

83. As part of her investigation, Ms. Due did not explore the qualifications of Ms. Mizar as part of her investigation, nor did she explore whether Mr. Feldman or Mr. Knabe had a history of engaging in sexist or ageist behavior or comments in the workplace. Due Dep., at 43-44, Exhibit 50. Ms. Due did nothing to inquire of Tuvell's PTSD, or to speak with Feldman about his attitudes towards Plaintiff's PTSD. Due Dep., at 87, Exhibit 50. Prior to the Ms. Due's completion of the investigation, she met with Mr. Mandel, who instructed her to inform Plaintiff that Ms. Due had no reason to conclude that Plaintiff had been mistreated. Due Dep., at 145-146, Exhibit 50.

IBM Response to 83. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Ms. Due conducted a thorough investigation into the concerns raised by Plaintiff, and concluded that Plaintiff's concerns were unsupported, and so advised Plaintiff. IBM denies that Mr. Mandel instructed Ms. Due to inform Plaintiff that she had no reason to conclude that Plaintiff had been mistreated, as Ms. Due reached that conclusion independently based upon her own investigation and the conversation with Mr. Mandel took place after she concluded the investigation. See IBM SOF, ¶¶ 17-19; Plf. Ex. No. 49.

84. In addition to never seriously investigating Mr. Tuvell's complaints of discrimination, Ms. Due also never investigated, nor did she come to a determination, of whether Mr. Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. Due Dep. Exh. 12, at IBM8283, Exhibit 76; Due Dep., at 164-165, Exhibit 50 (finding insufficient information to support allegations with respect to Mr. Feldman, and not addressing allegations with respect to Mr. Knabe at all).

IBM Response to 84. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Ms. Due conducted a thorough investigation into the concerns raised by Plaintiff, and concluded that Plaintiff's concerns were unsupported, and so advised Plaintiff. See IBM SOF, ¶¶ 17-19; Pl. Ex. No. 49.

85. Plaintiff was advised of his rights to appeal the conclusion of the investigation, which he did, to Mr. Russell Mandel. DSOF19; Mandel Dep., at 43-44, Exhibit 55. However, Mr. Mandel was biased as an appeal investigator, rendering him a patently inappropriate choice to take a fresh look at the complaint. Due Dep., at 145-146, Exhibit 50. Moreover, Mr. Mandel was an inappropriate investigator, under IBM's own conflict-of-interest policy, as he, personally, had been accused by Plaintiff of wrongdoing and discrimination, based on his failure to advance the investigation, and false assertions about IBM's practice of investigating third party complaints. PSOF77, 78, 79.

IBM Response to 85. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Ms. Due advised Plaintiff of his appeal rights, and his appeal was investigated by Mr. Mandel. IBM denies that Mr. Mandel was an inappropriate or biased investigator.

86. On August 25, 2011, Mr. Mandel wrote to Plaintiff, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55. On August 30, 2011, Mr. Mandel wrote Plaintiff, stating, "I am simply not going to discuss with you the concerns raised while you are out on STD." Mandel Dep. Exh. 12, at TUVELL1518, Exhibit 105, Mandel Dep., at 73, Exhibit 55.

IBM Response to 86. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the cited emails between Mr. Mandel and Plaintiff speak for themselves.

87. Mr. Mandel accorded Mr. Knabe and Mr. Feldman the opportunity to review his draft report and make suggestions about his version of events, but Mr. Mandel did not accord

Plaintiff with the same courtesy, demonstrating the one-sided nature of the investigation. Mandel Dep., at 87, 91, Exhibit 55; IBM10266-10275, Exhibit 106.

IBM Response to 87. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

88. While Mr. Mandel understood that Plaintiff's complaint included the allegations that his demotion/transfer in June 2011 was discriminatory and/or retaliatory, he never investigated whether that demotion/transfer was appropriate, and he failed to inquire as to whether Mr. Feldman exhibited any animus in the workplace based on handicap and/or retaliation. Mandel Dep., at 26, 97-98, Exhibit 55.

IBM Response to 88. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

89. On January 22, 2012, Mr. Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Plaintiff a requested transfer on January 6, 2012, based on handicap discrimination, availment of reasonable accommodation, denial of the obligation to reasonably accommodate and/or retaliation Mandel Dep., at 142-144, Exhibit 55; Mandel Exh. 33, at TUVELL1105, Exhibit 107. Mr. Mandel assigned himself the investigation of this Complaint, however, in performing these duties, Mr. Mandel admitted never investigating whether rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate the Plaintiff. Mandel Dep., at 145, 147, Exhibit 55.

IBM Response to 89. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff initiated another Open Door Complaint on or about January 22, 2012, which speaks for itself, and which was investigated by Mr. Mandel.

90. Since May 12, 2012, Plaintiff has been working at Imprivata, in a high level, technical capacity. He is able to perform these functions, despite his PTSD, because he is not being harassed. Tuvell Aff., ¶ 26, Exhibit 47.

IBM Response to 90. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

91. It is denied that Plaintiff's current employer is a competitor of IBM. In fact, Imprivata is part of a "strategic provisioning partnership" with IBM, such that its product is integrated with IBM's corresponding product. Tuvell Aff., ¶ 27, Exhibit 47.

IBM Response to 91. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that it considers Imprivata to be a competitor of IBM and that IBM's Business Conduct Guidelines expressly state that an employee "may not, without IBM's consent, work for an organization that markets products or services in competition with IBM's current or potential product or service offerings." IBM's Business Conduct Guidelines further explain that "organizations have multiple relationships with IBM. An IBM Business Partner may be both a client and a competitor," and therefore IBM employees are obligated to consult with IBM to determine whether their activities "will compete with any of IBM's actual or potential business." Supp. Ackerstein Aff., Ex. 117, at pp. 17, 26.

Respectfully submitted,
INTERNATIONAL BUSINESS
MACHINES, INC.,

By its attorneys,

/s/ Joan Ackerstein
Joan Ackerstein (BBO No. 348220)
Matthew A. Porter (BBO No. 630625)
JACKSON LEWIS P.C.
75 Park Plaza, 4th Floor
Boston, MA 02116
(617) 367-0025
(617) 367-2155 fax
ackerstj@jacksonlewis.com
porterm@jacksonlewis.com

**CERTIFICATE OF SERVICE**

This is to certify that on March 2, 2015, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Matthew A. Porter
Jackson Lewis P.C.

*{This page intentionally left blank.}*

*In The*

# United States Court of Appeals

*for the*

# First Circuit

Case No. 15-1914

WALTER TUVELL,

*Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

*Defendant-Appellee.*

*Appeal from an Order and Judgment entered in the United States District Court for the District of Massachusetts*

## BRIEF FOR PLAINTIFF-APPELLANT

ANDREW P. HANSON, ESQ.
LAW OFFICE OF ANDREW P. HANSON
One Boston Place, Suite 2600
Boston, Massachusetts 02108
(617) 933-7243
andrewphanson@gmail.com

*Attorney for Plaintiff-Appellant Walter Tuvell*

# CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, Appellant Walter Tuvell makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

   **None.**

2) For non-governmental corporate parties please list all publicly held companies that own 10% or more of the party's stock:

   **None.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

   **None.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

   **Not applicable – not a bankruptcy appeal.**

/s/ Andrew P. Hanson, Esq.

# TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... iii

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD ..... 1

JURISDICTION STATEMENT ..... 2

ISSUES PRESENTED FOR REVIEW ..... 3

STATEMENT OF THE CASE ..... 4

A. RELEVANT FACTS ..... 4

B. PROCEDURAL HISTORY ..... 22

SUMMARY OF ARGUMENT ..... 23

ARGUMENT ..... 25

I. STANDARD OF REVIEW ..... 25

II. TUVELL WAS A QUALIFIED DISABLED PERSON, WHICH SUPPORTS HIS CLAIMS UNDER COUNT II, COUNT IV, COUNT V, AND COUNT VI ..... 26

III. TUVELL WAS NOT PROVIDED REASONABLE ACCOMMODATION THROUGHOUT HIS EMPLOYMENT – COUNT II ..... 30

A. LEAVE WITH NO PAY WAS NOT A REASONABLE ACCOMMODATION ..... 32

B. REQUIRING TUVELL TO WORK UNDER CONDITIONS CONTRARY TO HIS MEDICAL LIMITATIONS WAS NOT REASONABLE ..... 33

C. TUVELL'S REQUEST FOR A NEW SUPERVISOR WAS A VALID REQUEST FOR REASONABLE ACCOMMODATION THAT WAS UNLAWFULLY DENIED – COUNT II .....34

D. TUVELL SOUGHT REASSIGNMENT TO A VACANT POSITION, FOR WHICH HE WAS QUALIFIED, AND IBM VIOLATED ITS DUTY TO REASONABLY ACCOMMODATE TUVELL BY REJECTING HIM FOR THE TRANSFER – COUNT II AND COUNT IV .....35

IV. TUVELL'S TRANSFER WAS REJECTED BECAUSE OF HIS DISABILITY (AND/OR HIS TAKING REASONABLE ACCOMMODATON) OR RETALIATION – COUNT V .....39

V. THE EVIDENCE REGARDING TUVELL'S SECOND DENIAL OF TRANSFER ALSO SUPPORTS LIABILITY .....47

VI. TUVELL WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT BASED ON DISABILITY, RETALIATION, OR A COMBINATION THEREOF – COUNT VII .....47

VII. TUVELL SUFFERED A NUMBER OF ADVERSE ACTIONS WHILE STILL EMPLOYED ON TOP OF HIS TWO REJECTIONS FOR TRANSFER .....51

VIII. THE TERMINATION WAS DISCRIMINATORY AND/OR RETALIATORY – COUNT VI .....56

IX. IBM'S INVESTIGATIONS WERE UNLAWFUL AND/OR INADEQUATE – COUNT VIII .....59

CONCLUSION .....62

# TABLE OF AUTHORITIES

**Page**

**Cases**

Billings v. Town of Grafton,
515 F.3d 39 (1st Cir. 2008).....52

Buckner v. Lew,
No. 5:13-CV-199-FL, 2014 WL 1118428 (E.D.N.C. Mar. 20, 2014).....45

Burlington Northern and Santa Fe Railway Co. v. White,
126 S. Ct. 2405 (2006)..... 51-52, 53

Cargill v. Harvard University,
60 Mass. App. Ct. 585 (2004) .....27

Clifton v. MBTA,
445 Mass. 611 (2005) .....51

Collazo v. Bristol-Myers Squibb Mfg.,
617 F.3d 39 (1st Cir. 2010).....46

College-Town v. MCAD,
400 Mass. 156 (1987) .....59, 62

Danco, Inc. v. Wal-Mart Stores, Inc.,
178 F.3d 8 (1st Cir. 1999).....48

Dominguez-Cruz v. Suttle Caribe, Inc.,
202 F.3d 424 (1st Cir. 2000).....43

Duvall v. Georgia-Pacific Consumer Products, L.P.,
607 F.3d 1255 (10th Cir. 2010) .....35

EEOC v. United Airlines, Inc.,
693 F.3d 760 (7th Cir. 2012) .....36

Faiola v. APCO Graphics, Inc.,
629 F.3d 43 (1st Cir. 2010).....30

Gardner v. Morris,
752 F.2d 1271 (8th Cir. 1985).....27

Gerald v. University of Puerto Rico,
707 F.3d 7 (1st Cir. 2013).....48

Jones v. Walgreen Co.,
679 F.3d 9 (1st Cir. 2012).....40, 46

Kennedy v. Dresser Rand Co.,
193 F.3d 120 (2nd Cir. 1999).....34

Kenney v. R&R Corp.,
20 MDLR 29 (MCAD Feb. 9, 1998).....59

Kosereis v. Rhode Island,
331 F.3d 207 (1st Cir. 2003).....40

Labonte v. Hutchins & Wheeler,
424 Mass. 813 (1997).....29

Laster v. Kalamazoo,
746 F.3d 714 (6th Cir. 2014).....49-50

Lewis v. City of Chicago,
496 F.3d 645 (7th Cir. 2007).....40

Lightbody v. Wal-Mart Stores East, L.P.,
No. 13-cv-10984-DJC, 2014 WL 5313873 (D. Mass. Oct. 17, 2014).....59

Lipchitz v. Raytheon Co.,
434 Mass. 493 (2001).....54, 58

Matthews v. Ocean Spray Cranberries, Inc.,
426 Mass. 122 (1997).....55

McAuliffe v. Suffolk Co. Sheriff's Dep't,
21 MDLR 27 (MCAD Feb. 12, 1999) ..... 48

NLRB v. Hotel Employees,
446 F.3d 200 (1st Cir. 2006) ..... 43

Noon v. IBM,
No. 12 Civ. 4544(CM)(FM),
2013 WL 6504410 (S.D.N.Y. Dec. 11, 2013) ..... 32

Noviello v. City of Boston,
398 F.3d 76 (1st Cir. 2005) ..... 50

Ralph v. Lucent Technologies,
135 F.3d 166 (1st Cir. 1998) ..... 33, 34

Randlett v. Shalala,
118 F.3d 857 (1st Cir. 1997) ..... 40

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) ..... 58

Ritchie v. Dep't of State Police,
60 Mass. App. Ct. 655 (2004) ..... 46, 52

Sensing v. Outback Steakhouse of Florida, LLC,
575 F.3d 145 (1st Cir. 2009) ..... *passim*

Smith v. Bell Atl.,
63 Mass. App. Ct. 702 (2005) ..... 33

Sullivan v. Raytheon Co.,
262 F.3d 41 (1st Cir. 2001) ..... 29

Taylor v. Roche,
196 Fed. Appx. 799 (11th Cir. 2006) ..... 40

Thomas v. Eastman Kodak Co.,
183 F.3d 38 (1st Cir. 1999) ..... 43

Thomas O'Connor Constructors, Inc. v. MCAD,
72 Mass. App. Ct. 549 (2008) .....48

Trustees of Forbes Library v. Labor Relations Commission,
384 Mass. 559 (1981) .....43

Valentin-Almeyda v. Municipality of Aguadilla,
447 F.3d 85 (1st Cir. 2006).....52

Velez v. Thermo King, Inc.,
585 F.3d 441 (1st Cir. 2009).....55

Walters v. Mayo Clinic Health Sys.-Eau Claire Hosp., Inc.,
998 F. Supp. 2d 750 (W.D. Wisc. 2014) .....32

Williams v. Philadelphia Housing Auth. Police Dep't,
380 F.3d 751 (3rd Cir. 2004).....32

**Statutes**

28 U.S.C. § 1291 .....2

28 U.S.C. § 1331 .....2

28 U.S.C. § 1332(a)(1).....2

42 U.S.C. § 12101 .....*passim*

42 U.S.C. § 12111 (8) .....26

29 C.F.R. § 1630.2 (o)(1)(ii) & (iii).....32

G.L. c. 151B, § 1(16) .....26

**Other Authorities**

Fed. R. App. P. 4(a)(1)(A) .....2

MCAD Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B (1998) .....*passim*

## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a) and Loc. R. 34(a), Plaintiff-Appellant Walter Tuvell respectfully submits that oral argument should be heard for this appeal to assist this Court in reaching a decision involving numerous issues of significance to the public. These issues include whether an employer may reject applications for job transfer from an employee on short-term disability leave precisely because the employee is on short-term disability leave, and yet, avoid liability for doing so under the Americans with Disabilities Act and Massachusetts General Laws Chapter 151B. These issues also include whether an employer may insist that an employee on short-term disability leave return to work for his harassing supervisor but simultaneously take the position that the employee is not a qualified disabled person eligible for a job transfer, in spite of medical documentation explaining that the employee can only function in a new work environment.

## JURISDICTIONAL STATEMENT

A. The District Court has jurisdiction of this matter on account of Plaintiff-Appellant Walter Tuvell's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., see 28 U.S.C. § 1331, and on account of diversity of citizenship between Plaintiff-Appellant Walter Tuvell (Massachusetts) and Defendant-Appellee International Business Machines, Inc. (New York), as the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332(a)(1).

B. The Court of Appeals for the First Circuit has jurisdiction of this appeal under Fed. R. App. P. 3 and 4 and by virtue of its appellate jurisdiction over district courts within its circuit. See 28 U.S.C. § 1291.

C. The Notice of Appeal in this action was timely filed on August 5, 2015, following the entry of judgment on July 8, 2015. See Fed. R. App. P. 4(a)(1)(A).

D. This appeal is from a final order granting summary judgment against Plaintiff-Appellant Walter Tuvell, and judgment in favor of Defendant-Appellee International Business Machines, Inc., was entered. Addendum "ADD" 1-27.

## ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed reversible error by concluding Tuvell was not a qualified disabled person.

2. Whether the District Court committed reversible error by concluding Tuvell was reasonably accommodated by IBM throughout his employment.

3. Whether the District Court committed reversible error by concluding IBM lawfully rejected Tuvell's two applications for job transfer.

4. Whether the District Court committed reversible error by concluding Tuvell was not subjected to an unlawful hostile work environment.

5. Whether the District Court committed reversible error by concluding Tuvell was not subjected to other unlawful adverse actions, separate from the rejections for transfer, while he was still employed.

6. Whether the District Court committed reversible error by concluding Tuvell's termination was not unlawfully discriminatory and/or retaliatory.

7. Whether the District Court committed reversible error by concluding IBM's investigations into Tuvell's protected complaints were lawful and adequate.

## STATEMENT OF THE CASE

### A. RELEVANT FACTS

Tuvell suffers from the disability of Post-Traumatic Stress Disorder ("PTSD"), A615, and IBM was aware of his disability. A1293. Tuvell was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a Ph.D. in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Daniel Feldman, his supervisor, and IBM acknowledges a lack of performance issues prior to May 18, 2011, the day on which harassment started, triggering Tuvell's PTSD. A258-A259, A614, A649-A653, A749-A751. Feldman also regarded Tuvell's work in the Performance Architecture area as competent and his interactions with others to be professional. A648, A654.

On May 18, 2011, Fritz Knabe, a supervisor, falsely accused Tuvell of failing to perform work, and Feldman failed to investigate when Tuvell pointed out that falsity. A616, A657-A658, A700-A701, A706-A707, A725. On June 8, 2011, Knabe yelled at Tuvell and falsely accused him of failing to provide work, and again Feldman refused to investigate and refused Tuvell's request for a three-way meeting to clear the air. A616. Feldman was aware of Tuvell's PTSD at least as early as May 26, 2011. A661.

On June 10, 2011, Feldman demoted Tuvell's level of work from that of a "Band 8" employee to that of a lesser "Band 7," and he simultaneously switched a less qualified employee, Sujatha Mizar, into Tuvell's position. A614, A616-A617, A647, A664-A670, A671, A746, A753, A786, A808, A840, A864, A875, A931-A932. Tuvell, a Band 8 employee, was thereafter responsible for work that had been performed by a Band 7 employee. A616, A753, A786. Due acknowledged the reassignment to be to a "lesser role." A753, A786. Tuvell was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower-level work. A671, A746, A864. The change also constituted a "public humiliation." A864. IBM's own policies regard such an "undesirable reassignment" as a tangible adverse employment action. A875, A931-A932. Further, the reassignment meant change of worksite to Marlborough from (mostly) Cambridge, which Tuvell regarded as a preferable location, and an increase in commuting distance of thirty miles each direction. A666, A669-670, A746. Via the demotion, Feldman unilaterally assigned Tuvell to switch roles with Mizar, despite Tuvell having decades more relevant experience for the position and despite Mizar's lack of a Ph.D. A614, A616-A617, A647.

IBM takes the position that the demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's]

unhappiness with working with Knabe." A726. However, IBM asserted to the contrary, "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." A1168.

IBM also justified the demotion based on Tuvell's alleged failure to produce certain Excel graphics, as allegedly required by Knabe. A654-A658, A668. However, Tuvell was never asked to produce Excel graphics. A616. Moreover, Feldman and Knabe both knew that Tuvell did not use Excel, so it defies logic to believe Knabe's claim that he asked Tuvell to complete such an assignment. A657-A658, A700-A701. Finally, IBM's descriptions of the Excel incident are inconsistent, as it elsewhere described Tuvell as performing his work "too slowly," as opposed to not providing the work at all. A706-A707, A725.

The demotion also came two days after Knabe yelled at Tuvell and, with knowing falsity, accused him of not producing work. A616. Feldman refused to investigate, and refused to respond to Tuvell's repeated inquiries for more detail concerning his alleged misconduct. A616. Feldman repeatedly denied Tuvell's requests for a three-way meeting with Knabe, himself, and Feldman to clear the air. A616, A660-A661. While Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had convened just such a three-way meeting between the three of them in March 2011, concerning a different issue. A660, A746. Moreover, as Tuvell was being demoted, Knabe, who was not

disabled and had acknowledged yelling at Tuvell, was not reassigned or otherwise disciplined in any way. A662-A664, A785, A790-A791.

On June 12, 2011, Tuvell complained to Feldman about the "harassment and yelling" and "'illegal' adverse job action." A864. That same day, Feldman required that all verbal communications with Tuvell be in the presence of an Human Resources ("HR") professional, and all written communications with Tuvell be copied to an HR professional, based on Tuvell's past history of litigation and engaging in protected complaints about harassment. A617, A862, A934.

The next day, June 13, 2011, which was just three days after the demotion, Feldman, the decision-maker with respect to the demotion, wrote an email to his boss and a member of HR in which he claimed Tuvell was "irrational and potentially dangerous" in conjunction with his PTSD, and Feldman advocated barring Tuvell from the workplace and firing him. A672-A673, A1293.

Tuvell complained to HR of harassment and disability discrimination on June 13, 2011. A708.

Two days later, Feldman disciplined Tuvell for failing to provide a joint status update on the transition of his work to Mizar, even though Mizar had already submitted the applicable joint report, A617, A674-A678, A935, A947-A948, A950. The next day, June 16, 2011, Feldman imposed on Tuvell the impossible task of piecing together, independently of Mizar and Feldman, on a single day's

notice, a detailed day-by-day schedule for three weeks, reflecting his taking over of Mizar's four duties on his reassignment, which was unachievable given that Tuvell had no acquaintance of his four entirely new responsibilities in the transition, and Feldman refused to provide Tuvell an example of such a schedule. A618, A620, A747, A936, A952-A953, A955, A958.

Four days later, on June 20, 2011, Feldman again referred to Tuvell's diagnosis of PTSD and claimed that Tuvell was "potentially dangerous." A679, A787-A788. However, Tuvell did not engage in any violent or threatening conduct whatsoever. A615, A783-A784.

Meanwhile, Lisa Due, an IBM Senior Case manager, was conducting IBM's initial investigation of Tuvell's complaints that month. A382-A387, A389. However, when conducting that investigation, Due did not explore the qualifications of Mizar, the employee who took over Tuvell's work upon his demotion, and Due did nothing to inquire of Feldman about his attitudes towards Tuvell's PTSD. A768, A782. Further, Due claimed that the following sentences provided by Tuvell in support of one such complaint, were "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

A435, A802-A803.

Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length and detail of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." A1080-A1081, A1083-A1088, A1091-A1101. In explaining reasons why Tuvell performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." A708. Yet, pursuit of claims was protected, and Tuvell never neglected, and IBM has never identified, any job task that Tuvell neglected as the result of lodging his internal, protected complaints. A708.

Prior to Due's completion of her investigation, she met with Mandel, who instructed her to inform Tuvell that Due had no reason to conclude that Tuvell had been mistreated. A794-A795. In addition to never seriously investigating Tuvell's complaints of discrimination, Due also never investigated whether Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. A797, A1078.

Tuvell appealed Due's adverse conclusion to Mandel, after learning of it on June 29, 2011. A552, A619, A894-A895. However, Mandel was biased as an appeal investigator, because he had already instructed Due how to respond with respect to her initial investigation. A794-A795. Meanwhile, on June 30, 2011, in response to one of Tuvell's protected complaints of harassment, Feldman

threatened, "assertions of bad faith . . . are inconsistent with success." A1131. After this reasonable and protected complaint of harassment by Tuvell, A1136, Feldman urged HR to discipline him based directly on that complaint. A1135.

On August 3, 2011, Feldman prohibited Tuvell from using a previously-agreed, reasonable amount of his workday to draft his internal complaints of discrimination, and then Feldman threatened Tuvell with termination when he said, "Now wait a minute, Dan." A620-A621. Also, on August 3, 2011, reflecting a pre-existing, secret plan to write up Tuvell for something, Tuvell was given a Formal Written Warning, with threat of termination, for innocently penning the innocuous vernacular phrase "if you're lazy you can just click this link"; meanwhile, Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Tuvell. A620-A621, A662-A664, A785, A790-A791, A1287-A1291.

Though Mandel understood that Tuvell's complaint included the allegations that his demotion was discriminatory and/or retaliatory, Mandel never investigated whether that demotion was appropriate, and he failed to inquire as to whether Feldman exhibited any animus based on handicap and/or retaliation. A893, A909-A910.

The harassment that Tuvell experienced at the hands of Feldman triggered serious symptoms of PTSD. A621-A622, A899, A965. For that reason, beginning

on or about August 11, 2011, Tuvell went onto medical leave, and ultimately his pay was lowered, and eventually completely curtailed, until he was terminated more than eight months later. A622, A624, A631, A636, A746, A1043-A1044.

On August 25, 2011, Mandel refused to advance Tuvell's internal complaints of discrimination and retaliation while on STD, stating, over Tuvell's objections, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." A899-A901, A904, A966, A1261. Then, Knabe and Feldman, but not Tuvell, were accorded the opportunity to review Mandel's draft conclusions, and offer suggestions. A1265-A1274. Mandel's eventual conclusions did not address Tuvell's allegations of wrongdoing against Knabe or Mandel. A626-A627.

Mandel had already completed his investigation by September 15, 2011, A397; nevertheless, he did not inform Tuvell of the negative conclusion of his investigation until November 17, 2011, which was *19 weeks* after the investigation had been requested. A619, A626. Moreover, Mandel was an inappropriate investigator under IBM's own conflict-of-interest policy, as he, personally, had been accused by Tuvell of wrongdoing and discrimination, based on his failure to advance the investigation during the pendency of Tuvell's disability leave, and his false assertions to Tuvell about IBM's practice of investigating third party

complaints. A799-A800, A897-A898, A903-A904, A929-A930, A941-A942, A1215-A1218, A1221, A1226-A1228, A1237-A1238, A1245.

While out on leave, the harassment by IBM continued, including: curtailing Tuvell's computer access based expressly on his being on medical leave, A687-A688, A1296; admittedly curtailing Tuvell's use of the IBM email system because he forwarded his protected complaints of harassment and discrimination to others within IBM, calling it "misuse," A1073; curtailing Tuvell's access to IBM's email system, because "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application," A1073; and counting as sick days Tuvell's work at home. A625.

Even though Tuvell made it clear that he would be medically unable to return to work until the investigation was properly completed, A899, A965, IBM refused to complete the investigation until four-and-a-half months after it commenced. A619, A626. On September 15, 2011, Tuvell's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [due to STD leave]. It is easy to return access once you return from STD." A905-A906, A1076. This adverse action even interfered with his ability to enter an IBM building to interview for his transfer, thereby completing his figurative and literal banishment from the workplace. A1204-A1205.

In order to remain a productive employee of IBM, Tuvell medically required the reasonable accommodation of a work environment that did not exacerbate his PTSD, such as a different supervisor, or a transfer to a new department, so that he would not have to interact with Feldman's harassment. A365-A368, A461-A462. Indeed, Ross's December 19, 2011 Medical Treatment Report Form ("MTR") that was provided to IBM states that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. Tuvell on many occasions informed IBM that he could no longer work in any capacity with Feldman, for medical reasons, (fear of further harassment exacerbating PTSD), and requested that he be accorded a new supervisor, or a transfer to a different position. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. IBM repeatedly rejected Tuvell's requests. A624, A626, A629-A631.

On January 23, 2012, Stephanie Ross, a highly-qualified social worker with many years of experience working with trauma victims, stated that while she advised Tuvell "not to return to [his] specific job environment," that "Patient has good functioning in the absence of trauma related stimuli." A1040-A1041, A1045-A1048, A1194-A1195. On January 31, 2012, Ross reiterated that "the only course to recovery for Tuvell required a reassignment by the company." A465. On September 28, 2012, Ross stated, "in a new setting with different people it was

possible that Tuvell could function quite well and attend his work." A466. Ross testified that she believed that Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. A1050-A1051, A1187-A1188. Ross reported that Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. A1051.

In December 2011, Tuvell went to IBM's Littleton facility to interview for a transfer that he affirmatively pursued, and his PTSD was not triggered by the interview or other efforts to pursue a transfer. A746, A1052-A1053, A1204-A1205. Tuvell conducted himself professionally at the December 1, 2011 interview with Chris Kime, a Development and Solutions Manager. A973-A974, A992. Tuvell was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. A997, A1015, A1060. Tuvell's many communications with Kime concerning the position were "cordial and professional." A1013.

Tuvell was qualified for an open position in IBM's Littleton office, SWG-0436579 ("The 579 Position"), for which he applied on November 28, 2011. A627, A977, A980-A983. Tuvell met all of the "minimal qualifications" listed in the job requisition, including advanced academic degree and fluency in English,

and he exceeded the amount of required experience with "C" programming language and software design, by decades. A614, A744-A745, A975-A976, A978-A979, A1055-A1056. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. A614, A744-A745, A975-A976, A978-A979, A1055-A1056.

Kime acted as Hiring Manager for The 579 Position and drafted the posting himself. A976-A979. Kime reviewed Tuvell's resumes, and concluded they had had "little doubt that you [Tuvell] have technical skills that we could use on the project." A984-A986, A1058. On or about December 1, 2011, Kime interviewed Tuvell by phone, which screened Tuvell's background and qualifications. A987-A989. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team." A991. As a result of the interview, Kime asked his support lead and also the next most senior member of the Littleton team to interview Tuvell. A993-A994. Kime acknowledged that the interviews with his own management team did not exclude Tuvell as a candidate. A998, A1000-A1001. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." A695. Kime considered Tuvell's technical knowledge and ability to be a strength. A999. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for The 579 Position. A1003. Kime believed Tuvell had "deep technical skills and

ability to produce solid documentation." A969, A1013-A1014. Nevertheless, Kime notified Tuvell on January 6, 2012, that he had been rejected for the transfer. A969.

On January 6, 2012, Kime communicated the following as the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." A969, A1013-1014.

IBM's own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. A876, A931-A932. Tuvell had amply reported that Feldman had been harassing him. A278-A282, A334-A339, A435-A436, A616-A617. Moreover, Tuvell's medical documentation required him to report to a different person. A461. Furthermore, IBM took the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." A726.

On January 6, 2012, Kime gave one other reason in addition to the fact that Tuvell was on disability leave as the justification for denying his application; namely, a "concern about the work being to [Tuvell's] liking." A969. However, after Tuvell was fully informed of the nature of the job, Tuvell wrote to Kime, on

December 9, 2011, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." A995-A996, A1060.

IBM later changed its purported rationale for rejecting Tuvell's application for the job in Kime's group; at his deposition, Kime testified it was because he couldn't offer Tuvell development work. A298-299. The published job description, which was drafted by Kime, and which formally designated the position as "Software Developer," was explicitly described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." A975, A977-A978, A1065. IBM has also claimed, after the fact, that its own STD justification was a lie, and that a different reason, Tuvell's past inability to work with his harassers, was the true reason for the rejection. A916-A919, A1021-A1022, A1069.

However, even if that were true, the evidence shows that Kime relied on the negative evaluation of Feldman, and that Feldman explicitly and discriminatorily wanted to fire Tuvell, as early as June 13, 2011, precisely because of Tuvell's diagnosis of PTSD. A672-A673, A1293. Kime acknowledges that Feldman's input was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman. A159. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with

these responsibilities and this set of relationships." A1004-A1005, A1063. Feldman verbally rated Tuvell a "3," which represents a low ranking, but above those facing termination. A1009, A1063. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." Id. Then, in a written exchange that had seemingly concluded when Kime thanked Feldman for his "time and candor," Feldman initiated further conversation and volunteered that he would not hire Tuvell again. A1063. As of that day, Kime no longer considered hiring Tuvell for the position. A1009-A1011. Just prior to his rejection for transfer, Tuvell had engaged in protected conduct by complaining about unlawful harassment and discrimination, and failure to reasonably accommodate his handicap. A624-A628.

After Tuvell was rejected for the transfer, and after Tuvell's health care provider had certified on December 19, 2011, that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting," A461, IBM steadfastly maintained its position that Tuvell was capable of performing his job in his current position under Feldman, ignoring the medical certification. A631.

Tuvell was medically incapable due to his PTSD of continuing to serve in his then-current position under Feldman's harassment, and at the time of his application for the transfer he had been on short-term disability ("STD") for

months, and was exhausting his benefits. A367, A466, A621-A622, A624, A631, A1147, A1303. He was already on two-thirds compensation, and within three weeks of the January 6, 2012 rejection, he was placed on completely unpaid leave. A624, A631. The denial of the transfer directly inflicted financial harm on Tuvell, because IBM reduced and eventually stopped paying him while on leave, because he was not medically able to continue in active service under a harassing supervisor. A367, A466, A621-A622, A624, A631, A1147, A1303.

In addition, after rejecting Tuvell, IBM held the position open (and indeed reposted it after rejecting Tuvell), and continued seeking a candidate to fill it. A1016. The second posting, which was numbered SWG-0456125 ("The 125 Position"), was otherwise identical to The 579 Position. A1017-1019. Kime was the hiring manager for The 125 Position, he did not consider Tuvell's application for The 125 Position, and he did not even respond to Tuvell's application, because he was advised by HR not to do so. A1018-1020. Kime's rejection of Tuvell occurred shortly after he learned that Tuvell was on STD leave, see A403, and shortly after he wrote to Feldman, "I do not envy you having to deal with HR and lawyers at this point – certainly I did not understand the STD situation and underestimated its significance." A1071. The reposted position also lapsed without being filled. A1018-A1020.

On January 22, 2012, Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Tuvell a requested transfer based on retaliation and in violation of the obligation to reasonably accommodate. A911-A913, A1280. Mandel, the investigator, never looked into whether the rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate Tuvell. A914, A916. On March 2, 2011, Tuvell filed a third Corporate Open Door Complaint, alleging that Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. A919-A920, A1257-A1258. Mandel never opened up an investigation to respond to this Complaint, and there was no formal response. A747, A920-A921. There are extensive facts showing IBM's investigations were wildly inadequate. A1309-A1418.

On March 13, 2012, Mandel, the employee in charge of IBM's investigations into Tuvell's complaints of discrimination and retaliation, *threatened Tuvell with termination if he continued emailing his protected complaints of discrimination to others*. A925, A1129.

On May 7, 2012, IBM wrote to Tuvell, stating that it believed Tuvell to be working for EMC, a competitor, and threatening termination. A635, A1143, A1150. On May 8, 2012, Tuvell denied working for EMC. A635. Tuvell explained that he did not wish to inform IBM where he was working, as he feared a

retaliatory response. A635. On May 11, 2012, IBM demanded to know where Tuvell was working, citing an inapplicable policy, and its need to confirm that Tuvell was not working for a competitor. A635, A745-A746, A1157-A1159, A1163. On May 15, 2012, IBM demanded to know Tuvell's employer, purportedly based on its duty to confirm that Tuvell was not working for a competitor. A636, A1151, A1165. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a non-employee there, and he suggested that he be permitted to submit the information about his alternate employment to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. A635-A636, A745, A1157-A1158. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2012. A636.

At the time of discharge, Tuvell was disabled (PTSD), and his disability was known to IBM. E.g., A615, A1293. Tuvell had lodged repeated, recent protected complaints of discrimination and retaliation. A635-A636, A1140-A1141, A1151. Tuvell was qualified for the position, as IBM kept offering to reinstate him to that position once he returned from sick leave, and that work had previously been performed by a more junior-level employee with fewer qualifications. A614,

A616-A617, A647, A666-A668, A753, A786. IBM attempted to fill Tuvell's position. A197.

After leaving IBM, Tuvell worked for years at a high level, thereby demonstrating the effectiveness that reasonable accommodation would have had. A747.

B. PROCEDURAL HISTORY

On March 12, 2012, Tuvell filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination. A11. The Equal Employment Opportunity Commission ("EEOC") issued Right-to-Sue Letters on February 19, 2013, and Tuvell timely filed a civil action in Massachusetts Superior Court. A11. Following IBM's removal of the complaint to the District Court on federal question and diversity grounds, Tuvell filed an Amended Complaint. A10-A40. Following discovery, IBM moved for summary judgment, which was granted by the District Court. Addendum ("ADD") 1-27. Tuvell thereafter filed the instant appeal. A210-A211.

## SUMMARY OF ARGUMENT

This Court reviews decisions granting summary judgment under a de novo standard. Brief at 24-25. Viewed in the light most favorable to Tuvell, the facts presented to the district court suffice to sustain a jury verdict in his favor on all Counts in his Amended Complaint. Brief at 24-61.

Tuvell, a highly-qualified and experienced mathematician, performed well early in his tenure at IBM. However, in the Spring of 2011, he began to be harassed and falsely accused of performance deficiencies. Following a specific discussion with Feldman, his immediate boss, about Tuvell's PTSD, Tuvell's work environment quickly disintegrated into a hostile nightmare, as he tried in vain to thwart off unjustified, false attacks on his performance and his right to be free from discrimination and retaliation. Brief at 37-60.

Tuvell experienced a plethora of adverse actions that were either ignored completely by the District Court, Brief at 37-60, or tossed aside due to the erroneous conclusion that Tuvell was not a qualified disabled person. Tuvell's medical documentation repeatedly stated that he could only return to work from his disability leave, but that he could return to work, if he could work for a new supervisor or be transferred to a new position. Brief at 25-29.

Thereafter, Tuvell applied for a transfer to an open position at a different location from his primary harasser, and by all accounts, he aced his interviews.

Right when Kime, the hiring manager, learned that Tuvell was on disability leave and received cancerous feedback from Feldman, however, Tuvell's hopes were dashed and he was explicitly rejected for the transfer because he was on disability leave, even though he was eminently qualified for the position. This constituted unlawful retaliation and discrimination in violation of the ADA and Chapter 151B. Brief at 37-60.

The District Court also erred by dismissing the fact that IBM effectively froze Tuvell out of the workplace, slowly diminishing his pay and insisting, unreasonably, that he return to work under his harasser. Brief at 29-37.

The District Court also erred by failing to credit the voluminous evidence Tuvell presented that IBM had simply scoffed at his legitimate, sincere, protected complaints of discrimination and failed to investigate them with any reciprocal sincerity. Brief at 57-60.

For these reasons, and the reasons explained below, the decision granting summary judgment must be reversed and the matter remanded for trial so Tuvell can pursue his claims for failure to reasonably accommodate (Count II, Count IV, and Count V), and unlawful discrimination, retaliation, and failure to investigate (Counts VI-VIII).

## ARGUMENT

### I. STANDARD OF REVIEW

This Court's review of the district court's grant of summary judgment is "de novo and not deferential." Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 152 (1st Cir. 2009) (citation omitted). Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. (citations omitted). A "genuine" issue is one that could be resolved in favor of either party, and a "material fact" is one that has the potential of affecting the outcome of the case. Id. (citations omitted).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Id. (citations omitted). If the moving party "has pointed to the absence of adequate evidence supporting the nonmoving party's case, the nonmoving party must come forward with facts that show a genuine issue for trial." Id. (citation omitted). The test is whether, as to each essential element, there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 152-53 (citation omitted).

In reviewing a grant of summary judgment, this Court "constru[es] the record in the light most favorable to the nonmovant and resolv[es] all reasonable inferences in the party's favor." Id. at 153 (citation omitted). Thus, to survive summary judgment, a plaintiff "is not required to rely only on *uncontradicted* evidence." Id. (citation omitted) (emphasis in original). Where the record contains inconsistencies "that favor in some lights the defendants and in others the plaintiff," as long as the "plaintiff's evidence is both cognizable and sufficiently strong to support a verdict in [his or] her favor, the factfinder must be allowed to determine which version of the facts is most compelling." Id. at 153, 162-63 (citation omitted) (reversing entry of summary judgment in disability discrimination case).

## II. TUVELL WAS A QUALIFIED DISABLED PERSON, WHICH SUPPORTS HIS CLAIMS UNDER COUNT II, COUNT IV, COUNT V, AND COUNT VI

Under 42 U.S.C. § 12101 et seq. (the "ADA") and Massachusetts General Laws Chapter 151B ("Chapter 151B"), a qualified disabled person is a disabled person who is capable of performing the essential functions of a particular job, *with* or *without* a reasonable accommodation. ADD 30, 42 U.S.C. § 12111 (8) (the position one "holds or desires"); ADD 33, G.L. c. 151B, § 1(16) (a "particular job"). IBM has conceded that Tuvell, who suffers from the disability of Post-Traumatic Stress Disorder ("PTSD"), A615, was a disabled person entitled to

protection under the ADA and Chapter 151B. See Addendum ("ADD") 13. As for whether Tuvell was a qualified disabled person, a reasonable jury could find that he was.

Tuvell took the position that he was medically able to perform work for IBM if he was provided the reasonable accommodation of a work environment that did not exacerbate his PTSD, such as a different supervisor, or a transfer to a new position away from Feldman. E.g., A461. Indeed, Ross's December 19, 2011 MTR states that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. On January 23, 2012, Ross stated that while she advised Tuvell "not to return to [his] specific job environment," that "Patient has good functioning in the absence of trauma related stimuli." A1045-A1048, A1194-A1195. On January 31, 2012, Ross reiterated that "the only course to recovery for Tuvell required a reassignment by the company." A465. On September 28, 2012, Ross stated, "in a new setting with different people it was possible that Tuvell could function quite well and attend his work." A466; see Cargill v. Harvard University, 60 Mass. App. Ct. 585, 603 (2004) (plaintiff's burden is merely to show that a reasonable accommodation is "possible"); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Sensing, 575 F.3d at 156-57 (plaintiff raised genuine issue of material fact that she was qualified disabled

person based partly on doctor's notes discussing her ability to return to certain position).

Ross, a highly qualified social worker with many years of experience working with trauma victims, testified that she believed that Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. A1040-A1041, A1050-A1051, A1187-A1188. Ross reported that Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. A1051.

In December 2011, Tuvell went to IBM's Littleton facility to interview for a transfer that he affirmatively pursued, and his PTSD was not triggered by the interview or other efforts to pursue a transfer. A746, A1052-A1053, A1204-A1205. Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. A992. Tuvell was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. A997, A1015, A1060. Tuvell's many communications with Kime concerning the position were "cordial and professional." A1013.

After leaving IBM, Tuvell worked for years at a high level, thereby demonstrating the effectiveness that reasonable accommodation would have had.

A747. See Sensing, 575 F.3d at 157 (plaintiff raised genuine issue of material fact that she was qualified disabled person based partly on how she worked following diagnosis of disability).

The district court silently ignored all of this evidence, and it was error to do so. Instead, the district court focused on the initial MTRs from Ross that stated Tuvell was initially "totally disabled." ADD 13. Massachusetts and Federal law confirms that employees may be considered qualified disabled individuals, even if they claim "total disability" (*without* accommodation) on medical documentation, so long as they claim that they can return to work *with* reasonable accommodation. Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997). Tuvell claimed, with written support from Ross, that there were at least two possible reasonable accommodations available to him. This distinguishes and defeats the "total disability" rationale.

Similarly, the district court focused on descriptions of Tuvell's PTSD-related symptoms and challenges in the vacuum of professional therapy while ignoring what actually occurred in the real world following his professional therapy when he (1) successfully interviewed in an IBM facility for transfer to another IBM position and (2) thereafter worked at a high level for years for another company.

The evidence positively demonstrates that Tuvell could continue working at IBM, if only he was provided with reasonable accommodation, and thus, he was qualified.

## III. TUVELL WAS NOT PROVIDED REASONABLE ACCOMMODATION THROUGHOUT HIS EMPLOYMENT – COUNT II

To make out a reasonable accommodation claim, Tuvell must show he suffers from a disability, he is a qualified disabled person, and IBM knew of his disability but did not reasonably accommodate him upon request. Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010). Tuvell need not establish discriminatory animus to prevail on this claim. See id.

IBM has conceded that Tuvell suffers from a disability, see ADD 13, and the facts supporting Tuvell's status as a qualified disabled person are outlined supra at 25-29.

As for the third prong, there is no dispute that IBM was aware of Tuvell's requests to accommodate his disability, see ADD 17, and a genuine issue of material fact exists as to whether IBM adequately offered or provided reasonable accommodation in response. The "accommodation" offered by IBM, to continue an unpaid medical leave indefinitely until Tuvell was able to return to work under Feldman, see ADD 16, was inadequate for two reasons. First, the indefinitely long, uncompensated leave that IBM proposed is not a valid, effective, or

acceptable reasonable accommodation, for there were acceptable options that would have returned Tuvell to work immediately, and accorded him equal career opportunities; second, the requirement that Tuvell return to working below Feldman was diametrically opposed to Tuvell's medical limitations. E.g., A461.

The harassment that Tuvell experienced at the hands of Feldman triggered serious symptoms of PTSD. A621-A622, A899, A965. In order to remain a productive employee of IBM, Tuvell medically required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Feldman's harassment. A365-A368, A461-A462. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. Tuvell on many occasions informed IBM that he could no longer work in any capacity with Feldman, for medical reasons, and requested that he be accorded a new supervisor, or a transfer to a different position. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. IBM repeatedly rejected Tuvell's requests. A624, A626, A629-A631. Beginning on or about August 11, 2011, Tuvell went onto medical leave, and ultimately his pay was lowered, and eventually completely curtailed, until he was terminated more than eight months later. A622, A624, A631, A636, A746, A1043-A1044.

The accommodation suggested by IBM could be found by a jury to be unreasonable and inadequate.

### A. LEAVE WITH NO PAY WAS NOT A REASONABLE ACCOMMODATION

Under the ADA, reasonable accommodations are modifications to the work environment that permit an employee to perform the essential functions of a desired position, or enable the disabled to "enjoy equal benefits and privileges of employment as are enjoyed by . . . employees without disabilities." ADD 35, 29 C.F.R. § 1630.2 (o)(1)(ii) & (iii). Similarly, under Chapter 151B, reasonable accommodations are adjustments to a job or work environment that allow one to perform the essential functions of a position and to enjoy "equal terms, conditions and benefits of employment." ADD 37-38, MCAD Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B (1998), at 2-3.

As numerous cases have held, a reasonable jury could find that forcing Tuvell to stay out of work, without compensation, when transfer to gainful employment under a different supervisor is an available option, fails to satisfy IBM's legal obligations to provide a reasonable accommodation. Williams v. Philadelphia Housing Auth. Police Dep't, 380 F.3d 751, 771-72 (3rd Cir. 2004); Noon v. IBM, No. 12 Civ. 4544(CM)(FM), 2013 WL 6504410, at *13 (S.D.N.Y. Dec. 11, 2013), at 35; Walters v. Mayo Clinic Health Sys.-Eau Claire Hosp., Inc., 998 F. Supp. 2d 750, 764 (W.D. Wisc. 2014) (leave not sufficient where other

accommodations available). Just because an employer has attempted one type of accommodation does not divest it of its responsibility to provide another, if the first attempt is not effective. Ralph v. Lucent Technologies, 135 F.3d 166, 172 (1st Cir. 1998); Smith v. Bell Atl., 63 Mass. App. Ct. 702, 721 (2005). While Tuvell's initial medical leave may be considered a temporary reasonable accommodation, in response to his major, immediate symptoms, eventually the extended, indefinite and uncompensated medical leave ceased being reasonable, when other reasonable accommodations were available that would permit him to fully participate in the workplace and earn a living. A621-A622, A624, A631, A746-A747, A899, A965, A1043-A1044.

### B. REQUIRING TUVELL TO WORK UNDER CONDITIONS CONTRARY TO HIS MEDICAL LIMITATIONS WAS NOT REASONABLE

IBM's proposed accommodation of forced leave until Tuvell could return to work under Feldman was also not reasonable, contrary to the district court's conclusion, see ADD Memo Order pp. 16, 19, given that continued working with Feldman in any capacity was directly contrary to Tuvell's medical limitation. A631, A1184. IBM submitted its proposal after Tuvell's health care provider certified on December 19, 2011, that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. On many other occasions, Tuvell informed IBM that he was medically incapable of returning

to work under Feldman, and described his symptoms. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. IBM's proposals were not reasonable accommodations, because they were contrary to Tuvell's medical limitations.

### C. TUVELL'S REQUEST FOR A NEW SUPERVISOR WAS A VALID REQUEST FOR REASONABLE ACCOMMODATION THAT WAS UNLAWFULLY DENIED – COUNT II

One accommodation Tuvell sought that would satisfy the medical limitations placed on him was to stay in the same position working under a different supervisor. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. The district court erroneously accepted IBM's self-serving dismissal of reassignment to another management team as not being a reasonable accommodation. ADD MO p. 17, 19. Transfer to a different supervisor, depending on the facts, may indeed be a valid reasonable accommodation. Ralph, 135 F.3d at 171-72 (employer changed supervisors as a reasonable accommodation); Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-23 (2nd Cir. 1999) (change of supervisor may be reasonable accommodation).

In this case, change of reporting relationship to a different supervisor was reasonable under the facts. IBM's own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. A876, A931-A932. Tuvell had amply reported that Feldman had been harassing him, and

consequently, a change of supervisor was reasonable as it was absolutely consistent with IBM's promulgated policy. A278-A282, A334-A339, A435-A436, A616-A617. Moreover, Tuvell's medical documentation required him to report to a different person. A461. Furthermore, IBM took the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." A726. Therefore, a genuine issue of fact exists as to whether Tuvell's request to report to a different supervisor was a viable request for reasonable accommodation that IBM unlawfully failed to provide.

### D. TUVELL SOUGHT REASSIGNMENT TO A VACANT POSITION, FOR WHICH HE WAS QUALIFIED, AND IBM VIOLATED ITS DUTY TO REASONABLY ACCOMMODATE TUVELL BY REJECTING HIM FOR THE TRANSFER – COUNT II AND COUNT IV

A second reasonable accommodation that Tuvell requested was reassignment to a vacant position, A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184, and the ADA requires employers to reassign employees to a vacant position to reasonably accommodate their disabilities. ADD 30; 42 U.S.C. § 12111(9)(B). If the employee is qualified, he or she must be transferred to a vacant, appropriate position, if required as a reasonable accommodation. Duvall v. Georgia-Pacific Consumer Products, L.P., 607 F.3d 1255, 1260 (10th Cir. 2010). There is no need for the employee to prove

that he or she is the "best" qualified applicant to obtain the reassignment. EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012); ADD 40-41, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment ("EEOC Guidance"). Rather, the employee need only show himself to be minimally qualified to establish **entitlement** to reassignment. ADD 41-42, EEOC Guidance ("Reassignment means that the employee **gets** the vacant position if s/he is qualified for it.") (emphasis supplied).

There is ample evidence to conclude that Tuvell was qualified for the open position in IBM's Littleton office, SWG-0436579 ("The 579 Position"), for which he applied on November 28, 2011. A627, A977, A980-A983. Tuvell met all of the "minimal qualifications" listed in the job requisition, including advanced academic degree and fluency in English, and he exceeded the amount of required experience with "C" programming language and software design, by decades. A614, A744-A745A975-A976, A978-A979, A1055-A1056. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. A614, A744-A745, A975-A976, A978-A979, A1055-A1056.

Kime, a Development and Solutions Manager, acted as Hiring Manager for The 579 Position and drafted the posting himself. A973-A974, A976-A979. Kime reviewed Tuvell's resumes, and concluded they had had "little doubt that you

[Tuvell] have technical skills that we could use on the project." A984-A986, A1058. On or about December 1, 2011, Kime interviewed Tuvell by phone, which screened Tuvell's background and qualifications. A987-A989. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team." A991. As a result of the interview, Kime asked his support lead and also the next most senior member of the Littleton team to interview Tuvell. A993-A994. Tuvell's was interviewed by these other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive." A997, A1060. Kime acknowledged that the interviews with his own management team did not exclude Tuvell as a candidate. A998, A000-A1001. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." A695. Kime considered Tuvell's technical knowledge and ability to be a strength. A999. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for The 579 Position. A1003. Kime believed Tuvell had "deep technical skills and ability to produce solid documentation." A969, A1013-A1014. Consequently, a jury could reasonably find that Tuvell met the minimal qualifications for The 579 Position. Nevertheless, Kime notified Tuvell on January 6, 2012, that he had been rejected for the transfer. A969. IBM's failure to reassign Tuvell to The 579 Position was an unlawful breach of its duty to reasonably accommodate him.

The district court held that this transfer to Kime's group "would not have been reasonable under the circumstances," given Tuvell's impairments "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities." ADD MO pp. 19-20. This conclusion was ludicrous and must be reversed, because IBM itself maintained (by offering to reinstate him) that Tuvell was capable of returning to work on Feldman's team. A1184. If Tuvell was able to function well enough in a team to be able to return to work under Feldman, it defies logic to conclude that he could not do so in a new position under Kime, especially given his doctor's advice.

In addition, the district court erroneously held that IBM reasonably accommodated Tuvell by encouraging him to apply for open positions in the company, ADD 19, because this "encouragement" was an illusory sham. IBM completely sabotaged Tuvell's attempt to transfer to Kime's group on two occasions (discussed more infra at 37-46) to a position for which he was eminently qualified and for which he interviewed well.

## IV. TUVELL'S TRANSFER WAS REJECTED BECAUSE OF HIS DISABILITY (AND/OR HIS TAKING REASONABLE ACCOMMODATON) OR RETALIATION – COUNT V

Tuvell has satisfied his prima facie burdens to demonstrate that the rejection of his application for The 579 Position was due to disability, his availment of reasonable accommodation based on that disability, and/or retaliation.

First, it is unquestioned that Tuvell was disabled due to PTSD, (as discussed supra at 25-26), and that just prior to his rejection for transfer, Tuvell had engaged in protected conduct by complaining about unlawful harassment and discrimination, and failure to reasonably accommodate his handicap. A624-A628. See ADD 26.

Second, as established above, Tuvell was qualified for the transfer, exceeding by decades the experience and credentials required of the position. Supra at 34-36.

Third, the rejection of Tuvell's application for transfer on January 6, 2012, was an adverse action under both the ADA and Chapter 151B. Tuvell was medically incapable due to his PTSD of continuing to serve in his then-current position under Feldman's harassment, and at the time of his application for the transfer he had been on STD for months, and was exhausting his benefits. A367, A466, A621-A622, A624, A631, A1147, A1303. He was already on two-thirds compensation, and within three weeks of the January 6, 2012 rejection, he was

placed on completely unpaid leave. A624, A631. The denial of the transfer directly inflicted financial harm on Tuvell, because IBM reduced and eventually stopped paying him while on leave, because he was not medically able to continue in active service under a harassing supervisor. A367, A466, A621-A622, A624, A631, A1147, A1303. Therefore, many cases support the proposition that the rejection of the transfer was an adverse action, and the district court's conclusion to the contrary, ADD MO p. 22, should be reversed. Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (denial of hardship transfer could be an adverse action); Lewis v. City of Chicago, 496 F.3d 645, 655 (7th Cir. 2007) (refusal to transfer away from harasser is an adverse action); Taylor v. Roche, 196 Fed. Appx. 799, 803 (11th Cir. 2006) (same).

Lastly, after rejecting Tuvell, IBM held the position open (and indeed reposted it after rejecting Tuvell), and continued seeking a candidate to fill it. A1016; Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003). The reposted position also lapsed without being filled. A1018-A1020. See, e.g., Jones v. Walgreen Co., 679 F.3d 9, 14, 20, n.7 (1st Cir. 2012) (outlining respective prima facie burdens).

There is direct evidence that Tuvell's disability was the primary factor in the rejection. On January 6, 2012, Kime communicated the following as the primary reason for the rejection: "I underestimated the difficulty of moving forward with

bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." A969, A1013-1014. This is direct evidence of discriminatory animus and causation, and the district court erred by completely ignoring it. See ADD 20-22. See Sensing, 575 F.3d at 161 (plaintiff put forth sufficient evidence that adverse employment action taken, at least in part, because of disability where manager stated he was not "comfortable" with plaintiff returning to work from leave due to potential liability).

On January 6, 2012, Kime gave one other reason in addition to the fact that Tuvell was on disability leave as the justification for denying his application; namely, a "concern about the work being to [Tuvell's] liking." A969. Pretext, and the reasonable jury's inference of discriminatory animus arising therefrom, is established by this alleged justification. For, after Tuvell was fully informed of the nature of the job, Tuvell wrote to Kime, on December 9, 2011, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." A995-A996, A1060.

There is additional evidence of disability animus. IBM curtailed Tuvell's access to IBM's email system, because "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." A1073. On August 25, 2011, IBM refused to advance Tuvell's internal complaints of

discrimination and retaliation while he was on STD, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." A899, A966. Even though Tuvell made it clear that he would be medically unable to return to work until the investigation was properly completed, A899, A965, IBM refused to complete the investigation until four-and-a-half months after it commenced. A619, A626. On September 15, 2011, Tuvell's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [due to STD leave]. It is easy to return access once you return from STD." A905-A906, A1076.

IBM later changed its purported rationale for rejecting Tuvell's application for the job in Kime's group, providing further evidence of pretext. At his deposition, Kime testified it was because he couldn't offer Tuvell development work. A298-299. This assertion is shown to be blatantly pretextual by the published job description itself, which was drafted by Kime, and which formally designated the position as "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." A975, A977-A978, A1065. IBM has also claimed, after the fact, that its own STD justification was a lie, and that a different reason, Tuvell's past inability to work with his harassers, was the true reason for the rejection. A916-A919, A1021-A1022, A1069. A jury would be free to reject these

explanations as pretextual, as they are inconsistent with the reasons given to Tuvell at the time of the rejection. See A969; Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 431-32 (1st Cir. 2000) (pretext established where reasons given for employment action during litigation differ from reasons given at the time of the action); NLRB v. Hotel Employees, 446 F.3d 200, 208 (1st Cir. 2006) (same).

However, even if that were true, the evidence shows that Kime relied on the negative evaluation of Feldman, and that Feldman explicitly and discriminatorily wanted to fire Tuvell, as early as June 13, 2011, precisely because of Tuvell's diagnosis of PTSD. A672-A673, A1293. Kime acknowledges that Feldman's input was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman, sufficient to establish the "cat's paw" theory. A159. Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-59 (1st Cir. 1999) (where a non-discriminatory employee makes a rejection based on an evaluation conducted by someone motivated by discriminatory animus, the employer is liable for discriminatory motives of the evaluator); Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 570 (1981). On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." A1004-A1005, A1063. Feldman verbally rated Tuvell a "3," which represents a low ranking, but

above those facing termination. A1009, A1063. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." A1007-A1008. Then, in a written exchange that had seemingly concluded when Kime thanked Feldman for his "time and candor," Feldman initiated further conversation and volunteered that he would not hire Tuvell again. A1063. As of that day, Kime no longer considered hiring Tuvell for the position. A1009-A1011.

The prima facie case, and the proof of pretext via false and changing justifications for the rejection, likewise support Tuvell's claim based on retaliation. However, Tuvell also has ample direct evidence of retaliatory animus to support his retaliation claim. Due, an IBM Senior Case manager who investigated some of Tuvell's internal complaints of discrimination, claimed that the following protected sentences provided by Tuvell in support of one such complaint, were "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

A435, A802-A803. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length and detail of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." A1080-A1081, A1083-A1088, A1091-A1101. In explaining reasons

why Tuvell performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." A708. Yet, Tuvell never neglected, and IBM has never identified, any job task that Tuvell neglected as the result of lodging his internal, protected complaints. A708; Buckner v. Lew, No. 5:13-CV-199-FL, 2014 WL 1118428, at *13 (E.D.N.C. Mar. 20, 2014) (employer's assertion that plaintiff's work would suffer due to her lodging of EEO complaint supported retaliation claim). A jury could find that IBM's overt hostility based on Tuvell's protected conduct establishes the true motive behind these rejections.

On August 3, 2011, Tuvell was prohibited from using a previously-agreed, reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Tuvell with termination. A620-A621. Also, on August 3, 2011, Tuvell was given a formal discipline, with threat of termination, for innocently penning the innocuous vernacular phrase "if you're lazy you can just click this link"; meanwhile, Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Tuvell. A620-A621, A662-A664, A785, A790-A791. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing

when you feel you've been wronged." A617, A862, A934. In response to one of Tuvell's protected complaints of harassment, Feldman threatened, "assertions of bad faith . . . are inconsistent with success." A1131. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based directly on that complaint. A685-A686, A1135. Finally, the rejection for the transfer took place in close temporal proximity, well within three months, to a number of Tuvell's protected oppositions to unlawful conduct and requests for reasonable accommodation. A624-A628. Jones v. Walgreen Co., 679 F.3d 9, 21 (1st Cir. 2012) (three-and-a-half-month gap between protected conduct and adverse action may raise an inference of retaliation); Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 50 (1st Cir. 2010) (three months between protected act and termination may raise inference of retaliation); Ritchie v. Dep't of State Police, 60 Mass. App. Ct. 655, 666 (2004).

Thus, there is ample direct evidence, as well as evidence of pretext, sufficient for a reasonable jury to conclude that Tuvell was rejected for the transfer based on disability discrimination, his availment of reasonable accommodation, and/or retaliation. The district court's holding on these issues, see ADD 21, 23, 26, should be reversed so a jury can decide the question of causation.

## V. THE EVIDENCE REGARDING TUVELL'S SECOND DENIAL OF TRANSFER ALSO SUPPORTS LIABILITY

Tuvell's second attempt to transfer to Kime's group was also rejected under circumstances supporting liability for Tuvell's claims of failure to reasonably accommodate, discrimination, and retaliation. The second posting, which was numbered SWG-0456125 ("The 125 Position"), was otherwise identical to The 579 Position, A1017-1019, and all the evidence discussed supra at 34-46 regarding Tuvell's application to The 579 Position is sufficient to establish liability on Tuvell's claims regarding his rejection from The 125 Position. In addition, Kime was the hiring manager for The 125 Position, he did not consider Tuvell's application for The 125 Position, and he did not even respond to Tuvell's application, because he was advised by HR not to do so. A1018-1020. Kime's rejection of Tuvell occurred shortly after he learned that Tuvell was on STD leave, see A403, and shortly after he wrote to Feldman, "I do not envy you having to deal with HR and lawyers at this point – certainly I did not understand the STD situation and underestimated its significance." A1071.

## VI. TUVELL WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT BASED ON DISABILITY, RETALIATION, OR A COMBINATION THEREOF – COUNT VII

The harassment experienced by Tuvell rises to the level of a hostile work environment. Numerous courts have held that as few as three or four incidents

may constitute severe or pervasive conduct sufficient to create a hostile work environment. Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 16-17 (1st Cir. 1999) (three incidents of harassment demonstrate hostile work environment); Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass. App. Ct. 549, 567 (2008) (four incidents are sufficient to generate liability for harassment); Gerald v. University of Puerto Rico, 707 F.3d 7, 22 (1st Cir. 2013) (three incidents); McAuliffe v. Suffolk Co. Sheriff's Dep't, 21 MDLR 27 (MCAD Feb. 12, 1999) (three incidents). On June 13, 2011, Tuvell's supervisor, Feldman, noted to agents of IBM that Tuvell reported suffering from PTSD and that Feldman considered Tuvell to be "irrational and potentially dangerous," and he petitioned IBM to fire Tuvell and disable his access to IBM buildings. A672-A673, A1293. On June 20, 2011, Feldman again referred to Tuvell's diagnosis of PTSD and claimed that Tuvell was "potentially dangerous." A679, A787-A788. However, Tuvell did not engage in any threatening conduct whatsoever. A615, A783-A784. These communications are direct evidence of animus against Tuvell's PTSD.

During this time and thereafter, Feldman and IBM engaged in a number of harassing acts, which in any combination constitutes a hostile work environment. Among them: (1) on May 18, 2011, Fritz Knabe, supervisor, falsely accused Tuvell of failing to perform work, and Feldman failed to investigate when Tuvell pointed out that falsity, A616, A657-A658, A700-A701, A706-A707, A725; (2) on

June 8, 2011, Knabe yelled at Tuvell and falsely accused him of failing to provide work, and again Feldman refused to investigate and refused Tuvell's request for a three-way meeting to clear the air, A616; (3) Feldman demoted Tuvell's level of work from that of a "Band 8" employee to that of a lesser "Band 7," and he simultaneously switched a less qualified employee, Sujatha Mizar, into Tuvell's position, A614, A616-A617, A647, A664-A670, A671, A746, A753, A786, A808, A840, A864, A875, A931-A932; (4) Feldman required that all verbal communications with Tuvell be in the presence of an HR professional, and all written communications with Tuvell be copied to an HR professional, based on Tuvell's past history of litigation and engaging in protected complaints about harassment, A617, A862, A864, A934; (5) Feldman disciplined Tuvell for failing to provide a status update on the transition of his work to Mizar, even though Mizar had already submitted the applicable joint report, A617, A674-A678, A935, A947-A948, A950; (6) Feldman imposed on Tuvell the impossible task of piecing together, independently of Mizar and Feldman, on a single day's notice, a detailed day-by-day schedule for three weeks, reflecting his taking over of Mizar's four duties on his reassignment, which was unachievable given that Tuvell had no acquaintance of his four entirely new responsibilities in the transition, and Feldman refused to provide Tuvell an example of such a schedule, A618, A620, A747, A936, A952-A953, A955, A958, see Laster v. Kalamazoo, 746 F.3d 714, 732 (6th

Cir. 2014) (heightened scrutiny may constitute a Title VII violation); (7) reflecting a preexisting secret plan to write up Tuvell for something, Feldman issued a Formal Written Warning to him on August 3, 2011, with a threat of termination, because Tuvell wrote, "or if you're lazy you can just click this link;" A620-A621, A662-A664, A785, A790-A791, A1287-A1291; (8) Feldman forbade Tuvell from spending pre-agreed time on his internal complaint of harassment, and then threatened Tuvell with termination when he said, "Now wait a minute, Dan." A620-A621.

Tuvell went out on STD due to severe PTSD symptoms caused by Feldman's harassment. A621-A622, A899, A965. While out on leave, the harassment by IBM continued, including: (9) refusal to appropriately act on Tuvell's internal complaints of harassment while he was on medical leave, and delaying resolution by four-and-a-half months, A619, A626; (10) curtailing Tuvell's computer access based expressly on his being on medical leave A687-A688, A1296; (11) admittedly curtailing Tuvell's use of the IBM email system because he forwarded his protected complaints of harassment and discrimination to others within IBM, calling it "misuse," A1073; (12) barring Tuvell from IBM facilities expressly because he was out on disability leave, A905-A906, A1076; see Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005) ("exclusion" and "denial of support" may contribute to the creation of a hostile work environment)

(citation omitted); (13) counting as sick days Tuvell's work at home A625; (14) denying Tuvell a transfer based on his being on STD, A969, A1013-1014; (15) threatening to fire Tuvell for circulating his protected complaints of discrimination to certain IBM employees A925, A1129; (16) threatening to fire Tuvell when he declined to reveal where he worked at a second job, and falsely accusing Tuvell of violating an inapplicable internal policy, A635, A745-A746, A1143, A1150, A1157-A1159, A1163; (17) consistently rejecting Tuvell's requests for reasonable accommodation, which would have allowed Tuvell to return to work and be paid. A94, A631, A634, A461. A reasonable jury could find that IBM's conduct could be severe or pervasive, such that a hostile work environment was created. See, e.g., Clifton v. MBTA, 445 Mass. 611, 617 n.5 (2005) (hostile work environment may be manifested even by a series of "pinpricks" that slowly add up to a wound).

## VII. TUVELL SUFFERED A NUMBER OF ADVERSE ACTIONS WHILE STILL EMPLOYED ON TOP OF HIS TWO REJECTIONS FOR TRANSFER

In addition to constituting a link in a chain of harassment constituting an unlawful hostile work environment, a number of the actions just enumerated are sufficient, in and of themselves, or in combination, to constitute tangible adverse actions, such that they "well might have dissuaded a reasonable worker from" engaging in protected activities, such as opposing discrimination or unlawful retaliation. Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct.

2405, 2415 (2006). See also Sensing, 575 F.3d at 160 (actions that disadvantage employees with respect to terms and conditions of employment constitute "adverse employment actions" for discrimination claim).

One of the adverse actions Tuvell suffered in the midst of suffering the two rejections for job transfer that were also adverse actions (discussed supra at 34-46) was IBM's curtailment of his access to IBM's buildings, computer networks, and email systems with which he could communicate with coworkers. A687-A688, A905-A906, A1073, A1076, A1296. This adverse action even interfered with his ability to enter an IBM building to interview for his transfer, thereby completing his figurative and literal banishment from the workplace. A1204-A1205; Billings v. Town of Grafton, 515 F.3d 39, 54, n.13 (1st Cir. 2008) (combination of slights may together rise to the level of an adverse action, including barring access to selectman's office).

The August 3, 2011 formal warning letter, with its threat of discharge, may also constitute an adverse action, based on its falsity. A616, A620-A621, A657-A658, A700-A701, A706-A707, A725, A790, A1287-A1291. Ritchie, 60 Mass. App. Ct. at 665 (false reprimands and evaluations are adverse actions for purposes of a Rule 12 motion); Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 97 (1st Cir. 2006).

The reassignment of Tuvell from doing the highest-level work within the Performance Architecture group to the lowest could also be considered an adverse action by a reasonable jury considering Count VI, where Tuvell, a Band 8 employee, was thereafter responsible for work that had been performed by a Band 7 employee. A616, A753, A786. Due acknowledged the reassignment to be to a "lesser role." A753, A786. Tuvell was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower-level work. A671, A746, A864. The change also constituted a "public humiliation." A864. IBM's own policies treat an "undesirable reassignment" as a tangible adverse employment action. A875, A931-A932. Further, the reassignment meant change of worksite to Marlborough from (mostly) Cambridge, which Tuvell regarded as a preferable location, and an increase in commuting distance of thirty miles each direction. A666, A669-670, A746; Burlington Northern, 126 S. Ct. at 2416 (reassignment of job functions were adverse, even if they fell within the worker's pre-existing job description).

There is sufficient evidence that Tuvell's demotion of June 10, 2011, was based on his disability. Feldman was aware of Tuvell's PTSD at least as early as May 26, 2011. A661. Tuvell was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Feldman, and

IBM acknowledges a lack of performance issues prior to May 18, 2011, the day on which harassment started, triggering Tuvell's PTSD. A258-A259, A614, A649-A653, A749-A751. Feldman also regarded Tuvell's work in the Performance Architecture area as competent and his interactions with others to be professional. A648, A654. Via the demotion, however, Feldman assigned Tuvell to switch roles with Mizar, despite Tuvell having decades more relevant experience for the position and despite Mizar's lack of a Ph.D. A614, A616-A617, A647.

IBM takes the position that the demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." A726. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." A1168. Evidence of pretext generates an inference of discrimination to be resolved by the jury. Lipchitz v. Raytheon Co., 434 Mass. 493, 501, 506-07 (2001).

IBM also justified the demotion based on Tuvell's alleged failure to produce Excel graphics, as allegedly required by Knabe. A654-A658, A668. However, that justification is pretextual, as Tuvell was never asked to produce Excel graphics. A616. Moreover, Feldman and Knabe both knew that Tuvell did not use Excel, so Knabe could not have logically asked him to complete such an

assignment. A657-A658, A700-A701. Finally, IBM's descriptions of the Excel incident are inconsistent, as it elsewhere described Tuvell as performing his work "too slowly," as opposed to not providing the work at all. A706-A707, A725; Velez v. Thermo King, Inc., 585 F.3d 441, 449 (1st Cir. 2009) (pretext based on changing explanations).

The demotion also came two days after Knabe yelled at Tuvell and, with knowing falsity, accused him of not producing work. A616. Feldman refused to investigate, and refused to respond to Tuvell's repeated inquiries for more detail concerning his alleged misconduct. A616. Feldman repeatedly denied Tuvell's requests for a three-way meeting with Knabe, himself, and Feldman to clear the air. A616, A660-A661. While Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had convened just such a three-way meeting between the three of them in March 2011, concerning a different issue. A660, A746. A reasonable jury could find that Feldman was not proactive in resolving the underlying issues, because he realized that the grievances against Tuvell had no actual merit. Moreover, as Tuvell was being demoted, Knabe, who was not disabled and had acknowledged yelling at Tuvell, was not reassigned or otherwise disciplined in any way. A662-A664, A785, A790-A791. See, e.g., Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997) (disparate

treatment is the "most probative means of establishing that the plaintiff's termination was a pretext for [unlawful] discrimination.").

Just three days after the demotion, on June 13, 2011, Feldman, the decision-maker with respect to the demotion, wrote an email to his boss and a member of HR in which he claimed Tuvell was "irrational and potentially dangerous" in conjunction with his PTSD, and Feldman advocated barring Tuvell from the workplace and firing him. A672-A673, A1293. There is much other direct evidence demonstrating discriminatory animus with respect to Tuvell's disability, as described supra at 9, 15, 40.

## VIII. THE TERMINATION WAS DISCRIMINATORY AND/OR RETALIATORY – COUNT VI

There is also sufficient evidence that Tuvell's May 17, 2012 termination, A636, was based on retaliation and/or disability discrimination. At the time of discharge, Tuvell was disabled (PTSD), and his disability was known to IBM. E.g., A615, A1293. Tuvell had lodged repeated, recent protected complaints of discrimination and retaliation. A635-A636, A1140-A1141, A1151. There is sufficient evidence that Tuvell was qualified for the position, as IBM kept offering to reinstate him to that position once he returned from sick leave, and that work had previously been performed by a more junior-level employee with fewer qualifications. A614, A616-A617, A647, A666-A668, A753, A786. The May 17,

2012 termination was an adverse action. A636. See, e.g., Sensing, 575 F.3d at 157 (termination is an adverse employment action). The final element of the prima facie discrimination case is established because IBM attempted to fill Tuvell's position. A197. The final element of the prima facie retaliation case is established because the termination occurred within days of Tuvell's making protected complaints about unlawful harassment and retaliation. A635-A636, A1140-A1141, A1151.

The direct evidence of animus based on disability and retaliation described supra at 9, 15, 40, 43-45, applies equally here, and establishes a genuine issue of material fact that Tuvell's termination was based on disability discrimination and/or retaliation for complaining of discrimination and/or seeking or availing himself of reasonable accommodation. The evidence of retaliatory animus includes the fact that on March 13, 2012, Mandel, the employee in charge of IBM's investigations into Tuvell's complaints of discrimination and retaliation, *threatened Tuvell with termination if he continued emailing his complaints of discrimination to others*. A925, A1129. ADD 46, EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II (B)(2) (complaining to *anyone* about discrimination is protected opposition under the ADA).

There is also evidence of pretext specific to the termination. On May 7, 2012, IBM wrote to Tuvell, stating that it believed Tuvell to be working for EMC,

a competitor, and threatening termination. A635, A1143, A1150. On May 8, 2012, Tuvell denied working for EMC. A635. Tuvell explained that he did not wish to inform IBM where he was working, as he feared a retaliatory response. A635. On May 11, 2012, IBM demanded to know where Tuvell was working, citing an inapplicable policy, and its need to confirm that Tuvell was not working for a competitor. A635, A745-A746, A1157-A1159, A1163. On May 15, 2012, IBM demanded to know Tuvell's employer, purportedly based on its duty to confirm that Tuvell was not working for a competitor. A636, A1151, A1163. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a non-employee there, and he suggested that he be permitted to submit the information about his alternate employment to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. A635-A636, A745, A1157-A1158. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2012. A636. The evidence of pretext, along with the prima facie case, establishes an inference of discriminatory or retaliatory motive sufficient to reach the jury. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000); Lipchitz, 434 Mass. at 501, 506-07 (showing that one or more articulated reasons are false generates inference of discrimination).

## IX. IBM'S INVESTIGATIONS WERE UNLAWFUL AND/OR INADEQUATE – COUNT VIII

A reasonable jury could find that IBM's investigations of Tuvell's complaints of discrimination were inadequate, delayed, biased, and unlawful. An inadequate response to an internal complaint "could itself foster a hostile environment and so give rise to liability therefor." Lightbody v. Wal-Mart Stores East, L.P., No. 13-cv-10984-DJC, 2014 WL 5313873, at *5 (D. Mass. Oct. 17, 2014). Also, a failure to properly investigate, in addition to supporting a hostile work environment claim, may form an independent basis for liability. College-Town v. MCAD, 400 Mass. 156, 167-68 (1987); Kenney v. R&R Corp., 20 MDLR 29, 31 (MCAD Feb. 9, 1998).

Tuvell complained to HR of harassment and disability discrimination on June 13, 2011. A708. Lisa Due conducted IBM's initial investigation of Tuvell's complaints that month. A382-A387, A389. However, when conducting that investigation, Due did not explore the qualifications of Mizar, the employee who took over Tuvell's work upon his demotion, and Due did nothing to inquire of Feldman about his attitudes towards Tuvell's PTSD. A768, A782. Prior to Due's completion of the investigation, she met with Mandel, who instructed her to inform Tuvell that Due had no reason to conclude that Tuvell had been mistreated. A794-A795. In addition to never seriously investigating Tuvell's complaints of

discrimination, Due also never investigated whether Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. A797, A1078.

Tuvell appealed Due's conclusion to Mandel. A619, A894-A895. However, Mandel was biased as an appeal investigator, because he had already instructed Due how to respond with respect to her initial investigation. A794-A795. Moreover, Mandel was an inappropriate investigator under IBM's own conflict-of-interest policy, as he, personally, had been accused by Tuvell of wrongdoing and discrimination, based on his failure to advance the investigation during the pendency of Tuvell's disability leave, and his false assertions to Tuvell about IBM's practice of investigating third party complaints. A799-A800, A897-A898, A903-A904, A929-A930, A941-A942, A1215-A1218, A1221, A1226-A1228, A1237-A1238, A1245.

In August 2011, Mandel repeatedly, and over Tuvell's objections, refused to advance the investigation because Tuvell was on medical leave. A899-A901, A904, A966, A1261. Mandel informed Tuvell of the negative conclusion of his investigation on November 17, 2011, *19 weeks* after the investigation had been requested. A619, A626. Given that IBM takes the position that Mandel had already completed his investigation by September 15, 2011, A397, with no explanation for the additional two-month delay in informing Tuvell of the result, a

jury could conclude that IBM intentionally used the delay to keep Tuvell out of the workplace.

Mandel's investigation was biased and one-sided, as Knabe and Feldman, but not Tuvell, were accorded the opportunity to review Mandel's draft conclusions, and offer suggestions. A1265-A1274. Though Mandel understood that Tuvell's complaint included the allegations that his demotion was discriminatory and/or retaliatory, Mandel never investigated whether that demotion was appropriate, and he failed to inquire as to whether Feldman exhibited any animus based on handicap and/or retaliation. A893, A909-A910. Mandel's conclusions did not address Tuvell's allegations of wrongdoing against Knabe or Mandel. A626-A627.

On January 22, 2012, Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Tuvell a requested transfer based on retaliation and in violation of the obligation to reasonably accommodate. A911-A913, A1280. Mandel, the investigator, never looked into whether the rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate Tuvell. A914, A916. On March 2, 2011, Tuvell filed a third Corporate Open Door Complaint, alleging that Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. A919-A920, A1257-A1258. Mandel never opened up an investigation to respond to this

Complaint, and there was no formal response. A747, A920-A921. For these and for many other reasons, see A1309-A1418, a reasonable jury could conclude that IBM's investigation and response to Tuvell's complaints were inadequate. See College-Town, 400 Mass. at 167-68 (holding employer liable for its "deferential and inadequate" investigation).

## CONCLUSION

For the aforestated reasons, Tuvell respectfully requests that this Court reverse the entry of summary judgment and remand the case for trial. Tuvell also requests that he be awarded attorney's fees and costs.

Respectfully submitted,

Plaintiff-Appellant Walter Tuvell,

By his Attorney

/s/ Andrew P. Hanson

Andrew P. Hanson, Esq.
BBO #672696
Andrew P. Hanson, Esq.
One Boston Place
Suite 2600
Boston, MA 02108
Tel: (617) 933-7243
Fax: (857) 239-8801
Email: andrewphanson@gmail.com

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

**Certificate of Compliance with Type-Volume Limitation, Typeface Requirement, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 13,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14 point font.

/s/ Andrew P. Hanson
Andrew P. Hanson, Esq.

Dated: December 1, 2015

CERTIFICATE OF FILING AND SERVICE

I, Elissa Matias, hereby certify pursuant to Fed. R. App. P. 25(d) that, on December 1, 2015, the foregoing Brief for Plaintiff-Appellant was filed through the CM/ECF system and served electronically on the individual listed below:

Matthew A. Porter
Anne Selinger
Jackson Lewis PC
75 Park Plaza
4th Floor
Boston, MA 02116
(617) 367-0025

/s/ Elissa Matias
Elissa Matias

NO. 15-1914

# United States Court of Appeals for the First Circuit

WALTER TUVELL

Plaintiff/Appellant

v.

INTERNATIONAL BUSINESS MACHINES, INC.

Defendant/Appellee

ON APPEAL FROM THE DISTRICT COURT OF MASSACHUSETTS, BOSTON

## BRIEF FOR THE DEFENDANT-APPELLEE INTERNATIONAL BUSINESS MACHINES, INC.

Joan Ackerstein, No. 33113
Matthew A. Porter, No. 39507
Anne Selinger, No. 1164576
JACKSON LEWIS P.C.
75 Park Plaza, 4th Floor
Boston, MA 02116
617-367-0025

Dated: January 21, 2016

## CORPORATE DISCLOSURE STATEMENT

NOW COMES Appellee International Business Machines, Inc., by and through counsel, and submits the following Corporate Disclosure Statement pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure. IBM has no parent corporation. IBM is a publicly traded corporation (NYSE: IBM), and no publicly held entity owns more than 10% of IBM's stock.

# TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ..... 2
TABLE OF CONTENTS ..... 3
STATEMENT OF THE ISSUES ..... 9
STATEMENT OF THE CASE ..... 11
STATEMENT OF THE FACTS ..... 16
A. Tuvell At Netezza and IBM ..... 16
B. Tuvell's Claim Of Post Traumatic Stress Disorder ..... 16
C. Tuvell's Inappropriate Communications With And Behavior Towards His Supervisors While An IBM Employee ..... 17
D. Tuvell Complains That Work Assignments Are "Harassment" And IBM Conducts An Investigation Into His Work Situation ..... 20
E. Tuvell Continues To Communicate With His Supervisor Inappropriately And Receives A Written Warning ..... 23
F. Tuvell Submits His First Corporate Open Door Complaint ..... 25
G. Tuvell Takes A Medical Leave of Absence from IBM And Submits Medical Treatment Reports Indicating He Is Totally Impaired And Unable To Work ..... 26
H. Tuvell Applies For Another Position With IBM While Out On Leave And Impaired To Work ..... 333
I. Tuvell Finds New Employment While On Leave From IBM And Is Subsequently Terminated From IBM For Failing To Inform IBM Where He Is Working ..... 377
SUMMARY OF THE ARGUMENT ..... 39
ARGUMENT ..... 41
THE STANDARD OF REVIEW ..... 41
I. TUVELL IS NOT A QUALIFIED HANDICAPPED PERSON THUS IBM IS ENTITLED TO JUDGMENT ON THE DISABILITY CLAIMS IN COUNTS I-VIII ..... 42
II. IBM WAS NOT REQUIRED TO PROVIDE TUVELL WITH A REASONABLE ACCOMMODATION BUT DID SO ANYWAY ..... 47
A. Tuvell's Demand For A New Supervisor Was Not A Reasonable Accommodation ..... 49

B. IBM Was Not Required To Transfer Tuvell To An Open Position For Which He Was Not Qualified ..... 50

C. IBM Attempted To Engage In The Interactive Process But Tuvell Refused ..... 53

III. IBM IS ENTITLED TO JUDGMENT ON TUVELL'S DISABILITY DISCRIMINATION CLAIMS BECAUSE TUVELL HAS NOT MADE OUT A *PRIMA FACIE* CASE OR REFUTED IBM'S LEGITIMATE BUSINESS REASONS ..... 55

A. Tuvell's Disability Discrimination Claims Fail Because He Cannot Make A *Prima Facie* Case of Discrimination or Establish Pretext ... 55

B. The Termination of Employment Was Not Discriminatory or Retaliatory ..... 599

C. Tuvell's Other Purported "Tangible Acts" Are Not Adverse Actions Or Harassment Under Chapter 151B or the ADA ..... 60

D. Tuvell Was Not Subjected To A Hostile Work Environment Thus Judgment On Count VII Should Be Affirmed ..... 62

IV. IBM IS ENTITLED TO JUDGMENT ON THE CLAIMS FOR RETALIATION IN COUNTS V-VIII ..... 63

V. IBM'S ALLEGED FAILURE TO INVESTIGATE CLAIM CANNOT SUCCEED BECAUSE THERE WAS NO UNDERLYING DISCRIMINATION ..... 67

VI. TUVELL HAS NOT APPEALED JUDGMENT AS TO HIS RACE, AGE, AND GENDER DISCRIMINATION CLAIMS ..... 68

CONCLUSION ..... 69

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Alvarado v. Donahoe*,
687 F.3d 453 (1st Cir. 2012).....62

*Anderson v. Liberty Lobby, Inc.*,
477 U.S. 242 (1986).....41

*Ansonia Bd. Of Educ. v. Philbrook*,
479 U.S. 60 (1986).....48

*August v. Offices Unlimited, Inc.*,
981 F.2d 576 (1st Cir. 1992).....45

*Balser v. IUE Local 201 v. Gen. Elec. Co.*,
661 F.3d 109 (1st Cir. 2011).....41

*Beal v. Board of Selectman*,
646 N.E.2d 131 (1995) .....44

*Blackie v. Maine*,
75 F.3d 716 (1st Cir. 1996).....66

*Bryant v. Caritas Norwood Hospital*,
345 F. Supp. 2d 155 (D. Mass. 2004).....47

*Burlington Indus., Inc. v. Ellerth*,
524 U.S. 742 (1988).....57

*Cailler v. Care Alternatives of Massachusetts*,
LLC, 2012 U.S. Dist. LEXIS 39414 (D. Mass. March 23, 2012).....49

*Colón-Fontánez v. Municipality of San Juan*,
660 F.3d 17 (1st Cir. 2011).....63

*Cook v. CTC Comm. Corp.*,
2007 U.S. Dist. LEXIS 80849 (D.N.H. Oct. 15, 2007).....67

*Cox v. New England Tel. & Tel. Co.*,
414 Mass. 375 (1993) .....43, 51

*Darian v. University of Massachusetts Boston*,
980 F. Supp. 77 (D. Mass. 1997).....48

*Dickenson v. UMass Mem. Medical Group*,
2011 U.S. Dist. LEXIS 30932 (D. Mass. Mar. 24, 2011) .....65

*Faiola v. APCO Graphics, Inc*.,
629 F.3d 43 (1st Cir. 2010).....43, 56

*Farmers Ins. Exch. v. RNK, Inc*.,
632 F.3d 777 (1st Cir. 2011).....41

*Fincher v. Depository Trust and Clearing Corp*.,
604 F.3d 712 (2nd Cir. 2010) .....67

*Freadman v. Metro. Prop. & Cas. Ins. Co*.,
484 F.3d 91 (1st Cir. 2007).....56

*Godfrey v. Globe Newspaper Co., Inc.*,
928 N.E.2d 327 (2010) .....44, 50

*Gomez-Perez v. Potter*,
452 Fed. Appx. 3 (1st Cir. 2011) .....62

*Henry v. United Bank*,
686 F.3d 50 (1st Cir. 2012).....43

*Jones v. Nationwide Life Ins. Co*.,
696 F.3d 78 (1st Cir. 2012).....51, 52

*Jones v. Walgreen Co*.,
679 F.3d 9 (1st Cir. 2012).....63

*Keeler v. Putnam Fiduciary Trust Co*.,
238 F.3d 5 (1st Cir. 2001).....67

*King v. Boston*,
883 N.E.2d 316 (2008) .....56, 60

*Litovich v. Somascan, Inc*.,
2008 U.S. Dist. LEXIS 108627 (D. Mass. Dec. 17, 2008).....48

*Melanson v. Browning-Ferris Indus.*,
281 F.3d 272 (1st Cir. 2002).....41

*Mesnick v. General Electric Co.*,
950 F.2d 816 (1st Cir. 1991).....58

*Mole v. University of Massachusetts*,
442 Mass. 582 (2004).....65

*Noon v. IBM*,
2013 U.S. Dist. LEXIS 174172 (S.D.N.Y. Dec. 11, 2013).....48

*Parra v. Four Seasons Hotel*,
605 F. Supp. 2d 314 (D. Mass. 2009).....68

*Perez v. Volvo Car Corp.*,
247 F.3d 303 (1st Cir. 2001).....41

*Pesterfield v. Tennessee Valley Authority*,
941 F.2d 437 (6th Cir. 1991).....44, 45

*Reed v. LePage Bakeries, Inc.*,
244 F.3d 254 (1st Cr. 2001).....52

*Rennie v. United Parcel Service*,
139 F. Supp. 2d 159 (D. Mass. 2001).....53

*Russell v. Colley Diickinson Hosp., Inc.,*
437 Mass. 443 (2002).....51

*Sensing v. Outback Steakhouse of Florida, LLC*,
575 F.3d 145 (1st Cir. 2009).....60

*Suarez v. Pueblo Int'l, Inc.*,
229 F.3d 49 (1st Cir. 2000).....42

*Sullivan v. Raytheon Co.*,
262 F.3d 41 (1st Cir. 2001) .....53

*Symonds v. Federal Express Corp.*,
2011 U.S. Dist. LEXIS 150056 (D. Me. Dec. 31, 2011).....61

*Thomas v. Eastman Kodak*,
183 F.3d 38 (1st Cir. 1999) .....53

*Verdrager v. Mintz, Levin et al.*,
2013 Mass. Super. LEXIS 206 (Mass. Super. Ct. 2013).....68

*Walters v. Mayo Clinic*,
998 F. Supp. 2d 750 (W.D. Wis. 2014).....48

*Weiler v. Household Finance Corp.*,
101 F.3d 519 (7th Cir. 1996) .....50

*Wernick v. Federal Reserve Bank of New York*,
91 F.3d 379 (2nd Cir. 1996) .....49, 50

*Williams v. Phila. Housing Auth. Police Dep't*,
380 F.3d 751 (3d Cir. 2004) .....48

**STATUTES**

42 U.S.C. §§ 12111(9)(B).....52

Americans with Disabilities Act, 42 U.S.C. §12101 .....*passim*

Mass. Gen. Laws c. 151B .....*passim*

**OTHER AUTHORITIES**

29 C.F.R. pt. 1630 App. § 1630.9.....54

EEOC Notice No. 915.002 .....50, 52

## STATEMENT OF THE ISSUES

1. Did the District Court properly determine that Tuvell was not a qualified disabled person because he could not perform the essential functions of his job with or without a reasonable accommodation based on evidence which included at least Tuvell's testimony and writings and medical forms completed by Tuvell's health care providers that certified him as "totally disabled" and not "able to function at his job responsibilities?"
2. Did the District Court properly determine that, notwithstanding the fact that Tuvell was not a qualified handicapped person, IBM reasonably accommodated Tuvell?
3. Did the District Court properly determine that Tuvell's failure to be hired for or transferred to another position is not actionable?
4. Did the District Court properly determine that Tuvell was not subjected to a hostile work environment?
5. Did the District Court properly determine that the other "tangible acts" cited by Tuvell were not adverse employment actions as they did not alter the material terms or conditions of his employment?
6. Did the District Court properly determine that Tuvell's termination from employment was not discriminatory and/or retaliatory where IBM proffered a legitimate reason for the termination –Tuvell's refusal to

disclose the name of the employer for whom he began working while on leave – and Tuvell offered no evidence of pretext?

7. Did the District Court properly determine that Tuvell could not prevail on his failure to investigate claim where he could not establish that IBM failed to conduct a reasonable investigation into his complaints and where no independent claim of failure to investigate exists absent underlying proof of discrimination?

## STATEMENT OF THE CASE

Walter Tuvell filed his First Amended Complaint ("FAC") on June 6, 2013, alleging against International Business Machines, Inc. ("IBM"), his then employer, claims under the Americans with Disabilities Act, 42 U.S.C. §12101, and Mass. Gen. Laws c. 151B of race, gender, age and disability discrimination and retaliation. The eight counts in the FAC, as characterized by Tuvell, are as follows: (I) Failure to Engage in the Interactive Process- ADA and Chapter 151B; (II) Failure to Reasonably Accommodate Plaintiff – ADA and Chapter 151B; (III) Failure to Assist In Helping Mr. Tuvell Obtain the Reasonable Accommodation of Reassignment to a Vacant Position for Which He Was Qualified – ADA and Chapter 151B; (IV) Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 – ADA and Chapter 151B; (V) Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 On the Basis of Handicap Discrimination, Retaliation for Availing Himself of the Reasonable Accommodation of Medical Leave, Retaliation for Engaging in Other Protected Conduct, Race, Gender, Age, and/or Any Combination Thereof – ADA and Chapter 151B; (VI) Tangible Job Actions on Account of Handicap, Retaliation, Race, Age, and/or Any Combination Thereof – ADA and Chapter 151B; (VII) Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – ADA and Chapter 151B;

and (VIII) Failure to Investigate and Remediate Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – Chapter 151B and the ADA. (R.A. 10-39).

Tuvell's claims of discrimination and retaliation all stem from two interactions with two supervisors in May and June 2011, after six months of uneventful employment. Tuvell claims these two benign interactions triggered his Post Traumatic Stress Disorder ("PTSD"), which was caused by the withdrawal of a job offer in 1997. (R.A. 100-01, 241-42).[1] As a result of those interactions, Tuvell within days complained of gender, race, age, and disability discrimination and subsequently requested a medical leave of absence. An IBM Senior Case Manager who investigated Tuvell's concerns in June 2011, shortly after the events in question, concluded his claims could not be substantiated. (R.A. 107-09, 117).

IBM filed its Motion for Summary Judgment on December 12, 2014, with a supporting Memorandum, Statement of Material Facts Not in Dispute, and the Affidavit of Joan Ackerstein. (Doc. Nos. 73-76). Tuvell filed a Memorandum in Opposition to IBM's Motion for Summary Judgment on February 12, 2015, with Plaintiff's Responses to Defendant's Statement of Facts and a separate Statement

[1] Tuvell's Response to IBM's Statement of Material Facts appears at pp. 98-149 of the Record Appendix. The majority of IBM's supporting citations are to both the Statement of Material Facts and the record evidence on which each fact is based.

of Material Facts and Exhibits Submitted in Opposition to Defendant's Motion for Summary Judgment. (Doc. Nos. 81-85).

IBM filed its Reply to Tuvell's Opposition to Summary Judgement on March 2, 2015, with a Response to Tuvell's Statement of Material Facts and a Supplemental Affidavit of Joan Ackerstein. (Doc. Nos. 86-88). In its Reply, IBM noted that Tuvell admitted 32 of IBM's 81 Material Facts Not in Dispute, and virtually admitted another 46 facts, denying them only by claiming a witness would not be believed, setting forth his own opinion without citing to evidence or disputing a statement in a non-material way. (Doc. No. 86, IBM Reply at 2). In sum, IBM demonstrated that Tuvell disputed only three of IBM's Material Facts, and that even those disputes were inconsequential. (*Id.* at 2, n. 1).[2]

On July 7, 2014, the District Court awarded summary judgment to IBM on the FAC in its entirety. In its Memorandum and Order, the Court awarded summary judgment on Tuvell's reasonable accommodation claims (Counts I-V) because Tuvell "failed to demonstrate that he was capable of performing the

[2] In its Response to Tuvell's Statement of Facts, IBM argued that Tuvell's 35-page response to IBM's Statement of Facts, as well as his own 28-page Statement of Facts, improperly contained conclusory argument and legal citations in violation of L.R. 56.1. (Doc. No. 87). IBM also filed a Motion and supporting Memorandum to Strike Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to the Motion for Summary Judgment, seeking to strike portions of Tuvell's Affidavit which lacked personal knowledge or other evidentiary foundation, as well as three exhibits that were irrelevant and inadmissible. (Doc. Nos. 89, 90).

essential functions required of his job, even with a reasonable accommodation." (Add. 13). The Court further ruled that even if Tuvell were a qualified handicapped person, his failure to accommodate claims could not succeed because the record evidence demonstrated that IBM engaged in the interactive process by offering Tuvell various accommodations, including receiving his performance reviews from a different supervisor, medical leave for doctor's appointments and the ability to apply for other jobs on IBM's internal job listing application. (Add. 18). The Court held, with respect to Tuvell's request for a new supervisor or transfer to a new position, that Tuvell had not demonstrated that either would enable him to perform the essential functions of his job given his serious impairments in "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities," as set forth in his medical reports. (Add. 20).

The Court awarded summary judgment on Tuvell's disability discrimination claims, (Counts VI-VIII), because Tuvell could not establish that he was a qualified handicapped person, or that he was subjected to adverse actions or that IBM's legitimate reasons for actions were a pretext for discrimination. (Add. 21-22). The Court specifically found that the "tangible acts" on which Counts VI-VII were based did not constitute adverse employment

actions because none of them caused "real harm" or any effect on Tuvell's "pay, benefits, title or any other term or condition of his employment." (Add. 24).

With respect to Tuvell's hostile work environment claim (Count VII), the Court concluded that while Tuvell found certain incidents "subjectively offensive," the "complained of 'tangible acts' represent regular business practices and policies . . . and relatively standard workplace interactions and criticisms," and, as such, "do not approach the level of severe or pervasive conduct that would be objectively offensive." (Add. 25).

Finally, the Court found that Tuvell could not prevail on his retaliation claims (Counts V-VIII), because the "pre-termination actions complained of by Tuvell are not adverse employment actions" and IBM offered a legitimate, nonretaliatory reason for the termination of Tuvell's employment, for which Tuvell could not demonstrate pretext. (Add. 26). The Court entered summary judgment on Tuvell's claims of other types of discrimination based on age, gender and race (Counts V-VIII), because Tuvell offered no facts supporting such claims. (Add. 27).

## STATEMENT OF THE FACTS

### A. Tuvell At Netezza and IBM

Tuvell is a white male hired by Netezza Corporation on November 3, 2010, when he was age 64. At Netezza, Tuvell reported to Daniel Feldman and also worked with Fritz Knabe. IBM acquired Netezza in January 2011, at which time Tuvell became an IBM employee. Tuvell, a software developer, worked in IBM's Performance Architecture Group under the supervision of Daniel Feldman, reporting on a "dotted line" to Fritz Knabe. (R.A. 10-11).

### B. Tuvell's Claim Of Post Traumatic Stress Disorder

Tuvell's FAC alleges that he suffers from Post Traumatic Stress Disorder ("PTSD"). (R.A. 583) For purposes of summary judgment, IBM does not contest that the condition which disabled Tuvell is PTSD.[3]

The "traumatic" event on which Tuvell's alleged PTSD is based occurred fourteen (14) years before Tuvell became an IBM employee. In 1997, Tuvell was allegedly offered a job by Microsoft Corporation but Microsoft rescinded that offer after Tuvell and his wife met with Microsoft employees in Seattle. (R.A. 98, 241-42). Tuvell considered Microsoft's treatment of him and his family as tantamount to "rape," recounting the situation in a complaint he submitted to

[3] For purposes of summary judgment, IBM did not challenge the claimed disability. However, in the event of a trial, IBM would dispute that the disabling condition is PTSD.

Microsoft entitled, "Sleepless in Boston. How Microsoft Raped My Family While Recruiting Me, January 24-April 20, 1997." (R.A. 99, 247-48, 1201). In 2001, Tuvell was diagnosed with PTSD based on the Microsoft incident by a licensed social worker (Stephanie Ross) who has been treating him since 1993. (R.A. 241-42, 1042, 1187).

### C. Tuvell's Inappropriate Communications With And Behavior Towards His Supervisors While An IBM Employee

For the first six months that Tuvell worked for IBM (November 2010 – April 2011), Tuvell's employment was uneventful. That changed with Tuvell's reaction to two normal workplace incidents, the first of which occurred on May 18, 2011. On that date, Knabe advised Feldman that Tuvell failed to complete an assignment. When Feldman raised the issue with Tuvell, he became upset, called Knabe a "liar" and denied that Knabe ever gave him that particular assignment. (R.A. 100, 259, 269-274, 556-57).

The second "incident" took place on June 8, 2011. At that time, Knabe asked Tuvell about an outstanding work assignment in front of other employees and, according to witnesses, in the ensuing discussion both Tuvell and Knabe raised their voices. (R.A. 101, 260-265). There is no dispute that all that followed –including Tuvell's insistence that he was being harassed and discriminated against – stemmed from those two incidents, which Tuvell acknowledges and describes at page 4 of his brief.

Following the June 8 discussion with Knabe, Tuvell sent him an aggressive email in which he berated Knabe for his misunderstanding of Tuvell's communications with him. Addressing their earlier disagreement, Tuvell wrote:

> At about 3pm, you jumped on me for not having run a perf-stat-ready build (i.e. turbo), with stats, so that Steve could use the stats. You did so publically, in the Camb office, in a LOUD voice, in a CONDESCENDING manner (you know, like the time you publically berated Michael Sporer when he and everyone else became impatient when you fumbled for 15 minutes at the Wahoo status meeting with a recalcitrant presentation . . .) . . . This was not acceptable behavior from my point of view, and I asked you to get off my back.

(R.A. 849). The next day, Knabe told Feldman that he did not think he could maintain a good working relationship with Tuvell. On June 10, 2011, Feldman told Tuvell that he did not believe that Tuvell and Knabe could continue working effectively together, and assigned Tuvell to provide performance architecture support on a different project in place of another employee, Sujatha Mizar, a younger, female, Asian employee. (R.A. 101, 104, 328-333). Mizar, in turn, was assigned to work with Knabe. Tuvell's assignment to the new project did not result in any change in his pay or rank. (R.A. 101, 331-33).

Tuvell testified that he believed that Feldman's decision to have him and Mizar switch projects was motivated by age, sex, and race discrimination, as

Mizar is an Asian female who is younger than Tuvell and, in his opinion, less qualified. (R.A. 104, 274-75, 435).[4]

Two days later, on June 12, 2011, Tuvell sent Feldman a disturbing email that began as a status update on work assignments but quickly devolved into a diatribe against Knabe and Feldman. In the email, Tuvell referenced an assortment of tests that Knabe suggested Tuvell run, which Tuvell described as "worthless," which "'must' have been obvious to [Knabe], but it's his manner to arbitrarily assign scut work to me (seemingly due to neuroses of his own, as has become increasingly clear to me)." (R.A. 852). The email then described Tuvell's perception of what had transpired that week:

> BTW, have you noticed that all the above were 5 days of work packed into only 3 days? I did this voluntarily, of course, as I always step up where above-and-beyond-the-call-of-duty is required. Nevertheless, that good deed didn't go unpunished, because [Knabe] shat upon me in public (Camb office) with lies, bullying/harassment and yelling, and surreptitiously (behind my back, refusing to talk to me face-to-face) causing me to be 'fired' from the Wahoo project on Fri. This was an 'illegal' adverse job action (in the IBM sense, perhaps even in the civil law sense), because it was a consummated false defamation of me (IBM policy calls it 'harassment'), totally without due process.

[4] Tuvell is not pursuing his race, age, or gender discrimination claims on appeal, presumably because he had no evidence to support those claims.

(R.A. 853). Given the tone of Tuvell's email and his stated intent to pursue the matter formally with Human Resources ("HR"), Feldman advised Tuvell that he should copy HR on all future correspondence with Feldman. (R.A. 851).

### D. Tuvell Complains That Work Assignments Are "Harassment" And IBM Conducts An Investigation Into His Work Situation

Two days later, on June 14, 2011, Feldman sent both Tuvell and Mizar an email asking that they submit daily reports on their work transitioning into their new roles. While Mizar submitted a transition report to Feldman that day, Tuvell did not. The following day, Feldman sent Tuvell another email, reiterating his earlier request for a daily report and clarifying that he required reports from both Tuvell and Mizar. (R.A. 105, 476-77). In response to Feldman's request for a status update, Tuvell responded with a harshly worded email mocking Feldman's request and accusing him of harassment and retaliation. The email begins as follows:

> Oh Come on. Ok, you want a status report, I'll give you a status report. It is identical to Sujatha's. As if you didn't know that was obviously going to be the case, and which is the reason I didn't bother sending you this redundant, utterly useless information. I tried looking for 'my own words', but Sujatha's words can't be bettered and all we're really after here is clear communications, right?
>
> * * *
>
> As long as you insist on interacting with me in this sort of blatant (not even an attempt at subtlety) snide

> harassment/retaliation, I might as well bring the following piece of information (below) about this 'transition" to the attention of [Human Resources] . . . you and [Knabe] now appear to be on a campaign of actively persecuting me (this email of yours is a sample piece of evidence).

(R.A. 475).

In his June 15, 2011, Tuvell complained to HR Specialists Kelli-Ann McCabe and Diane Adams, that Feldman's request that Tuvell file a daily report constituted "blatant" and "snide harassment/retaliation," even though Feldman also required a daily report from Mizar.[5] (R.A. 106, 435-39, 543-46). On June 16, 2011, Tuvell sent multiple emails to Adams and McCabe, complaining of harassment by Feldman and Knabe based on Feldman's decision to switch Tuvell's work assignment with Mizar, and stating that it was impossible for him to continue to work with Feldman. (R.A. 106, 544-45). That same day, Adams forwarded Tuvell's email to Lisa Due, a Senior Case Manager in IBM's HR Department, who conducted an investigation. (R.A. 107, 383-85). In sum, despite six months of uneventful employment, within six days of the change in his work assignments, Tuvell concluded he could no longer work with Feldman.

Due's investigation expanded to include another complaint by Tuvell on June 17, 2011, which was based upon an email he received from Feldman

[5] Tuvell's assertion that he was "disciplined" for failing to provide the status report, (App. Br. 7), is not supported by the record.

requesting Tuvell's "independent perspective on the transition" to his new assignment. (R.A. 489). In that email, Feldman asked Tuvell for a "first draft for a detailed (one-day granularity) schedule for your work on the assigned projects between now and the beginning of your medical leave," in light of the fact that Tuvell was to be out for approximately a month beginning in early July for elective cosmetic surgery followed by vacation. (*Id.*). In response to Feldman's simple request, Tuvell wrote a lengthy email accusing Feldman of "engaging in a program of badgering/harassing/bullying blackballing me." (R.A. 486-88). Specifically, Tuvell characterized Feldman's request for a work schedule as "an impossible-to-succeed blackballing task."[6] (*Id.*). During the course of her investigation, Due asked Feldman to provide her with examples of similar requests to other employees and confirmed that Feldman had indeed asked other employees for such schedules. (R.A. 781).

Due's investigation included interviews with five individuals, including Tuvell, who described his experience working with Feldman and Knabe as "torture" and "rape." (R.A. 107, 389, 549, 753-59). After speaking with the five individuals, Due concluded that Tuvell's complaints were unsupported. (R.A.

[6] Tuvell's email also included several *ad hominem* attacks against Feldman, *e.g.*, "[y]ou are no hero"; "[t]o what extent could there be a smidgen of envy/jealousy/hate that I succeeded where everybody else, both in and out of the performance group, and throughout the company, and you yourself, failed?" (R.A. 486-87).

387). On June 29, 2011, Due sent Tuvell an email informing him of the results of her investigation and advising him of his appeal rights if he was dissatisfied with her findings. (R.A. 109, 1074). Based on Due's investigation and findings, IBM determined that moving Tuvell to another supervisor was not warranted. (R.A. 107-08, 387, 392-93). Tuvell appealed Due's findings to Russell Mandel, the Program Director for IBM's Concerns and Appeals, the following day, (R.A. 895), and submitted a more detailed Open Door Complaint based on the same issues in August of that year, *see* pp. 25-26.

### E. Tuvell Continues To Communicate With His Supervisor Inappropriately And Receives A Written Warning

In early July of 2011, Tuvell took a medical leave of absence for elective cosmetic surgery, followed by a vacation, and returned to work in early August of 2011. (R.A. 109). On July 6, 2011, before taking leave, Tuvell sent an email to one his colleagues and Feldman, explaining that he had completed an assignment regarding a wiki page and telling them they could find the results of his work by searching the wiki. Tuvell also attached a link and wrote, "if you're lazy you can just click this link." (R.A. 445). Feldman responded to Tuvell's email thanking him for the link and, following up on a previous conversation he and Tuvell had regarding Tuvell's communication style, mentioned that his use of the word "lazy" was "the sort of thing you want to avoid." (R.A. 444).

Initially, in response to Feldman's feedback, Tuvell sent an email to Feldman and his co-worker and apologized for his use of language that could have been interpreted as offensive. (R.A. 445). Then, on July 20, 2011, Tuvell sent Feldman and his co-worker an email retracting his apology for the July 6 email because he had concluded that "obviously no apology was necessary." (R.A. 444-47).

On August 3, 2011, shortly after Tuvell returned to work, Feldman met with him to discuss his pending and future assignments and to discuss Tuvell's recent behavior. During that meeting, Feldman gave Tuvell a written warning for his disruptive conduct, including Tuvell's July 2011 emails. (R.A. 110, 401, 443-47). While Tuvell claims that the written warning resulted from a "pre-existing, secret plan to write [him] up for something," (App. Br. 10), the reality is that Tuvell's disrespectful and inappropriate emails to Feldman beginning in June of that year compelled Feldman to reach out to HR for guidance on how to counsel Tuvell on the tone of his communications.[7] At that time, HR advised Feldman

[7] In addition to the emails already described, Tuvell sent others that were equally disrespectful towards Feldman, including a status update on June 30 which prompted Feldman to contact HR about a warning. That email consisted only of the word "Nil"; when Feldman requested clarification as to the meaning of that email, Tuvell wrote: "'Nil' meant what it's meant all along with these entirely superfluous 'transition updates': nothing to speak of with respect to the demotion . . . this letter is obviously intended as harassment, an [sic] I take objection to is [sic] as such. I guess I should at least thank you for putting in email for me." (R.A. 1131-33, 1287-91).

that he should first provide verbal counseling and, if that did not resolve the issue, proceed with a written warning, which Feldman did on August 3, 2011, after Tuvell continued to engage in inappropriate and disrespectful communications with him. (R.A. 1287-1291).

Shortly after his meeting with Feldman, on August 11, 2011, Tuvell contacted Kathleen Dean, a nurse in IBM's Medical Department, and informed her that he wanted to apply for Short Term Disability leave due to a "sudden condition." (R.A. 115, 415). Dean responded to Tuvell with information on how to apply for STD leave and on August 15, 2011, Tuvell informed Feldman that he intended to use sick days until his request for STD was approved. (R.A. 18, 115, 415). Tuvell's application for STD was allowed by IBM as a reasonable accommodation on August 17, 2011.

### F. Tuvell Submits His First Corporate Open Door Complaint

One day later, on August 18, 2011, Tuvell submitted an Open Door Complaint, which is an internal IBM process whereby an employee can raise a concern and request an investigation. Tuvell's Open Door Complaint was titled "Claims of Corporate and Legal Misconduct" and was submitted in two parts: the first part was 129 pages long and titled "Acts of Fritz Knabe," while the second part was 153 pages long and titled "Acts of Dan Feldman." Tuvell estimated that

he spent over 22 hours per day on these documents over the course of 2-3 weeks.[8] (R.A. 116, 243-44, 745).

Russell Mandel, the Program Director for IBM's Concerns and Appeals, investigated Tuvell's first Open Door Complaint. On or around September 15, 2011, Mandel completed a lengthy report based on his interviews of nine people, including Tuvell. The report concluded that Tuvell was not subjected to any adverse or unfair employment actions. (R.A. 116, 397, 1431-1449).

### G. Tuvell Takes A Medical Leave of Absence from IBM And Submits Medical Treatment Reports Indicating He Is Totally Impaired And Unable To Work

On or about August 15, 2011, Tuvell provided a Medical Treatment Report ("MTR") to Dean, completed by Tuvell's health care provider, which indicated that Tuvell suffered from a sleep disorder and stress reaction and that he was "totally impaired" for work. (R.A. 118, 571). The MTR also indicated that Tuvell suffered *severe* impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities, and that he suffered *serious* impairment in his

[8] Tuvell repeatedly claims that Feldman agreed to let him use a "reasonable amount of his workday to draft his internal complaints of discrimination," (App. Br. 10), but Tuvell's source of that "agreement" appears to be his own email to Feldman *informing* him that his complaint to Human Resources "will claim some of my hours to be devoted to it, which I will legitimately charge against hours I could have spent doing productive technical work." (R.A. 864).

ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. (*Id.*).

Tuvell submitted another MTR dated September 9, 2011, completed by the same health care provider, which again indicated that Tuvell was "totally impaired" for work. (R.A. 118, 574-75). After receiving the MTR, Dean emailed Tuvell and informed him that because the MTR indicated a sleep disorder and acute stress reaction, it would have to be completed by a specialist, not his family physician (in Tuvell's case, a nurse practitioner). Dean also indicated that because his MTR mentioned a psychotherapist, Tuvell should provide his psychotherapist with an MTR to complete as well. (R.A. 422).

In response, Tuvell sent Dean three emails within 24 hours, challenging her request that his MTR be completed by a specialist and accusing her of not "playing it straight" by asking that a psychotherapist complete his form. (R.A. 420). In his haste to attack the legitimacy of Dean's request, Tuvell overlooked information in his MTR which explicitly stated that he was seeing a psychotherapist, writing

> The MTR . . . does NOT mention EITHER of the words 'psychotherapist' or 'acute' . . . Therefore, you provably misrepresented the MTR, in writing. And hence, your reason for not granting/certifying the MTR is provably FALSE. Why would you do that? What is going on . . . Please explain yourself, in clear language. Promptly.

(*Id*.). Dean responded that the request for a psychotherapist to complete the form was based on information provided in the MTR indicating that Tuvell was in psychotherapy but ultimately informed Tuvell that she would accept the September MTR completed by his physician while she consulted with IBM's physician about Tuvell's questions. (R.A. 119, 418-23).

Dean subsequently contacted Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, about Tuvell's resistance to having his MTR completed by a specialist. Dr. Snyder explained that IBM's process for psychological disorders required an MTR to be completed by a psychiatrist if an employee is out for 6-8 weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." (R.A. 119, 417). Dean conveyed Dr. Snyder's explanation to Tuvell and informed him that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR if he was not able to return to work in the next month. (R.A. 120, 428).

Tuvell responded to Dean's request for proper medical certification by asking if she was joking and insisting that there was nothing a psychiatrist could do to help him because there was nothing "wrong" with him, as the "only" reason he was out on STD was due to his belief that he was "being subjected to abuse at work." (R.A. 120, 427-28). Given Tuvell's adamant resistance to seeing a

psychiatrist, and in an effort to accommodate Tuvell, Dean ultimately informed him that IBM would accept a completed MTR from the Licensed Social Worker ("LICSW") who treated him. (R.A. 121, 409-411).

Tuvell subsequently provided IBM with MTRs completed by Stephanie Ross, the social worker who was the only source of treatment for his purported psychological distress, for the months of October and November of 2011, stating that Tuvell was "totally impaired" for work. (R.A. 121, 455-59). The October MTR completed by Ross indicated that Tuvell suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety." Ross also rated Tuvell as having serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising. (*Id.*).

The MTR completed by Ross in November identified PTSD for the first time as Tuvell's diagnosis and indicated that Tuvell was still "totally impaired" for work. (R.A. 122, 458-59). The MTR also indicated that Tuvell continued to have serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, interaction and active participation in group activities, managing conflict with others, setting realistic goals, and having good autonomous judgment. (*Id.*). Ross

testified about Tuvell during her deposition that at the time she completed the MTR in November 2011,

> any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Tuvell] was triggered into a state that involved hyper-reactivity, hyper-arousal. He was in a state of very difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded.

(R.A. 122-23, 363). Ross further testified that she was concerned for Tuvell's mental health stability and believed that just going into the building where he worked and seeing Feldman or Knabe could trigger his obsessive thoughts, depression, or other strong reactions. (R.A. 123, 364).

Ross's opinion was plainly supported by Tuvell's own behavior. In or around that time, Tuvell testified that he was in close proximity to the IBM office on a weekend and stopped at a gas station with his wife and daughter and proceeded to "blow up," hitting the dashboard, the interior roof of the car and door frame as hard as he could, and yelling as loud as he could for as long as he could, describing himself as "full-blown crazy" because he was "triggered by being that close to [IBM] and that gas station." (R.A. 121-22, 276-77).

Tuvell provided IBM with another MTR on December 16, 2011, again completed by Ross, that continued to rate him "totally impaired for work," adding "for current job assignment." (R.A. 123, 461-62). The MTR indicated that

Tuvell was seriously impaired with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, setting realistic goals and having good autonomous judgment. (*Id*.).

In the December MTR, Ross did not affirmatively check off the section that asked if the employee could work with temporary modifications but did write that the "only modification that would be possible is a change of supervisor and setting." (R.A. 123-24, 461). This was the first time Tuvell submitted forms from a health care provider specifically requesting a change in supervisor as an accommodation. Ross later testified that it was only "possible" that a new supervisor and setting would enable Tuvell's return to work. (R.A. 124, 367). For his part, Tuvell, while employed, did not identify anyone who could serve as his manager in place of Feldman. At his deposition, Tuvell conceded he could not identify any other manager. (R.A. 124; S.A. 1-2)[9].

In or around that time, Ross explained that Tuvell was "unable to drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical," a description she included in Tuvell's appeal of the

[9] IBM has moved for leave of Court to file a Supplemental Appendix comprised of two pages of Tuvell's deposition transcript which were inadvertently omitted from the Appendix. This reference is to those two pages.

denial of Long Term Disability ("LTD") benefits from MetLife, specifically writing that his "symptoms would return if [he] had to drive near the facility, and he would have to pull over and manage intense anxiety symptoms and emotional overwhelm." (R.A. 124-25, 465-66).

While Tuvell was on medical leave, IBM restricted his VPN access to IBM's internet and to IBM facilities because while Tuvell was on STD leave and not working, there was no need for that access. During this time, Tuvell continued to email complaints using IBM's Lotus Notes to HR and numerous other IBM employees, including senior executives who had no involvement in his employment situation. IBM subsequently restricted Tuvell's access to Lotus Notes and IBM's internal corporate network based on his disruptive use of those systems. (R.A. 125-30, 451, 1073, 1075-76, 1252).

Tuvell exhausted his STD leave on January 25, 2012, at which time he remained out of work on an approved, unpaid leave. On or around April 25, 2012, IBM learned that Met Life denied Tuvell's claim for LTD benefits and informed Tuvell that they would continue to accommodate him by holding his position open for him and granting him unpaid leave while he appealed the denial of LTD benefits. (R.A. 130).

### H. Tuvell Applies For Another Position With IBM While Out On Leave And Impaired To Work

On December 8, 2011, Tuvell was interviewed for an open position he had applied for through IBM's Global Opportunity Marketplace ("GOM") by Christopher Kime, one of the decisionmakers tasked with filling the position. Without being solicited, Tuvell told Kime that he was on STD leave prior to his interview, but Kime had no knowledge of and did not seek any information related to Tuvell's medical condition or the circumstances surrounding Tuvell's STD leave. (R.A. 131, 288). Indeed, Tuvell falsely advised Kime that he was "coming back from STD leave" and had a "completely clean bill of health" and was "symptom free," notwithstanding the fact that he had submitted MTRs to IBM describing him as "totally impaired" for work in both November and December of 2011. (R.A. 131, 403, 458-61).

As a part of his consideration of Tuvell's candidacy, Kime looked for Tuvell's job performance review history (known in IBM as a "PBC"), but was unable to find one on IBM's internal website. Kime therefore reached out to Feldman, who explained that Tuvell's leave had prevented Feldman from providing him with a PBC. (R.A. 132, 289, 294-95). Kime then asked Feldman about Tuvell's performance and Feldman informed him that Tuvell had good technical skills but had difficulties working with other people in his group and had been moved from one team to another and still had not found a role that

appeared to work for him and the team. (R.A. 133, 290-93.). Kime testified that at no point during their telephone conversation did Feldman mention that Tuvell had filed any internal complaints with IBM regarding harassment or discrimination and that Kime was not aware of Tuvell's complaints at that time. (R.A. 133, 294-96).

Kime was not aware at the onset of the interviewing process that Tuvell did not have a PBC that Kime could present to his management chain for a discussion on Tuvell's qualifications. (R.A. 134, 291, 297). On January 6, 2012, Kime emailed Tuvell to tell him that he would not be offering him the position. Kime testified that he could not move forward with taking Tuvell directly from STD leave based on the difficulty of assessing his work performance without any PBC available. Kime also explained to Tuvell that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." (R.A. 134, 297, 406-07).

Kime testified that he concluded that Tuvell was not an appropriate candidate for the position because Tuvell appeared to be interested in development work, while the position involved software maintenance for a mature product and involved working in a close team environment. (R.A. 297-300). Specifically, Kime testified that he managed "a small team of dedicated individuals who have all spent a significant amount of time working on the

product and we were looking for individuals who would be able to make a long-term commitment. . . Looking at Mr. Tuvell's job history I did not see any positions that he had held for that type of a time span." (R.A. 299). Kime's review of Tuvell's job history, in addition to Feldman's feedback, led him to conclude that Tuvell

> had moved looking for a position he would like. In my interactions with Mr. Feldman he indicated that he had not been able to find a position that Mr. Tuvell liked. Given my limited resources and opportunities of what I could offer him to work on, I was certainly concerned that we may have difficulty finding a position that Mr. Tuvell would be happy in and committed to.

(R.A. 300).

On January 11, 2012, Tuvell sent Feldman an email asking why he did not receive the Kime position, stating that his failure to get the position was retaliation for taking STD leave, and demanding that Feldman provide him with other ideas for reasonable accommodations. (R.A. 1180-81). Feldman responded to Tuvell's inquiry by explaining that he was not chosen for the position because Kime's team did not think he was the right fit and informed Tuvell that the decision was reviewed by HR to ensure that it was made for legitimate business reasons. (R.A. 1180) Feldman also offered a variety of additional accommodations, including having someone other than Feldman provide Tuvell with performance feedback, allowing Tuvell to leave work as necessary to attend

any doctor's appointments, and ongoing access to GOM to look for open positions under a different supervisor. (R.A. 139-40, 1180, 1184). Tuvell rejected all of Feldman's proposed accommodations and on January 23, 2012, Tuvell's counsel requested as a reasonable accommodation that IBM transfer Tuvell to the Kime position, to which he had previously applied and been rejected, and which had been reposted after the first posting for the position expired. (R.A. 17-18, 140).

IBM denied Tuvell's request for reassignment, but proposed additional alternative accommodations, including returning to his job but receiving feedback from a different manager. (R.A. 140, 1184). Tuvell nevertheless independently applied for the reposted position with Kime on January 25, 2012, but was not considered for the position for the same reasons he had not been selected for the identical, previously-posted position. (R.A. 140-41, 302-03).

On February 15, 2012, John Metzger, Feldman's supervisor, wrote to Tuvell directly and offered him the alternate accommodation of receiving his performance evaluations from Metzger directly, instead of from Feldman. Tuvell rejected Metzger's proposed accommodation. (R.A. 28, 141-42).

## I. Tuvell Finds New Employment While On Leave From IBM And Is Subsequently Terminated From IBM For Failing To Inform IBM Where He Is Working

Unbeknownst to IBM, in or around the same time Tuvell was communicating with Feldman and Metzger about potential accommodations – *and applying for LTD benefits from IBM* – Tuvell was also interviewing for a full-time job with Imprivata, which offered him a job on February 28, 2012. (R.A. 19, 141, 149). Without IBM's knowledge, Tuvell began working for Imprivata on March 12, 2012. (R.A. 143, 149, 250-253, 257). Tuvell's salary at Imprivata was greater than what he was earning at IBM and Tuvell is therefore claiming lost wages of $21,510.00. (*Id.*).

On May 7, 2012, while Tuvell was still on leave, Adams sent Tuvell an email asking him to confirm that he was not working for EMC Corporation while on leave from his employment with IBM. IBM's Business Conduct Guidelines require employees on leave to inform IBM if they begin working for another company so IBM can run a conflict check and ensure that the company is not a competitor. (R.A. 31, 143-44, 1156-65). Tuvell's response was to accuse IBM of defamation and demand that Adams produce evidence that he was violating IBM's Guidelines. Adams replied by informing Tuvell that his LinkedIn page listed EMC as his current employer. What followed were additional requests that Tuvell inform IBM for which company he was working while on leave and

responses from Tuvell that were, in general, accusations of retaliation and harassment and refusals to provide the name of his new employer. (R.A. 143-44, 1156-65).

Finally, on May 15, 2012, Adams informed Tuvell that he had to identify his employer by 5:00 PM the following day or IBM would be forced to terminate his employment. (*Id*.). Despite this request, Tuvell continued to refuse to provide IBM with the name of the company he was working for while on leave and on May 17, 2012, Tuvell's employment from IBM was terminated based on his refusal to advise IBM of where he was working, despite repeated requests that he do so. (R.A. 145, 453).

## SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment to IBM on all Eight Counts of the FAC alleging discrimination, harassment and retaliation. The District Court reviewed extensive undisputed evidence regarding Tuvell's claims that he was harassed, discriminated and retaliated against by IBM and determined that the record evidence, including admissions made by Tuvell during his deposition and in response to IBM's Statement of Material Facts Not in Dispute, did not support his claims.

Those claims are, quite simply, based entirely on Tuvell's extreme and irrational reaction to two benign workplace interactions and its aftermath. Within six days of a change in assignments, Tuvell concluded he could no longer work with Feldman. Even a cursory review of Tuvell's numerous, hyper-aggressive emails and excerpts from what amount to hundreds of pages of "Claims of Corporate and Legal Misconduct" reveals a wholly disproportionate reaction to what occurred on May 18 and June 8, 2011.[10]

Tuvell's extreme and irrational reaction to the workplace disagreement which occurred is precisely the conduct which caused Tuvell's health care providers to certify him "totally impaired for work." They reported to IBM that

[10] Many of those emails are cited herein and portions of Tuvell's Claims of Corporate and Legal Misconduct Addendums are included in the Record Appendix and can be found at R.A. 1107-12, 1114-27, 1230-38, 1253-58, 1278-1280.

Tuvell was disabled from work because he had serious impairments in getting along well with others without behavioral extremes, managing conflicts with others, initiating social contacts, negotiating and compromising, setting realistic goals and having good autonomous judgment. Relying on Tuvell's health care providers and Tuvell's own testimony, the Court correctly found that Tuvell was not a qualified handicapped person.

Even if IBM had an obligation to accommodate Tuvell's disability, it did so. IBM provided Tuvell with the reasonable accommodation of a leave from work until such time as he was capable of returning to his job. It offered him the ability to return to work and have performance reviews from another manager and time off for medical appointments. It also allowed him to search for other positions but he did not identify one for which he was qualified

IBM is entitled to summary judgment on the FAC in its entirety because in addition to the accommodations he received, he was not subject to any actionable adverse actions or a hostile work environment, and IBM adequately investigated his complaints. Finally, IBM is entitled to summary judgment on Tuvell's claim that his termination was discriminatory or retaliatory because IBM established a legitimate reason for termination – he would not identify his current employer – and Tuvell could not establish pretext.

## ARGUMENT

## THE STANDARD OF REVIEW

While this Court reviews the District Court's grant of summary judgment *de novo*, the District Court ruling should be upheld where the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Farmers Ins. Exch. v. RNK, Inc*., 632 F.3d 777, 782 (1st Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). The mere existence of some alleged factual dispute will not defeat a properly supported summary judgment motion. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-252 (1986). Rather, the plaintiff must "affirmatively point to specific facts that demonstrate the existence of an authentic dispute," *Melanson v. Browning-Ferris Indus.,* 281 F.3d 272, 276 (1st Cir. 2002). At summary judgment, the Court must ignore "conclusory allegations, improbable inferences, and unsupported speculation," *Balser v. IUE Local 201 v. Gen. Elec. Co.*, 661 F.3d 109, 118 (1st Cir. 2011), and keep in mind that "an absence of evidence on a critical issue weighs against the party – be it the movant or the nonmovant – who would bear the burden of proof on that issue at trial." *Perez v. Volvo Car Corp*., 247 F.3d 303, 310 (1st Cir. 2001) (citations omitted).

## I. TUVELL IS NOT A QUALIFIED HANDICAPPED PERSON THUS IBM IS ENTITLED TO JUDGMENT ON THE DISABILITY CLAIMS IN COUNTS I-VIII

The District Court properly concluded Tuvell failed to demonstrate he was capable of performing the essential functions of his job, even with a reasonable accommodation, relying on the MTRs from Tuvell's health care providers from August through December 2011, Tuvell's own testimony, and on the testimony of Stephanie Ross, his therapist. For that reason, summary judgment on the disability-based claims Counts I through VIII should be affirmed.

Tuvell's disability-based claims, which are essentially claims of failure to accommodate, failure to engage in the interactive process, disability discrimination, harassment, and failure to investigate, are based entirely on his *completely unfounded* insistence that his supervisor harassed and bullied him, thereby requiring Tuvell's removal from his supervision based on Tuvell's purported PTSD. Two HR investigations comprised of interviews of numerous witnesses concluded that Tuvell's complaints were unfounded.

The incidents Tuvell cites as intolerable harassment are set forth *supra* at pp. 17-18. The incidents, individually and combined, lack any objective basis for a reasonable person to construe them as harassment or behavior that depart in any way from the "ordinary slings and arrows that workers routinely encounter in a hard, cold world." *Suarez v. Pueblo Int'l, Inc*., 229 F.3d 49, 54 (1st Cir. 2000).

Indeed, it is difficult to even characterize them as "slings and arrows." If these innocuous interactions "triggered serious symptoms of PTSD," (App. Br. 31), as Tuvell claims, Tuvell was demonstrably not a qualified handicapped person, capable of performing the essential functions of his position or *any* position, the conclusion reached by his health care providers who certified he was totally disabled from work.

To prevail on Counts I-VIII,[11] to the extent they allege disability discrimination, Tuvell must first demonstrate that: (1) he is a handicapped person within the meaning of the ADA and G.L. c. 151B; and (2) he is qualified to perform the essential functions of the job with or without reasonable accommodation. *Henry v. United Bank*, 686 F.3d 50, 59-60 (1st Cir. 2012); *Faiola v. APCO Graphics, Inc*., 629 F.3d 43, 47 (1st Cir. 2010) (reciting the legal standard for disparate treatment and failure to accommodate claims under the ADA and Mass. Gen. Laws c. 151B). To demonstrate that he is a qualified handicapped person, Tuvell must show that he is an individual who "is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." Mass. Gen. Laws c. 151B, § 1(16); *see Cox v. New England Tel. & Tel. Co*., 414 Mass. 375, 381 (1993). Importantly, Tuvell

[11] Tuvell has abandoned his claims of age, race, and gender discrimination on appeal, as he makes no mention of them in his brief or his Statement of Issues.

"bears the initial burden of producing some evidence that an accommodation that would allow him [] to perform the essential functions of the position would be possible, and therefore that he [] is a 'qualified [disabled] person.'" *Godfrey v. Globe Newspaper Co., Inc.*, 928 N.E.2d 327, 333 (2010).

As determined by the District Court, Tuvell cannot succeed on his claims of disability discrimination because he "failed to demonstrate that he was capable of performing the essential functions required of his job, even with a reasonable accommodation." (Add. 13). In determining whether an individual is able to perform the "essential functions" of his job and is therefore a qualified handicapped person, courts have looked to, among other things, an individual's own characterization of his disability and/or the findings of the individual's physician. *Beal v. Board of Selectman*, 646 N.E.2d 131, 137-38 (1995) (plaintiff not a qualified handicapped person where she asserted that she could not return to work and her doctor diagnosed her with chronic fatigue, sleep disorder, and susceptibility to black outs during stressful situations, rendering her incapable of performing essential functions of position as police officer); *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437, 442 (6th Cir. 1991) (employee was not "qualified" individual under Rehabilitation Act where, "contrary to plaintiff's contention that he was perfectly capable of returning to work in June 1980 and was therefore a qualified handicapped person within the meaning of the Act, the

evidence supports the district court's finding that in 1980, plaintiff presented himself as an individual incapable of performing the normal, interactive functions of his job and incapable of functioning if there was the slightest hint of criticism.").

Here, the evidence provided by Tuvell's health care providers and his own testimony and writings establish that he was totally impaired to work from August through at least December of 2011, the last MTR provided, after which time he remained on leave while applying for LTD benefits. The MTRs submitted by Tuvell's health care providers indicate that he suffered from "severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities." (R.A. 455-62). Indeed, by his own admission, Tuvell could not even be in the vicinity of IBM without becoming "full-blown crazy" and engaging in violent outbursts. (R.A. 276-77). These behavioral shortcomings and Tuvell's MTRs and LTD application confirm that Tuvell was "totally incapacitated to work," and thus, he was not a qualified handicapped person. *See August v. Offices Unlimited, Inc*., 981 F.2d 576 (1st Cir. 1992) (plaintiff unable to offer any facts undermining statements on long term disability forms stating he was totally disabled); *see also Pesterfield,* 941 F.2d at 442 (not qualified handicapped person where unable to function when criticized).

Tuvell argues that the District Court erred in holding that he was not a qualified handicapped person because it failed to consider "what actually occurred in the real world following his professional therapy," which included his ability to interview for a job with Kime and his assertion that after January 2012, he was able to work for an employer other than IBM. (App. Br. 29). Tuvell's argument fails because the ability to go to an interview does not demonstrate he could handle the responsibilities of the job, including getting along with others without behavioral extremes. Indeed, Tuvell's MTR for that same time period indicates that he had "serious impairment" in doing just that. (R.A. 462). Moreover, Tuvell points to no record evidence indicating that he "worked at a high level for years" at another company.

Accordingly, the District Court properly concluded, after reviewing substantial evidence submitted by both parties, that Tuvell was not a qualified handicapped person because "[n]othing in the record demonstrates that Tuvell would have been able to successfully interact with groups or deal appropriately with criticism." (Add. 15). That determination should not be disturbed.

## II. IBM WAS NOT REQUIRED TO PROVIDE TUVELL WITH A REASONABLE ACCOMMODATION BUT DID SO ANYWAY

The gravamen of Counts I-V is that IBM purportedly failed to accommodate Tuvell's alleged disability in violation of M.G.L. c. 151B and the ADA. The District Court concluded there was no obligation to accommodate since Tuvell was not a qualified handicapped person. However, the Court also found IBM had accommodated Tuvell, though it had no obligation to do so, and that ruling should be affirmed.

In addition to granting him extended medical leave, IBM made a further attempt to reasonably accommodate Tuvell by proposing he receive his performance reviews from a different manager, John Metzger, while also giving him the continued ability to take leave for medical appointments whenever necessary. (R.A. 140-42).

That Tuvell insisted a new supervisor was the only accommodation he would accept does not make his unilateral demand a required or reasonable accommodation, and this Court can so find as a matter of law. Neither the ADA nor Mass. Gen. Laws c. 151B requires an employer to provide a disabled employee the accommodation of his choice, including that of reassignment to a new supervisor. *See Bryant v. Caritas Norwood Hospital*, 345 F. Supp. 2d 155, 170 (D. Mass. 2004) (ADA "does not require the employer to grant its disabled employee's accommodation of choice, even if it is reasonable one, and instead

provides the employer with 'the ultimate discretion to choose between effective accommodations.'"); *Litovich v. Somascan, Inc*., 2008 U.S. Dist. LEXIS 108627 at * 25 (D. Mass. Dec. 17, 2008) (a disabled employee is "not entitled to the accommodation of her choice, but only to a reasonable accommodation"); *Darian v. University of Massachusetts Boston*, 980 F. Supp. 77, 89 (D. Mass. 1997) (nursing student's refusal to accept university's reasonable accommodation or demonstrate that it was unreasonable doomed her failure to accommodate claim).

Finally, Tuvell's argument that unpaid leave is not a reasonable accommodation (App. Br. 32), is not supported by the cases on which he relies, in which none of the employees were certified as "totally impaired to work." *Williams v. Phila. Housing Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004) (work restriction only foreclosed carrying firearms); *Noon v. IBM*, 2013 U.S. Dist. LEXIS 174172 (S.D.N.Y. Dec. 11, 2013) (employee with back problems not precluded from all work); *Walters v. Mayo Clinic*, 998 F. Supp. 2d 750, 764 (W.D. Wis. 2014) (employee could perform all job duties). *Compare Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986) (unpaid leave is likely a reasonable accommodation for purposes of Title VII reasonable accommodation provision). Moreover, Tuvell's assertion that IBM "forced" him to stay out of work ignores that Tuvell failed to seek appropriate psychiatric help, as requested by IBM, or consider trying alternative reasonable accommodations that might

have enabled his return to work, choosing instead to remain on medical leave while insisting he could not work with Feldman.

Accordingly, IBM complied with its obligations under the ADA and Mass. Gen. Laws c. 151B and the District Court's award of summary judgment on those claims should be affirmed.

### A. Tuvell's Demand For A New Supervisor Was Not A Reasonable Accommodation

As the District Court found, Tuvell's insistence on a new supervisor was not a reasonable accommodation as a matter of law. Citing authority from this Court, the District Court noted that, "[c]ontrary to Tuvell's arguments, IBM was under no obligation to, essentially, 'find another job for an employee who is not qualified for the job he or she was doing.'" (Add. 19, citing *August,* 981 F.2d at 581 n.4); s*ee also Cailler v. Care Alternatives of Massachusetts*, LLC, 2012 U.S. Dist. LEXIS 39414 at *23 (D. Mass. March 23, 2012) ("A reasonable accommodation provided to an employee with a handicap is to allow her to perform the essential functions 'of the position involved,' . . . *i.e.*, the plaintiff's original position."); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 384- 85 (2nd Cir. 1996) (holding that employee's request for a new supervisor was not required under the ADA).

In recognizing an employer's right to define the essential functions of a job, including reporting to a particular supervisor, the *Wernick* court explained

that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." *Id.*; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 33, (EEOC Notice No. 915.002) ("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation."); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) ("In essence, Weiler asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility.").

In sum, Tuvell's demand for a new supervisor – at the same time that he provided certifications indicating he was totally disabled and unable to work – was not a reasonable accommodation as a matter of law under either Mass. Gen. Laws c. 151B or the ADA.

### B. IBM Was Not Required To Transfer Tuvell To An Open Position For Which He Was Not Qualified

In Counts III, IV, and V, Tuvell claims that he was denied the reasonable accommodation of transfer to a different position within IBM. As with Tuvell's demand for a new supervisor, to the extent that Tuvell is claiming that he was entitled to a transfer to a different position, the Supreme Judicial Court has ruled that assignment to a new position is not a "reasonable accommodation" under Mass. Gen. Laws c. 151B. *See Godfrey,* 928 N.E.2d at 336 ("[n]either

elimination of an essential duty from a position nor assignment to an unrelated position are 'reasonable accommodations'") (citing *Russell v. Cooley Dickinson Hosp., Inc*., 437 Mass. 443, 454 (2002) (reasonable accommodation does not require employer to "fashion a new position")); *Cox*, 414 Mass. at 390 ("reasonable accommodation does not include waiving or excluding an inability to perform an essential job function"). Accordingly, Tuvell's claim that IBM was required to transfer him to an open position as a reasonable accommodation under Mass. Gen. Laws c. 151B is not supported by Massachusetts law and summary judgment should be affirmed as to that claim.

Under federal law, "reassignment to a vacant position" *may* be a reasonable accommodation in certain circumstances, but only if the employee is qualified for the position. 42 U.S.C. §§ 12111(9)(B). While courts are divided on how active employers must be in assisting a qualified handicapped person to relocate to an open position within the company, no court has held that an employer is required to relocate an employee to an open position if that employee is not capable of performing the essential functions of the position. *Jones v. Nationwide Life Ins. Co*., 696 F.3d 78, 91 (1st Cir. 2012) (accommodation not reasonable where employee cannot demonstrate it would enable him to perform essential functions of job); Enforcement Guidance: Reasonable Accommodation and Undue

Hardship Under the Americans with Disabilities Act, Question 24, (EEOC Notice No. 915.002) ("An employee must be 'qualified' for the new position").

It is incumbent on the plaintiff to "show that a proposed accommodation would enable [him] to perform the essential functions of [his] job." *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 259 (1st Cr. 2001). Here, at the same time that Tuvell was demanding transfer to the Kime position, his MTRs indicated that he had, among others, serious impairments "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities." (R.A. 458-62). As such, Tuvell has not demonstrated that transferring him to a different work setting – *particularly* where IBM determined that Tuvell was not subject to any discrimination or harassment in his previous setting – would have been a reasonable accommodation enabling him to perform the essential functions of his job. (Add. 20) (citing *Jones,* 696 F.3d at 90).

Accordingly, the District Court properly concluded that "Tuvell's admitted, serious impairments 'getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities' indicates that even his desired transfer would not have been reasonable under the circumstances." (Add. 19-20).

While Tuvell argues that the District Court's conclusion to this effect was "ludicrous," because "IBM itself maintained (by offering to reinstate him) that Tuvell was capable of returning to work on Feldman's team," (App. Br. 38), that argument distorts IBM's reasonable accommodation of Tuvell and should be disregarded. IBM's decision to accommodate Tuvell by holding his position open for him is not the equivalent of a health care provider – or IBM – determining that Tuvell was actually capable of returning to work.

### C. IBM Attempted To Engage In The Interactive Process But Tuvell Refused

Tuvell does not appear to pursue his claim of failure to engage in the interactive process, which is set forth in Count I of the FAC, since it is not one of the seven issues he presents for review. To the extent that he does, this Court should affirm the District Court's determination that IBM was not obligated to engage in the interactive process where "no reasonable trier of fact could find that the employee was capable of performing the job, with or without reasonable accommodation." (Add. 16; quoting *Sullivan v. Raytheon Co.,* 262 F.3d 41, 47-48 (1st Cir. 2001)). In the alternative, the District Court properly found that IBM engaged in the interactive process with Tuvell.

It is settled that "a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." *Rennie v. United Parcel Service*, 139 F. Supp. 2d 159, 168

(D. Mass. 2001); 29 C.F.R. pt. 1630 App. § 1630.9 ("the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability").

In contrast to the interactive process just described, Tuvell's only effort to engage with IBM's overtures was to repeatedly demand transfer to a new supervisor and/or a new position. When IBM asked Tuvell to find a psychiatrist after his nurse practitioner indicated that he needed to remain on leave for more than six weeks, Tuvell refused to consider seeking appropriate treatment, insisting there was nothing medically wrong with him and that he was only ill because of IBM's alleged actions. (R.A. 427-28). In a further effort to accommodate Tuvell, IBM offered to have Metzger provide him with performance-related feedback and reviews instead of Feldman. Tuvell refused that accommodation too, and declined to suggest any alternatives other than transfer to a different supervisor, which was not, as a matter of law, a reasonable accommodation.

In short, Tuvell's "participation" in the interactive process consisted of repeatedly demanding that IBM acquiesce to the only accommodation he would accept, while consistently refusing to even consider, much less try, any alternatives set forth by IBM. Nonetheless, IBM continued to provide Tuvell with leave until such time as he was able to return to work and in so doing,

satisfied its obligation to engage in the interactive process and provide Tuvell with a reasonable accommodation.

## III. IBM IS ENTITLED TO JUDGMENT ON TUVELL'S DISABILITY DISCRIMINATION CLAIMS BECAUSE TUVELL HAS NOT MADE OUT A *PRIMA FACIE* CASE OR REFUTED IBM'S LEGITIMATE BUSINESS REASONS

As an initial matter, the remaining disability-based discrimination claims set forth in Counts VI-VIII, also fail because Tuvell was not a qualified handicapped individual. In addition, those claims were properly dismissed because with respect to the two arguably adverse actions he experienced – his failure to get a job with Kime's group and the termination of his employment – Tuvell cannot establish a *prima facie* case or overcome IBM's legitimate reason. The Court's conclusion that Tuvell failed to establish a *prima facie* case of disability discrimination or provide any evidence demonstrating that the legitimate business reasons proffered by IBM are pretext for discrimination is supported by the record and should be affirmed.

### A. Tuvell's Disability Discrimination Claims Fail Because He Cannot Make A *Prima Facie* Case of Discrimination or Establish Pretext

To establish a *prima facie* disability discrimination claim, a plaintiff "must establish that (1) [he] suffers from a disability or handicap, as defined by the ADA; (2) [he] was nevertheless able to perform the essential functions of [his] job, either with or without reasonable accommodation; and (3) the defendant took

an adverse employment action against [him] because of, in whole or in part, [his] protected disability.'" *Freadman v. Metro. Prop. & Cas. Ins. Co*., 484 F.3d 91, 100 n. 7 (1st Cir. 2007); *Faiola,* 629 F.3d at 47 (reciting the legal standard for disparate treatment and failure to accommodate claims under the ADA and Mass. Gen. Laws c. 151B). If a plaintiff is able to set forth a *prima facie* case of discrimination, the burden shifting framework applies, but "the burden of proving unlawful discrimination rests with the plaintiff at all times." *Freadman,* 484 F.3d at 99 (internal citations omitted).

As already demonstrated, Tuvell cannot establish a *prima facie* case of disability discrimination because he cannot demonstrate that he was a handicapped person capable of performing the essential functions of his job. In addition, Tuvell's disability discrimination claim regarding the Kime position fails because Tuvell cannot demonstrate: (1) that his failure to get the Kime position was an adverse employment action; or (2) that the legitimate reason articulated for not giving him the position is a pretext for discrimination.

First, while Tuvell was disappointed by his failure to get the Kime position, disappointment alone does not render the action adverse. *See King v. Boston*, 883 N.E.2d 316, 323 (2008) (discrimination claim requires "real harm" as opposed to subjective feelings of "disappointment and disillusionment"). Tuvell's failure to get the position did not materially or otherwise adversely impact his conditions of

employment with IBM, which at all times remained unchanged. That is, Tuvell already had a job with IBM which remained open for him. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1988) ("a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). Nor did the rejection of Tuvell's application for the new position "inflict[] direct economic harm," because Tuvell remained employed by IBM and has not alleged, or demonstrated, that the position with Kime's group would have resulted in a promotion, greater benefits or prestige. *Id*. at 762.

Further, even if the failure to get the Kime position could be considered an adverse action, Tuvell has not demonstrated that the legitimate reason for IBM's decision was a pretext for discrimination. As an initial matter, Kime was aware that Tuvell was on STD leave before he interviewed him for the position.[12] (R.A. 403). Moreover, Kime had no knowledge of Tuvell's medical condition and did not make any inquiry into the circumstances surrounding Tuvell's leave. Indeed, Tuvell (falsely) advised Kime that he was "coming back" from STD with a

[12] This is in contrast to Tuvell's assertion that he applied for the position, "aced his interviews," and "[r]ight when Kime, the hiring manager learned that [he] was on disability leave" he was explicitly rejected for the job. (App. Br. 24). Kime's knowledge of Tuvell's STD prior to interviewing him completely undermines Tuvell's assertion that Kime discriminated against him because he was on STD.

"completely clean bill of health." (*Id*.). Kime testified that it was difficult to assess Tuvell's candidacy without a PBC and that he ultimately concluded Tuvell was not an appropriate candidate for the position, in part, due to his concern about Tuvell's ability to work well with a small team – a conclusion that is amply supported by the evidence in the record concerning Tuvell's interactions with Knabe, Feldman, HR and IBM's medical group.

Tuvell has not established that Kime's legitimate business reasons for not offering him the position were pretextual. Indeed, instead of presenting specific facts demonstrating a discriminatory reason, Tuvell continues to assert vaguely that he was not accepted for the position based on his disability and/or retaliation.[13] Such groundless speculation cannot counter IBM's proffered legitimate business reason. *See Mesnick v. General Electric Co.,* 950 F.2d 816, 824 (1st Cir. 1991) ("[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive." (Internal quotations omitted)).

[13] At the District Court, Tuvell claimed that the rejection was based on retaliation, disability, and race, gender, and age discrimination. (R.A. 35). On appeal, he alleges only that it was caused by retaliation and/or disability discrimination.

### B. The Termination of Employment Was Not Discriminatory or Retaliatory

As for the termination of his employment in May 2012, which would constitute an adverse action, IBM is entitled to summary judgment because IBM articulated a legitimate reason for that termination and Tuvell has no evidence of pretext. Tuvell was on extended leave from IBM for approximately ten months when IBM learned that he may have been working for a competing company in violation of IBM's Business Conduct Guidelines. According to Tuvell's personal LinkedIn web page, he was working for IBM competitor EMC while working at IBM. After learning this, IBM contacted Tuvell about his employment (R.A. 1156-65), but Tuvell responded by repeatedly and inexplicably refusing to tell IBM for which company he was working while he was still an IBM employee, while accusing IBM of harassment and defamation. (*Id*.). As a result of his refusal to disclose his new employer's identity, IBM terminated Tuvell's employment. (R.A. 145).

As noted by the District Court, Tuvell failed to offer any evidence contradicting IBM's stated reason for his termination. (Add. at 23). Tuvell's specious assertions of disability discrimination and retaliatory discharge, grounded in nothing more than Tuvell's suppositions, are not sufficient to support claims of discrimination and the District Court's award of judgment should be affirmed.

### C. Tuvell's Other Purported "Tangible Acts" Are Not Adverse Actions Or Harassment Under Chapter 151B or the ADA

As for the other "tangible acts" identified by Tuvell in Count VI and VII, they do not constitute adverse employment actions as a matter of law. An adverse employment action "refer[s] to the effects on working terms, conditions, or privileges that are material, and thus governed by the statute, as opposed to those effects that are trivial and so not properly the subject of a discrimination action. . . Material disadvantage for this purpose arises when objective aspects of the work environment are affected." *King*, 883 N.E.2d 316 at 323 (internal citation omitted); *Sensing v. Outback Steakhouse of Florida, LLC*, 575 F.3d 145, 157 (1st Cir. 2009) (an adverse action has been defined as "any material disadvantage[] in respect to salary, grade, or other objective terms and conditions of employment").

Tuvell points to an assortment of acts he deems adverse under the ADA and Chapter 151B, alleging IBM: disabled his access to IBM facilities and its computer systems while he was on medical leave; held off on finalizing review of his complaint while he was on leave; issued a warning letter on August 3, 2011; and treated work at home days as sick days. None of the above actions are "adverse" under either Massachusetts or federal law.

First, IBM limited Tuvell's access to facilities and computer networks only while he was on medical leave and admittedly "totally incapacitated to work." As such, there was no business reason for Tuvell to have access to the facilities or

networks and his limited access to both resulted in no "real harm" to his ability to not work during his medical leave.

Second, Tuvell has provided no evidence in support of his claim that IBM failed to progress and finalize his internal complaint, or somehow delayed it. To the contrary, both Due and Mandel testified that they each conducted separate investigations, which included interviewing multiple witnesses, including Tuvell, and reviewing relevant internal documents. After completing their respective investigations, each of them concluded that Tuvell's allegations were unfounded. In any event, failure to properly investigate a complaint is not an adverse action. *See Symonds v. Federal Express Corp.*, 2011 U.S. Dist. LEXIS 150056 at *53 (D. Me. Dec. 31, 2011) ("Failure to investigate complaints of discrimination cannot be considered an adverse employment action.").

Third, the formal warning letter Feldman gave Tuvell, which counselled him about his inappropriate behavior, did not affect – materially or otherwise – the terms or conditions of Tuvell's employment, as neither Tuvell's pay, grade, benefits, nor his title were affected by the letter. Finally, Tuvell's "work at home" days were treated as sick days only after he had advised that he was unable to work and, as such, IBM reasonably treated such days that he did not come to work as sick days.

Accordingly, to the extent Tuvell's discrimination (and retaliation) claims are based on any of the above "tangible acts," those claims must fail as such acts are not adverse employment actions under state or federal law. As explained by the District Court, while Tuvell found these incidents "subjectively offensive," the "complained of 'tangible acts' represent regular business practices and policies . . . and relatively standard workplace interactions and criticisms" which "do not approach the level of severe or pervasive conduct that would be objectively offensive." (Add. 25).

### D. Tuvell Was Not Subjected To A Hostile Work Environment Thus Judgment On Count VII Should Be Affirmed

In Count VII, Tuvell alleges that certain "tangible" actions created a hostile work environment on the basis of his disability, age, gender, race, and retaliation, although, as with his other discrimination claims, he now appears to limit this claim solely to disability discrimination and retaliation. To rise to the level of harassment or a hostile work environment, as Tuvell appears to allege, "even a string of trivial annoyances will not suffice to make an adverse action showing: 'the alleged harassment must be severe or pervasive.'" *Alvarado v. Donahoe*, 687 F.3d 453, 461 (1st Cir. 2012) (quoting *Gómez-Pérez v. Potter*, 452 Fed. Appx. 3, 9 (1st Cir. 2011). In addition, "any abuse must be both objectively offensive (as viewed from a reasonable person's perspective) and subjectively so (as perceived by the plaintiff)." *Id*.

As just explained, the "tangible acts" Tuvell lists are neither adverse nor, even viewed collectively, objectively offensive, and judgment as to Tuvell's hostile work environment claim should be affirmed. *Id*. (taunting and mocking comments about employee's psychiatric condition, while callous and objectionable, did not rise to level of severe and pervasive). *See also Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17, 44 (1st Cir. 2011) (appellant could not show hostile work environment where, *inter alia*, supervisor regularly refused to meet with appellant, yelled at her, and limited her movements around workplace).

## IV. IBM IS ENTITLED TO JUDGMENT ON THE CLAIMS FOR RETALIATION IN COUNTS V-VIII

Tuvell's claims for retaliation, included in Counts V-VIII, are based on the same alleged adverse actions as his discrimination claims and are equally without merit. A plaintiff seeking to establish a *prima facie* case of retaliation under 151B and the ADA must show, by a preponderance of the evidence, "that (1) he engaged in protected conduct; (2) suffered an adverse employment action; and (3) [that] there was a causal connection between the protected conduct and the adverse action." *Jones v. Walgreen Co*., 679 F.3d 9, 21 n. 7 (1st Cir. 2012). If a plaintiff establishes these factors, the *McDonnell Douglas* burden shifting scheme follows, ultimately requiring the plaintiff to demonstrate that the adverse action was the result of retaliatory animus. *Id*. at 21.

As an initial matter and, as already described, Tuvell's failure to get an offer from Kime was not an adverse action under state or federal law. Nor has Tuvell demonstrated that his complaints against Feldman caused him not to get the Kime position; indeed, prior to making the decision not to hire him, Kime was not aware that Tuvell had filed any complaints regarding his disability either internally or externally. (R.A. 290-93). Moreover, IBM has provided a legitimate reason for not offering Tuvell the position for which he interviewed, as discussed *supra* at pp. 33-35.

Second, to the extent Tuvell's retaliation claim is based on Feldman's comments to Kime regarding Tuvell's difficulties working well with the individuals in his group, his claim still fails as such comments were not an adverse action and did not lead to an adverse action. Feldman's comments were offered in response to a legitimate request for an assessment of Tuvell's performance, rendered necessary by the fact that Tuvell did not have a written performance review on file. (R.A. 289-95).

Moreover, there is no evidence that Feldman's assessment of Tuvell's interpersonal difficulties, while candid, was in any way false or exaggerated. Feldman did not impugn or question Tuvell's technical abilities and his feedback on Tuvell's interpersonal skills was based on his experience managing Tuvell during his time at IBM. That assessment is amply supported by the record in this

case, which includes countless examples of Tuvell's over-the-top, inflammatory attacks on his colleagues and human resources professionals in response to routine requests and criticisms. Indeed, Tuvell does not dispute, nor could he, the veracity of Feldman's feedback, which was consistent with Feldman's experience working with Tuvell and supported by the limitations set forth in Tuvell's MTRs indicating that Tuvell suffered from severe impairment in his ability to get along well with others without behavioral extremes, among other things. (R.A. 458-62). *See, e.g. Dickenson v. UMass Mem. Medical Group*, 2011 U.S. Dist. LEXIS 30932 at * 43-45 (D. Mass. Mar. 24, 2011) (plaintiff's performance issues were legitimate, non-retaliatory reason for his poor review and failure to get promoted). Indeed, Feldman's concerns about Tuvell's ability to work effectively with his colleagues predate any of Tuvell's protected activity, further undermining Tuvell's assertion that Feldman's comments to that effect were motivated by retaliatory animus. *Mole v. University of Massachusetts*, 442 Mass. 582, 594 (2004) (where "problems with an employee predate any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation").

Feldman's honest assessment of Tuvell's interpersonal difficulties is distinguishable from the situations underlying the cases cited by Tuvell (App. Br.

43), in which decisionmakers relied on inaccurate, biased evaluations. In *Thomas v. Eastman Kodak*, for example, the plaintiff provided sufficient evidence that her supervisor's evaluations of her were unfair based on conflicting, positive evaluations from previous supervisors and current customers. 183 F.3d 38, *62-64 (1st Cir. 1999). Tuvell has pointed to no such evidence here.

IBM has also established that it had a legitimate reason for Tuvell's termination given Tuvell's refusal to provide information to IBM concerning where he was working while on a leave of absence from IBM. As set forth *supra*, pp. 37-38, there was nothing discriminatory or retaliatory about IBM's actions in this regard.

Finally, even if Tuvell could satisfy his *prima facie* case with respect to these actions, his claim still fails because he has provided no evidence that IBM's stated reason for either was pretext, and that the real reason was retaliation. Tuvell's protected activity did not immunize him from "the same risks that confront virtually every employee every day in every work place," including recommendations reflective of his performance, the possibility of being rejected for a different position, or an expectation that he abide by IBM's policies and procedures. *See Blackie v. Maine*, 75 F.3d 716, 723 (1st Cir. 1996) (affirming summary judgment in favor of employer on FLSA retaliation claim where employees failed to show that adverse action stemmed from retaliatory motive).

As mere speculation or inferences of retaliatory motive are insufficient to satisfy a plaintiff's burden of establishing pretext, judgment as to these claims should be affirmed.

## V. IBM'S ALLEGED FAILURE TO INVESTIGATE CLAIM CANNOT SUCCEED BECAUSE THERE WAS NO UNDERLYING DISCRIMINATION

The District Court also properly entered summary judgment on Count VIII, alleging a failure to investigate, because no independent claim of failure to investigate exists absent underlying proof of discrimination. *See Keeler v. Putnam Fiduciary Trust Co*., 238 F.3d 5, 13 (1st Cir. 2001). Nor is there support for the notion that a failure to investigate is a distinct adverse action for purposes of retaliation claims. *See Fincher v. Depository Trust and Clearing Corp*., 604 F.3d 712, 721 (2nd Cir. 2010) ("an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint"); *Cook v. CTC Comm. Corp*., 2007 U.S. Dist. LEXIS 80849, at *8 (D.N.H. Oct. 15, 2007) ("Evidence of a flawed investigation is relevant only if [the plaintiff] proves that [human resources] intentionally failed to investigate properly in order to concoct a pretext for her termination.").

Moreover, to the extent Tuvell's failure to investigate claim is relevant to any consideration of damages, such a claim still fails in light of ample evidence

that IBM conducted appropriate, good faith investigations and determined that Tuvell's claims of harassment, discrimination and retaliation were unfounded. Aside from his own conclusion that the investigations were flawed because they did not result in his preferred outcome, Tuvell has offered no evidence that such investigations did not take place or that they were conducted in bad faith. *See, e.g., Parra v. Four Seasons Hotel*, 605 F. Supp. 2d 314, 336 (D. Mass. 2009) (finding acceptable an employer's testimony that an investigation took place, consisting of a discussion with the plaintiff and a review of the customer complaint upon which plaintiff's complaint was based); *Verdrager v. Mintz, Levin et al*., 2013 Mass. Super. LEXIS 206 at *28-29 (Mass. Super. Ct. 2013).

## VI. TUVELL HAS NOT APPEALED JUDGMENT AS TO HIS RACE, AGE, AND GENDER DISCRIMINATION CLAIMS

Tuvell has not appealed judgment as to his race, age, and gender discrimination claims and, as such, the District Court's decision with respect to those claims should not be disturbed. To the extent Tuvell continues to press his claims of age, gender, and race discrimination under Chapter 151B in Counts V-VIII, the dismissal of them should be affirmed because, as determined by the District Court, "Tuvell has offered no facts to support his discrimination claims based on age, gender or race." (Add. 27).

## CONCLUSION

For all of the above stated reasons, the District Court's July 7, 2015 Memorandum and Order entering summary judgment for IBM should be affirmed in its entirety.

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)**

Appeal No. 15-1914

I, Anne E. Selinger, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,637 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen point Times New Roman.

*/s/Anne E. Selinger*
Anne E. Selinger (Court of Appeals No. 1164576)

**CERTIFICATE OF SERVICE**

Appeal No. 15-1914

I, Anne E. Selinger, certify that on January 21, 2016, I electronically filed the Brief for Defendants-Appellee with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the below counsel of record is registered as an ECF Filer and that he will be served by the CM/ECF system:

Andrew P. Hanson, Esq.
One Boston Place, Suite 2600
Boston, MA 02108

*/s/ Anne E. Selinger*
Anne E. Selinger (Court of Appeals No. 1164576)

*{This page intentionally left blank.}*

*In The*

# United States Court of Appeals

*for the*

# First Circuit

Case No. 15-1914

WALTER TUVELL,

*Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

*Defendant-Appellee.*

*Appeal from an Order and Judgment entered in the United States District Court for the District of Massachusetts*

## REPLY BRIEF FOR PLAINTIFF-APPELLANT

ANDREW P. HANSON, ESQ.
LAW OFFICE OF ANDREW P. HANSON
One Boston Place, Suite 2600
Boston, Massachusetts 02108
(617) 933-7243
andrewphanson@gmail.com

*Attorney for Plaintiff-Appellant Walter Tuvell*

# TABLE OF CONTENTS

**Page**

TABLE OF CITATIONS ..... iii

ARGUMENT ..... 1

I. TUVELL WAS A QUALIFIED DISABLED PERSON ..... 1

A. IBM'S BRIEF CONTRADICTS ITS EARLIER ADMISSION THAT TUVELL WAS A QUALIFIED DISABLED PERSON WITHOUT A REASONABLE ACCOMMODATION ..... 1

B. TUVELL HAS ALSO SHOWN HE WAS A QUALIFIED DISABLED PERSON WITH A REASONABLE ACCOMMODATION ..... 3

II. IBM'S OFFER OF "REASONABLE ACCOMMODATION" WAS NOT REASONABLE, AND IBM UNLAWFULLY REFUSED TUVELL'S REQUESTS FOR ALTERNATIVES THAT WERE REASONABLE ACCOMMODATIONS ..... 7

III. IBM'S UNLAWFUL REJECTIONS OF TUVELL'S TWO APPLICATIONS FOR JOB TRANSFER ALSO CONSTITUTED DISABILITY DISCRIMINATION AND RETALIATION ..... 12

IV. TUVELL'S SEVENTEEN (17) EXAMPLES OF HARASSING CONDUCT SHOULD BE CONSIDERED BY A JURY ON THE HOSTILE WORK ENVIRONMENT CLAIM, AS EVEN IBM HAS NO ANSWER FOR THEM ..... 15

V. IN ADDITION TO THE DENIALS OF TRANSFERS AND TUVELL'S TERMINATION, OTHER ADVERSE ACTIONS SUPPORT LIABILITY UNDER COUNT VI ..... 17

VI. TUVELL'S TERMINATION WAS ALSO DISCRIMINATORY AND/OR RETALIATORY ..... 19

VII. IBM ADMITTED THAT IT FAILED TO INVESTIGATE ONE OF TUVELL'S COMPLAINTS OF DISCRIMINATION AND SHOULD BE LIABLE UNDER COUNT VIII .....20

CONCLUSION .....24

# TABLE OF AUTHORITIES

**Page**

**Cases**

Alvarado v. Donahoe,
687 F.3d 453 (1st Cir. 2012).....16

Cailler v. Care Alternatives of Massachusetts, LLC,
No. 09-12040-DJC, 2012 WL 987320 (D. Mass. Mar. 23, 2012) .....9

Cleveland v. Policy Mgmt. Sys. Corp.,
526 U.S. 795 (1999).....4

College-Town v. MCAD,
400 Mass. 156 (1987) .....21, 22, 23

Fincher v. Depository Trust and Clearing Corp.,
604 F.3d 712 (2nd Cir. 2010) .....20

Jones v. Nationwide Life Ins. Co.,
696 F.3d 78 (1st Cir. 2012).....11

Montemerlo v. Goffstown Sch. Dist., SAU #19,
No. 12-CV-13-PB, 2013 WL 5504141 (D. N.H. Oct. 4, 2013) .....11

Moran v. Gala,
66 Mass. App. Ct. 135 (2006) .....2

Noon v. IBM,
No. 12 Civ. 4544(CM)(FM),
2013 WL 6504410 (S.D.N.Y. Dec. 11, 2013).....8, 13, 18

Noviello v. City of Boston,
398 F.3d 76 (1st Cir. 2005).....15, 17

Quiles-Quiles v. Henderson,
439 F.3d 1 (1st Cir. 2006).....2, 16, 17

Ralph v. Lucent Technologies,
135 F.3d 166 (1st Cir. 1998).....10

Reed v. LePage Bakeries, Inc.,
244 F.3d 254 (1st Cir. 2001).....11

Russell v. Cooley Dickinson Hosp., Inc.,
437 Mass. 443 (2002) .....4

Sensing v. Outback Steakhouse of Florida, LLC,
575 F.3d 145 (1st Cir. 2009).....6

Weiler v. Household Finance Corp.,
101 F.3d 519 (7th Cir. 1996) ..... 9-10

Wernick v. Federal Reserve Bank of New York,
91 F.3d 379 (2nd Cir. 1996) .....9

**Statutes and Other Authorities**

Equal Employment Opportunity Commission Enforcement Guidance, No.
915.002, 1997 WL 33159167 (Feb. 12, 1997) .....4

M.G.L. ch. 151B, § 4(4).....14, 18, 19, 21

M.G.L. ch. 151B, § 4(4A).....14, 18, 19, 21

# ARGUMENT

## I. TUVELL WAS A QUALIFIED DISABLED PERSON

### A. IBM'S BRIEF CONTRADICTS ITS EARLIER ADMISSION THAT TUVELL WAS A QUALIFIED DISABLED PERSON WITHOUT A REASONABLE ACCOMMODATION

In its brief, IBM argues that Tuvell was "not a qualified handicapped person, capable of performing the essential functions of his position or *any* position." IBM's Brief at 43 (emphasis in original). However, on January 24, 2012, IBM admitted, through counsel, that Tuvell was a qualified disabled person (without accommodation). A1184-A1185. Specifically, Larry Bliss, Counsel for IBM, wrote to Tuvell's counsel, "The ADA does not require IBM to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell's manager as a reasonable accommodation ***since Mr. Tuvell is capable of performing the job.***" A1184 (emphasis supplied). Since IBM also knew and has conceded that Tuvell was disabled, e.g., IBM's Brief at 16 & n.3, Tuvell has satisfied the two elements of the definition of a qualified disabled person, i.e., that he was disabled and capable of performing the essential functions of a job, either with or without reasonable accommodation. See Tuvell's Brief at 26.

IBM likely stated that Tuvell was capable of performing his job without an accommodation as part of its strategy to drag out the short term disability process until Tuvell's benefits were reduced to zero and continue to send the message that

the only way Tuvell would be allowed to return to work at IBM was to continue reporting to Feldman in his current position, all in the hopes that Tuvell would just resign, and IBM could avoid terminating his employment and increasing the chances that he could prevail in a lawsuit against it. See Quiles-Quiles v. Henderson, 439 F.3d 1, 6, n.4 (1st Cir. 2006) ("The jury reasonably could have inferred . . . that, instead of pursuing a formal termination, (the plaintiff's) supervisors engaged in a course of harassment to force him to relinquish his position.").

IBM should be estopped from arguing now that Tuvell was not capable of performing his job without an accommodation. See, e.g., Moran v. Gala, 66 Mass. App. Ct. 135, 139-42 (2006). In Moran, where an attorney had previously represented in a deed that a certain piece of real estate belonged to one property, the attorney and his wife were estopped from thereafter pursuing an adverse possession claim against the owners of that property, because doing so would "squarely contradict" the position the attorney had taken previously in writing. Id. This mirrors the instant case, and where Tuvell engaged counsel as he struggled in vain to prompt IBM to agree to transfer him to a new position and retained counsel for the expensive path of litigation, these detriments should prevent IBM from arguing now that he was not capable of performing his job without an accommodation. See id. at 140 (recognizing the "cost and trouble of this

litigation" in support of finding of estoppel); Frederick v. ConAgra, Inc., 713 F. Supp. 41, 45 (D. Mass. 2012) (listing elements of estoppel doctrine). Accordingly, this Court should rule that Tuvell has presented sufficient evidence for a jury to conclude that he was a qualified disabled person, which is relevant for his claims under Counts II and IV and some of his claims in Counts V and VI.

### B. TUVELL HAS ALSO SHOWN HE WAS A QUALIFIED DISABLED PERSON WITH A REASONABLE ACCOMMODATION

Even if IBM could admit on January 24, 2012, that Tuvell was a qualified disabled person without a reasonable accommodation and now be entitled to argue that he was not a qualified disabled person without a reasonable accommodation, Tuvell has separately established that he was a qualified disabled person with a reasonable accommodation. See Tuvell's Brief at 26-30.

First, a jury could decide Tuvell was capable of returning to his job with a new supervisor. See Tuvell's Brief at 27-30. In IBM's attempt to defeat this path to qualified disabled person status, IBM argued generally that Tuvell was "totally impaired to work from August through at least December of 2011." IBM's Brief at 45.

There are two problems with this argument. For starters, Tuvell's December 19, 2011 MTR provided that the "modification that would be possible is a change of supervisor + setting," thus indicating that Tuvell was NOT totally impaired to

work. A461. Since the MTR provides that Tuvell was capable of performing his job with an accommodation, Tuvell has established that he was a qualified disabled person. The fact that previous MTRs indicated that Tuvell was totally disabled from his current position reporting to Feldman (without accommodation) does not prevent Tuvell from being a qualified disabled person. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 797-98, 802 (1999) (pursuit and receipt of Social Security Disability Insurance benefits with representation of "total disability" does not prevent recipient from pursuing ADA claim); Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 452 (2002) (pursuit and receipt of benefits on assertion of "total disability" does not prevent plaintiff from claiming he is qualified disabled person under 151B); Equal Employment Opportunity Commission Enforcement Guidance, No. 915.002, 1997 WL 33159167, at *17 (Feb. 12, 1997) ("[A]n individual who asserts that s/he is both 'totally disabled' and a 'qualified individual with a disability' has not necessarily made inconsistent representations.").

Also, this MTR was dated December 19, 2011. IBM is trying to divert the Court's attention from the conclusion from Tuvell's health care provider on that day – that he was capable of performing his job with an accommodation – by discussing communications and incidents from before December 19, 2011. IBM's Brief at 45. However, the critical facts here are that Tuvell was prevented from

returning to work under a different supervisor AFTER December 19, 2011, that he was denied the transfer to The 579 Position AFTER December 19, 2011, and that he was denied the transfer to The 125 Position AFTER December 19, 2011. A969, A1016-A1020.

This issue of timing is relevant to the second way that a jury could decide Tuvell was a qualified disabled person with an accommodation; namely, that he could perform his job after a transfer to The 579 Position or The 125 Position. Again, after Tuvell's health care provider informed IBM that the "modification that would be possible [for Tuvell] is a change of supervisor + setting," A461, and after the hiring manager for the transfer positions had been impressed by Tuvell's qualifications and Tuvell had performed well in the interviews, Tuvell's Brief at 15-16, IBM rejected Tuvell for the transfers. A969, A1016-A1020. In the meantime, IBM admitted on January 24, 2012, that Tuvell was capable of performing his current job. A1184. It defies logic to argue that Tuvell could simultaneously be capable of performing his current role but not be capable of performing the essential functions of a *different* position due to the responsibility of "getting along with others without behavioral extremes." IBM's Brief at 46. IBM should not be permitted to have it both ways.

Along these same lines, since IBM admitted on January 24, 2012, that Tuvell was capable of performing his current job, and since IBM repeatedly told

him during that time period that he could apply for a transfer to an open position elsewhere at IBM, it defies logic for IBM to argue now that Tuvell was not "capable of performing the essential functions of his position or *any* position." IBM's Brief at 43 (emphasis in original). Indeed, while Tuvell was still on leave at IBM, he *proved* that he was capable of performing the essential functions of a position by working at Imprivata, and now IBM is arguing he was incapable of doing so! A143.

Finally, regarding the evidence Tuvell has presented regarding his work at Imprivata that a jury could credit in its conclusion that Tuvell was a qualified disabled person, IBM alleges that Tuvell pointed "to no record evidence indicating that he 'worked at a high level for years' at another company." IBM's Brief at 46. However, Tuvell did point to such record evidence. On page 29 of his brief, he cited page 747 of the Joint Appendix for the point that he made on page 28 of his brief that he had worked at a high level for years at another company. Indeed, on page 747 of the Joint Appendix that he cited, Tuvell's affidavit indicates that since May 12, 2012," he had been "working at Imprivata, in a high level, technical capacity. I am able to perform these functions, despite my PTSD. I am able to perform such functions whenever I am not being harassed." A747. See Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 157 (1st Cir. 2009) (plaintiff raised genuine issue of material fact that she was qualified disabled person based

partly on how she worked following diagnosis of disability). Tuvell has established, or at least created a genuine issue of material fact, that he was capable of returning to his job with a new supervisor and/or to a position with a different setting and supervisor, such as The 579 Position or The 125 Position, and thus, that he was a qualified disabled person.

## II. IBM'S OFFER OF "REASONABLE ACCOMMODATION" WAS NOT REASONABLE, AND IBM UNLAWFULLY REFUSED TUVELL'S REQUESTS FOR ALTERNATIVES THAT WERE REASONABLE ACCOMMODATIONS

IBM maintains that it was reasonable to offer Tuvell the chance to remain on unpaid leave until he could return to work under Feldman, the supervisor who exacerbated his PTSD, because if Tuvell was willing to return to that harassing environment, IBM would allow him to go to doctor's appointments and have performance reviews with someone other than Feldman. IBM's Brief at 47. By immersing Tuvell right back into a role with Feldman as his day-to-day supervisor, that arrangement would have been contrary to Tuvell's documented medical limitations. See Tuvell's Brief at 33-34. Because that arrangement was contrary to his documented medical limitations, it does not meet the definition of a "reasonable accommodation," which is a modification to the work environment that actually permits an employee to do his job. See Tuvell's Brief at 32.

Since IBM's offered "accommodation" was not a reasonable one under the circumstances, its reliance on cases where employers gave employees a choice between multiple reasonable accommodations is unpersuasive. See IBM's Brief at 48. Indeed, IBM advances no argument, nor could it, explaining how, in the face of Tuvell's documented medical limitations, requiring Tuvell to continue reporting to Feldman was a "reasonable accommodation." IBM has elsewhere recognized the crucial importance of offering an accommodation that is consistent with a disabled employee's medical limitations. See Noon v. IBM, No. 12 Civ. 4544(CM)(FM), 2013 WL 6504410, at *12 (S.D.N.Y. Dec. 11, 2013) (IBM argued that its proposed accommodations "were 'plainly reasonable' because they were consistent with Plaintiff's physical limitations."). Even if IBM's proposed accommodation *was* consistent with Tuvell's medical limitations, which of course it was not, it could still be found to be unreasonable by a jury, as the court held in Noon. Id. at *13. Certainly, then, where IBM's proposed accommodation was directly contrary to Tuvell's medical limitations, a jury could find it to be unreasonable.

Similarly, IBM's attempt to distinguish cases relied on by Tuvell holding that unpaid leave can fail to qualify as a reasonable accommodation, see Tuvell's Brief at 32-33, based on its notion that Tuvell was "totally impaired to work,"

IBM's Brief at 48, once again ignores the fact that Tuvell's MTR dated December 19, 2011, certified that he was not totally impaired to work. A461.

Regarding Tuvell's request for a new supervisor, IBM characterizes this as asking IBM to "find another job for an employee who is not qualified for the job he or she was doing." IBM's Brief at 49. However, IBM maintained that Tuvell was qualified for the job he was doing, A631, A1184, and Tuvell's request for a new supervisor was not a request for another job, it was a request for a new supervisor. Under the MCAD Guidelines, "modifying methods of supervision" can be a "reasonable accommodation." Addendum ("ADD") 38.

Cases cited in this context by IBM, see IBM's Brief at 49-50, are inapposite. August v. Offices Unlimited, Inc., 981 F.2d 576, 584 (1st Cir. 1992) turned on whether the plaintiff was a qualified disabled person, not on whether he was reasonably accommodated, and he never requested a new supervisor. The plaintiff in Cailler v. Care Alternatives of Massachusetts, LLC, No. 09-12040-DJC, 2012 WL 987320 (D. Mass. Mar. 23, 2012) also did not request a new supervisor. Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 385 (2nd Cir. 1996) is unpersuasive, because the employer there had offered other reasonable accommodations to the employee with a back injury, namely ergonomic furniture and the ability to move around and stretch periodically, thereby obviating the need to provide a new supervisor. Similarly, Weiler v. Household Finance Corp., 101

F.3d 519, 526 (7th Cir. 1996) is unpersuasive, because that employer had affirmatively "contacted (the employee) and offered her alternative available positions within her salary grade and invited her to interview for them," and since she refused to even interview for the transfers, the employer didn't need to also offer her a new supervisor.

These cases cannot trump Ralph v. Lucent Technologies, 135 F.3d 166, 171-72 (1st Cir. 1998), where this Court held that an employer had reasonably accommodated an employee with workplace-induced PTSD and depression by providing him with 52 weeks of paid leave and then changing his supervisor upon his return from leave. The Ralph Court went on to hold that the employer's duty to provide a reasonable accommodation continued even after having provided the reasonable accommodation of paid leave and a new supervisor. Id. at 167, 172 (claims under both 151B and the ADA). IBM's offer of unpaid leave and no new supervisor stands in stark contrast to that reasonable accommodation. A jury should be permitted to decide whether, under the circumstances, IBM's proposal or Tuvell's proposal was reasonable under Count II. See Tuvell's Brief at 30-35.

Likewise, a jury should be permitted to decide whether Tuvell's proposals to be transferred to The 579 Position and The 125 Position were reasonable accommodations that were unlawfully rejected under Count II and Count IV. See Tuvell's Brief at 35-38.

IBM acknowledges on page 51 of its brief that a transfer to an open position may be a reasonable accommodation under the ADA. E.g., Montemerlo v. Goffstown Sch. Dist., SAU #19, No. 12-CV-13-PB, 2013 WL 5504141, at *6 (D. N.H. Oct. 4, 2013) (summary judgment denied for employer on reasonable accommodation claim where jury could find that plaintiff was qualified to transfer to open 4th-grade teaching position). See also Tuvell's Brief at 35-38. Meanwhile, neither of the First Circuit cases cited by IBM in this context, see IBM's Brief at 51-52, involved an employee seeking a transfer as a reasonable accommodation. See Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012) (no liability for employer that raised the possibility of transferring the plaintiff, who declined to pursue a transfer); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 260, 262 (1st Cir. 2001) (no liability for employer where plaintiff had not sufficiently requested an accommodation).

IBM relies on the Jones and Reed cases to argue simply that transferring Tuvell to The 579 Position or The 125 Position were not reasonable accommodations based on IBM's conclusion that Tuvell was not a qualified disabled person. Id. at 51-53. IBM tries to hang its hat on Tuvell not being able to perform the essential functions of his job after a transfer because IBM had determined that he had not been subjected to discrimination or harassment in his previous setting. Id. at 52. IBM is grasping at straws here. Its biased, incomplete,

self-serving "investigations" surely cannot serve as the gospel on this topic. Attorney Moore's expert report dissects the numerous inadequacies of those "investigations" across 38 pages, A1365-A1402, providing plenty of support for the conclusion that the result of IBM's "investigations" does not dictate whether Tuvell could perform the essential functions of his job after a transfer.

The climax of IBM's argument in this section was that IBM's "decision to accommodate Tuvell by holding his position open for him is not the equivalent of a health care provider – or IBM – determining that Tuvell was actually capable of returning to work." IBM's Brief at 53. Once again, IBM misses the mark completely, because Tuvell's health care provider, e.g., A461, and IBM, A631, A1184, *both* determined Tuvell was capable of returning to work. As a result, a reasonable jury could find that Tuvell was a qualified disabled person capable of performing The 579 Position or The 125 Position, see discussion of qualified disabled person status supra at 1-7 as well as Tuvell's Brief at 26-29 and 35-38, and thus, that they were reasonable accommodations that IBM failed to provide, which supports liability under Count II and Count IV.

## III. IBM'S UNLAWFUL REJECTIONS OF TUVELL'S TWO APPLICATIONS FOR JOB TRANSFER ALSO CONSTITUTED DISABILITY DISCRIMINATION AND RETALIATION

One of the ways IBM unlawfully discriminated against Tuvell because of his disability and retaliated against him because of his protected activities under the

ADA and Chapter 151B was by denying his applications to obtain open positions at IBM. As discussed supra at 1-7 and in his first Brief at 26-29, Tuvell was a qualified disabled person, and he was specifically qualified for the transfer to The 579 Position and The 125 Position, as discussed in his first Brief at 35-38.

The first failure to transfer Tuvell – to The 579 Position – was an adverse employment action, because instead of permitting Tuvell to resume work and be paid his normal salary for his work, the failure to transfer Tuvell returned him to a status of being on short term disability leave ("STD") with a reduced income. See Tuvell's Brief at 39-40. See also Noon, 2013 WL 6504410, at *6, *8 (IBM's "failure to rehire" employee on disability leave to a different position within IBM could be found by jury to be an adverse employment action). The second failure to transfer Tuvell – to The 125 Position – was also an adverse employment action, because the very next day after the second denial of transfer, Tuvell's STD benefits ran out, and he was transitioned to unpaid leave. See Tuvell's Brief at 39-40. Tuvell was thus left with a job that provided no income, as opposed to a job that would have provided him a regular income and allowed him to resume his career.

The District Court's conclusion that these denials were not adverse employment actions was based on the erroneous rationale that Tuvell's material terms, conditions, and privileges of employment, including his salary, "remained unchanged." ADD 22. The two denials of transfer caused Tuvell's income to drop

to zero. See Tuvell's Brief at 39-40.[1] This Court should reverse and hold that the denials of transfers were adverse employment actions, which is relevant for Tuvell's claims that the denials of transfers constituted unlawful discrimination as well as unlawful retaliation under Count V.

As for the remaining elements of Tuvell's claims in Count V,[2] there is extensive direct and circumstantial evidence that the denials of transfers were unlawfully discriminatory and/or retaliatory. See Tuvell's Brief at 39-47. The District Court avoided an analysis of all this evidence in this context by wrongly holding that Tuvell was not a qualified disabled person and that the denials of transfers were not adverse actions. ADD 20-22. As a result, the District Court never discussed any alleged legitimate, nondiscriminatory reason for the denials of transfers.[3] If it had, it would have had to address the fact that on January 6, 2012, Kime communicated the following as the primary reason for the denial of transfer: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term

[1] IBM also wrongly asserts that this was not an infliction of economic harm. See IBM's Brief at 57.

[2] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count V, see IBM's Brief at 43, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

[3] It only did so for the termination. ADD 22.

disability – this will receive very close scrutiny from the operations people in the organization." See Tuvell's Brief at 40. This direct evidence of discriminatory animus and causation is just one example of the many pieces of evidence[4] that support a finding of liability under Count V. See Tuvell's Brief at 39-47.

## IV. TUVELL'S SEVENTEEN (17) EXAMPLES OF HARASSING CONDUCT SHOULD BE CONSIDERED BY A JURY ON THE HOSTILE WORK ENVIRONMENT CLAIM, AS EVEN IBM HAS NO ANSWER FOR THEM

Tuvell cites seventeen (17) examples of conduct that a reasonable jury could find helped create and foster a hostile work environment based on his disability, his complaints of discrimination, or a combination thereof. See Tuvell's Brief at 47-51.[5] In its two-paragraph section defending against this argument for liability under Count VII, IBM does not mention any of those seventeen (17) examples of harassing conduct. See IBM's Brief at 62-63. All it does is refer to its discussion of some of this conduct in its previous section on "Tangible Acts." See id. at 63.

[4] These numerous pieces of evidence discussed by Tuvell in his first brief are not "groundless speculation" and were not asserted "vaguely," as alleged in conclusory fashion by IBM, see IBM's Brief at 58, as it discussed the denial of transfers without any explanation, not surprisingly, of how Kime's written communication on January 6, 2012, denying the first transfer was anything other than direct evidence of discrimination. See id. at 57-58.

[5] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under Count VII, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See, e.g., Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir. 2005).

However, in that previous section on "Tangible Acts," IBM only addresses five of the seventeen (17) examples of harassing conduct. See id. at 60-62. The ones that it did discuss are sufficient to support a finding of a hostile work environment, and the ones it failed to address, such as Tuvell being subjected to defamation by his supervisor multiple times, being demoted, being denied a job transfer specifically because he was on disability leave, and being threatened with termination for seeking to draft a complaint of discrimination, are also sufficiently severe and/or pervasive to support a finding of a hostile work environment. See Tuvell's Brief at 47-51; Quiles-Quiles, 439 F.3d at 7-9 (reinstating jury verdict on disability harassment and retaliation claims and describing evidence that supported both claims, such as supervisors "frequently mentioning the disability in the course of their actions").

These seventeen (17) examples of harassing conduct were far more than just "trivial annoyances," as argued by IBM, see IBM's Brief at 62, and the plaintiff's "hostile work environment claim [that] necessarily rest[ed] on three discrete verbal exchanges taking place over the course of a period spanning more than eight months" in Alvarado v. Donahoe, 687 F.3d 453, 462 (1st Cir. 2012), even if it included "taunting and mocking comments," pales in comparison to Tuvell's hostile work environment claim. A reasonable jury could find that Tuvell's seventeen (17) examples of harassing conduct were more analogous to the hostile

work environment in Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005), where the plaintiff was "subjected to a steady stream of abuse," "falsely accused of misconduct," and subjected to "work sabotage, exclusion, [and] denial of support."

Like IBM, the District Court completely overlooked almost all of the seventeen (17) examples of harassing conduct discussed in Tuvell's Brief at 47-51, choosing only to mention two and erroneously referring to the rest, including defamation, being denied a job transfer specifically because he was on disability leave, and being threatened with termination for seeking to draft a complaint of discrimination, as "regular business practices and policies." ADD 25. A jury should be permitted to evaluate Count VII, as "[T]he hostile environment question[] is . . . to be resolved by the trier of fact on the basis of inferences drawn from a broad array of circumstantial and often conflicting evidence." Quiles-Quiles, 439 F.3d at 8.

## V. IN ADDITION TO THE DENIALS OF TRANSFERS AND TUVELL'S TERMINATION, OTHER ADVERSE ACTIONS SUPPORT LIABILITY UNDER COUNT VI

The District Court's conclusion that none of the seventeen (17) actions enumerated in support of Tuvell's hostile work environment claim constitute adverse employment actions for purposes of Tuvell's discrimination and retaliation claims in Count VI, ADD 23-24, was reversible error. See Tuvell's Brief at 51-

56.[6] For example, the District Court referred to Tuvell's demotion as an "inter-group transfer" that did not result "in any change to Tuvell's pay or his rank within the company." ADD 24. However, the demotion in fact lowered Tuvell from a Band 8 position to a Band 7 position, which IBM acknowledged to be a "lesser role." See Tuvell's Brief at 53. A reasonable jury could find that this diminution in rank, along with the other evidence marshaled by Tuvell regarding the demotion, see Tuvell's Brief at 53, meant that the demotion was an adverse employment action under the standard for a discrimination claim as well as the more lenient standard for a retaliation claim. See Tuvell's Brief at 51-53. See also Noon, 2013 WL 6504410, at *7 (a transfer that is a "setback to (one's) career . . . is an adverse employment action within the meaning of the ADA."). IBM does nothing to challenge this conclusion, as it failed even to mention the demotion, let along the diminution in rank from Band 8 to Band 7, in its discussion of Count VI. See IBM's Brief at 60-62.

The evidence supporting a finding of IBM's disability discrimination is plentiful. See, e.g., Tuvell's Brief at 40-47. Furthermore, the evidence supporting a finding of IBM's disability discrimination in relation to the demotion in

[6] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count VI, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

particular is plentiful, see Tuvell's Brief at 53-56, and the District Court thus erred by granting summary judgment on Count VI.

## VI. TUVELL'S TERMINATION WAS ALSO DISCRIMINATORY AND/OR RETALIATORY

Tuvell has presented sufficient evidence for a jury to conclude that the alleged justification for his termination was a pretext for discrimination and/or retaliation, thereby supporting liability again under Count VI. See Tuvell's Brief at 56-58.[7] On May 11, 2012, IBM communicated its need to confirm that Tuvell was not working for a competitor. See Tuvell's Brief at 58. Tuvell communicated his willingness to satisfy that need by submitting information about his employment to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. See Tuvell's Brief at 58. A reasonable jury could find that when IBM rejected Tuvell's offer, it was not motivated solely to learn where Tuvell was working, and that its decision to terminate Tuvell's employment instead of accepting his offer that would have allowed it to receive the assurance it sought was tainted by discriminatory and/or retaliatory motives. See Tuvell's Brief at 56-58.

[7] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count VI, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

## VII. IBM ADMITTED THAT IT FAILED TO INVESTIGATE ONE OF TUVELL'S COMPLAINTS OF DISCRIMINATION AND SHOULD BE LIABLE UNDER COUNT VIII

IBM argues that no independent claim of failure to investigate exists absent underlying proof of discrimination, but none of the cases it cited involve claims under the ADA and Chapter 151B, and in the only case it cited where the plaintiff argued that the employer failed to perform *any* investigation in response to a particular complaint, the Second Circuit held, "We do not mean to suggest that failure to investigate a complaint cannot ever be considered an adverse employment action for purposes of a retaliation claim." Fincher v. Depository Trust and Clearing Corp., 604 F.3d 712, 722 (2nd Cir. 2010).

IBM also argues that it "conducted appropriate, good faith investigations," and that Tuvell "has offered no evidence that such investigations did not take place." See IBM's Brief at 68. This is false. On March 2, 2012, Tuvell filed a Corporate Open Door Complaint alleging discrimination, retaliation, and unlawful failure to reasonably accommodate him. A1252-A1258. See also Tuvell's Brief at 61. Mandel, the employee in charge of IBM's investigations into Tuvell's complaints of discrimination and retaliation, admitted that he never even opened an investigation into Tuvell's Complaint dated March 2, 2012. A920. See also Tuvell's Brief at 61-62. Then, on March 13, 2012, Mandel *threatened Tuvell with termination if he continued emailing his complaints of discrimination to others*.

A925, A1129. See also Tuvell's Brief at 57. This evidence supports a finding of liability under the ADA and Sections 4(4) (retaliation), 4(4A) (interference)[8], and 4(16) (disability discrimination) of Chapter 151B. College-Town v. MCAD, 400 Mass. 156, 167-68 (1987). See Tuvell's Brief at 59-62.

In College-Town, the Supreme Judicial Court (the "SJC") held:

> The hearing commissioner also found that [the employer] discriminated against [the plaintiff] in violation of *G. L. c. 151B, ß 4*, by failing to take adequate steps to remedy the situation once [the plaintiff] complained of [a supervisor's] harassment. . . . In this case, the hearing commissioner found that [the employer] did not conduct a fair or thorough investigation of [the plaintiff's] **allegation** of sexual harassment. The hearing commissioner concluded that the investigation was "deferential and inadequate." The commissioner's conclusion was supported by substantial evidence, and there was no error of law.

400 Mass. at 167-68 (emphasis supplied). The SJC did not condition its holding on discrimination having been proven. Indeed, it discussed the employer's obligation to investigate the "allegation" of harassment. Id. at 167. Further, the dissent states, "Although the commission is critical of the employer's investigation, there was no corroboration of the employee's complaints on the record before it . . . . The employer was, therefore, faced with the problem of resolving a credibility contest between a recently hired employee and a

[8] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count VIII, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

comparatively senior supervisor." Id. at 174. This indicates that the majority concluded the opposite, namely, that an employer could be held liable for failing to conduct a proper investigation when the question of liability at the time was unclear. See id. at 167-68.

If this Court held otherwise, it would create an untenable framework with extremely perverse incentives. Specifically, an employer in receipt of a good faith complaint of discrimination could fail to even investigate the complaint, and it would avoid liability as long as a court later granted it summary judgment or a fact finder later determined that there had not been any discrimination. Indeed, the legality of an employer's decision not to investigate a good faith claim of discrimination would depend not on the circumstances at the time the complaint was made and what was known by the employer, it would depend on what happened in litigation years later. In this case, that would mean that the propriety of IBM's decision not to investigate Tuvell's March 2, 2012 complaint at all would depend on what evidence Tuvell uncovered himself during litigation in the three years, four months, and five days that passed between the day he submitted his complaint and the day the District Court ruled against him. A1252, ADD28.

Surely the Massachusetts legislature did not intend for employers to be encouraged to duck their heads in the sand in this fashion. If an employer does not investigate a good faith complaint of discrimination at the time it is made, it will

not know if one of its employees is violating the law by acting in a discriminatory manner. It will put the onus on plaintiffs to go fight court battles for years to try and prove that discrimination occurred, thereby occupying the court system's resources, while an employer sits idly by with its fingers crossed, gambling that a fact finder will later conclude that it was not required to perform any investigation whatsoever in response to a good faith complaint years before.

None of the cases cited by IBM in this context was from a Massachusetts state appellate court, see IBM's Brief at 67-68, and given the rationale just described, this Court should not disturb the holding of College-Town. Instead, this Court should hold that IBM's failure to perform any investigation of Tuvell's March 2, 2012 complaint was a per se violation of Section 4(4A) of Chapter 151B, and that a jury could find that IBM's conduct in response to Tuvell's complaints of discrimination also violated the ADA and Sections 4(4) and 4(16) of Chapter 151B.

## CONCLUSION

For the aforestated reasons, as well as the reasons discussed in Tuvell's first Brief, Tuvell respectfully requests that this Court reverse the entry of summary judgment and remand the case for trial. Tuvell also requests that he be awarded attorney's fees and costs.

Respectfully submitted,

Plaintiff-Appellant Walter Tuvell,

By his Attorney

/s/ Andrew P. Hanson
Andrew P. Hanson, Esq.
No. 1171500
Andrew P. Hanson, Esq.
One Boston Place
Suite 2600
Boston, MA 02108
Tel: (617) 933-7243
Fax: (857) 239-8801
Email: andrewphanson@gmail.com

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

**Certificate of Compliance with Type-Volume Limitation, Typeface Requirement, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 5,650 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14 point font.

/s/ Andrew P. Hanson
Andrew P. Hanson, Esq.

Dated: February 16, 2016

CERTIFICATE OF FILING AND SERVICE

I, Elissa Matias, hereby certify pursuant to Fed. R. App. P. 25(d) that, on February 16, 2016, the foregoing Reply Brief for Plaintiff-Appellant was filed through the CM/ECF system and served electronically on the individuals listed below:

Joan Ackerstein
Matthew A. Porter
Anne Selinger
Jackson Lewis PC
75 Park Plaza
4th Floor
Boston, MA 02116
(617) 367-0025

/s/ Elissa Matias
Elissa Matias

*{This page intentionally left blank.}*

**In The**

# United States Court Of Appeals

**For The**

# First Circuit

Case No. 15-1914

WALTER TUVELL,

*Plaintiff-Appellant,*

*v.*

INTERNATIONAL BUSINESS MACHINES,

*Defendant-Appellee.*

*Appeal from an Order and Judgment entered in the United States District Court for the District of Massachusetts*

## PETITION FOR REHEARING, AMENDED (TER)

WALTER E. TUVELL, *PRO SE*
836 Main St.
Reading, Massachusetts 01867
(781) 944-3617 (h); (781) 475-7254 (c)
walt.tuvell@gmail.com

# TABLE OF CONTENTS

PREFACE ..... iii
AUTHORITY ..... iv
REASONS WHY REHEARING SHOULD BE ALLOWED ..... v
QUESTIONS PRESENTED ..... vi
RELIEF SOUGHT ..... vii
CASES CITED ..... viii
CERTIFICATE OF COMPLIANCE ..... ix
CERTIFICATE OF SERVICE ..... x
ARGUMENT ..... 1
Introduction ..... 1
Summary Judgment Standard Of Review (SJSOR) ..... 1
PSOF (Plaintiff's Statement Of Facts) ..... 2
PSOF-Exclusion ..... 3
PSOF-Exclusion With Particularity ..... 7
Prototype: Excel Graphics ..... 7
Three-Way Meeting; Yelling; Demotion/Reassignment ..... 9
QDI: MTR; STD; "Totally Disabled"; And All That ..... 11
QDI-Exclusion With Particularity ..... 15
Conclusion ..... 15

# PREFACE

In the matter of Tuvell v. IBM, this is a petition for rehearing of the appellate panel's *per curiam* opinion issued on May 13, 2016, which affirmed the district court's opinion (Memorandum and Order, Dkt. 94, dated Jul. 6, 2015, filed Jul. 7, 2015).

# AUTHORITY

This is a dual-purpose[1,†] petition, authorized by FRAP (Federal Rules of Appellate Procedure) 35 and 40.

† Superscript *numbers* are to be *ignored*. They refer to *endnotes* (not *footnotes*) that that exist only in a *separate* "annotated" version of this petition, which is available for the panel to consult at their discretion. The *only* difference between the two versions (apart from the presence of the endnotes themselves and references thereto) is the content of this footnote.

# REASONS WHY REHEARING SHOULD BE ALLOWED

Rehearing should be allowed because this petition raises issues of *mistakes*‡ satisfying the following required criteria (underlined) of FRAP rules:

(A) Panel rehearing (FRAP 40)[2] — the panel has overlooked or misapprehended several points of (procedural and/or substantive) law or fact,[3] resultantly causing great harm to Tuvell (throwing the case into confusion and destroying it).

(B) *En banc* rehearing (FRAP 35)[4] — the panel's decision conflicts with certain decisions of the United States Supreme Court and the First Circuit Court of Appeals,[5] as well as other Circuit Courts of Appeals,[6] and also applicable holdings of the Supreme Judicial Court of Massachusetts (SJC)[7] (see *Cases Cited*, below).[8]

According to these FRAP rules, it is our burden here to point out how *"mistakes were made by the courts"* (of the two types listed, (A) and (B)) — i.e., that *"the courts' (joint) opinion was wrongly decided"* — and *not* to "re-argue the case-in-chief on the merits." To do the latter would be wastefully duplicative, because those case-in-chief materials are already readily available to the courts.

---

‡ As mentioned in the remarks at the beginning of the *QUESTIONS PRESENTED* section, below, the mistakes we identify herein first appeared in the opinion of the district court. The question may be asked: Why didn't we raise these district court mistakes already in our Appellate briefs (principal and reply) we presented to the appellate panel? The answer is that it was *inappropriate (not ripe)* to do so, by rule. The panel's review of the district court's opinion is *de novo*: the panel looks at appellant's case-in-chief with fresh eyes, and comes to its own independent determination, owing no deference to the district court's opinion; raising issues of *mistake* by the district court would be out-of-bounds for that inquiry. It is only *here, at rehearing* level, that issues of *mistake* are in order (FRAP 35, 40). Since the panel *adopted* the district's opinion, any mistakes at the district level are equally attributable to the appellate level, so are appropriate here.

# QUESTIONS PRESENTED

Throughout, we speak of "the courts" to refer indiscriminately to both district court and appellate panel for this case. Similarly, when there is no need to distinguish the opinions of the two courts, we just say "the (joint) opinion" (abbreviated "op.") to refer to both indiscriminately. No confusion results thereby, since the appellate court adopted the district court's opinion without reservation (saying "the district court got it right"), so both courts can justifiably be assigned coequal, joint ownership.

(A) Were the courts' opinions rightly decided?
*[Suggested answer: No.]*

(B) At summary judgment, are the courts bound by the summary judgment standard of review (as promulgated by, e.g., *Sensing v. Outback Steakhouse*)?
*[Suggested answer: Yes.]*

(C) At summary judgment, are the courts required to accurately consider all documents properly submitted by the parties pursuant to FRCP (Federal Rules of Civil Procedure) 56 and LR (Local Rule) 56.1?
*[Suggested answer: Yes.]*

(D) Must the courts observe Supreme Court precedent for its cases cited herein?
*[Suggested answer: Yes.]*

(E) Should the courts observe the precedent of the First Circuit, the other federal Circuits, and the Massachusetts Supreme Judicial Court (SJC), for their cases cited herein?
*[Suggested answer: Yes.]*

# RELIEF SOUGHT

(A) Correction (vacation) of the appellate panel's opinion.

(B) Correction (reversal) of the district court's opinion.

(C) Remand to district court for further proceedings.

(D) Costs and fees to the extent applicable.

# CASES CITED

(A) *Bulwer v. Mt. Auburn Hospital*, SJC-11875 (Mass. SJC, 2016).

(B) *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006, unanimous).

(C) *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999, unanimous).

(D) *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219 (2d Cir., 1994). [Cited only in a footnote.]

(E) *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir., 2001).

(F) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000, unanimous).

(G) *Sensing v. Outback Steakhouse of Florida*, *LLC,* 575 F.3d 145 (1st Cir., 2009).

(H) *Tolan v. Cotton*, 572 U.S. ___ (2014, *per curiam*). [Cited only in an endnote.]

# CERTIFICATE OF COMPLIANCE

(A) This brief complies with the **type-volume limitation** of FRAP 32(a)(7)(B), because the *ARGUMENT* section of the brief (which *excludes* the front-matter part of the brief exempted by FRAP 32(a)(7)(B)(iii), and the optional appendix of endnotes, discussed in fn. † in the *AUTHORITY* section, above) contains less than 3,500 words. (Even *including* all those exempted parts, the *total* number of words in the *entire* document is less than 9,000 words.) The brief also complies with the additional **page-length limitations** of FRAP 35(b)(2) and 40(b), because it (the *ARGUMENT* section) does not exceed 15 pages.

(B) This brief complies with the **typeface requirements** of FRAP 315.42(a)(5) and the **type style requirements** of FRAP 32(a)(6), because this brief has been prepared using Linux Fedora LibreOffice 5.0.6.2 Writer, in proportionally spaced 14-point regular Times New Roman font, double-spaced between lines (with acceptable coordinated variations for title page, headings, footnotes and endnotes, lists, displayed quotations, emphasis, etc.). The brief is published electronically in PDF format, with page size 8½″-by-11″, and 1″ margins on all sides (with page number footers in the bottom margin, as is allowable). When printed, the brief is intended to be rendered on unglazed white paper.

*Signed:* */s/ Walter E. Tuvell*

*Dated:* *June 4, 2016*

# CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically via the First Circuit's CM/ECF system, on Jun. 4, 2016. It will be served electronically via CM/ECF to all counsel of record and other registered participants of the Court's CM/ECF system. I hereby certify that paper copies will be sent to all participants not registered in CM/ECF.

*Signed:* */s/ Walter E. Tuvell*

*Dated:* *June 4, 2016*

# ARGUMENT

## Introduction

The courts' errors are categorized into two general (intertwined)[9] classes:

(A) **"PSOF-Exclusion"** errors.

(B) **"QDI-Exclusion"** errors.

We first discuss PSOF-exclusion, which is deeply rooted in the *summary judgment standard of review*. Our analysis must begin there.

## Summary Judgment Standard Of Review (SJSOR)

This case is currently in the posture of appellate review over IBM's motion for *summary judgment*. As such, the **SJSOR** (Summary Judgment Standard of Review) governs the proceedings, both at district court (upon initial review) and at appellate panel (upon independent non-deferential plenary *de novo* review). We argue that, while the courts *paid lip service* to the SJSOR (op., pp. 1–2), they ***utterly failed to observe*** that standard, resulting in a wrongful decision.

The SJSOR, as promulgated by, e.g., *Sensing* (§ II(A), pp. 152–153) and its many parents, siblings and progeny, **strictly mandates the duties** incumbent upon any tribunal reviewing summary judgment. We formulate the SJSOR as a rubric of six (6) **core tenets:**[10]

(A) **All Issues —** *All* (not just "some") *issues*, especially *disputed genuine issues of material fact* ("DFs"),[11] must be considered ("admitted into discussion").

(B) **Whole Record —** The *entire* (not just "part" of the) *record as a whole, concerning each and every issue*, must be considered.

(C) **In Context —** Issues must be considered *in the context* of the record-as-a-whole (as opposed to "out-of-context line-by-line" isolation).[12]

(D) **Non-Movant Trumps Movant —** Issues must be *construed* in the *light most favorable* to, and *credit awarded* to, *non-movant* (not to movant).

(E) **All Inferences —** *All* (not just "some") *reasonable inferences* from these tenets must also be *favorably interpreted* and *credited* to *non-movant*.[13]

(F) **Light Burden —** Non-movant bears only the *light burden* of *mere production* of facts; he *need* offer *only de minimus* (i.e., non-conclusory) proof/persuasion, and *no* legal theories supporting relief (but he *may* offer some of either). Fact-finding is for the jury at trial, not for the court at summary judgment.[14] "Enough evidence" is *not* a criterion (though sometimes colloquially cited).

To belabor the obvious: "must" here means *mandatory*. The reviewing tribunal has *absolutely no discretion* in the matter (by self-imposed, advertised, rule).

## PSOF (Plaintiff's Statement Of Facts)

Conforming to customary practice for summary judgment in the 1st Circuit (see FRCP 56 and LR 56.1), seven (7) **key documents** were filed by the parties in this case, none of which was flagged as defective, and all of which are officially included in the record of this case forwarded to the appellate panel:

(A) **DSOF —** Defendant's Statement of Facts, Dkt. 74 (Dec. 15, 2014).

(B) **DMemo —** Defendant's Memorandum in Support of Summary Judgment, Dkt. 75 (Dec. 15, 2014).

(C) **RespDSOF —** Plaintiff's Response to DSOF, Dkt. 82 (Feb. 12, 2015). Note that RespDSOF refers to PSOF nineteen (19) times. Of the two, RespDSOF is *reactive* (to the DSOF), while PSOF is the *active* one. Both must be credited.

(D) **PSOF**[15] **—** Plaintiff's Statement of Facts, Dkt. 83 (Feb. 12, 2015). It explicitly declares on its face that it is submitted "[p]ursuant to LR 56.1".

(E) **PMemo —** Plaintiff's Memorandum in Opposition to Summary Judgment, Dkt. 85 (Feb. 12, 2015).

(F) **RepPMemo —** Defendant's Reply to PMemo, Dkt. 86 (Mar. 2, 2015).

(G) **RespPSOF —** Defendant's Response to PSOF, Dkt. 87 (Mar. 2, 2015).

In customary practice, and by inspection in the present case, the **PSOF** is the *most important* of these key documents to be considered at summary judgment time, *above and beyond the others* (RespDSOF is second most important, but is *limited* by being *reactive* to DSOF). For, by the SJSOR ("non-movant trumps movant" tenet), the PSOF *determines* the first-tier "facts/DFs of the case" *that courts must credit*. The DSOF is consigned to a second-tier "jaundiced view".

But that ("*courts must credit*") did not happen.

## PSOF-Exclusion

With that background, the "PSOF-exclusion" class of errors can now be defined like this (with a great deal of explication to follow):

**PSOF-EXCLUSION THESIS: The courts subtly[16] excluded, ignored and overlooked the PSOF (failing to consider and credit it, or even acknowledge its existence), misapprehending its crucial significance with no justification whatever (explicit or implicit, intentional or inadvertent), though the courts were unconditionally required to include it. The courts thus patently failed to hew to the SJSOR's strict "all issues" and "whole record" tenets. The courts resultantly improperly/erroneously/falsely resolved disputed facts in favor of movant, thus violating the SJSOR's "non-movant trumps movant" tenet too. This was grave legal error of procedural law ("basic rules of the game").[17]**

This pervasive PSOF-exclusion maneuver, originating with the district court and propagated to the appellate panel, comprises the crux issue (root cause) for many of the arguments in this petition. It was a *systemic error* of procedural law that tainted every aspect of the courts' reasoning, and inevitably spawned further, derivative, errors.

As *proof of our thesis*, we begin by noting four (4) characteristics of the courts' treatment of the above seven (7) key documents:

(A) Only two (2) of the key documents (DSOF, RespDSOF) are *listed* (op., p. 2) among the documents the courts relied upon for their facts, *"unless otherwise noted"*.

(B) Close inspection[18] reveals that only two (2) of the key documents (DMemo, PMemo) were in fact *"otherwise noted."*

(C) That leaves fully three (3) of the key documents (PSOF, RepPMemo, RespP-SOF) *completely unacknowledged* as a source for the courts' facts.

(D) Most conspicuous (by its *absence*) was the crucial PSOF — which was pointedly **entirely invisible** from the courts' vision of the case.

Continuing with our proof, deeper analysis (presented in separate sections, below) reveals that the courts' PSOF-exclusion principal: (i) not merely "passively neglected to mention" the PSOF; (ii) but actively had adverse consequences to Tuvell, namely, crediting many of IBM's facts (instead of Tuvell's) which were in actual substantive conflict and dispute with the PSOF ("movant trumped non-movant" — 180° the wrong way around from the SJSOR). The courts, by "explicitly nowhere observing" the PSOF, silently (without rationale or explanation) elevated the DSOF to dominance, and relegated the PSOF to obscurity. The courts thereby failed to meet the SJSOR "whole record" tenet, because they considered only an inexplicably-chosen "non-PSOF subset". Plaintiff's banished PSOF facts were *not permitted to figure at all into DF calculations* — though the SJSOR ("all issues" tenet) strictly mandates that *all* of plaintiff's facts (especially those within the PSOF) *must* be considered, acknowledged, referenced, and credited (SJSOR "non-movant trumps movant"). The courts thus wreaked massive havoc on the genuine and material DFs of this case. That is *ipso facto* illegitimate.

The courts' systemic failure to consider and credit the utterly crucial PSOF wholly eviscerated the SJSOR "all issues" tenet, to plaintiff's great detriment. The

wrongful PSOF-exclusion, together with its consequent "unreasonable non-inferences", comprehensively disemboweled Plaintiff's case — because only the crucial PSOF could hope to reveal the many DFs that do indeed exist in this case (and which only a trial, not summary judgment, can resolve).

**The courts' failure to allow plaintiff's PSOF to figure into the DF calculus constituted egregious, harmful, fatal error, causing a false opinion to be rendered, which must be corrected (vacated/reversed and remanded).**

Once the PSOF-exclusion error was ensconced into place, it became the systemic progenitor of many additional errors flowing from it — as will be reviewed in separate sections, below (by referencing certain relevant facts asserted in the PSOF).[19] Due to space limitations, not all such PSOF-driven facts can be individually addressed in detail here; but our arguments are generalizable, and all of Plaintiff's arguments on the record, hereby reasserted, continue to remain in full force (are not waived). All facts asserted in the PSOF, if properly credited, provide numerous potential reasons (to the extent they are genuine and material) to correct the courts' opinion, and deny IBM's motion for summary judgment.

*Q.E.D. (PSOF-Exclusion thesis, modulo forward references to separate sections below.)*

## PSOF-Exclusion With Particularity

High-level PSOF-exclusion errors tainted many areas of the courts' opinion, spawning low-level errors many times over. We present here a discrete "particularized" list (FRAP 40(a)(2)) of specific PSOF facts that the courts were *required to consider/credit*, but erroneously *didn't* (in whole or in part, recalling the SJSOR's "all issues" and "whole record"): ¶¶ 1, 2–8, 10–18, 21–32, 35–40, 42–52, 54–91 (all hereby incorporated by reference).

As for *with-particularity fact-areas* where PSOF-exclusion factored heavily in the courts' wrongful rejection of Tuvell's arguments, we cite these:

(A) **Three-Way Meeting; Yelling; Demotion/Reassignment**. A whole section is devoted to this topic, below.

(B) **Retaliation.**[20] Op., p. 26.

(C) **Investigation.** Op., p. 25, fn. 9.

(D) **Hostile work environment** (especially "*hyper-critical hyper-scrutiny*" [a well-known blackballing/retaliatory tactic], such as: (i) "bad" [though *protected*][21] emails; (ii) "lazy" letter; (iii) Formal Warning Letter; (iv) complaining to "too many" people [also *protected*];[22] (v) complaining to upper management [also *protected*];[23] (vi) other tangible acts). Op., pp. 23–25.

## Prototype: Excel Graphics

Let the "Excel graphics" episode stand for our *prototypical example* of PSOF-exclusion error. We proceed to present an *illustrative rigorous proof* of the courts' error for this example. This example argument/proof generalizes, *mutatis mutan-*

*dis*, to all items in the "particularized" PSOF-exclusion list, above.[24]

IBM asserts, and the courts accept (op., p.3), concerning the Excel graphics episode, that "Mr. Knabe advised Mr. Feldman that [Tuvell] had failed to complete a work assignment [the Excel graphics] in a timely fashion" (DSOF ¶ 7, p. 2). This instance of IBM's assertion, and all other instances of the assertion, explicitly or implicitly stand for the proposition that Knabe's report to Feldman was *true*. Indeed, Knabe himself has given sworn testimony that he "ask[ed] Mr. Tuvell to provide those [Excel] graphics" (Knabe dep., p. 35).

Tuvell asserts, and the courts reject, the diametrically opposite proposition, that Knabe's report to Feldman was *false* (RespDSOF ¶7, p. 3; PSOF ¶¶ 1, 3–4, pp. 1–2), with properly provided adequate proof per SJSOR's "light burden" tenet.[25]

> According to the SJSOR ("non-movant trumps movant"), the courts were *tightly bound* to credit Tuvell's version of the Excel graphics episode/fact, not IBM's version. But they did the *exact opposite* (op., p. 3).

Now, the opposed stances ("true" vs. "false") of the parties in this example *proves* that the Excel graphics episode/fact was a true DF ("disputed fact", which is obviously "genuine" and "material", since the Excel graphics episode kicked off the whole avalanche of all facts in this case). But existence of even a *single* DF, such as this, already suffices to *defeat* a motion for summary judgment (by SJ-

SOR's "all issues"). This therefore *proves* rigorously that the courts *erred* in *granting* summary judgment.

*Q.E.D. (Excel graphics example.)*

## Three-Way Meeting; Yelling; Demotion/Reassignment

Going beyond PSOF-exclusion "*discrete facts*" mentioned above, this section analyzes a PSOF-exclusion *"fact-area"* which is "particularized" in a different sense, namely, to Tuvell's individual circumstances.

PSOF ¶¶ 2, 5–8, pp. 1–3, asserts factual statements of injuries (psychological PTSD retraumatization, yelling incident [defamation, see below], undesirable demotion/reassignment, continuing harassment), and Tuvell's protests thereto, and his requests for three-way meeting. By the SJSOR ("all issues", "non-movant trumps movant", "all inferences"), the courts were bound to credit these PSOF facts. But they *failed* to do so. We proceed to *prove* this.

The "stressor" (as it is technically called) for the retriggering of Tuvell's PTSD was IBM's falsity regarding the Excel graphics episode. Tuvell's retraumatization prompted him to explicitly reveal his PTSD affliction to IBM on May 26, 2011 (PSOF ¶ 10, p. 3) (though implicitly it had been objectively apparent prior to that), and to cite his PTSD as the impetus for his requests for three-way meeting as reasonable accommodation therefor. Tuvell was initially worried about the specter

of "mere defamation".[26]

But as time went on, and the abusive behavior escalated (notably the yelling incident, and especially Feldman's continued refusal of requests for three-way meeting), the pretextual nature of IBM's behaviors led Tuvell to conclude (justifiably, by the *pretext-only* theory; *Bulwer, Reeves*),[27] that something "*seriously more illegal* than defamation" must be motivating IBM's behavior, namely discrimination and/or retaliation based on some combination of protected characteristics (age, sex, race, ultimately PTSD disability). This prompted Tuvell to upgrade his "mere defamation" complaint to IBM accordingly.

At that point, having been properly apprised of Tuvell's PTSD status and notified of his discrimination/retaliation claims, IBM was required by the ADA to engage with Tuvell in an interactive process/dialogue concerning accommodation, and award him the three-way meeting he'd been requesting so urgently. But not only did IBM refuse to engage in interactive discussion or award three-way meeting, it took the plainly discriminatory/retaliatory step of unilaterally demoting/reassigning Tuvell to an position undesired by Tuvell — again based on Knabe's falsity (about his reason for yelling). This trammeled Tuvell's rights under such decisions as *Humphrey*[28] and *BNSF v. White*[29] (see PSOF ¶¶ 14–17, pp. 4–5).

The courts were bound by the SJSOR ("non-movant trumps movant", "all inferences") to credit these PSOF facts, and were further bound (by *Humphrey* and

*BNSF v. White*) to find that IBM was guilty of failure to engage in interactive process, of failure to accommodate (three-way meeting), and of discrimination/retaliation (demotion/reassignment). But the courts failed to do so. That was error.

*Q.E.D. (Three-way meeting; yelling; demotion/reassignment.)*

## QDI: MTR; STD; "Totally Disabled"; And All That

The "QDI-exclusion" class of errors refers to the courts' wrongful crediting of IBM's woefully flawed (but superficially plausible-sounding)[30] *"totally disabled"/not-QDI argument*, which goes like this:

(A) On his MTRs (Medical Treatment Reports), Tuvell's health-care providers checked certain *"totally disabled"* check-boxes, and circled certain number-choices consistent with typical PTSD symptoms[31] and with Tuvell's particular circumstances.[32]

(B) "Therefore" Tuvell *was "totally disabled from being able to do his job, or indeed any job of any kind"* (paraphrased; IBM Appellate Brief, p. 43).

(C) ***IF*** this "totally disabled" argument were valid/creditable (which it isn't!), then of course Tuvell would not be a "QDI (Qualified Disabled Individual) in the sense of the ADA" — that is, he would not be able to: "perform all essential job functions, *with or without reasonable accommodation*." That in turn would mean that Tuvell was not covered by the ADA at all (since QDI is a prerequisite for ADA coverage), so all his ADA claims would automatically fail.

**QDI-EXCLUSION THESIS: The courts (op., p. 13) wrongly credited the above "totally disabled"/not-QDI argument, thereby excluding all of Tuvell's issues that were QDI related. It was grievous error for the courts to do so.**

As *proof of our thesis*, we now present no fewer than five (5) (!) "clear and convincing arguments" that IBM's "totally disabled"/not-QDI argument is utterly specious and false, *on many different levels.* Each one yields a proof of our thesis.

**First Proof —** Tuvell's MTRs were filed for the *sole purpose* of *short-term disability* benefits (leave), and *not* for any ADA purpose whatsoever; this is undisputed.[33] And in *that* (STD) context, Tuvell's health-care providers routinely[34] filled out the MTRs, correctly and accurately, with the *meaning*[35] that: (i) under the PTSD-exacerbating conditions Tuvell found himself subjected to, he was (temporarily[36]) able to perform only 0% of his *job-as-assigned functions (essential or not)*[37] *without accommodation*; and (ii) that he could work only 0% with his harassers Feldman and Knabe (but could work 100% with all non-harassers). The problem for IBM is that double-underlined phrase in the preceding sentence: the very terms of IBM's own STD plan did *not* include a "with or without accommodation" clause[38] — and so, the STD MTRs are *inconsistent with (inapplicable to)* the ADA concept of "with or without accommodation". Since the courts unquestioningly swallowed IBM's bait to interpret the MTRs *out-of-context* in the non-STD ADA manner, the courts thereby *violated* the SJSOR ("in context" tenet). That was error, harmful to Tuvell. *Q.E.D. (QDI-Exclusion thesis.)*

**Second Proof —** The MTRs are very short documents (2 pages each), so everything on an MTR is naturally in the *context* of everything else. Importantly, Tu-

vell's health-care providers inscribed certain short (but extremely informative) free-form narrative writing (as opposed to mere check-box checking and number-circling) on the MTRs. That inscribed writing indicated Tuvell could function well if he were just *accommodated*, to the extent of removing the abuse that was being committed upon him.[39] Yet, the courts unquestioningly accepted IBM's insinuation to interpret the MTRs in an *out-of-context* ("line-by-line isolation") manner, *looking only at the check-boxes and circled-numbers*, and closed its eyes to the inscribed writing. The courts thereby again *violated* the SJSOR ("whole record", "in context", "non-movant trumps movant"). That was error, harmful to Tuvell. *Q.E.D. (QDI-Exclusion thesis.)*

**Third Proof —** IBM's "totally disabled" argument had its *after-the-fact genesis* with IBM's *external lawyers* (at the MCAD hearings on this case) — the argument was never raised (or claimed to be raised) by anyone at IBM *at the time of events*, as IBM's own *internal lawyer*, Bliss, has self-admitted.[40] Since it was concocted after-the-fact, IBM's "totally disabled" argument was by definition *post hoc rationalization for earlier actions [namely, any action depending on "not-QDI" for its rationale, such as denial of transfer]* — that is, it was ***by definition pretextual*** ("not the real reason"). Hence, the courts' wrongful acceptance of IBM's pretext here again abridges Tuvell's pretext-only rights under *Bulwer* and *Reeves*. *Q.E.D. (QDI-Exclusion thesis.)*

**Fourth Proof —** IBM's "totally disabled" argument must not be credited in any event (even ignoring pretext), though the courts erroneously did so, due to the on-point holding of *Cleveland* (pp. 802–803, commentary added, internal punctuation omitted, emphasis in original and also added) and its accords:[41]

> [D]espite the [misleading, mere] *appearance* of conflict that arises from the [superficial, out-of-context] *language* of the two statutes [SSDI (analogous to STD, both having **no** "reasonable accommodation" clause) and ADA] … the two claims *do not inherently conflict* … because there are too many situations in which an SSDI claim and an ADA claim can *comfortably exist side by side* [even if claimant or health-care providers declare "total disability" on disability benefits application] … [especially since] the ADA defines a "qualified disabled individual" to include a disabled person who can perform the essential functions of her job *with reasonable accommodation* [as *Tuvell* declares in this case (plaintiff's Appellate Brief, p. 29), and which the court *must* credit, by the SJSOR "nonmovant trumps movant" and "all inferences" tenets] [but SSDI does not have such a clause].

*Q.E.D. (QDI-Exclusion thesis.)*

**Fifth Proof —** IBM *knew at the time* it terminated Tuvell that he was working for another company (though Tuvell didn't disclose the identity of that company, Imprivata, at the time of events). So IBM knew Tuvell couldn't possibly have been "disabled from working at 'any' job", as IBM now claims (IBM Appellate Brief, p. 43). So yet again we see that IBM's "totally disabled" argument was *false/pretextual*, and the courts erred yet again by agreeing with IBM, and again violating the SJSOR ("whole record" tenet this time). *Q.E.D. (QDI-Exclusion thesis.)*

## QDI-Exclusion With Particularity

High-level not-QDI errors tainted many areas of the courts' opinion, spawning low-level errors many times over. We present here a "particularized" list (FRAP 40(a)(2)) of not-QDI fact-areas the courts erroneously *excluded*, though they were *required* to *include* them. For, the courts' exclusions of these fact-areas were *wholly predicated* on the now-discredited "totally disabled"/not-QDI argument.[42]

(A) **Accommodation;[43] interactive process; transfer.** Op., pp. 16, 20.

(B) **Discrimination;[44] retaliation.** Op., p. 21.

(C) **Termination.** Op., p. 22. At this time, we further bring one *additional* argument regarding the termination:[45] the courts' decision abridged Tuvell's "symptoms-of-disability" rights under *Humphrey*.[46]

## Conclusion

For the reasons presented herein, plaintiff's claims (Complaint, Dkt. 10; Appellate briefs, principal and reply; etc.) were wrongly rejected. The courts' decision granting summary judgment in this case was patent error (stemming from the "PSOF-exclusion" and "QDI-exclusion" blunders), and must be corrected. Without correction, manifest injustice results.

No employment case can be secretly deemed "*too big (complicated) to succeed*". That would provide a *carte blanche "how-to" blueprint* for employers to blithely commit discrimination/retaliation.

*{This page intentionally left blank.}*

# ENDNOTES

1· Dual-purpose (FRAP 35, 40) petitions are explicitly envisioned, hence implicitly permitted, by FRAP 35(b)(3).

2· FRAP 40.

3· FRAP 40(a)(2) (emphasis added): "[E]ach point of law or fact that the petitioner believes the *court has overlooked or misapprehended*". These points need not be listed here at the beginning; instead, they are stated with particularity and argued in context, below.

4· FRAP 35.

5· FRAP 35(b)(1) and 35(b)(1)(A) (emphasis added): "The petition must begin with a statement that … the *panel decision conflicts* with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases)".

6· FRAP 35(b)(1) and 35(b)(1)(B) (emphasis added): "The petition must begin with a statement that … the proceeding … involves an issue on which the *panel decision conflicts* with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Such cases are listed in the *CASES CITED* section, with citations given in the *ARGUMENT* section, below.

7· Neither FRAP 35 nor 40 requires citation to applicable authoritative state law (but they do not forbid it, either).

8· FRAP 35(b)(1) and 35(b)(1)(A): "The petition must begin with … citation to the conflicting case or cases". Additional particularized citations are given in context, below.

9· A prime example of how PSOF-exclusion and QDI-exclusion are intertwined occurs in the courts' handling of Tuvell's *discrimination* claims: see en. 44 in the *QDI-Ex-*

*clusion With Particularity* section.

10· Or "axioms," if you will, since these are the fundamental, "given," not-to-be-questioned, rules of engagement, upon which further consequences are based.

11· As used herein, unless otherwise explicitly noted or implicitly deducible from context: (i) "*issue* [of dispute]" means "*genuine* issue"; (ii) "*facts* [of the case]" means "*material* facts". In turn, the terms "genuine" and "material" are used with their meanings as defined in *Sensing*, p. 152: (i) "*genuine*" means "can be resolved in favor of either party"; (ii) "*material*" means "has the potential of affecting the outcome of the case".

12· The "in context" tenet doesn't appear explicitly in *Sensing,* but is imputed implicitly as a corollary of the "whole record" tenet from numerous other sources (the leading one being simply "Context matters", *BNSF v. White*, p. 69). The danger of out-of-context snippets, seen many times in IBM's filings in this case, is well-captured in Cardinal Richelieu's famous cynical aphorism: "If you give me six lines written by the hand of the most honest of men, I will find something in them which will hang him."

13· The continuing vitality and axiomatic nature of the SJSOR's "non-movant trumps movant" and "all inferences" tenets recently figured in a rare "error-correction" (summary vacation) reprimand of the 5th Cir. by the Supreme Court (*Tolan*, p. 1, internal punctuation suppressed, emphasis added): "In articulating the factual context of the case, the Fifth Circuit failed to adhere to the <u>axiom</u> that in ruling on a motion for summary judgment, [t]he evidence of the *nonmovant is to be believed*, and *all justifiable inferences* are to be drawn in his favor."

14· *"De minimus" proof/persuasion of facts* means mere demonstration that a *reasonable trier of fact <u>could</u> (> 0% probability) resolve facts* in non-movant's favor. As a general rule *(though not always)*, that requires production of evidence of "significant

probative value", which means a "non-conclusory reason" that fact-finder can arguably hang their hat on ("> 0% probability"). However, the clause *"though not always"* does indeed apply in Tuvell's case. For, by case law in the *context of employment discrimination and retaliation*, a showing *of causative facts* is *not* required: instead, a mere *showing of pretext* ("not-the-true-reason"), without more (that is, without a showing of actual discriminatory or retaliatory *animus*), already suffices to defeat summary judgment— by the so-called ***"pretext-only"*** holdings of *Reeves* and *Bulwer* (see below in this endnote). Since Tuvell's PSOF does indeed provide many instances of such pretext (with SJSOR-sufficient "light burden" *showings of pretext* [not showings of substantive discrimination/retaliation; *Reeves, Bulwer*], via such accepted forms as "contradictory statements" and "shifting explanations"), the courts' opinion conflicts with authority:

**(i)** *Reeves* (p. 147, emphasis added): "[O]nce the employer's justification has been eliminated, discrimination may well be the *most likely* [> 50% probability] alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."

**(ii)** *Bulwer* (slip opinion, p. 19, internal punctuation omitted, emphasis added): "[T]he burden of persuasion at summary judgment remains with the *defendants* [not plaintiff], who, as the *moving parties*, have the burden of *affirmatively demonstrating the [total] absence* of a genuine issue of material fact on every relevant issue, *even if* they would not have the burden on an issue if the case were to go to trial."

15· The PSOF in this case obviously (by inspection) satisfies the pleading criteria of the SJSOR, *Sensing*, p. 152, internal punctuation omitted (see also en. 14): "Once the moving party has pointed to the [alleged] absence of adequate evidence supporting the nonmoving party's case [DSOF], the nonmoving party must come forward with facts that show a genuine issue for trial [PSOF]. … At this [summary judgment] stage, the nonmoving party may not rest upon mere [conclusory] allegation or denials [RespDSOF] of the movant's pleading, but must set forth specific facts show-

ing that there is [existence of] a genuine issue of material fact [DF] as to each issue upon which he would bear the ultimate burden of proof at trial [such proof is not required at summary judgment stage though]."

16· Invisibly; *sub silentio*; the courts *"paid no attention"* to the PSOF. When we say the courts "excluded/ignored" the PSOF, we're *not* saying the courts "*said*" they were excluding/ignoring it — they simply "*did*" exclude/ignore it (from all externally detectable points-of-view we can imagine). Perhaps inadvertently. In particular, we are *not* arguing that the PSOF was "rejected" or "stricken" by the courts, for that kind of language would connote a *positive act* (with a motive), which we do not perceive.

17· Also called "judicial thumb on the scale." If this were done *intentionally* (which we do not allege, see en. 16), it would even qualify as judicial misconduct.

18· Aided by the search functionality of a word processing program.

19· In some instances, certain offers of proof or of legal theories may be included (many others exist) in our arguments, but those offers are *optional*; see fn. 4 in the *AUTHORITY* section. See also en. 14.

20· For which we rely on the main teaching of *BNSF v. White*, p. 57 (emphasis added), to the effect that: "[T]he anti-retaliation provision … covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context [of retaliation] that means that the employer's actions must be harmful to the point that they *could well dissuade a reasonable worker from making or supporting a charge of discrimination*."

21· Because under the aegis of *course/conduct/context* of complaints about discrimination and retaliation.

22· EEOC Compliance Manual, § 8, Retaliation, May 20, 1998, at 8-II(B)(2), emphasis added: "Examples of Opposition: *Complaining to anyone* about alleged discrimina-

tion against oneself or others."

23· Because *ordained and solicited* by IBM policy (Corporate Open Door process).

24· We do not claim that the single Excel graphics episode, *standing by itself in isolation without more*, suffices to impel the courts to overturn their decision. Rather, what we claim is: (i) the Excel graphics example is just a *prototype*, intended to be applied to all the *"particularized" PSOF facts* (see section on *PSOF-Exclusion With Particularity*), and those *in toto* do suffice to overturn the courts' decision (by SJSOR "all issues"); (ii) the Excel graphics had material *consequences* (the domino effect of kicking off the whole avalanche of all facts of this case), and *all those consequential facts in aggregate* do suffice to overturn the courts' opinion (by SJSOR "all inferences"). An explicit example of such a "stand-alone impeller" for overturning the courts' decision is given in the section on *Three-Way Meeting; Yelling; Demotion/Reassignment*, below.

25· The proffered SJSOR-style "light burden" adequate proof amounts to item (i) in the following list. More robust (non-required) offers of proof would include items (ii) and (iii) as well.

**(i)** In Mandel's Open Door Report (IBM11168), Mandel reports that Knabe told Mandel *both* that Knabe "suggested" that Tuvell "use Excel charts", *and* that Tuvell used a "nonstandard choice of operating system" which made it "*impossible* to run Microsoft Office tools such as Excel" (emphasis added). Further, Knabe also admitted at his deposition (p. 24) that he knew Mr. Tuvell "did not use Excel", though he didn't "recall the exact date" he learned this (it was certainly on or before Feb. 1, 2011, see item (ii) following). Feldman also admitted at his deposition (p. 39) that, as of May 18, 2011, he "knew that they [Microsoft Windows and Excel] were *not installed* on his [Tuvell's] system" (emphasis added). Those establish pretext (logically inconsistent self-contradiction).

**(ii)** In Mandel's Open Door Report (IBM11169), Mandel reports that Knabe told

Mandel that Tuvell did not "seem to have access [to Excel] or familiarity with a suitable Excel substitute". However, Knabe had received an email from Tuvell (on Feb. 1, 2011, and Tuvell spoke to Knabe about that email within a day), wherein Tuvell wrote, "I work in OpenOffice [referring to the OpenOffice Calc program, which is a 'suitable Excel substitute'], I've exported to Excel for you, hope it works." Further, Knabe received another email from Tuvell (Apr. 7, 2011), containing a major technical document authored by Tuvell ("PMtest.pdf") which Knabe himself had instructed Tuvell to produce, which Knabe admitted at his deposition (p. 110) demonstrated that Tuvell used a "very sophisticated … excellent" statistics and graphics package "[f]ar more sophisticated than" (hence a "suitable substitute for") Excel. Those establish pretext (contradiction).

**(iii)** IBM has variously claimed that: (α) Tuvell "had not been able to produce" the Excel graphics (Knabe dep., p. 37); (β) Knabe "[didn't] recall" when he learned that Tuvell "was not going to prepare" the graphics (Knabe dep., pp. 38–39); (γ) Knabe told Feldman that he was "frustrated" because Tuvell was "moving too slowly [on the Excel graphics] and [not] getting the tooling and tests done in a timely manner" (Mandel Open Door report, IBM11169; see also IBM's response to Interrogatory 4, Sep. 26, 2013); (δ) Feldman claimed Knabe "complained about Excel graphics not being produced in a timely fashion", yet he "[couldn't] recall" exactly what Knabe said about it, and he recalled nothing else about the conversation (Feldman dep., p. 38); (ε) Knabe "[didn't] recall" telling Tuvell of any deadline for the graphics (Knabe dep., p. 39); (ζ) Feldman did recall Knabe "asked for a specific deliverable [the graphics in Excel format] and a specific time frame" (Feldman dep., pp. 39–40); (η) Knabe thought Tuvell "did not appear to grasp [or] comprehend" what Knabe wanted with regard to the graphics (Mandel Open Door report, IBM11168); (θ) Knabe reported "Tuvell offered to generate the data [for the graphics] in a usable [comma-separated value, CSV] format" (Mandel Open Door report, IBM11168); (ι) Knabe "[didn't] recall" whether Tuvell offered to help Knabe reformat in CSV for-

mat (Knabe dep., p. 39); (κ) Knabe "made a quick sketch [on a Post-It Note] showing a series of strip charts, each with all three quantities plotted" (Mandel Open Door report, IBM11168); (λ) Knabe "[didn't] know" if he provided Tuvell with said Post-It Note (Knabe dep., p. 40); (μ) Knabe did not recognize the Post-It Note when presented to him, nor whether it related to the graphics Knabe requested of Tuvell (Knabe dep., p. 40); (ν) the Post-It Note bears no resemblance whatsoever to Knabe's description of it (it contained no "three quantities plotted"; see the Post-It Note itself, and Knabe dep., pp. 143–145); (ξ) Knabe himself admitted that to derive Knabe's desired Excel graphics from the Post-It Note "would be extremely difficult … [and] would require clairvoyance [mind-reading]" (Knabe dep., pp. 107–108); (ο) "Mr. Knabe states that while [Tuvell's] reports contained much useful data, it [was] difficult to analyze the information because there were over 20 reports, each in a separate file corresponding to a different test, making it difficult to recognize trends or patterns across tests. In addition, the choice of ASCII art made it difficult to understand any particular test's results because three separate quantities were represented in three separate graphs, making it difficult to see at a glance how the different quantities were varying relative to each other over time and impossible to view the entire graph at once, as many extended for pages and pages. Mr. Knabe states that he suggested that Mr. Tuvell use Excel charts, because the data could be displayed far more concisely." (Mandel Open Door report, IBM11167–11168); (π) Knabe "[didn't] recall" why he wanted Tuvell to make the graphics (Knabe dep., p. 43), or why he needed the graphics (Knabe dep., p. 44); (ρ) Feldman claimed at his deposition (p. 39) that Tuvell "essentially refused [to Dan's face] to produce Excel graphics," yet he also "[couldn't] remember if Tuvell den[ied] that he had even been asked to produce Excel graphics"; (σ) etc. Those establish pretext (shifting contradictory and/or significantly different explanations).

26· Workplace abuse, particularly defamation, is the main stressor that exacerbates Tuvell's personal/peculiar "flavor" of PTSD. The legal theory underlying Tuvell's fear

of defamation is that known-false attack on reputation in regard of vocation constitutes defamation *per se* (without proof of special damages). Tuvell was familiar with this legal theory because he'd experienced workplace defamation abuse previously, at a different employer, as Tuvell told Feldman at their meeting on May 26, 2011.

27· For unknown reasons, the courts rely on a case (*Che v. Mass. Bay Transp. Auth.*, op., p. 23) that promotes a "**pretext-plus**" theory, which is *no longer good law*. The courts even go so far as to repeat their no-longer-good-law pretext-plus bias in their argument in the first paragraph of op., p. 17.

28· Quote: "For purposes of the ADA, with [only] a few exceptions, *conduct resulting from a disability [such as Tuvell's great fear of pretext-based harassment] is considered to be part of the disability, rather than a separate basis for termination.* The link between the disability and termination [or other adverse act, such as demotion/reassignment] is particularly strong where it is the employer's *failure to reasonably accommodate a known disability* [such as granting three-way meeting] that leads to discharge [or other adverse acts] for performance inadequacies resulting from that disability." (*Humphrey*, pp. 1139–1140, emphasis added.)

29· Quote: "Based on th[e] record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee [at least in retaliation cases]." "*[R]eassignment* was … virtually an admission that respondent was *demoted* when [] responsibilities were taken from her [at least in retaliation cases]". (*BNSF v. White*, pp. 71, 80, Alito's concurrence, emphasis added.)

30· See *Cleveland's* comment about *confusion of language*, in the Fourth Proof, below.

31· PTSD is a serious affliction, and has some symptoms that can be "scary-sounding" to the uninitiated. (One of the goals is to protect disabled individuals from stereotyping and stigmatization prejudice based on "scary-sounding" symptoms.) Amongst the typical symptoms, all of which were exhibited by Tuvell, are hyper-vigilance, hyper-arousal, hyper-reactivity, hyper-startle, hyper-focus and hypo-mania.

32· Tuvell's PTSD is specifically sensitive to workplace bullying/harassment/abuse (col-

loquially, "blackballing"), especially defamation.

33· At oral argument for this case (Apr. 5, 2016), IBM's counsel admitted for-the-record that: "[I]n each of those MTRs, he [Tuvell] was described as 'totally disabled' from working. These [the MTRs] are the **basis** on which he **sought** and **received** short-term disability [STD]." This proves *both* that: (i) the MTRs were indeed submitted *for the purpose of STD* (not for any ADA-related reason); and (ii) IBM *believed* the MTRs' contention that Tuvell "had PTSD" (for otherwise Tuvell *wouldn't* have received the STD leaves).

34· That is, neither Tuvell nor his health-care providers had any idea at the time they innocently filled out the MTRs that IBM would try to pervert the MTRs in out-of-context twisted ways to pretend they reported "bad" things about him that were never intended. See Cardinal Richelieu's aphorism in en. 12.

35· Ross dep., p. 80 (emphasis added):

**Q.** So your belief that Mr. Tuvell could not return to the work situation was that his [e]motions were so intense [due to PTSD] that it was going to *retrigger all of the things that you are talking about,* his not sleeping, his obsessive thoughts, his depression, *all of that?* Just going into that building and seeing *Dan Feldman and Fritz Knabe* might trigger those strong reactions?

**A.** Yes.

**Q.** And so *that's the reason* that you indicated that for *some [temporary] period of time* he was *totally impaired* from work?

**A.** *I did,* and I was concerned for his mental stability *at the time*.

36· Noting that PTSD has only intermittent disabling active phases, it is nevertheless fully recognized by the ADA, as emphasized by the ADA Amendments Act (ADAAA), 29 CFR Ch. XXIV §1630.2(j)(3)(iii): "[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activites indicated: … post-traumatic stress disorder … substantially

limit[s] brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above."

37· Working for a specified individual supervisor was *not* an "essential job function" for Tuvell's job, because the position existed independently of the identity of the group's supervisor.

38· The MTRs were governed by IBM's STD policy (employee handbook contract), which only contemplates the employee's *job-as-assigned* (not only "essential job functions"), *without accommodation*: "'Unable to work' means unable to perform the duties of the job you held at the time of your sickness or accident, or the duties of any other job IBM determines that you are capable of performing" (*About Your Benefits — Income & Asset Protection,* Document Number USHR109, Jul. 1, 2010, p. 15). We repeat again that *at the time of events*, nobody at IBM ever spoke to anyone (Tuvell or another) about any suspicion that Tuvell was "incapable" ("totally disabled") of doing any job.

39· Because *context was ignored* at summary judgment, Tuvell's rights were abridged. *In context*, alongside the rigid check-box/number-circling exercise, the MTRs (which are all in the record) carry the following important material in flexible narrative format inscribed by Tuvell's health-care providers, which the courts were *bound to credit according to the SJSOR* ("in context", "whole record", "non-movant trumps movant" tenets), but refused to do so:

**(i)** Ongoing acute stress symptoms, especially regarding perception of retaliation following sudden demotion without cause. Disruption of sleep, eating, symptoms of helplessness & anxiety. [MTR of Oct. 12, 2011.]

**(ii)** Pt. [patient] continues to experience intense triggering of symptoms with any reference to work environment & incident of demotion & lack of investigation. Symptoms of high reactivity, anxiety, and fear resume easily. [MTR of Nov. 3, 2011.]

**(iii)** Pt. continues to experience extreme triggering regarding workplace previously assigned. Only modification that would be possible is a change of supervisor & setting. Unable to return to previous setting w/ [with] current supervisor & setting. PTSD symptoms exacerbate immediately. [MTR of Dec. 19, 2011.]

40· Plaintiff's Appellate Reply Brief (p. 1, Bliss letter dated Jan. 24, 2012 [*chronologically following* all MTRs, see en. 39], emphasis added): "The ADA does not require IBM to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell's manager as a reasonable accommodation, since *Mr. Tuvell is capable of performing the job*."

41· As already highlighted above, the courts' verbiage in its decision at op., p. 14, fn. 5, is now invalidated because of the courts' PSOF-exclusion.

42· And along with discreditation of the "totally disabled"/not-QDI argument, additional discreditations follow (by the SJSOR "all inferences" tenet), like a domino effect. As a result, *everything* in the courts' decision tainted by the QDI-exclusion error is now invalidated, and must now be reopened for reconsideration (just as everything tainted by PSOF-exclusion must be reopened for reconsideration). Here are just three examples:

**(i)** The finding by the courts (op., pp. 15, 18) to the effect that Tuvell "could not and did not identify anyone who could serve as his manager in place of [] Feldman", is now shown to be hopelessly prejudicial (insinuating that "Tuvell could work for no one") because of its misleading *out-of-context misrepresentation*. (So this is another place, in addition to ignoring the PSOF, where the courts blindly accepted IBM's false arguments without actually consulting actual record.) In context, the actual transaction tells a very different story (Tuvell dep., vol. II, p. 89):

**Q.** Well, did you work for Dan Feldman's group?

**A.** Yeah.

**Q.** Did you identify somebody there you thought could manage you? *[Where the second "you" refers to its immediate referent, Feldman's group, not to Tuvell per-*

*sonally, or so Tuvell thought, as his next answer shows.]*

**A.** No. *[Tuvell answered this way because he was not a manager, so had no knowledge of the various criteria that figure into managerial promotions at IBM, such as qualifications, availability, desire, etc.]* It was certainly nobody in that group that I felt was qualified to be a manager of that group. Including me, of course.

**(ii)** The finding by the courts (op., p. 15) to the effect that "[a] position transfer would not guarantee that Tuvell would never have to see, or hear about, Feldman again", is just plain silly. For, "seeing and hearing" Feldman was never a problem for Tuvell. All of Tuvell's problems with Feldman arose in the context of *interacting* with Feldman as a bullying/harassment manager, and if that reporting arrangement weren't in effect the problem would disappear.

**(iii)** The finding of the courts (op., p. 18) to the effect of IBM's giving Tuvell the "opportunity" to receive feedback and performance evaluations from Metzger (Feldman's supervisor) as a "reasonable accommodation", is too impossibly duplicitous to fathom. For, Tuvell's problems with Feldman were related, not to performance evaluation *per se*, but to day-to-day manager/employee *interactions* (which would continue under IBM's "opportunity"), and in any case it would still be Feldman who would send his (skewed) reports to Metzger, upon which Metzger would base his feedback and performance evaluations. And that's not even to mention that Metzger had already shown himself to be an ally of Knabe and Feldman, and a foe of Tuvell, and Tuvell had already accused him of wrongdoing in his internal complaints to IBM (which were forwarded to Metzger).

43· The courts' citation of "likelihood of success [of proposed accommodation]" at op., p. 18, seems to be another example of the courts' failure to observe the SJSOR's "light burden" tenet. For, the courts seem to be hinting that a "*high* likelihood of success" is required; whereas the "light burden" tenet really requires only "> 0% probability." See en. 14.

44· By its blanket citation to the *McDonnell Douglas* framework (op., p. 20, fn. 8), the courts cite an *incorrect standard* for the Tuvell's burden and nature of proof. That framework only applies to discrimination cases relying on *indirect evidence*. The *Tuvell* case, however, relies on a great deal of *direct evidence*, obviating the utility of *McDonnell Douglas* for almost all of *Tuvell*. No only that, but even if the courts *had* applied the correct (direct evidence) standard, they *still* would have missed the correct decision on this question of discrimination — because of *PSOF-exclusion* (because Tuvell's direct evidence is raised in the PSOF, which the courts *ignored*).

45· It hasn't been raised previously because it's a legal theory, and it's not necessary to raise legal theories at summary judgment time.

46· To be more specific about this legal theory: Tuvell's *refusal to name* his new employer (Imprivata) to IBM — which IBM claims was the *sole* reason for his termination (DSOF ¶ 79, p. 17) — was prompted by Tuvell's PTSD symptoms (en. 31), which caused him overwhelming fear that IBM would retaliate upon him by interfering with his advantageous relationship with Imprivata (PSOF ¶¶ 56–57, pp. 17–18). At the time, IBM *was well acquainted* with Tuvell's PTSD, and that his refusal to name Imprivata was based precisely on his PTSD symptoms (Tuvell's email of May 10, 2012: "I will, however, tell you why I refuse to inform you where I now work. The reason is that I fear IBM, either by rogue individuals or corporately, would happily use such information to work back-channels to get me fired"). Therefore, according to *Humphrey* (en. 28), IBM terminated Tuvell for the *very sole reason of his PTSD disability*.

*{This page intentionally left blank.}*

# IBM
## MEDICAL TREATMENT REPORT (MTR) FORM
IBM CONFIDENTIAL WHEN COMPLETED

**TO BE COMPLETED BY EMPLOYEE:**

Employee Name: Walter Tuvell Serial # 0G3821 Division Network
Date of Birth: 6/19/47 Job Assignment: Performance Architect

***Employee is responsible for any costs associated with the completion of this form, and for ensuring its return to IBM IHS (Integrated Health Services).***

I authorize my health care provider (print name) VICTORIA VASQUEZ, NP to complete this form and to discuss this information with an IBM nurse and/or physician.

Employee Signature: WE Tuvell Date: 8/15/11

**TO BE COMPLETED BY THE HEALTH CARE PROVIDER:**

**I. DIAGNOSIS(ES) & ICD9 CODE(S) (if this case involves a mental health issue, complete page two also):** Sleep Disorder 307.41 ; Stress reaction 308.9

EDC if pregnancy: _____

**II. DETAILED TREATMENT PLAN: (medications/dosages, tests, lab studies, referrals, treatment modalities, surgery/dates, etc.):**

Paroxetine 30mg 1/2 tab po QD

Date of Next Appt. 4 WKS

**III. WORK ABILITY (Modified duty is available in most cases.)**

**Is the employee totally impaired for work?** Yes ✓ No ____ Estimated Return to Work Date: _____

(Fill out either "A" or "B" below as appropriate, but not both)

**A.** If **totally impaired**, give date total impairment began: 8/15/11 and explain in functional terms why the employee is unable to work: Unable to get adequate rest to be able to function at his job responsibilities

**B.** If **NOT totally impaired**, can the employee work with temporary modifications? Yes ____ No ____

1.) If yes: give start date of modifications: _____ Estimated end date of modifications: _____

Specify workplace modifications requested: _____

2.) If no: explain in functional terms why the employee is unable to work with modifications: _____

**IV. TREATING HEALTH CARE PROVIDER INFORMATION: (NOTE: This is a legal document. Please sign and date it.)**

Name (please print): VICTORIA A. VASQUEZ, FNP-BC Specialty: Family Practice
Signature: Victoria A. Vasquez, FNP-BC Date: 8/15/11
Address: 41e Woburn St., Reading MA 01867
Phone Number: 781-944-0600 Fax Number: 781-942-0253

When completed and signed by health care provider, fax to **919-543-0834** (IBM Integrated Health Services Center), or for assistance call 1-888-553-5752 option #2.

**INCOMPLETE FORMS, INCLUDING THOSE NOT SIGNED AND DATED, WILL NOT BE PROCESSED, AND WILL BE RETURNED TO THE HEALTH CARE PROVIDER BEFORE DETERMINATION OF BENEFITS CAN BE MADE.**

# IBM MEDICAL TREATMENT REPORT – PSYCHIATRIC IMPAIRMENT RATING PORTION

**(Only fill out this section if this case involves a psychiatric issue)**

Employee Name: Walter Tuvell Serial Number: _____

**I. LEVELS OF IMPAIRMENT: Please use the following rating numbers to specify the degree of impairment for each area of function noted in section II.**

**Rating Impairment:**

0 No Impairment
1 Minimal Impairment
2 Mild Impairment
3 Moderate Impairment
4 Serious Impairment
5 Severe Impairment

**II. AREAS OF FUNCTION Circle the numbers that describe the patients current condition, using the table above as a guide.**

**1. Activities of Daily Living**

0 1 2 3 4 5 Self care and hygiene (dressing, bathing, eating, cooking)
0 1 2 3 4 5 Normal living postures/ambulation (sitting, lying, walking)
0 1 2 3 4 5 Travel (driving, riding, flying)
0 1 2 3 4 5 Non specialized hand activities (grasping, lifting, tactile discrimination)
0 1 2 3 4 5 Sleep (restful sleep pattern)
0 1 2 3 4 5 Social and recreational activities (consider pre-illness activities of the patient)

**2. Social Functioning**

0 1 2 3 4 5 Get along with others without behavioral extremes
0 1 2 3 4 5 Initiate social contacts, negotiate and compromise
0 1 2 3 4 5 Communicate clearly and effectively with others
0 1 2 3 4 5 Interact and actively participate in group activities

**3. Thinking, Concentration, Persistence and Pace**

0 1 2 3 4 5 Comprehend/follow simple commands
0 1 2 3 4 5 Apply common sense to carry out a task
0 1 2 3 4 5 Ask simple questions, request assistance when needed
0 1 2 3 4 5 Perform simple, routine, repetitive tasks
0 1 2 3 4 5 Ability to abstract or understand concepts
0 1 2 3 4 5 Maintain attention, concentration on a specific task and complete in a timely manner
0 1 2 3 4 5 Memory. immediate and remote
0 1 2 3 4 5 Judgment
0 1 2 3 4 5 Problem solving and conceptual reasoning ability
0 1 2 3 4 5 Perform daily tasks (including work) the patient performed prior to the injury or illness at a reasonable pace
0 1 2 3 4 5 Ability to initiate decisions and perform planned action

**4. Adaptation to Stress**

0 1 2 3 4 5 Perform activities on schedule, be punctual
0 1 2 3 4 5 Adapt to limits or standards
0 1 2 3 4 5 Manage conflicts with others - negotiate, compromise
0 1 2 3 4 5 Set realistic goals, has good autonomous judgment

**Overall Impairment Rating (0 to 5):** 4 **GAF:** _____

Health Care Provider's Signature: Victoria A. Vasquez, FNP-BC Specialty: Family Practic

# IBM
## MEDICAL TREATMENT REPORT (MTR) FORM
IBM CONFIDENTIAL WHEN COMPLETED

**TO BE COMPLETED BY EMPLOYEE:**

Employee Name: Walter Tuvell Serial # ØG3821 Division Netezza

Date of Birth: 6/19/47 Job Assignment: Performance Architect

***Employee is responsible for any costs associated with the completion of this form, and for ensuring its return to IBM IHS (Integrated Health Services).***

I authorize my health care provider (print name) Victoria Vasquez, NP to complete this form and to discuss this information with an IBM nurse and/or physician.

Employee Signature: WETuvell Date: 9/7/11

**TO BE COMPLETED BY THE HEALTH CARE PROVIDER:**

**I. DIAGNOSIS(ES) & ICD9 CODE(S) (if this case involves a mental health issue, complete page two also):** Sleep Disorder 307.41, Stress reaction 308.9

EDC if pregnancy: _____

**II. DETAILED TREATMENT PLAN: (medications/dosages, tests, lab studies, referrals, treatment modalities, surgery/dates, etc.):** Paroxetine 30mg ½ tab po QD

Date of Next Appt. 4 WKS

**III. WORK ABILITY (Modified duty is available in most cases.)**

**Is the employee totally impaired for work**? Yes ✓ No ____ Estimated Return to Work Date: _____

(Fill out either "A" or "B" below as appropriate, but not both)

**A.** If **totally impaired**, give date total impairment began: 8/15/11 and explain in functional terms why the employee is unable to work: Sleep is still a major impairment; Pt is in psychotherapy to help this acute stress. This ongoing

**B.** If **NOT totally impaired**, can the employee work with temporary modifications? Yes ____ No ____

1.) If yes: give start date of modifications: _____ Estimated end date of modifications: _____

Specify workplace modifications requested: _____

2.) If no: explain in functional terms why the employee is unable to work with modifications: _____

**IV. TREATING HEALTH CARE PROVIDER INFORMATION: (NOTE: This is a legal document. Please sign and date it.)**

Name (please print): VICTORIA VASQUEZ Specialty: Family Practice

Signature: Victoria Vasquez, NP-BC Date: 9/7/11

Address: 46 Woburn St, Reading MA 01867

Phone Number: 781-944-0600 Fax Number: 781-942-0243

When completed and signed by health care provider, fax to **919-543-0834** (IBM Integrated Health Services Center), or for assistance call 1-888-553-5752 option #2.

**INCOMPLETE FORMS, INCLUDING THOSE NOT SIGNED AND DATED, WILL NOT BE PROCESSED, AND WILL BE RETURNED TO THE HEALTH CARE PROVIDER BEFORE DETERMINATION OF BENEFITS CAN BE MADE.**

# IBM MEDICAL TREATMENT REPORT – PSYCHIATRIC IMPAIRMENT RATING PORTION

**(Only fill out this section if this case involves a psychiatric issue)**

Employee Name: Walter Tuvell Serial Number: _____

**I. LEVELS OF IMPAIRMENT: Please use the following rating numbers to specify the degree of impairment for each area of function noted in section II.**

**Rating Impairment:**

0 No Impairment
1 Minimal Impairment
2 Mild Impairment
3 Moderate Impairment
4 Serious Impairment
5 Severe Impairment

**II. AREAS OF FUNCTION Circle the numbers that describe the patients current condition, using the table above as a guide.**

**1. Activities of Daily Living**

0 1 2 3 4 5 Self care and hygiene (dressing, bathing, eating, cooking)
0 1 2 3 4 5 Normal living postures/ambulation (sitting, lying, walking)
0 1 2 3 4 5 Travel (driving, riding, flying)
0 1 2 3 4 5 Non specialized hand activities (grasping, lifting, tactile discrimination)
0 1 2 3 4 5 Sleep (restful sleep pattern)
0 1 2 3 4 5 Social and recreational activities (consider pre-illness activities of the patient)

**2. Social Functioning**

0 1 2 3 4 5 Get along with others without behavioral extremes
0 1 2 3 4 5 Initiate social contacts, negotiate and compromise
0 1 2 3 4 5 Communicate clearly and effectively with others
0 1 2 3 4 5 Interact and actively participate in group activities

**3. Thinking, Concentration, Persistence and Pace**

0 1 2 3 4 5 Comprehend/follow simple commands
0 1 2 3 4 5 Apply common sense to carry out a task
0 1 2 3 4 5 Ask simple questions, request assistance when needed
0 1 2 3 4 5 Perform simple, routine, repetitive tasks
0 1 2 3 4 5 Ability to abstract or understand concepts
0 1 2 3 4 5 Maintain attention, concentration on a specific task and complete in a timely manner
0 1 2 3 4 5 Memory. immediate and remote
0 1 2 3 4 5 Judgment
0 1 2 3 4 5 Problem solving and conceptual reasoning ability
0 1 2 3 4 5 Perform daily tasks (including work) the patient performed prior to the injury or illness at a reasonable pace
0 1 2 3 4 5 Ability to initiate decisions and perform planned action

**4. Adaptation to Stress**

0 1 2 3 4 5 Perform activities on schedule, be punctual
0 1 2 3 4 5 Adapt to limits or standards
0 1 2 3 4 5 Manage conflicts with others - negotiate, compromise
0 1 2 3 4 5 Set realistic goals, has good autonomous judgment

**Overall Impairment Rating (0 to 5):** 3-4 **GAF:** _____
Health Care Provider's Signature: Victoria A Vasquez APRN Specialty: Family Practice

FAXED 10/13/11

# IBM
## MEDICAL TREATMENT REPORT (MTR) FORM
IBM CONFIDENTIAL WHEN COMPLETED

**TO BE COMPLETED BY EMPLOYEE:**

Employee Name: Walter Tuell Serial # 6G382 Division Netezza

Date of Birth: 6/19/47 Job Assignment: Performance Architect

***Employee is responsible for any costs associated with the completion of this form, and for ensuring its return to IBM IHS (Integrated Health Services).***

I authorize my health care provider (print name) Victoria Vasquez, NP to complete this form and to discuss this information with an IBM nurse and/or physician.

Employee Signature: WE Tuell Date: 10/14/11

**TO BE COMPLETED BY THE HEALTH CARE PROVIDER:**

**I. DIAGNOSIS(ES) & ICD9 CODE(S) (if this case involves a mental health issue, complete page two also):** Stress reaction 308.9; Sleep disturbance 307.41

EDC if pregnancy: _____

**II. DETAILED TREATMENT PLAN: (medications/dosages, tests, lab studies, referrals, treatment modalities, surgery/dates, etc.):**

Paroxetine 30mg ½ tab po QD

Weekly TALK therapy

Date of Next Appt. _____

**III. WORK ABILITY (Modified duty is available in most cases.)**

**Is the employee totally impaired for work**? Yes ✓ No____ Estimated Return to Work Date: _____

(Fill out either "A" or "B" below as appropriate, but not both)

**A.** If **totally impaired**, give date total impairment began: 8/15/11 and explain in functional terms why the employee is unable to work: cannot travel to former business site nor be in same building due to panic attacks; sleep still erratic

**B.** If **NOT totally impaired**, can the employee work with temporary modifications? Yes _____ No _____

1.) If yes: give start date of modifications: _____ Estimated end date of modifications: _____

Specify workplace modifications requested: _____

2.) If no: explain in functional terms why the employee is unable to work with modifications: _____

**IV. TREATING HEALTH CARE PROVIDER INFORMATION: (NOTE: This is a legal document. Please sign and date it.)**

Name (please print): VICTORIA VASQUEZ Specialty: Family Nurse Practitioner

Signature: Victoria A. Vasquez, FNP-BC Date: _____

Address: Middlesex Family Practice, 46 Woburn St., Reading MA 01867

Phone Number: 781-944-0600 Fax Number: 781-942-8253

When completed and signed by health care provider, fax to **919-543-0834** (IBM Integrated Health Services Center), or for assistance call 1-888-553-5752 option #2.

**INCOMPLETE FORMS, INCLUDING THOSE NOT SIGNED AND DATED, WILL NOT BE PROCESSED, AND WILL BE RETURNED TO THE HEALTH CARE PROVIDER BEFORE DETERMINATION OF BENEFITS CAN BE MADE.**

## IBM MEDICAL TREATMENT REPORT – PSYCHIATRIC IMPAIRMENT RATING PORTION

**(Only fill out this section if this case involves a psychiatric issue)**

Employee Name: Walter Tuwell Serial Number: ØG3821

**I. LEVELS OF IMPAIRMENT: Please use the following rating numbers to specify the degree of impairment for each area of function noted in section II.**

**Rating Impairment:**

0 No Impairment
1 Minimal Impairment
2 Mild Impairment
3 Moderate Impairment > fluctuates
4 Serious Impairment
5 Severe Impairment

**II. AREAS OF FUNCTION Circle the numbers that describe the patients current condition, using the table above as a guide.**

**1. Activities of Daily Living**

0 1 2 3 4 5 Self care and hygiene (dressing, bathing, eating, cooking)
0 1 2 3 4 5 Normal living postures/ambulation (sitting, lying, walking)
0 1 2 3 4 5 Travel (driving, riding, flying)
0 1 2 3 4 5 Non specialized hand activities (grasping, lifting, tactile discrimination)
0 1 2 3 4 5 Sleep (restful sleep pattern)
0 1 2 3 4 5 Social and recreational activities (consider pre-illness activities of the patient)

**2. Social Functioning**

0 1 2 3 4 5 Get along with others without behavioral extremes
0 1 2 3 4 5 Initiate social contacts, negotiate and compromise
0 1 2 3 4 5 Communicate clearly and effectively with others
0 1 2 3 4 5 Interact and actively participate in group activities

**3. Thinking, Concentration, Persistence and Pace**

0 1 2 3 4 5 Comprehend/follow simple commands
0 1 2 3 4 5 Apply common sense to carry out a task
0 1 2 3 4 5 Ask simple questions, request assistance when needed
0 1 2 3 4 5 Perform simple, routine, repetitive tasks
0 1 2 3 4 5 Ability to abstract or understand concepts
0 1 2 3 4 5 Maintain attention, concentration on a specific task and complete in a timely manner
0 1 2 3 4 5 Memory. immediate and remote
0 1 2 3 4 5 Judgment
0 1 2 3 4 5 Problem solving and conceptual reasoning ability
0 1 2 3 4 5 Perform daily tasks (including work) the patient performed prior to the injury or illness at a reasonable pace
0 1 2 3 4 5 Ability to initiate decisions and perform planned action

**4. Adaptation to Stress**

0 1 2 3 4 5 Perform activities on schedule, be punctual
0 1 2 3 4 5 Adapt to limits or standards
0 1 2 3 4 5 Manage conflicts with others - negotiate, compromise
0 1 2 3 4 5 Set realistic goals, has good autonomous judgment

**Overall Impairment Rating (0 to 5):** 3 **GAF:** _____

Health Care Provider's Signature: Victoria A Vasquez FNP Specialty: Family Nurse Practitioner

# IBM
## MEDICAL TREATMENT REPORT (MTR) FORM
IBM CONFIDENTIAL WHEN COMPLETED

**TO BE COMPLETED BY EMPLOYEE:**

Employee Name: Walter Tunell Serial # 663821 Division Netezza

Date of Birth: 6/19/47 Job Assignment: Performance Architect

***Employee is responsible for any costs associated with the completion of this form, and for ensuring its return to IBM IHS (Integrated Health Services).***

I authorize my health care provider (print name) Stephanie Ross, LICSW to complete this form and to discuss this information with an IBM nurse and/or physician.

Employee Signature: WE Tunell Date: 10/16/11

**TO BE COMPLETED BY THE HEALTH CARE PROVIDER:**

**I. DIAGNOSIS(ES) & ICD9 CODE(S) (if this case involves a mental health issue, complete page two also):** Acute stress reaction [redacted] Adjustment Disorder w/ mixed anxiety + depression
308.3 309.4

EDC if pregnancy: _____

**II. DETAILED TREATMENT PLAN: (medications/dosages, tests, lab studies, referrals, treatment modalities, surgery/dates, etc.):**

Medication by Middleser Family Practice weekly psychotherapy to reduce stress symptoms, continue to evaluate, increase coping strategies, give support

Date of Next Appt. 10/18/11

**III. WORK ABILITY (Modified duty is available in most cases.)**

**Is the employee totally impaired for work**? Yes ✓ No____ Estimated Return to Work Date: _____

(Fill out either "A" or "B" below as appropriate, but not both)

**A.** If **totally impaired**, give date total impairment began: 8/15/11 and explain in functional terms why the employee is unable to work: Ongoing acute stress symptoms especially regarding retaliation following sudden demotion without cause. Disruption of sleep, eating, symptoms of helplessness + perception of anxiety.

**B.** If **NOT totally impaired**, can the employee work with temporary modifications? Yes _____ No ✓

1.) If yes: give start date of modifications: _____ Estimated end date of modifications: _____

Specify workplace modifications requested: _____

2.) If no: explain in functional terms why the employee is unable to work with modifications: without safe resolution of current hostile work environment without fear of reprisals... symptoms will persist.

**IV. TREATING HEALTH CARE PROVIDER INFORMATION: (NOTE: This is a legal document. Please sign and date it.)**

Name (please print): Stephanie Ross LICSW Specialty: Psychotherapist

Signature: Stephanie Ross Date: 10/12/11

Address: 742 Massachusetts Ave Arlington, MA 02476

Phone Number: 781-646-6640 Fax Number: ——

When completed and signed by health care provider, fax to **919-543-0834** (IBM Integrated Health Services Center), or for assistance call 1-888-553-5752 option #2.

**INCOMPLETE FORMS, INCLUDING THOSE NOT SIGNED AND DATED, WILL NOT BE PROCESSED, AND WILL BE RETURNED TO THE HEALTH CARE PROVIDER BEFORE DETERMINATION OF BENEFITS CAN BE MADE.**

## IBM MEDICAL TREATMENT REPORT – PSYCHIATRIC IMPAIRMENT RATING PORTION

**(Only fill out this section if this case involves a psychiatric issue)**

Employee Name: Walter Tinnell Serial Number: ØG3821

**I. LEVELS OF IMPAIRMENT: Please use the following rating numbers to specify the degree of impairment for each area of function noted in section II.**

**Rating Impairment:**
0 No Impairment
1 Minimal Impairment
2 Mild Impairment
3 Moderate Impairment
4 Serious Impairment
5 Severe Impairment

**II. AREAS OF FUNCTION Circle the numbers that describe the patients current condition, using the table above as a guide.**

**1. Activities of Daily Living**
0 1 2 3 4 5 Self care and hygiene (dressing, bathing, eating, cooking)
0 1 2 3 4 5 Normal living postures/ambulation (sitting, lying, walking)
0 1 2 3 4 5 Travel (driving, riding, flying)
0 1 2 3 4 5 Non specialized hand activities (grasping, lifting, tactile discrimination)
0 1 2 3 4 5 Sleep (restful sleep pattern)
0 1 2 3 4 5 Social and recreational activities (consider pre-illness activities of the patient)

**2. Social Functioning**
0 1 2 3 4 5 Get along with others without behavioral extremes
0 1 2 3 4 5 Initiate social contacts, negotiate and compromise
0 1 2 3 4 5 Communicate clearly and effectively with others
0 1 2 3 4 5 Interact and actively participate in group activities

**3. Thinking, Concentration, Persistence and Pace**
0 1 2 3 4 5 Comprehend/follow simple commands
0 1 2 3 4 5 Apply common sense to carry out a task
0 1 2 3 4 5 Ask simple questions, request assistance when needed
0 1 2 3 4 5 Perform simple, routine, repetitive tasks
0 1 2 3 4 5 Ability to abstract or understand concepts
0 1 2 3 4 5 Maintain attention, concentration on a specific task and complete in a timely manner
0 1 2 3 4 5 Memory. immediate and remote
0 1 2 3 4 5 Judgment
0 1 2 3 4 5 Problem solving and conceptual reasoning ability
0 1 2 3 4 5 Perform daily tasks (including work) the patient performed prior to the injury or illness at a reasonable pace
0 1 2 3 4 5 Ability to initiate decisions and perform planned action

**4. Adaptation to Stress**
0 1 2 3 4 5 Perform activities on schedule, be punctual
0 1 2 3 4 5 Adapt to limits or standards
0 1 2 3 4 5 Manage conflicts with others - negotiate, compromise
0 1 2 3 4 5 Set realistic goals, has good autonomous judgment

**Overall Impairment Rating (0 to 5):** 3-4 **GAF:** _____
Health Care Provider's Signature: Stephen Rus Specialty: Psychotherapist MSW

T. Ex 3
K. Dean

P)



**IBM**
**MEDICAL TREATMENT REPORT (MTR) FORM**
IBM CONFIDENTIAL WHEN COMPLETED

**TO BE COMPLETED BY EMPLOYEE:**
Employee Name: Walter Tuvell Serial # 6E3821 Division Veteran
Date of Birth: 6/19/47 Job Assignment: Performance Architect
***Employee is responsible for any costs associated with the completion of this form, and for ensuring its return to IBM IHS (Integrated Health Services).***
I authorize my health care provider (print name) Stephanie Ross, LICSW to complete this form and to discuss this information with an IBM nurse and/or physician.
Employee Signature: WE Tuvell Date: 11/4/2011

**TO BE COMPLETED BY THE HEALTH CARE PROVIDER:**

**I. DIAGNOSIS(ES) & ICD9 CODE(S) (If this case involves a mental health issue, complete page two also):** Post traumatic stress disorder 309.81

EDC if pregnancy: _____

**II. DETAILED TREATMENT PLAN: (medications/dosages, tests, lab studies, referrals, treatment modalities, surgery/dates, etc.):**
Weekly psychotherapy for reduction of stress symptoms, increase positive coping strategies, give support to individ + couple as needed
Date of Next Appt. 11/9/11

**III. WORK ABILITY (Modified duty is available in most cases.)**
**Is the employee totally impaired for work?** Yes ✓ No ___ Estimated Return to Work Date: _____

(Fill out either "A" or "B" below as appropriate, but not both)
**A. If totally impaired,** give date total impairment began: 8/15/11 and explain in functional terms why the employee is unable to work: Pt. continues to experience intense triggering of symptoms with any reference to work environment + incident of demotion + lack of investigation. Symptoms of high reactivity, anxiety and fear resume easily.

**B. If NOT totally impaired,** can the employee work with temporary modifications? Yes ___ No ___
1.) If yes: give start date of modifications: _____ Estimated end date of modifications: _____
Specify workplace modifications requested: _____

2.) If no: explain in functional terms why the employee is unable to work with modifications: _____

**IV. TREATING HEALTH CARE PROVIDER INFORMATION: (NOTE: This is a legal document. Please sign and date it.)**
Name (please print): Stephanie Ross LICSW Specialty: Psychotherapist
Signature: Stephanie Ross Date: 11/3/11
Address: 192 Massachusetts Ave Arlington MA 02476
Phone Number: 781-646-6640 Fax Number: _____

When completed and signed by health care provider, fax to **919-543-0834** (IBM Integrated Health Services Center), or for assistance call 1-888-553-5752 option #2.

**INCOMPLETE FORMS, INCLUDING THOSE NOT SIGNED AND DATED, WILL NOT BE PROCESSED, AND WILL BE RETURNED TO THE HEALTH CARE PROVIDER BEFORE DETERMINATION OF BENEFITS CAN BE MADE.**

## IBM MEDICAL TREATMENT REPORT – PSYCHIATRIC IMPAIRMENT RATING PORTION

**(Only fill out this section if this case involves a psychiatric issue)**

Employee Name: Walter Tunell Serial Number: 643821

**I. LEVELS OF IMPAIRMENT: Please use the following rating numbers to specify the degree of impairment for each area of function noted in section II.**

**Rating Impairment:**
0 No Impairment
1 Minimal Impairment
2 Mild Impairment
3 Moderate Impairment
4 Serious Impairment
5 Severe Impairment

**II. AREAS OF FUNCTION Circle the numbers that describe the patients current condition, using the table above as a guide.**

**1. Activities of Daily Living**
0 1 2 3 4 5 Self care and hygiene (dressing, bathing, eating, cooking)
0 1 2 3 4 5 Normal living postures/ambulation (sitting, lying, walking)
0 1 2 3 4 5 Travel (driving, riding, flying)
0 1 2 3 4 5 Non specialized hand activities (grasping, lifting, tactile discrimination)
0 1 2 3 4 5 Sleep (restful sleep pattern)
0 1 2 3 4 5 Social and recreational activities (consider pre-illness activities of the patient)

**2. Social Functioning**
0 1 2 3 4 5 Get along with others without behavioral extremes
0 1 2 3 4 5 Initiate social contacts, negotiate and compromise
0 1 2 3 4 5 Communicate clearly and effectively with others
0 1 2 3 4 5 Interact and actively participate in group activities

**3. Thinking, Concentration, Persistence and Pace**
0 1 2 3 4 5 Comprehend/follow simple commands
0 1 2 3 4 5 Apply common sense to carry out a task
0 1 2 3 4 5 Ask simple questions, request assistance when needed
0 1 2 3 4 5 Perform simple, routine, repetitive tasks
0 1 2 3 4 5 Ability to abstract or understand concepts
0 1 2 3 4 5 Maintain attention, concentration on a specific task and complete in a timely manner
0 1 2 3 4 5 Memory, immediate and remote
0 1 2 3 4 5 Judgment
0 1 2 3 4 5 Problem solving and conceptual reasoning ability
0 1 2 3 4 5 Perform daily tasks (including work) the patient performed prior to the injury or illness at a reasonable pace
0 1 2 3 4 5 Ability to initiate decisions and perform planned action

**4. Adaptation to Stress**
0 1 2 3 4 5 Perform activities on schedule, be punctual
0 1 2 3 4 5 Adapt to limits or standards
0 1 2 3 4 5 Manage conflicts with others - negotiate, compromise
0 1 2 3 4 5 Set realistic goals, has good autonomous judgment

**Overall Impairment Rating (0 to 5):** 3-4 **GAF:** _____
Health Care Provider's Signature: _____ Specialty: Psychotherapist

# IBM
## MEDICAL TREATMENT REPORT (MTR) FORM
IBM CONFIDENTIAL WHEN COMPLETED

**TO BE COMPLETED BY EMPLOYEE:**

Employee Name: Walter Tuvell Serial # ØG3821 Division Nekeza

Date of Birth: 6/19/47 Job Assignment: Performance Architect

***Employee is responsible for any costs associated with the completion of this form, and for ensuring its return to IBM IHS (Integrated Health Services).***

I authorize my health care provider (print name) Stephanie Ross, LICSW to complete this form and to discuss this information with an IBM nurse and/or physician.

Employee Signature: WE Tuvell Date: 12/16/11

**TO BE COMPLETED BY THE HEALTH CARE PROVIDER:**

**I. DIAGNOSIS(ES) & ICD9 CODE(S) (if this case involves a mental health issue, complete page two also):** 309.81

EDC if pregnancy: _____

**II. DETAILED TREATMENT PLAN: (medications/dosages, tests, lab studies, referrals, treatment modalities, surgery/dates, etc.):**

Weekly psychotherapy for reduction of stress symptoms, increase positive coping strategies, give support as needed to individual & couple

Date of Next Appt. 12/20/2011

**III. WORK ABILITY (Modified duty is available in most cases.)**

**Is the employee totally impaired for work**? Yes ✓ No____ Estimated Return to Work Date: _____

For current job assignment.

(Fill out either "A" or "B" below as appropriate, but not both)

**A.** If **totally impaired**, give date total impairment began: 8/15/11 and explain in functional terms why the employee is unable to work: Pt. continues to experience extreme triggering regarding workplace previously assigned.

**B.** If **NOT totally impaired**, can the employee work with temporary modifications? Yes _____ No _____

1.) If yes: give start date of modifications: _____ Estimated end date of modifications: _____

Specify workplace modifications requested: Only modification that would be possible is a change of supervisor + setting.

2.) If no: explain in functional terms why the employee is unable to work with modifications: Unable to return to previous setting w/ current supervisor + setting - PTSD symptoms exacerbate immediately

**IV. TREATING HEALTH CARE PROVIDER INFORMATION: (NOTE: This is a legal document. Please sign and date it.)**

Name (please print): Stephanie Ross LICSW Specialty: Psychotherapist

Signature: _____ Date: 12/19/11

Address: 792 Massachusetts Ave. Arlington MA 02476

Phone Number: 781-646-6640 Fax Number: _____

When completed and signed by health care provider, fax to **919-543-0834** (IBM Integrated Health Services Center), or for assistance call 1-888-553-5752 option #2.

**INCOMPLETE FORMS, INCLUDING THOSE NOT SIGNED AND DATED, WILL NOT BE PROCESSED, AND WILL BE RETURNED TO THE HEALTH CARE PROVIDER BEFORE DETERMINATION OF BENEFITS CAN BE MADE.**

# IBM MEDICAL TREATMENT REPORT – PSYCHIATRIC IMPAIRMENT RATING PORTION

**(Only fill out this section if this case involves a psychiatric issue)**

Employee Name: Walter Tuwell Serial Number: QG3821

**I. LEVELS OF IMPAIRMENT: Please use the following rating numbers to specify the degree of impairment for each area of function noted in section II.**

**Rating Impairment:**

0 No Impairment
1 Minimal Impairment
2 Mild Impairment
3 Moderate Impairment
4 Serious Impairment
5 Severe Impairment

**II. AREAS OF FUNCTION Circle the numbers that describe the patients current condition, using the table above as a guide.**

**1. Activities of Daily Living**

0 1 2 3 4 5 Self care and hygiene (dressing, bathing, eating, cooking)
0 1 2 3 4 5 Normal living postures/ambulation (sitting, lying, walking)
0 1 2 3 4 5 Travel (driving, riding, flying)
0 1 2 3 4 5 Non specialized hand activities (grasping, lifting, tactile discrimination)
0 1 2 3 4 5 Sleep (restful sleep pattern)
0 1 2 3 4 5 Social and recreational activities (consider pre-illness activities of the patient)

**2. Social Functioning**

0 1 2 3 4 5 Get along with others without behavioral extremes
0 1 2 3 4 5 Initiate social contacts, negotiate and compromise
0 1 2 3 4 5 Communicate clearly and effectively with others
0 1 2 3 4 5 Interact and actively participate in group activities

**3. Thinking, Concentration, Persistence and Pace**

0 1 2 3 4 5 Comprehend/follow simple commands
0 1 2 3 4 5 Apply common sense to carry out a task
0 1 2 3 4 5 Ask simple questions, request assistance when needed
0 1 2 3 4 5 Perform simple, routine, repetitive tasks
0 1 2 3 4 5 Ability to abstract or understand concepts
0 1 2 3 4 5 Maintain attention, concentration on a specific task and complete in a timely manner
0 1 2 3 4 5 Memory. immediate and remote
0 1 2 3 4 5 Judgment
0 1 2 3 4 5 Problem solving and conceptual reasoning ability
0 1 2 3 4 5 Perform daily tasks (including work) the patient performed prior to the injury or illness at a reasonable pace
0 1 2 3 4 5 Ability to initiate decisions and perform planned action

**4. Adaptation to Stress**

0 1 2 3 4 5 Perform activities on schedule, be punctual
0 1 2 3 4 5 Adapt to limits or standards
0 1 2 3 4 5 Manage conflicts with others - negotiate, compromise
0 1 2 3 4 5 Set realistic goals, has good autonomous judgment

**Overall Impairment Rating (0 to 5):** 3 **GAF:** _____
Health Care Provider's Signature: [signature] Specialty: psychotherapist

# 2. IBM Short-Term Disability Income Plan for Employees Hired 01/01/2004 and later

## 2.1 Summary

The IBM Short-Term Disability (STD) Income Plan provides for payment of disability benefits equal to your salary when you are absent due to illness or injury. You are eligible for this Plan from the first day of employment.

The Plan provides:

Salary* continuation (minus Workers' Compensation wage payments and/or Social Security Disability Income [SSDI] payments) for each day absent, up to a maximum of 26 weeks (1,040 hours) in a period of 12 consecutive months:

***100% salary continuation for the first 13 weeks***

***66 2/3% salary continuation for an additional 13 weeks***

After five years of service, company paid short-term disability benefits increase to 100% of pay for 26 weeks.

Note: If you have been previously employed by IBM, your short-term disability benefits are based on your most recent date of hire as described above, previous years of service are *not* taken into consideration.

*Salary is defined as regular monthly compensation for regularly scheduled hours, not over 40 hours a week. For non executive employees under commission or incentive plans , "regular monthly compensation" is defined as on-target earnings, the cash compensation you earn when you achieve 100% of your sales performance targets. **STD payments for employees on commission plans will be adjusted retroactively to the STD start date after an employee has been out ill for 60 consecutive days. For executive employees, "regular monthly compensation" is defined as base salary only.** The terms of the Executive Annual Incentive Program govern eligibility for annual incentive when an executive employee is eligible for benefits under this plan.

**Note** for California employees:

Following the first 26 weeks of your disability, benefits will be equal to 55% of regular salary up to the maximum weekly benefit set by the State of California. If you are eligible for and ultimately approved for benefits under the IBM Long-Term Disability Income Plan (LTD), your LTD benefit will be reduced by the benefit amount received under the IBM Short-Term Disability Income Plan. Please consult the IBM Short-Term Disability Income Plan California Supplement available on the IBM intranet in the Legal Notices/Formal HR Documents section of You and IBM at http://w3.ibm.com/hr/.

## 2.2 What is Covered

If you are unable to work because you are sick or have an accident, your salary will be provided by the IBM Short-Term Disability Income Plan which covers regular employees starting on the first day of employment. "Unable to work" means unable to perform the duties of the job you held at the time of your sickness or accident, or the duties of any other job that IBM determines that you are capable of performing.

While you are employed, and beginning with the first regular workday of reported absence, this Plan will provide you with salary continuation for each day absent up to a maximum of 26 weeks (1,040 hours) in a period of 12 consecutive months. All payments cease on termination of employment. If for any reason, you receive an overpayment of STD benefits, this overpayment must be repaid to IBM.

*{This page intentionally left blank.}*

| | | | |
|---|---|---|---|
| Mr. Frederick C. Knabe | Distinguished Engineer (Originator's Project Manager)) | SWG | Cambridge, MA |
| Mr. Steven L. Lubars | Advisory SW Engineer | SWG | Marlborough, MA |
| Mr. Jerrold R. (Richard) Title | Advisory SW Engineer | SWG | Cambridge, MA |

III. CHRONOLGY

November – December, 2010 – Mr. Feldman hired Mr. Tuvell into his Netezza product performance team on November 10, 2010. Mr. Tuvell's responsibilities include measuring product performance and developing mathematical models for predicting the performance of new products. Mr. Tuvell was assigned to support Mr. Knabe and his team as the performance lead, who were working on a new product with the code name "Wahoo." Therefore, Mr. Tuvell was responsible for performance measurement and analysis in order to develop success criteria to aid Mr. Knabe's team to achieve its performance objectives. During this time frame IBM was in the process of acquiring Netezza.

December, 2010 – Mid-February, 2011 – Mr. Tuvell began working on the Wahoo performance model/commensurability project. The intent of this project was to build a valid model that would be able to predict that the Software associated with Wahoo would be fast enough to run on Wahoo. There are a series of notes from Mr. Tuvell to Mr. Feldman from December 31, 2010 – January 26, 2011 stating that he while he continues to work on the project, he has not made significant headway (e.g., "need to understand it better," "...the necessity for a commensurabilty proof isn't needed in the next couple of days," it is a "a major goal of mine for upcoming week," "plan to make serious progress this week," etc.). On January 17, Mr. Feldman sent Mr. Tuvell a draft of the model, he had developed on his own. On January 26, Mr. Feldman sent Mr. Tuvell a "final" draft of the model and February 14, Mr. Tuvell stopped working on the model since it was developed already by Mr. Feldman.

January 1, 2011 – Netezza was acquired by IBM.

Mid-March, 2011 – Mr. Feldman removed Mr. Tuvell from working on other projects in order to allow him to focus only on Mr. Knabe's project.

May 6 – 17, 2011 – Mr Tuvell provided his Wahoo performance data via a variety of performance reports called "PerfReport' and "Waltbar," which included ASCII art graphics. Mr. Knabe states that while reports contained much useful data, it difficult to analyze the information because there were over 20 reports, each in a separate file corresponding to a different test, making it was difficult to recognize trends or patterns across tests. In addition, the choice of ASCII art made it difficult to understand any particular test's results because three separate quantities were represented in three separate graphs, making it difficult to see at a glance how the different quantities were

PERF REPORTS AN ISSUE DIFFICULT TO INTERPRET

KNABE T. AGRAWAL

varying relative to each other over time and impossible to view the entire graph at once, as many extended for pages and pages.

Mr. Knabe states that he suggested that Mr. Tuvell use Excel charts, because the data could be displayed far more concisely. Mr. Knabe indicates that when Mr Tuvell did not appear to grasp his explanation, Mr. Knabe made a quick sketch showing a series of strip charts, each with all three quantities plotted. Mr. Knabe continues that when it appeared that Mr. Tuvell still did not appear to comprehend what he wanted, he told Mr. Tuvell he would do the work himself.

Since the data was not formatted in a readily available format to allow the data to be imported easily into Excel, Mr. Knabe chose to manipulate the data himself in "Emacs." Mr. Tuvell offered to generate the data into the usable format (i.e., "comma separated values [CSV]), but Mr. Knabe elected to do this by himself, since he wanted to generate the charts as quickly as possible. Mr. Knabe presented the charts at the Wahoo status meeting based on the data that Mr Tuvell had collected, but had not assembled into a format that could be easily assessed and reviewed.

In Mr Tuvell's recollection of these events, on May 16, 2011, after reviewing some Wahoo performance statistics in an ASCII report format called either "PerfReport" or "Waltbar," Mr. Knabe asked Mr. Tuvell to include in his performance reports an indication of resource capacity-usage (i.e., where demand on Wahoo resources started nearing their limits or becoming over-subscribed). Mr. Tuvell states that he suggested that an improvement would be to construct an ASCII-art graph so that the reader of a "WaltBar" report could visually detect an over subscription scenario. Mr. Knabe agreed.

Mr Tuvell further recalls that on May 17, 2011, Mr. Knabe and Mr. Tuvell further discussed "WaltBar" and Mr. Tuvell's ASCII-art graphic results. Mr. Tuvell states that Mr. Knabe's discussion were "wide-ranging, exploratory and vague." An example provided by Mr. Tuvell was that Mr. Knabe showed him how he could use Emacs to re-format some of the WaltBar reporting tables (from "plain ASCII" to "comma-separated values [CSV]"). As indicated earlier, Mr. Knabe states that it appeared to him that Mr. Tuvell did not appear to comprehend that he wanted a more concise representation via Excel, he told Mr. Tuvell he would do the work himself. At this point, Mr. Tuvell's and Mr. Knabe's accounts of the issue converge -- Mr. Tuvell offered to reformat some of the reports, but Mr. Knabe said that he would do the work himself.

May 18, 2011 – Mr. Knabe presented at the regular Wahoo project status meeting, the Excel graphics discussed above. Mr. Tuvell sees this as depicting the same data as Mr. Tuvell's ASCII-art graphics did, while Mr. Knabe sees this as depicting the data in a more usable format to analyze the data.

INVESTIGATOR'S NOTE: Mr. Knabe states that Mr Tuvell spent a significant amount of time configuring his workstation with a nonstandard choice of operating system. This led to many delays and problems that he had to solve in order to work with Netezza's software, as well as making it impossible to run Microsoft Office tools such as Excel

which was widely used by other members of the performance group nor did Mr. Tuvell seem to have access to or familiarity with a suitable Excel substitute. In addition, a more junior member of Mr. Knabe's team Mr. Devesh Agrawal (i.e., a band 7 employee), was able to build various performance measurement tools on several occasions in a matter of hours that were highly valuable in gathering useful data. Mr. Agrawal states that he got these tools done over a weekend. However, he does agree that Mr. Tuvell's performance graphs were difficult to interpret because you had to go through 50 pages of data as opposed to a single graph which Mr. Tuvell did not develop. He also states that Mr. Tuvell had a tendency to do things his own way rather than following direction; and that things are working "much smoother" since Ms. Sujatha Mizar, a Band 7, has replaced Mr. Tuvell. Mr. Agrawal states that this is because Ms. Mizar is easier to "dialogue" with, is "more communicative," and shows "greater insight" than Mr. Tuvell.

Mr. Knabe also states that Mr. Tuvell identified and wrote a tool to synchronize the time between two systems, but then got stuck when the tool did not have sufficient granularity. Mr Knabe recalls that Mr Tuvell claimed it would be a complex project to resolve this problem. Mr Knabe questioned this analysis, and chose to try solving it himself. Mr. Knabe states that it took him less than 30 minutes once he was able to access the machines in question. This experience contributed to Mr. Knabe's impression that Mr Tuvell was not familiar or confident with some of the basic knowledge required of the performance team lead.

May 18, 2011 -- Mr. Knabe told Mr. Feldman that he was frustrated with his inability to get Mr. Tuvell to do work he believed he had asked for including moving too slowly and getting the tooling and tests done in a timely manner and even having to do the above work himself . Mr. Feldman said that he would discuss the issue with Mr. Tuvell.

Later that day, Mr. Feldman met with Mr. Tuvell. Mr. Tuvell had some papers that he wanted to show Mr. Feldman. Before reviewing them, Mr. Feldman said that he wanted to discuss an issue that Mr. Knabe had raised (i.e., that Mr. Knabe was frustrated with getting graphs that succinctly summarize Wahoo resource utilization across a number of test cases) and they needed to figure out how to make it so that Mr. Knabe wouldn't be frustrated. Mr. Tuvell states that Mr. Feldman told him that Mr. Knabe was "ripping mad" at Mr. Tuvell for "disobeying his orders" and "not producing the Excel graphics for him" that he asked for. Though Mr. Tuvell also states that the above is a "paraphrase" but "an accurate portrayal of the impact" Mr. Feldman's words had on him at the time and the actual words "may have been somewhat different" because he was "so shocked" that he "cannot now recall" the precise wording. However, he denies that Mr. Feldman said that he told Mr. Tuvell that Mr. Knabe was "frustrated" that he had not "picked up" on Mr. Knabe's suggestion that he create an Excel graphic depiction of his work.

Mr. Feldman states that Mr. Tuvell became visibly agitated and argued that what Mr. Knabe wanted was inferior to what he was already providing and then complained "quite loudly" that Mr. Knabe was "going behind his back." Mr. Feldman continues that Mr. Tuvell stated that he was "pissed, Mr. Feldman attempted to move the conversation back to a discussion of what was necessary to improve Mr. Knabe's satisfaction, and Mr.

*{This page intentionally left blank.}*

Q. At any other subsequent time did you learn about whether or not Mr. Tuvell did work in Excel on his work laptop?

A. Yes.

Q. When did you learn that?

A. I don't recall the specific date.

Q. Was it before or after your May 2011 meeting with Mr. Feldman?

A. I don't recall the exact date.

Q. What did you learn about Mr. Tuvell and his use of Excel at work?

A. Mr. Tuvell did not use Excel. Excel was not available for the operating system that he used for his work, the operating system that he had configured his system with.

Q. Is it fair to say that you don't recall when you learned that, whether it was before or after you spoke to Mr. Feldman in mid-May 2011?

A. I don't recall the exact date.

Q. Generally when did you learn about it?

A. I believe it to be before.

Q. Now, this conversation that you had with Mr. Feldman in mid-May, I will suggest to you that that conversation occurred on May 18, 2011. Does

they should be presented graphically, and that they could be presented using tools such as Excel.

Q. Did you ask Mr. Tuvell to provide those graphics?

A. Yes.

Q. And what did Mr. Tuvell respond?

A. I don't recall.

Q. Did you tell Mr. Tuvell when you needed those graphics by?

A. I certainly don't recall.

Q. Can you recall anything else of that meeting in which you requested graphics from Mr. Tuvell?

A. No.

Q. Did you indicate to Mr. Tuvell that you had a, quote, vague desire, end quote, to analyze more data more closely?

A. I don't recall.

Q. Was there any particular reason why you would have needed the graphics in Excel?

A. No.

Q. Did Mr. Tuvell appear to comprehend what you wanted at this meeting?

A. I believe so. I have no reason to

A. No.

Q. Do you recall whether the date of the meeting was the same day that you met with Mr. Feldman to discuss the graphics?

A. No, I don't recall that. In particular, it is unlikely that they would have been in the same day since my meetings with Mr. Feldman typically were in Marlboro and my expectation is that my meeting to discuss the graphics would have been with the team in Cambridge. However, on occasion Mr. Feldman did come to the Cambridge office. So I don't know for sure whether it would have been that same day.

Q. Do you have a present recollection of complaining to Mr. Feldman about Mr. Tuvell's failure to provide the graphics?

A. I do recall that I was frustrated that Mr. Tuvell had not been able to produce the graphics for this particular performance study.

Q. But my question is a little different, which is do you have a recollection of making that complaint to Mr. Feldman? Do you actually recall doing that?

A. I recall a discussion with Mr. Feldman in

his office to discuss Mr. Tuvell's performance.

Q. I will ask you about that later.

A. Certainly.

Q. Your present recollection is it was a meeting in person?

A. Yes.

Q. And it was in his office?

A. That's my recollection.

Q. And his office is in Marlboro?

A. Yes.

*Q. Given that you produced these graphics yourself, at some point you must have gotten an understanding that Mr. Tuvell was not going to produce them; is that fair to say?

A. Mm-hmm.

Q. When did you learn that Mr. Tuvell was not going to produce those graphics? You can't say "mm-hmm." You have to say "yes" or "no."

A. Could you repeat the question or the statement.

*(Question read)

A. Yes.

Q. When did you develop that understanding that Mr. Tuvell was not going to prepare those

graphics?

A. I don't recall.

Q. Was it at the meeting with Mr. Tuvell?

A. I don't believe so but I do not recall.

Q. Do you recall telling Mr. Tuvell of any deadline for these graphics?

A. I don't recall.

Q. Is it fair to say that you understood that Mr. Tuvell worked in OpenOffice Calc?

A. Is it fair to say that I understood? I don't recall specifically what Mr. Tuvell used for his tools with respect to OpenOffice Calc. I have no reason to disbelieve that he used OpenOffice Calc.

Q. Is there any reason why you would not have wanted the graphics prepared using OpenOffice Calc?

A. No.

Q. Did Mr. Tuvell offer to help you reformat in CSV during your conversation with him?

A. I don't recall. In particular, I don't recall how many conversations occurred between this initial conversation we have been discussing and my production of the graphics.

Q. Do you believe that there's more than one

conversation with Mr. Tuvell concerning your request that he produce graphics?

A. I don't know. I don't recall.

Q. Did you provide Mr. Tuvell during this conversation with a Post-it?

A. I don't know. I may have.

(Document marked as Knabe Exhibit 2 for identification)

Q. Could you review just the center portion, the image, of Knabe Exhibit 2.

A. (Reviewing document) Okay.

Q. Do you recognize that Post-it?

A. No.

Q. Is that your handwriting?

A. I believe it is.

Q. Does this Post-it relate to the graphics that you were requesting?

A. I don't know.

Q. Do you have any reason to doubt that you gave this Post-it to Mr. Tuvell at your meeting with him in which you requested graphics?

MS. ACKERSTEIN: Objection.

A. I have no reason to believe or disbelieve it was at that meeting.

Q. Is it fair to say that the graphic display on the first page of Exhibit 3 was unacceptable to you?

A. It was unacceptable.

Q. Why was it unacceptable?

A. It was difficult for me to glance across many instances, many copies -- not copies but many separate instances of test results and quickly understand where salient features of the performance results were being exhibited.

Q. The second page is an adequate representation, in your mind?

A. It was.

Q. Does this refresh your recollection as to -- well, do you recall whether you made the Excel graphics in the evening or in the morning?

A. I'm not sure. I would expect to have made them late in the day simply because I would have had more time to focus on them accurately.

Q. Did you explain to Mr. Tuvell why you wanted him to make the graphics?

A. I don't recall.

Q. Is it fair to say that Page 1 of Exhibit 3 reflects the type of graphical presentation that Mr.

comprehensible way. However, I don't think Mr. Tuvell understood what was meant by trying to put these in a more comprehensible format.

Q. Was that the Post-it that we looked at earlier?

A. It may have been. I don't know for sure on that Post-it because it is a scribble.

Q. I show you a copy of the Post-it.

A. Yes. I realize you are showing me a copy of the Post-it, but the Post-it -- I don't know if that was the Post-it that we used or whether -- I don't even remember the Post-it per se or what we were doing on the white board.

Q. Would you agree with me that it would be difficult or impossible to arrive at the graphic on Page 2 of Exhibit 3 from looking at your Post-it, which is Exhibit 2?

MS. ACKERSTEIN: Objection.

A. If you are asking if it would be difficult to derive that instruction from being given merely this isolated Post-it --

Q. Exhibit 2.

A. -- and nothing else, I would say that would be extremely difficult. That would require

clairvoyance. However, diagrams, Post-its, white boards are rarely presented in a fashion that are expected to be of textbook quality and completely expository on their own.

In fact, in our line of work a tremendous amount happens in terms of discussions which are done at white boards. They are an extraordinary number of boxes and arrows, drawings which look like scribbles to anybody who comes into a discussion after the fact but which convey significant information to the participants in the discussion at the time.

This discussion with Mr. Tuvell would have been and any drawings produced would have been within that context of describing what we were attempting to do, what I needed to see. Therefore, I do not put a tremendous amount of weight on this particular Post-it unless someone is asking if that would be sufficient and nothing else to understand what to do.

Q. If you had asked Mr. Tuvell to create the graphic that you wanted, why didn't you say that in Exhibit 9?

MS. ACKERSTEIN: Objection.

A. No, I do not.

(Recess taken)

BY MR. MANTELL:

Q. As of May 18, 2011, did you understand that Mr. Tuvell worked in R?

A. I don't recall all the skills and tools that Mr. Tuvell had. However, I did see in this report from April a reference to R. So I will assume that I had some knowledge that he was familiar with R.

Q. Is it fair to say that R is a statistics and graphics package?

A. Yes. A very sophisticated package.

Q. Is it more sophisticated than, say, Excel?

A. Far more sophisticated. It's an excellent tool.

Q. Did you understand that Mr. Tuvell worked with Python, a programming language?

A. That sounds familiar. I don't remember which scripting languages that he was using. Python sounds plausible. It could have been any of several other languages as well.

Q. The ASCII data that you got from Mr. Tuvell that you did not consider adequate, that just

my explanation, I made a quick sketch on a Post-it, showing a series of strip charts, each with all three quantities plotted. When Mr. Tuvell still did not appear to comprehend, I told him I would do the work myself."

When you met with Mr. Tuvell about these graphs, was it your intention that he would be the one preparing the graphs?

A. Yes. Originally my intention was that Mr. Tuvell would prepare all the performance analysis charts. Actually, as you reread that description, I suddenly recall how the Post-it came together and what the pieces on this Post-it actually are.

Q. Okay.

A. What this Post-it shows --

Q. You are looking now at Exhibit 2?

A. I am looking at Exhibit 2. What this Post-it shows is each one of these larger squares here is representing a different test. So you will see this here, in Exhibit 3, this Excel chart represents one test area. "Count_Distinct" it is titled on this. There are a number of these, 20, 30, 40. I don't remember exactly how many. We needed to be able to look at a vast number of these

to understand how our performance was doing because we were measuring our performance across many different types of scenarios.

So what this Post-it shows is each one of these larger boxes was intended to represent a different one of these graphs. So having a whole set of these, you'd get as many as you could onto one page and then you would have another page. Then each one of them would be showing these three different quantities. I can't even remember today what the three different quantities are. So we would be able to see all of these one after another after another and compare them.

One of the problems with the charts presented by Mr. Tuvell -- this one is not too difficult to see, but some of these charts in ASCII art literally went pages and pages. The number of rows of data here that are shown sometimes went quite long. You can see that this has, in Exhibit 3, some sort of timing information here that looks like -- "EPOCH_TS" looks like a time series information counter.

Some of these went on for a huge number of rows, and consequently it was very difficult to

understand what was going on if you had an enormous number of pages of this ASCII art also separated so that it was harder to see where the different values coincided. That was part of the goal here, was to get these in a spot where the time scales could all be compressed to essentially the same width of a page, thus making it easier to be able to scan through and look for anomalies. And looking for anomalies was the principal objective of doing all this.

Q. So when you met with Mr. Tuvell you tried to explain to him what you wanted but he couldn't grasp it?

A. That is my recollection.

Q. When you had a discussion with Mr. Feldman, you were reporting to him your frustration of trying to get Mr. Tuvell to produce these graphs and him not understanding what you wanted?

MR. MANTELL: Objection.

A. I don't recall all the specific things that we discussed in each meeting that I had with Mr. Feldman, but the key thing around this so-called Excel graphics issue was around Mr. Tuvell's inability to understand what I wanted to be able to

*{This page intentionally left blank.}*

A. It seemed both more specific and more urgent.

Q. What specific work, what specific projects did Mr. Knabe say Mr. Tuvell wasn't performing well on?

A. Mr. Knabe had asked him to produce some data that allowed for analysis of the resource utilization in the Wahoo machine and he hadn't gotten it.

Q. Now, did Mr. Knabe complain about Excel graphics not being produced in a timely fashion?

A. That's my memory, yes.

Q. What exactly did Mr. Knabe say on or about May 18th?

A. I can't recall.

Q. Can you recall anything else about the conversation?

A. No.

Q. Have you exhausted your recollection of Mr. Knabe's complaint on May 18, 2011?

A. Yes.

Q. Did you speak to Mr. Tuvell regarding this complaint?

A. I believe so, yes.

Q. Did Mr. Tuvell deny being asked to produce Excel graphics?

A. My memory is that Mr. Tuvell insisted that the form of the data he was providing was sufficient in itself and essentially refused to produce Excel graphics.

Q. Did Mr. Tuvell deny that he had been asked to produce Excel graphics?

A. I can't remember.

Q. He may have or he may not have?

A. He may have; he may not have.

Q. Did you know as of May 18th, 2011, that Mr. Tuvell did not use Microsoft Windows or Excel?

A. I knew that they were not installed on his computer.

Q. Did you know that he did not use them?

A. You mean as a matter of moral principle or something?

Q. That he just didn't know how to use them or just didn't use them?

A. No, I did not know that.

Q. Did Mr. Knabe describe a deadline that Mr. Tuvell had missed on or about May 18, 2011?

A. Yes. My recollection is he had asked for a

specific deliverable and a specific time frame and hadn't gotten it.

*Q. Do you recall the deadline that Mr. Knabe claimed to have imposed?

A. Can I confer with my attorney?

Q. Why don't you answer this question first and then you can confer. There's a question pending.

MR. MANTELL: Repeat the question, please.

*(Question read)

A. No.

MR. MANTELL: Would you like to discuss?

MS. ACKERSTEIN: Let's take a break.

(Attorney-client conference from 10:52 to 10:57 a.m.)

BY Mr. MANTELL:

Q. To your knowledge, did Mr. Tuvell ever produce any work product at IBM in Excel?

A. No.

Q. Is there any reason why?

A. He chose not to.

Q. Did he ever explain why he never produced work in Excel?

A. Early on in his employment he expressed a

*{This page intentionally left blank.}*

**RESPONSE TO INT. 3**

IBM objects to this Interrogatory on the grounds that it is vague, overbroad, unduly burdensome, not relevant and not reasonably calculated to lead to the discovery of admissible evidence. IBM further objects to this Interrogatory on the grounds that it seeks information protected from disclosure by the attorney work product doctrine and/or the attorney client privilege. Subject to and without waiving the foregoing objections, IBM has not obtained any such statements as described in this Interrogatory.

**Interrogatory 4:** State with particularity each and every fact supporting the Defendant's contention, if it so contends, that the Plaintiff performed any of Plaintiff's jobs or positions with Defendant in an unsatisfactory manner. In response to this interrogatory, provide a description of all instances in which Plaintiff performed in an unsatisfactory manner, including

a. a description of the instance;
b. the date of the instance;
c. the time and location that the instance took place;
d. a full identification, including last known addresses and telephone numbers, of all individuals who witnessed each instance;
e. the time and location that the matter was discussed with, or otherwise brought to the Plaintiff's attention; and
f. an identification of any document(s) relating to or describing the instance.

**RESPONSE TO INT. 4**:

IBM objects to this Interrogatory on the grounds that it is vague, overbroad, unduly burdensome, not relevant and not reasonably calculated to lead to the discovery of admissible evidence. IBM further objects to this Interrogatory on the grounds that it seeks information protected from disclosure by the attorney work product doctrine and/or the attorney client privilege. Subject to and without waiving the foregoing objections, IBM states as follows:

Plaintiff was hired by Netezza Corporation in November 2010 and joined IBM when Netezza was acquired by IBM in January 2011. From the time Plaintiff was hired, until mid-May 2011, Plaintiff was generally able to work effectively with Dan Feldman and Fritz Knabe. The difficulties with Plaintiff and his team members began on or about May 18, 2011. On that

date, Mr. Knabe advised Mr. Feldman that he believed Plaintiff was working too slowly and that he was not getting work from Plaintiff in a timely manner, with the result that Mr. Knabe had to do the work himself. Later that day, Mr. Feldman followed up with Plaintiff on that issue. However, Plaintiff became very agitated, took issue with the work Mr. Knabe requested, and complained about Mr. Knabe discussing the issue with Mr. Feldman. Ultimately, Plaintiff threw the papers in his hand on Mr. Feldman's desk and walked out. The following day, Plaintiff worked from home, apparently because he was so angry about what occurred. What happened thereafter may not constitute "unsatisfactory performance" as Plaintiff uses the term within the meaning of this Interrogatory but IBM describes what then occurred which kept Plaintiff from focusing on substantive work.

The week following the incident described above, Mr. Feldman had further conversations with Plaintiff about the need to work effectively with Mr. Knabe. Plaintiff complained that Mr. Knabe was not clear in his direction and expected Plaintiff to read his mind. Mr. Feldman directed Plaintiff to clearly specify the next iteration of work to be done, including a schedule to be used as a mechanism for insuring that there would be agreement among the three of them about deliverables. On May 26, 2011, Mr. Feldman met with Plaintiff for a one-on-one status check, to make sure things were progressing smoothly. During that conversation, Plaintiff complained that the request for a report of scheduled work was akin to being placed on a performance improvement plan. Mr. Feldman assured him that was not the case, but that the report requested from him was merely to assure that Plaintiff, Mr. Feldman and Mr. Knabe were all on the same page with respect to work to be delivered by Plaintiff.

Plaintiff's response to Mr. Feldman's effort to help Plaintiff work collegially with Mr. Knabe was to suggest Mr. Knabe was not truthful about Plaintiff's work. Plaintiff said that the

## Info about WahooProto

Walter Tuvell to: Fritz Knabe
Bcc: Daniel Feldman

02/01/2011 08:50 AM

From: Walter Tuvell/Marlborough/IBM
To: Fritz Knabe/Marlborough/IBM,
Bcc: Daniel Feldman/Marlborough/IBM@IBMUS
Default custom expiration date: 02/01/2012

Fritz, attached is the current state of the "spreadsheet model" I've been working on. Dan's flavor of the model (various versions) are also included, in other sheets. We've been taking semi-independent shots at this, as a sanity-check to cover all bases, but we'll be merging to a single model. [I work in OpenOffice, I've exported to Excel for you, hope it works.]

You've seen this before, but now I'd like to ask you if you could please help by suppling the info for the WahooProto column? Of course, the concept of "WahooProto" is fluid, and will vary over time. That's fine, and if you have a story of how you see WahooProto evolving, that would be very welcome too.

As you know, the ultimate goal is to fill in all the blanks on the spreadsheet, and come up with a predictive theory. It's further my hope you'll find this effort interesting, and you're very invited to join the fray, in any way you'd care to.

Additionally, I'm attaching a high-level architectural sketch of what the Netezza system looks like, including buzzwords and where they fit in. Probably still some bugs in it, and certainly still needs some beautification, but don't we all? This is something I've found missing from the training materials I've see to date. I was particularly struck by John Metzger's recent anecdote about his meeting with ~10 IBMers, who were smart (as he put it), but who nevertheless thought Netezza was just a layer of software that could be sprinkled over any DBMS. That speaks to the need for a visualization such as this. I'd be very glad for your review of that too, of course.

Thanks in advance!

- Walt


NPSCommensurability.xls

NPSdiagram.pdf

*{This page intentionally left blank.}*

**PMtest document**

Walter Tuvell to: netezza-perf-arch 04/07/2011 02:37 PM
Cc: Cambridge, John Metzger, Garth Dickie, Michael Sporer

From: Walter Tuvell/Marlborough/IBM
To: netezza-perf-arch,
Cc: Cambridge, John Metzger/Marlborough/IBM@IBMUS, Garth Dickie/Marlborough/IBM@IBMUS, Michael Sporer/Marlborough/IBM@IBMUS
Default custom expiration date: 04/06/2012

Folks, please find attached rev. 1.0 of the Wahoo/Violin perf report I've been nibbling away at for several weeks. There's also a tarball of data if you want to play with it, available for the asking. (It'll also be archived.)

Though there's no Acknowledgements section in the doc (per guidelines), I do want to thank everyone for their help. You know who your are, and so does everyone else!

- Walt


PMtest.pdf

*{This page intentionally left blank.}*

**Fw: A part of the story**
Walter Tuvell to: walt.tuvell 06/15/2011 10:14 AM
Default custom expiration date: 06/14/2012

----- Forwarded by Walter Tuvell/Marlborough/IBM on 06/15/2011 10:14 AM -----

From: Kelli-ann McCabe/Marlborough/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 06/15/2011 10:00 AM
Subject: Re: A part of the story

Hi Walt,

Thanks for the note, I do appreciate the additional information. I have forwarded this to Diane who will get it to the IST. I understand a case worker will be assigned very soon, once you hear from the case worker you should direct all future communication to them, as I wont' be involved directly unless IST asks me.

Thanks
Kelli

***** Please note my new email address .*****

Kelliann McCabe
Vice President of Human Resources
Netezza, an IBM Company
26 Forest St.
Marlborough, MA 01752
+508 382 8556 DIRECT
+508 397 1680 MOBILE
+508 382 8510 FAX
mccabek@us.ibm.com

Walter Tuvell | Kelli-ann, I'm thinking about something Dan w... | 06/14/2011 04:53:08 PM

From: Walter Tuvell/Marlborough/IBM
To: Kelli-ann McCabe/Marlborough/IBM@IBMUS
Date: 06/14/2011 04:53 PM
Subject: A part of the story

Kelli-ann, I'm thinking about something Dan wrote the other day, and which I didn't think to speak to as I was summarizing my story to you yesterday, but which has a very big part to play It starts out a little round-about.

When I came to work at Netezza (last Nov. 3), I was very "shy", pathologically so (literally). I haven't always been that way, and have slowly worked my way out of that condition over the past 6 months (as you probably observed yesterday), as I've healed. What was happening was that I was in shell-shock, literally (a.k.a. PTSD). That's because I've experienced some very bad treatment at some of the places I've worked before, including immediately before I came to Netezza, and I was very afraid Netezza (or anyplace else) could turn out to be another such place. So I was basically afraid of my own shadow, and everything else. I did not want to get pounded down yet again.

Well, Dan noticed this, and got me to talk about it. He literally "befriended" me, very unusual in a "master/servant" relationship. This happened slowly, and in many ways. Here's the best example: There was an instance once when we were both in Camb (last in Jan, as I recall), where I was trying

to explain something to him, and he wasn't understanding (because I wasn't doing a very good job), so I ended up saying to him, "OK, I'll confess, I've got a copy of this on my laptop, I had my wife scan it in this morning, I'll send it to you". (It was 10 pages out of a book.) He was astonished, asking why I hadn't simply done that in the first place (which was a proper reaction). He asked, "Are you afraid of copyright infringement, that should be no problem because it's under the fair-use exemption." I told him, hesitantly (because I was so withdrawn): "No, I just didn't want you to think I was too well-qualified for my job, for fear I would come across as too competent, to the point of being threatening to people." This was the form my "shyness" took, and he'd seen it several times before and after. He said "Look, I keep telling you this, Netezza isn't like the places you've worked before, we really value employees of your high degree of competence, and your bad experiences simply will never be repeated here". There were a number of examples like this (8-10?). In this way, he pulled me out of my shell and into his confidence, little by little.

So, it was in precisely this vein that I mentioned to him my experience with being slandered/libeled/defamed at another company. And I told him I was exactly seeing this again, in Fritz, and I was afraid. But he continued giving me his usual assurances, saying that kind of problem wouldn't happen to me here, because Fritz wasn't like that (Dan is somewhat in-awe of Fritz). In other words, he just wasn't "getting it", so I felt compelled to pull out my ultimate story, that I'd sued that other company and won, thereby proving that I really, really did know what I was talking about when it comes to people like Fritz.

So there you have it. THAT'S why I mentioned my earlier "brush with the law", namely, to convince Dan that my fear of Fritz (and, by analogy with my earlier company, of Dan himself, though I didn't say that) was entirely justified.

And now the kicker: Dan KNEW that's why I mentioned the earlier suit, yet he had the temerity to twist my story into implying I was trying to "threaten" him and/or Netezza with a lawsuit! Exactly the opposite: I was begging him to protect me from such dastardly things happening to me again. But he failed to do so, and instead has thrown me under the bus -- by doing such things as refusing to set up a 3-way meeting, keeping me in the dark about what Fritz's problems with me really are (why did Fritz call me liar and bully, he must have given examples?), pretending I was threatening him with a lawsuit, etc.

Does this give you an idea how I can be so upset? That's a rhetorical question, of course I do know you understand, but just to make it quite clear: If I seem to be overly crazed by an incident that some people might think is "just the way it works in the big leagues", it's because I've been "raped" before (apologies if you object to that analogy, but I can't afford to be misunderstood yet again), and still have some scars that haven't healed.

- Walt

PS. I assume and hope you'll be forwarding this and other relevant materials to the IST people, it is something they should know about.

**Subject:** Re: IBM Business Conduct Guidelines
**From:** Walt Tuvell <walt.tuvell@gmail.com>
**Date:** 05/10/12 09:37
**To:** Diane Adams <adamsd@us.ibm.com>

No. I will NOT inform you where I am currently working. There is NO requirement, under either BCG or employment contract, that I do so. There is only a requirement that I abide by the terms of those contracts, and I hereby affirm that I have faithfully done so throughout the entirety of my tenure at IBM, and will continue to do so.

I will, however, tell you why I refuse to inform you where I now work. The reason is that I fear IBM, either by rogue individuals or corporately, would happily use such information to work back-channels to get me fired (even though that would constitute tortious interference with advantageous relationship).

On 05/09/2012 05:18 PM, Diane Adams wrote:

> Walt:
>
> Thanks for your response. IBM needs to ensure that a current employee is not engaged in competitive employment. Please advise where you have been working during your leave.
>
> Diane M. Adams
> Netezza HR Partner
> SWG - Information Management
> 508-382-8534
> adamsd@us.ibm.com
>
> From: Walt Tuvell <walt.tuvell@gmail.com>
> To: Diane Adams/Fishkill/IBM@IBMUS, Robert Mantell <rmantell@Theemploymentlawyers.com>, Daniel Feldman/Marlborough/IBM@IBMUS, RUSSELL E MANDEL/Somers/IBM@IBMUS
> Date: 05/08/2012 09:40 PM
> Subject: Re: IBM Business Conduct Guidelines
>
> ---
>
> It was an inadvertent error of mine to include Rob Mantell on this note. I'd intended to include Russell Mandel instead. Sorry.
>
> On 05/08/2012 09:15 PM, Walt Tuvell wrote:
> You must be joking. In my letter earlier today (included below), I wrote "known-false", and I charged you/IBM with "defamation", which of course includes as part of its very definition "falsity". That says very explicitly that your accusation is false. I have of course NOT worked for EMC since Dec 2009 (I started at Netezza in Nov 2010). And you/IBM know it.

You can't convincingly pretend otherwise. For that reason, my charge of defamation/retaliation/etc. stands ("wanton disregard for the truth, and with subjective awareness of probable falsity"). Indeed, by your present note, you are continuing your harassment of me.

Furthermore, you cannot convincingly pretend you've relied on my LinkedIn profile. The last time I edited it was in 2009 (when I added the EMC profile), and I haven't touched it since, or even looked at it. I know this for a fact, because I've consciously avoided updating it, or looking at it (for personal reasons). I don't know why it says I've been at EMC for "2007- Present (5 years)"; I'm not a LinkedIn "power user", so I don't know its editorial policies. Perhaps LinkedIn automatically writes things like "Present (5 years)" in profiles that aren't kept up-to-date, but that's just a guess. But it's not my responsibility to figure things like that out -- it is your/IBM's responsibility to do the due-diligence of figuring things like that out, before you recklessly go around discussing it amongst yourselves ("publication") and making wild accusations about me. As a matter of fact, I have myself noticed crazy entries in LinkedIn profiles for various people (not myself, until now), and wondered how they got that way, because it's simply not credible that so many people would be so sloppy as to make such nonsensical mistakes, unless some sort of LinkedIn glitch were to blame.

In any case, no matter what LinkedIn says, you cannot pretend to believe what it says about me/EMC/IBM. For if you were to believe it, you would have to believe that I was somehow employed simultaneously by EMC and IBM beginning in Nov 2010. That's stupidly non-credible on its face, by any stretch of anyone's imagination. For, if I HAD been simultaneously by EMC and IBM, you surely cannot really think I'd be so stupid as to advertise that fact on LinkedIn!

But here's the biggest problem: That entry in LinkedIn for IBM as a past employer for 2010-2012 -- IS A FORGERY! I didn't know it existed until just now. I didn't put it there, and I have no idea how it got there. But I intend to find out. One possibility is that somebody captured my LinkedIn password (from, say, Netezza's network or elsewhere), and used it to forge my LinkedIn profile.

Whoever put that entry in LinkedIn is not merely a defamer. He/she is now most likely a crimimal.

On 05/08/2012 06:32 PM, Diane Adams wrote:

Walt,

Your public LinkedIn page states that you have been a Consulting Engineer at EMC from “2007- Present (5 years)". The page also identifies IBM as a "Past" employer. Please answer the question either yes or no - Have you worked for EMC in any capacity, such as a contractor, consultant, or employee during the course of your IBM employment?

If you do not definitively deny that you currently are working for EMC in some capacity or that you have worked for EMC in some capacity during your employment with IBM within 24 hours, IBM will have no choice but to conclude you have had sufficient opportunity to provide an answer to this question.

Diane M. Adams
Netezza HR Partner

SWG - Information Management
508-382-8534
adamsd@us.ibm.com

From: Walt Tuvell <walt.tuvell@gmail.com>
To: Diane Adams/Fishkill/IBM@IBMUS, Robert Mantell <rmantell@Theemploymentlawyers.com>, Daniel Feldman/Marlborough/IBM@IBMUS
Date: 05/08/2012 03:49 PM
Subject: Re: IBM Business Conduct Guidelines

---

Diane -

As you know, my attorney, Rob Mantell, informed IBM's attorney, Joan Ackerstein, by email on May 3: "Mr. Tuvell has done absolutely nothing that would lead you to conclude that he works for or has worked for EMC." [Apart from the work I did for EMC before I joined for IBM, of course.]

That is the truth. And that is where the matter should have ended: as an exploratory conversation between attorneys.

But remarkably, you have now chosen to take this matter to an entirely different level. Namely, by your wordings -- "IBM believes ... you ... are ... in violation", "significant concern", "core values of trust and personal responsibility", "conflict of interest", "it appears that you violated", "seriousness of this situation", "your employment will be terminated" -- you have now chosen, as an officially authorized representative of IBM (as opposed to mere attorney/attorney side-discussion), to falsely impute/accuse me of unethical and/or illegal behavior, and threaten me with termination therefor -- WITH NO CREDIBLE BASIS WHATSOEVER.

If I am wrong about that, then I hereby invite/demand that you produce, forthwith, the credible intelligence (including the names of informers, if any) upon which you base your accusation. If you are able to do so, then I will immediately apologize for, and withdraw, the remainder of the instant email.

But you and I both know you cannot do so. For, if you had such credible basis in your possession, you'd simply terminate me immediately (properly), rather than threaten to terminate me.

That (i.e., the absence of credible basis) means that you personally -- together with whatever person(s) put you up to this (if anyone) -- have now proactively and directly implicating yourselves in known-false (or in wanton disregard for the truth, and with subjective awareness of probable falsity) accusation of me, of committing unethical/illegal acts, specifically in relation to my vocation/profession.

There are at least three problems with this:

(i) It is beyond obvious that you have been in communication with certain other persons (in

particular, Joan Ackerstein, perhaps via a chain of other persons) about this matter. That amounts to "publication". Your published, false accusation of reputation-injuring activities by me, therefore amounts to DEFAMATION. That is illegal, of course. Indeed, since your accusation is specifically in regard to my vocation/profession, your false accusation is actually defamation "per se", i.e., it requires no proof of special damage. Nevertheless, special damage has indeed occurred, namely, your threat to terminate me PROVES that my reputation has actually been injured.

(ii) What is the motivating REASON for your defamation, and threat of termination of my employment? That also is beyond obvious: There can be but one and only one reason, namely, retaliation/harassment/bullying/IIED against me for my long-standing claims of age/sex/race/disability discrimination and other wrongdoing (including previous acts of defamation and IIED), and now also for my recent filing of MCAD charge regarding same. Hence, your/IBM's act amounts to yet a NEW act of (defamation-based) RETALIATION. That is also illegal, of course.

(iii) Finally, you specifically cite the BCG. It is a binding contract, as you know (because all employees must certify allegiance to it every year, as a condition of employment). However, the clause of the BCG you cite causes you problems: "providing assistance ... products and services in competition with IBM's current or potential product or service offerings". These are the problems it causes you:

(iii)(a) (1)The wording "providing assistance" is far too non-specific to be enforceable, because there are very many positions with EMC (or any other company) that are too tenuously connected to IBM's legitimate business interests to constitute valid unethical/illegal behavior. (Does playing second base on EMC's softball team constitute "providing assistance"?) (2) The clause is far too broad, because of IBM's very expansive reach of "current" offerings. (3) And the clause is impossibly over-broad, because IBM's "potential" offerings extend literally to EVERY other gainful occupation on the planet. Taken together, these three objections show that the clause is an unconscionable term of contract.

(iii)(b) How many other people at IBM have been prosecuted under this clause of the BCG? On the "no credible basis" standard (discussed above), it must be the case that you have been dunning literally EVERY other IBM employee (equally without credible basis) about such "conflict of interest". If you are not doing that (and I'm sure you aren't), but instead are singling me out for special treatment (I'm sure you are), then it proves that I am being subjected to disparate treatment -- again for the beyond-obvious reason of retaliation/harassment/bullying/IIED.

None of this behavior is surprising, coming from you. It perfectly fits the pattern of culpable conduct you have personally displayed in continuously persecuting me throughout my ordeal of the past year, all the way from advising Dan Feldman to attack me the way he did (as he himself freely volunteered to me), to your present very-long-running stance of completely stonewalling my request for reasonable accommodation via transfer.

By CC'ing Russell Mandel on this email, I hereby submit these unethical/illegal acts of yours to him, as my FOURTH Open Door C&A complaint. (Noting that my THIRD complaint also remains in-process at this time.) Even if he "determines" that acts of true illegality are "beyond the scope" of his investigative ability/responsibility/authority, surely the obvious breach of BCG ethics is not.

- Walt Tuvell

On 05/07/2012 12:48 PM, Diane Adams wrote:

Walt:

This letter is regarding your employment with IBM. IBM believes that you currently are or have been during the course of your employment in violation of one of IBM's Business Conduct Guidelines.

Specifically, it appears that you currently are or have been during the course of your employment with IBM working for EMC Corporation in some capacity, such as an employee, consultant or contractor. That is a matter of significant concern to IBM since it considers EMC to be a competitor and you never asked for consent or obtained it.

IBM has Business Conduct Guidelines which set out the core values of trust and personal responsibility it expects its employees to embrace. One of those Guidelines relates to conflicts of interest. Section 5.1 of IBM's Business Conduct Guidelines states the following:

"An obvious conflict of interest is providing assistance to an organization that markets products and services in competition with IBM's current or potential product or service offerings. *You may not, without IBM's consent, work for such an organization in any capacity, such as an employee, a consultant or as a member of its board of directors.*"

It appears that you violated this Business Conduct Guideline. Given the seriousness of this situation, IBM has determined that your employment will be terminated effective at 5:00 PM on May 8, 2012. If IBM is incorrect about your working with EMC Corporation, please contact me before that time to confirm that you are not currently and have not been at any time while an IBM employee working for EMC as an employee, consultant or contractor.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamsd@us.ibm.com

*{ This page intentionally left blank. }*

***IBM Confidential: Re: Re: Weekly report**

**Walter Tuvell** to: Daniel Feldman 06/13/2011 08:58 AM

Cc: Kelli-ann McCabe, Daniel Feldman, John Metzger

Bcc: Ilkforms, walt.tuvell

Default custom expiration date: 06/12/2012

Dan, I will abide by your communication wishes, for as I wrote I intend to abide by all policies and procedures.

I reiterate that I have reported our conversations fully faithfully, although I haven't written very much about topic, so I'm not sure what you're referring to. Are you referring to the "footnote" in my weekly report? If so, then I would be interested in hearing your version of that interchange. Until then, I stand by what I wrote. Or are you referring to my statement that your "only" interest was in the success of Wahoo? I stand by that too. I did not, of course, quote you about "justice to me", I wrote that as a parenthetical, so it cannot be pretended that I was putting those words into your mouth. But when I did raise those words ("doing the right thing by me") to you in our conversation ~3 week ago, what you did instead was simply reiterate the "only success of Wahoo" mantra. Or are you denying the charge that you've adamantly refused to join me in asking Fritz for a 3-way conversation? Yes you have certainly done that multiple times (and the only "reason" you've given me was that "this is the way you've done it for 30 years"). That's why I was forced to ask Fritz for a two-way conversation between just him and myself following his second instance of harassment (approx. 3 weeks ago). If none of these are the mistaken reportage you complain about, I would appreciate it if you'd be more explicit.

Further, I did not say you are actively "punishing" me. What I said is "adverse job action". When somebody "disappears" from a project in the middle of the night, only to show up on limbo, it speaks silent volumes to the organization. And when somebody is yelled at in public and been accused of not doing their job (as Fritz did), that's completely inexcusable. It would be inexcusable even in private and based upon truth, but it is probably "illegal" (IBM and/or civil) in public and based on provable lies, as Fritz did to me. And you most certainly did not help me, instead passively letting me be "punished" by Fritz. If we disagree on points like these, then I guess we'll just have to wait to see how the IBM process handles it. After all, you did admit at our last meeting that you're an "engineer", not pretending to be skilled at the personal interactions side of the world, and I admitted the same, so we both should value professional help in this matter.

Let me add one clarification to your note. I did mention to you once that I'd been involved in a case of workplace harassment/defamation once before, through absolutely no fault of my own, extremely similar to the one that has now been inflicted upon me. I told you that, not as a "threat" or "warning", as your note seems to subliminally imply ("protecting ... interests"), but as a point of information that "I know what I'm talking about", or as you said to me, "you've seen this movie before". But I raised the point only a single time. It was you yourself who raised it the second time, and you did it for the obvious purpose of pumping more information from me about the incident, for example, you asked if it happened in court (it didn't, it was an arbitration in a hotel room), if it was against an individual or a company (it was the company), and whether I won redress or not (yes I did). I did not offer you any of this information, you yourself quizzed me down about it. And at the same time you told me about your experience of suing somebody. Did you expect me to take away from that last an intimation that you were going to sue me? I doubt it, just as I was not intimating I was going to sue you or anybody else. I was only saying I know my right, and I am clearly the victim here, not the attacker.

For, unless I am gravely mistaken, it is my right, according to both "IBM law" and civil law, to do what I'm doing, and that retaliation against me for doing so isn't. I am sorry you have chosen to make this formally adversarial ("Dear Dr. Tuvell"), when I am doing nothing more than upholding my rights according to normal, guaranteed policies and procedures.

- Walt

| | | |
|---|---|---|
| Daniel Feldman | Dear Dr. Tuvell, I am in receipt of your comm... | 06/12/2011 01:44:51 PM |

From: Daniel Feldman/Marlborough/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS, Kelli-ann McCabe/Marlborough/IBM@IBMUS, Daniel Feldman/Marlborough/IBM@IBMUS
Cc: John Metzger/Marlborough/IBM@IBMUS
Date: 06/12/2011 01:44 PM
Subject: *IBM Confidential: Re: Weekly report

Dear Dr. Tuvell,

I am in receipt of your communication of 6/12/2011, a copy of which is attached below.

I do not believe that you have correctly reported our conversations and I deny that you are being punished in any way.

I see no choice but to require that all future conversations between you and me be in the presence of a Human Resources professional and that all written communication between you and me be copied to a Human Resources professional. I believe this is necessary to protect yours, my and the firm's interests.

I go down this path regretfully. You have twice now made clear to me your history of suing when you feel you've been wronged in the office and I see no choice.

Respectfully Yours,

Daniel J. Feldman.
Director, Netezza Performance Architecture
Software Group, Information Management

**Phone:** 508 382 8480
**E-mail:** dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell | Week of Jun 5 - Jun 12 2011 After 2.5 weeks... | 06/12/2011 09:44:32 AM

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Date: 06/12/2011 09:44 AM
Subject: Weekly report

Week of Jun 5 - Jun 12 2011

After 2.5 weeks of Wahoo total noncompliance of various styles, the machine finally came to life, i.e., became usable on Wed for perf testing. I ran an overnight test Tue, and Wed morn saw it had succeeded. Running PerfScore tool on it, I accidentally key-bounced Wahoo 100G vs. Skimmer 1000G upon CLI entry (auto-complete), which resulted in a false indication that Wahoo was >4x faster than Skimmer, which I (erroneously) reported. There was singing in the streets of Cambridge. But I discovered my error late Wed night at home, and immediately reported that the correct reading was that Wahoo is 1.7x slower than Skimmer. A major part of the bug was that I "wanted" Wahoo to be fast, and decieved myself, instead of cooly sanity-checking. As a double-check, I carefully re-ran the 100G test on Thur morn (coming into the office at 5:15 AM, skipping my normal morning workout to do so), concurrently on the 2 machines, visually observing their progess. This confirmed the 1.7x slower number as definitive.

Late on Wed afternoon (before my error, above, was known), Fritz

published to me and Steve a list of 5 "upcoming performance tests", which I completed by Fri (and I assume Steve completed his part too). Actually some of the things Fritz suggested were worthless, as "must" have been obvious to Fritz, but it's his manner to arbitrarily assign scut work to me (seemingly due to neuroses of his own, as has become increasingly clear to me). These were things like running debug builds where there was no reason to, and collecting stats via PerfBar when those had already been collected by WaltBar runs. So I gently pointed out their worthlessness, and there being agreement by the cognescenti (Devesh) that they were worthless I didn't need to do those worthless things.

Also on Fri, I worked with Devesh, who's been tapped as the contact-point in the Wahoo group for perf-related stuff. He had several interesting ideas about how to pursue the perf difficulties, all of which had come up in group discussion before, but which couldn't be followed up until now (because we didn't have a working Wahoo machine). I satisfied all his requirements, using PerfScore as "the" right tool for doing it. Devesh "gets it" how important PerfScore is to Netezza.

BTW, have you noticed that all the above were 5 days of work packed into only 3 days? I did this voluntarily, of course, as I always step up where above-and-beyond-the-call-of-duty is required. Nevertheless, that good deed didn't go unpunished, because Fritz shat upon me in public (Camb office) with lies, bullying/harassment and yelling, and surreptitiously (behind my back, refusing to talk to me face-to-face) causing me to be "fired" from the Wahoo project on Fri. This was an "illegal" adverse job action (in the IBM sense, perhaps even in the civil law sense), because it was a consummated false defamation of me (IBM policy calls it "harrassment"), totally without due process.

The very act of Fritz's having gone to Dan behind my back, and falsely accusing me of being a liar and bully (as Dan told me he did)*, already amounts to such an "illegal" act. Additionally compounding that defamation is the further public humiliation of unilateral removal from the most excellent high-profile position on Wahoo, to what seems (to me and others, just ask any disinterested third-party observer) to be a highly symbolic deportation to Siberia. I felt unjustly accused and unjustly acted upon. Nevertheless, Dan reiterated his many-times repeated mantra that his ONLY [his word] interest is in helping the Wahoo project succeed (thereby excluding intersts in such minor niceties as justice to me, if it came at the expense of Wahoo/Fritz). Upon telling Dan that I was interested in following-up this issue using established corporate processes, he suggested that I should go to legacy Netezza HR (Kelli-ann McCabe), and that I should also look up (on "IBM Blue Pages") the new IBM HR escalation proceses. I have initated those things. As time goes on, this activity will claim some of my hours to be devoted to it, which I will legitimatly charge against hours I could have spent doing productive technical work.

Please observe: I am being straightforward, above-board and highly communicative about this whole adverse job action thing. This is in complete contrast to the way I myself have been treated (by Fritz, but also by Dan who has refused multiple requests by me for 3-way meetings with Fritz). I believe I am doing it "The IBM Way".

* Footnote: That part of the meeting with Dan in his office Fri morn went like this: I reminded Dan that at our earlier meeting regarding a similar unaccountable action by Fritz against me (~ 3 weeks previously, where Fritz complained about my non-production of some graphs he had in fact never asked me to produce), I had stated that

some things Fritz had said to Dan (as reported by Dan to me, recalling that Fritz had again gone behind my back to talk to Dan) were "provably known false when stated", but that I was hesitant to call them "lies" because to me that word had a connotation of "intent to deceive". But this time, after having reviewed all the facts and context available to me, I had come to the conclusion that I must indeed accuse now Fritz of the very word "lying", in addition to reiterating my previous charge of bullying. At that point Dan looked at me squarely and told me "I must tell you that Fritz has come to me and told me the same things about you".

**Robert Mantell**

**From:** Larry Bliss [blissl@us.ibm.com]
**Sent:** Tuesday, January 24, 2012 8:21 PM
**To:** Robert Mantell
**Subject:** Re: Confidential--Walt Tuvell

Robert:

I am writing in response to your email.

IBM strongly disagrees with your characterization of the facts and the law. IBM has fully complied with the Americans with Disabilities Act (ADA).

Mr. Tuvell's position is that he cannot work for a particular manager, not that he is unable to perform the essential functions of his job. Indeed, Mr. Tuvell has repeatedly made it quite clear in numerous communications that he can perform the job, but just can't work under the direction of Dan Feldman. The ADA does not require IBM to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell's manager as a reasonable accommodation since Mr. Tuvell is capable of performing the job.

Mr. Tuvell's case is easily distinguishable from Smith v. Midland Brake, Inc., which dealt with an employee whose maladies were so severe that he could not physically perform a job on a break assembly line. Mr. Tuvell can perform his job, so the reasoning of the case clearly does not apply.

As I am sure you know, the EEOC guidance states employers are not required to offer the accommodation specifically requested by the employee. Accordingly, IBM is not obligated to transfer Mr. Tuvell simply because he requested it.

IBM has repeatedly engaged in an interactive dialogue and offered multiple reasonable accommodations to Mr. Tuvell. In fact, in a recent email, IBM offered Mr. Tuvell the opportunity to attend medical appointments for treating his alleged condition. While IBM was not obligated to switch Mr. Tuvell's manager, IBM even offered to have Mr. Tuvell's second line manager handle important human resource related discussions with Mr. Tuvell, such as delivering performance feedback. Mr. Tuvell refused these accommodations. The Company consistently conveyed its openness to an interactive dialogue but your client apparently took the position the specific accommodation he requested is the one and only accommodation that was acceptable to him.

Based on Mr. Tuvell's last email to Mr. Feldman, he stated he is going to apply for Long Term Disability (LTD). While IBM expects most employees to commence the LTD application process while they are still on Short Term Disability (STD), IBM is granting Mr. Tuvell an unpaid leave of absence so he can attempt to take advantage of the generous IBM LTD benefit program.

Finally, Mr. Tuvell can appeal internally any action that is eligible for review under IBM's HR appeal programs. It is my understanding his latest appeal is under review.

Regards,

Larry Bliss
Counsel
IBM
1 New Orchard Road
Armonk, New York 10504

(914) 499-4867
(914) 499-6085 (fax)
Tie line: 641-4867
blissl@us.ibm.com

PREPARED BY IBM ATTORNEY / PRIVILEGE REVIEW REQUIRED



From: Robert Mantell <rmantell@theemploymentlawyers.com>
To: Larry Bliss/Armonk/IBM@IBMUS
Date: 01/23/2012 03:19 PM
Subject: Confidential--Walt Tuvell

Larry,

Once again, I am writing to request that Mr. Tuvell be transferred to posting SWG-0436579, which remains open under the new posting no.
SWG-0456125. IBM has an obligation to transfer Mr. Tuvell as a reasonable accommodation, pursuant to the Amereicans With Disabilities Act. 42 U.S.C.
section 12111(9)(B).

As I explained in my letter to Russell Mandel of November 9, 2011, which you have reviewed, Mr. Tuvell has a disability, for which he needs accommodation. Mr. Tuvell and his physician have come to the conclusion that he is medically incapable of continuing to work under Mr. Feldman, in any capacity.

Mr. Tuvell and I have repeatedly sought the reasonable accommodation of reassignment. While IBM has permitted Mr. Tuvell to seek other positions through GOM, IBM has so far refused to participate in finding a position for Mr. Tuvell, outside of the normal GOM process, thereby placing Mr.
Tuvell on the same level as any other IBM employee seeking an internal transfer. I believe that this failure to offer special assistance to Mr.
Tuvell to find an alternative job violates the duty to reasonably accommodate under the ADA, because I believe that the interactive process requires the employer to do more than simply permit an employee to apply to a position without support or direction. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999) ("Thus, the reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position"). The law requires more than that the company merely consider an application, or treat the handicap individual's desire to transfer as it would any other.
Id., at 1165. In its interpretative guidance on reassignments as a reasonable accommodation, the EEOC asks the question, "Does reassignment mean that the employee is permitted to compete for a vacant position?" The answer is, "No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise reassignment would be of little value and would not be implemented as Congress intended." EEOC Enforcement Guidance: Reasonable

Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment, question 29.

Furthermore, the EEOC asks, "Does an employer have to notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?" The EEOC answers as follows: "The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time. In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment, question 28.

IBM's invitation to Mr. Tuvell to use GOM is unsatisfactory, and violates the law. It's failure to affirmatively look for open positions for Mr. Tuvell, and offer them to him, violates the law. Moreover, failure to properly engage in the interactive process is strong evidence of bad faith, generating the possibilitiy of punitive damages. See Sprague v. United Airlines, Inc., 2002 U.S. Dist. Lexis 14519, at 8-9.

However, when Mr. Tuvell went through GOM, and found a vacant position for which he qualified--posting SWG-0436579--he was rejected, not because he was unqualified, but allegedly because he was not the "right fit." 1/6/12 Kime e-mail (Mr. Kime's rejection notice listed the fact that Mr. Tuvell was taking medical leave as the prime reason for the rejection, but apparently IBM is not longer asserting that as a reason). By rejecting Mr. Tuvell on the basis of such a vague, diffuse reason, which is thoroughly unrelated to his technical skill or qualification, IBM has, and currently is violating the Americans With Disabilities Act.

The ADA specifically lists "reassignment to a vacant position" as one of the ways an employer is required to reasonably accommodate the handicapped. 42 U.S.C. section 12111(9)(B). If the employee is qualified, he or she gets the job. There is no need for the employee to prove that he or she is the best qualified applicant to obtain it as a reassignment. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment.

This communication is not designed to fall under Rule 408. It is a formal notice to you and IBM that it has the obligation to reassign Mr. Tuvell to a vacant position for which he is qualified, as a reasonable accommodation under the ADA, that posting SWG-0436579 is a vacant position for which Mr. Tuvell is qualified, and that IBMs failure to reassign Mr. Tuvell, and continued refusal to do so represents a knowing or reckless violation of his rights under the ADA. Please reassign Mr. Tuvell immediately, to SWG-0436579 (now SWG-0436579), or some other position for which Mr. Tuvell is qualified, which does not fall under the supervision of Mr. Feldman.

Mr. Tuvell has filed with IBM an internal complaint regarding the failure to transfer, and the denial to accord him reasonable accommodation. As a courtesy, a copy of that complaint is attached.

Robert S. Mantell
Rodgers, Powers & Schwartz LLP

18 Tremont St.
Suite 500
Boston, MA 02108
617 742-7010, ext. 305
RMantell@TheEmploymentLawyers.com[attachment "tuvell complaint internal transfer final.pdf" deleted by Larry Bliss/Armonk/IBM]

Addendum to Met Life Attending Physician Statement
1/31/2012
Regarding Walter Tuvell 6/19/1947
From Stephanie Ross, LICSW
Psychotherapist, treating clinician

Mr. Tuvell suffers from PTSD and due to his recent re-traumatization at his work place has suffered an exacerbation of many of his symptoms. He suffers sleep disturbance, eating disturbance, anxiety, depression, hypersensitivity and reactivity in social interaction. I recommended his medical leave from this work place as necessary for his recovery and re-stabilization. It was my recommendation that the only course to recovery for Mr. Tuvell required a reassignment by the company. This recommendation has not been heeded. In my opinion a return to this triggering work place would be detrimental to Mr. Tuvell and would inhibit his recovery.

*{This page intentionally left blank.}*

**From:** Kathleen Dean
**To:** Stewart Snyder
**CC:** Al Pfluger
**BCC:**
**Sent Date:** 2011-10-19 19:03:03:000
**Received Date:**
**Subject:** *IBM Confidential: Walter Tuvell - conversation with his Therapist.
**Attachments:**

Dr. Stew.

Stephanie Ross LICSW Speciality Psychotherapist called on Wednesday the 19th. I originally had a meeting set up with her at 1PM but she caught me off guard and called sooner. I spoke with her 1st and then I had Al come in the office. Needless to say, it was hard to get a word in with her talking so much. I have not shared this with HR Russell Mandel, waiting to speak with you. Kathy & Al.

Summary of conversation:

Medical problem - he is suffering from PTSD. Weekly therapist appointments.

Kathleen A. Dean, R.N. COHN, COHC
IBM Health Services Advisor
Integrated Health Services, IBM EFishkill
Phone: (845) 894-9573 or tieline 533-9573
Fax: (845) 892-3226 or tieline 532-3226
email: deanka@us.ibm.com

October 19, 2011

Spoke with therapist, who has known Walter Tuvell and his family for over 20 years.
Some of the things she brought up during this conversation were:

- Walt is hardworking smart, intelligent, and takes enormous pride in his work.
- Work is his life.
- Willing and works long hours for his job. Brilliant, gives 100% to his job.
- He is not crazy. He is absolutely sane and has no violent tendencies.
- He has a strong sense of justice.
- Being yelled at in front of others and then being demoted.
- He has difficulty sleeping and eating. He is in distress. He is angry and irritable. Walt feels like he has been violated and treated unjustly. He feels he has been shut out and there has been no communication.
- His therapist feels that Walt has medical problems from this situation. She sees him weekly.
- She mentioned him being stonewalled, blackballed, being yelled at in front of others. No one sat down and talked to him about what had occurred and why. Communication & interaction not done.
- No one had set up a meeting with him, his manager and others to explain what had occurred and why. Walt doesn't know why this has happened. He can not figure it. If work is not adequate than explain to him – back it up logically as to why.
- She mentioned in Walt's perspective that there was not an adequate investigation by HR, no communication by his manager/others regarding the situation that occurred and the demotion.
- Feelings of having been threatened. He is now dealing with this enormous injustice. He is looking for an explanation why this occurred.
- Walt is concerned that he was being set up to fail.
- He has lost trust in management and HR. She stated Walt feels the original HR did not listen and advocate. She did not investigate further. She did not put them in the same room to discuss. He lost trust in HR.
- Need to repair trust which may not be able to retract without feeling like he is put in a corner. Looking for an apology.
- Walt worked for Netezza and then IBM. Happy he was able to keep the same job. Another position such as a transfer, will take him away from the original job he loves to do.

Page 77

actively participate in group activities"; is that right?
**A. Correct.**
Q. Then in Adaption to Stress, you said Mr. Tuvell had a serious impairment with respect to managing conflict with others, negotiate, comprise, and set realistic goals, has good autonomous judgment; is that correct?
**A. Correct.**
Q. And you gave him an overall impairment rating of 3 to 4, which was between a moderate impairment and a serious impairment?
**A. Correct.**
Q. Now, what was the incident of demotion?
**A. Mr. Tuvell reported that -- well, in describing some of the circumstances of his work reactivity and triggering, he described a situation in which he was asked to -- he was -- well, he was taken off of -- I don't know what his words were -- a project that he had been previously working on and was asked to step aside. From his description, the person who was going to take over that project was someone who was much younger -- I don't recall if he said less experienced -- and that he was being moved**

Page 78

**to some other piece of work. That's what he perceived to be a demotion. That is how he referenced his experience of that incident in recalling what was traumatizing him.**
Q. Was there any change in title?
**A. Not to my knowledge.**
Q. Was there any change in salary?
**A. Not to my knowledge.**
Q. Is it fair to say you didn't form an opinion that he was demoted?
**A. Correct.**
Q. You just reported his perception of a demotion?
**A. Correct.**
Q. What was the "intense triggering of symptoms with any return to the work environment"?
**A. Even in conversation Mr. Tuvell became extremely upset. He had trouble speaking. You know, he would cry. He would shake when talking about the work setting and the things that he experienced going on. Shall I go on?**
Q. Yes.
**A. Well, is there anything else you want to be particular on?**

Page 79

Q. No. You said that there was an intense triggering of symptoms. I was interested in what the intense triggering was.
**A. Well, at that point any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which he was triggered into a state that involved hyper-reactivity, hyper-arousal. He was in a state of very difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded. Whenever he started to think, it was like he could not stop. All of the things would cascade. His mood was both depressed and anxious simultaneously. I'm sure there's more. Those are the ones I'm recalling at the moment.**
Q. Did he mention any names to you?
**A. Names?**
Q. Yes, of people who were the subject of the triggering.
**A. Sure.**
Q. Do you remember who they were?
**A. The two that come to mind immediately are a person named "Fritz" -- I don't remember the last**

Page 80

**name -- and a person named -- and his direct boss, Dan. The triggering was probably more severe with Dan.**
Q. So your belief that Mr. Tuvell could not return to the work situation was that his motions were so intense that it was going to retrigger all of the things that you are talking about, his not sleeping, his obsessive thoughts, his depression, all of that? Just going into that building and seeing Dan Feldman or Fritz Knabe might trigger those strong reactions?
**A. Yes.**
Q. And so that's the reason that you indicated that for some period of time he was totally impaired from work?
**A. I did, and I was concerned for his mental stability at the time.**
Q. Now, go back and look at Exhibit 3 for a moment. In 2011 --
**A. Wait a minute. This is 5. Is that 3?**
Q. 3 is the long list of sessions that you had.
**A. (Examines documents) Okay, I have it.**
Q. Do you see the page for 2011?

*{This page intentionally left blank.}*

# February 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 |
| 20 | 21 | 22<br>**Dan: Performance Evaluation** | 23 | 24 | 25 | 26 |
| 27 | 28 | | | | | |

# March 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16<br>Database transport | 17 | 18<br>Removal from project Glass | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | 31 | | |

# April 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | | 1 | 2 |
| 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| 10 | 11 | 12 | 13 | 14 | 15 | 16 |
| 17 | 18 | 19 | 20 | 21 | 22 | 23 |
| 24 | 25 | 26 | 27<br>Dan’s Lunch ’N Learn | 28 | 29 | 30 |

# May 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| 15 | 16 | 17 | 18<br>Dan: Excel graphics; no 3-way mtg; only care about Wahoo | 19 | 20 | 21 |
| 22 | 23 | 24<br>Mtg Fritz (Excel graphics)<br>Mtg Dan (daily updates) | 25 | 26<br>Mtg Dan: PTSD | 27 | 28 |
| 29 | 30 | 31 | | | | |

# June 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | 1 | 2 | 3 | 4 |
| 5 | 6<br>Fritz pretends Wahoo not bottleneck | 7 | 8<br>Fritz yelling | 9<br>Phone Dan: why did Fritz yell? | 10<br>Dan: demotion; bully & liar<br>Start IDR: email McCabe | 11<br>Hail & fairwell emails |
| 12<br>Weekly report (CC McCabe)<br>Dear Dr. Tuvell HR monitoring | 13<br>Mtg Metzger<br>Mtg McCabe: age disc. | 14<br>Dan: transition status reports<br>Email McCabe: PTSD | 15<br>Mtg Metzger<br>Dan complains about report<br>Oh Come On: age, sex, race | 16<br>Request for transfer (due to PTSD)<br>Impossible proj. planning | 17 | 18 |
| 19 | 20<br>Phone Lisa Due | 21 | 22 | 23 | 24 | 25 |
| 26 | 27 | 28 | 29<br>Lisa Due report (“insufficient facts” sham)<br>Start appeal: email Mandel | 30<br>Blktrace plans<br>nzVtCapture.sh harassment<br>Ad hominem Dan absolution | | |

# July 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | | **1**<br>**Mtg Metzger**<br>**Phone Mandel (agree to long-form complaint)** | **2** |
| **3** | **4** | **5**<br>**Dan: 3 "behavior issues"; "vet" emails**<br>**Dan absolution** | **6**<br>**Request help (impossible planning)**<br>**"Lazy" email**<br>**Dan absolution** | **7** *(Surgery STD)* | **8** *(Surgery STD)* | **9** |
| **10** | **11** *(Surgery STD)*<br>**Dan attacks "lazy" email**<br>**My apology** | **12** *(Surgery STD)* | **13** *(Surgery STD)* | **14** *(Surgery STD)* | **15** *(Surgery STD)* | **16** |
| **17** | **18** *(Surgery STD)* | **19** *(Surgery STD)* | **20** *(Surgery STD)*<br>**My apology for apologizing** | **21** *(Surgery STD)* | **22** *(Surgery STD)* | **23** |
| **24**<br>**31** | **25** *(Vacation)* | **26** *(Vacation)* | **27** *(Vacation)* | **28** *(Vacation)* | **29** *(Vacation)* | **30** |

# August 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3<br>Pseudo-yelling; FWL; fainting<br>Emergency draft & email<br>Last office day | 4<br>Dan's self-embarrass-ment (incl. raison d'être) | 5<br>Mandel: raison d'être; no 3rd party complaints | 6 |
| 7 | 8<br>Dan: harp on "ill-defined" | 9 | 10 | 11<br>Contact IHS<br>Dan phones my home (fail)<br>Dan email: phone him | 12<br>Dan email: requests phone number | 13 |
| 14 | 15<br>STD #1 (STD@$100%) | 16 | 17 | 18<br>OCpl&Il (Corp. Open Door C&A & Ombudsman) | 19 | 20 |
| 21 | 22 | 23 | 24 | 25<br>Mandel refuses to discuss IDR during STD | 26 | 27 |
| 28<br>OCal | 29 | 30<br>Mandel refuses to discuss IDR during STD (again) | 31 | | | |

# September 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | 1 | 2 | 3 |
| 4<br>OCaII | 5 | 6<br>Netezza VPN access rescinded | 7 | 8 | 9 | 10 |
| 11 | 12 | 13<br>Physical access rescinded | 14 | 15<br>STD #2 | 16 | 17 |
| 18 | 19 | 20 | 21<br>CTCO Richard Kaplan: “cancer growing on IBM” | 22<br>OCaIII | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | |

# October 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | | | 1 |
| 2 | 3 | 4 | 5<br>I (re-)tell IBM I know about reasonable accomm., ADA, etc. | 6 | 7 | 8 |
| 9 | 10<br>IBM's first ack./"dialog" concerning reasonable accomm. | 11<br>I tell IBM I know about retaliation based upon discrimination | 12 | 13 | 14 | 15 |
| 16 | 17<br>Dan changes work-at-home days to STD | 18<br>STD #3 | 19 | 20 | 21 | 22 |
| 23 | 24 | 25 | 26<br>(STD@$66⅔%) | 27 | 28 | 29 |
| 30<br>Rob Mantell | 31 | | | | | |

# November 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3<br>OCalV | 4 | 5 |
| 6 | 7 | 8<br>STD #4 | 9<br>Mantell letter to Mandel | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17<br>Mandel phone call: sham report of investigation | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25<br>Mandel email: sham written report of investigation | 26 |
| 27 | 28<br>Apply to GOM SWG-0436579<br>Dan pretends I didn't check-in | 29 | 30 | | | |

# December 2011

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | 1<br>Kime phone interview | 2 | 3 |
| 4 | 5 | 6<br>Bliss pretends access wasn't rescinded | 7 | 8<br>Littleton interview | 9 | 10 |
| 11 | 12<br>Kime: "very positive" feedback | 13 | 14 | 15 | 16 | 17 |
| 18 | 19 | 20<br>STD #5 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 |

# January 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5<br>Wikipedia QR Code | 6<br>Kime: GOM rejection (+2 “reasons”) | 7 |
| 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| 15 | 16<br>Dan: Kime lied (+1 “reason”) | 17 | 18 | 19<br>Phone Adams: GOM | 20<br>Dan: inadequate accommod.<br>(NC v1.0: 2nd C&A) | 21 |
| 22<br>NC (v1.1) | 23 | 24<br>Bliss: refusal to accommod.<br>STD ends | 25<br>Unpaid leave granted (to apply for LTD)<br>Apply to GOM SWG-0456125 | 26<br>Headhunter contact for subsequent employment | 27 | 28 |
| 29 | 30 | 31 | | | | |

# February 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | 1 | 2 | 3 | 4 |
| 5 | 6 | 7<br>Apply for LTD | 8 | 9 | 10 | 11 |
| 12 | 13<br>Mandel: Kime, Dan lied (+1 “reason”) | 14 | 15<br>Metzger: inadequate accommod. | 16 | 17<br>Mandel: Kime, Dan, Mandel lied (+2 “reasons”) | 18 |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 |
| 26 | 27 | 28<br>Mandel: reject 2nd C&A<br>Mandel: reject 2nd GOM | 29 | | | |

# March 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | | | 1 | 2<br>OCaV<br>NCaI (3rd C&A) | 3 |
| 4 | 5 | 6<br>Notes, w3 VPN access rescinded | 7 | 8<br>Physical access rescinded (again) | 9<br>NCaII | 10 |
| 11 | 12<br>Start work at subsequent employer<br>File MCAD Charge | 13<br>Mandel: threaten me because of opposition | 14 | 15 | 16 | 17 |
| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 |

# April 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| 15 | 16 | 17<br>Denial of LTD (ultimately appealed, and again denied) | 18 | 19 | 20 | 21 |
| 22 | 23 | 24 | 25<br>Unpaid leave extended (to apply for LTD) | 26 | 27 | 28 |
| 29 | 30 | | | | | |

# May 2012

| Sun | Mon | Tue | Wed | Thu | Fri | Sat |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7<br>Adams: EMC | 8<br>4th C&A<br>Adams: LinkedIn | 9<br>Adams: demand for subsequent employer | 10 | 11<br>Adams: PLOA | 12 |
| 13 | 14 | 15<br>Adams: competitive employment | 16 | 17<br>Dan: termination; don't delete data; supply passwords | 18 | 19 |
| 20 | 21 | 22<br>Forensics courier | 23 | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | 31 | | |

APPEAL

# United States District Court
# District of Massachusetts (Boston)
# CIVIL DOCKET FOR CASE #: 1:13–cv–11292–DJC

Tuvell v. International Business Machines, Inc.
Assigned to: Judge Denise J. Casper
Case in other court: Middlesex Superior Court, 12–01428
USCA – First Circuit, 15–01914
Cause: 28:1441 Petition for Removal – Employment Discrim

Date Filed: 05/29/2013
Date Terminated: 07/08/2015
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

**Plaintiff**

**Walter Tuvell**

represented by **Robert S. Mantell**
Rodgers, Powers & Schwartz, LLP
Suite 500
18 Tremont Street
Boston, MA 02108
617–742–7010
Fax: 617–742–7225
Email: RMantell@TheEmploymentLawyers.com
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Andrew P. Hanson**
Andrew P. Hanson, Esq.
One Boston Place
Suite 2600
Boston, MA 02108
617–933–7243
Email: andrewphanson@gmail.com
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**International Business Machines, Inc.**

represented by **Joan I. Ackerstein**
142 Cynthia Road
Newton, MA 02459
(617) 332–8537
Email: ackjoan@aol.com
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Matthew A. Porter**
Jackson Lewis PC
75 Park Plaza
4th Floor
Boston, MA 02116
617–367–0025
Fax: 617–367–2155
Email: porterm@jacksonlewis.com
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

| Date Filed | # | Docket Text |
|---|---|---|
| 05/29/2013 | 1 | NOTICE OF REMOVAL by International Business Machines, Inc. ( Filing fee: $ 400, receipt number 0101–4477064 Fee Status: Filing Fee paid) (Attachments: # 1 Exhibit A–1, # 2 Exhibit A–2, # 3 Exhibit B, # 4 Exhibit C, # 5 Civil Cover Sheet, # 6 Category sheet)(Porter, Matthew) (Entered: 05/29/2013) |

| | | |
|---|---|---|
| 05/30/2013 | 2 | NOTICE of Case Assignment. Magistrate Judge Robert B. Collings assigned to case. Plaintiff's counsel, or defendant's counsel if this case was initiated by the filing of a Notice of Removal, are directed to the Notice and Procedures regarding Consent to Proceed before the Magistrate Judge which can be downloaded here. These documents will be mailed to counsel not receiving notice electronically. (Abaid, Kimberly) (Entered: 05/30/2013) |
| 05/30/2013 | 3 | Certified Copy of Notice of Removal Provided to Defense Counsel by mail (Danieli, Chris) (Entered: 05/30/2013) |
| 05/30/2013 | 4 | NOTICE of Appearance by Joan I. Ackerstein on behalf of International Business Machines, Inc. (Ackerstein, Joan) (Entered: 05/30/2013) |
| 06/03/2013 | 5 | ELECTRONIC NOTICE TO COUNSEL: Notification forms indicating whether or not a party has consented to proceed before a U.S. Magistrate Judge have not been received in the Clerk's Office. The submission of the form is mandatory. Completed forms shall be filed promptly. Additional forms can be obtained on the Court's web page at http://www.mad.uscourts.gov. (Russo, Noreen) (Entered: 06/03/2013) |
| 06/03/2013 | 6 | Assented to MOTION for Extension of Time to June 24, 2013 to File Response/Reply as to 1 Notice of Removal, *(Complaint)* by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 06/03/2013) |
| 06/04/2013 | 7 | Refusal to Consent to Proceed Before a US Magistrate Judge. . (Ackerstein, Joan) (Entered: 06/04/2013) |
| 06/04/2013 | 8 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting 6 Motion for Extension of Time to File Response/Reply. "ALLOWED." (Russo, Noreen) (Entered: 06/04/2013) |
| 06/04/2013 | 9 | ELECTRONIC NOTICE of Reassignment. Judge Denise J. Casper added. (Abaid, Kimberly) (Entered: 06/04/2013) |
| 06/06/2013 | 10 | AMENDED COMPLAINT *First* against International Business Machines, Inc., filed by Walter Tuvell.(Mantell, Robert) (Entered: 06/06/2013) |
| 06/07/2013 | 11 | STATE COURT Record. (Porter, Matthew) (Entered: 06/07/2013) |
| 06/24/2013 | 12 | ANSWER to 10 Amended Complaint by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 06/24/2013) |
| 06/25/2013 | 13 | NOTICE of Scheduling Conference Scheduling Conference set for 7/29/2013 03:15 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 06/25/2013) |
| 06/25/2013 | 14 | Judge Denise J. Casper: ORDER entered. Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys(Hourihan, Lisa) (Entered: 06/25/2013) |
| 07/22/2013 | 15 | JOINT STATEMENT re scheduling conference *Pursuant to Local Rule 16.1*. (Porter, Matthew) (Entered: 07/22/2013) |
| 07/22/2013 | 16 | CERTIFICATION pursuant to Local Rule 16.1 *of Defendant International Business Machines, Inc.*. (Porter, Matthew) (Entered: 07/22/2013) |
| 07/26/2013 | 17 | ELECTRONIC NOTICE OF RESCHEDULING Scheduling Conference set for 7/29/2013 02:10 PM in Courtroom 11 before Judge Denise J. Casper. (NOTE TIME CHANGE ONLY) (Hourihan, Lisa) (Entered: 07/26/2013) |
| 07/26/2013 | 18 | ELECTRONIC NOTICE OF RESCHEDULING Scheduling Conference set for 7/29/2013 03:30 PM in Courtroom 11 before Judge Denise J. Casper. (NOTE TIME CHANGE ONLY)(Hourihan, Lisa) (Entered: 07/26/2013) |
| 07/29/2013 | 19 | ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Scheduling Conference held on 7/29/2013. Initial disclosures due by 8/19/13. Amended Pleadings due by 12/16/2013. Fact discovery due by 4/30/14. Plaintiff's expert disclosures due by 1/31/14. Defendant's expert disclosures due by 3/31/14. Expert discovery to be completed by 5/30/2014. Summary Judgment Motions due by 8/15/2014. Opposition to summary judgments motions due by 9/26/14. Status Conference set for 5/1/2014 02:15 PM in Courtroom 11 before Judge Denise J. Casper. |

| | | |
|---|---|---|
| | | (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Robert Mantell for the plaintiff. Joan Ackerstein for the defendant.) (Hourihan, Lisa) (Entered: 07/30/2013) |
| 07/29/2013 | 20 | Judge Denise J. Casper: ORDER entered. SCHEDULING ORDER.(Hourihan, Lisa) (Entered: 07/30/2013) |
| 09/19/2013 | 21 | MOTION for Protective Order *With Respect to Inquiries Concerning Plaintiff's Subsequent Employer* by Walter Tuvell.(Mantell, Robert) (Entered: 09/19/2013) |
| 10/03/2013 | 22 | Opposition re 21 MOTION for Protective Order *With Respect to Inquiries Concerning Plaintiff's Subsequent Employer* filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 10/03/2013) |
| 10/03/2013 | 23 | AFFIDAVIT in Opposition re 21 MOTION for Protective Order *With Respect to Inquiries Concerning Plaintiff's Subsequent Employer of Joan Ackerstein* filed by International Business Machines, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Ackerstein, Joan) (Entered: 10/03/2013) |
| 12/09/2013 | 24 | Judge Denise J. Casper: ELECTRONIC ORDER entered denying 21 Motion for Protective Order. The Court denies this motion for a number of reasons. First, Plaintiff Walter Tuvell ("Tuvell") has not complied with Local Rule 37.1(B)(4) by failing to state with particularity each of the discovery request and/or third−party subpoenas (if any of the latter have even been served) for which he seeks relief. Second, the Court does not agree with Tuvell's argument that his current employment is not relevant to the claims and defenses and any discovery requests regarding this employment are not reasonably calculated to lead to admissible evidence. Even as alleged by Tuvell, his current, non−IBM employment was the reason provided by Defendant IBM for his termination because he refused to identify his new employer. D. 21 at 3 (citing amended complaint). Moreover, whether Tuvell began employment with another employer in violation of a non−compete agreement with IBM, at a minimum, bears upon whether IBM had a legitimate business reason for taking the adverse action it did against Tuvell and, therefore, bears upon his claims for discrimination and IBM's defenses to these claims. Third, given the nature of Tuvell's claims and the remedies he seeks (including punitive damages), information about his current employment is fair game as to his claims and the potential calculation of damages. See D. 22 at 5−6 and cases cited. Moreover, although employment records may contain information of a private nature, the protective order that Tuvell seeks is so broad that it would bar access to basic information including the name of his employer, his start date for employment and his duties and responsibilities in this employment. For all of these reasons, the Court DENIES the motion for protective order. (Hourihan, Lisa) (Entered: 12/09/2013) |
| 01/27/2014 | 25 | MOTION to Seal Document *Motion for leave to file Motion to Compel Responses to Plaintiff's First Set of Interrogatories Under Seal* by Walter Tuvell.(Mantell, Robert) (Entered: 01/27/2014) |
| 01/28/2014 | 26 | Withdrawal of motion: 25 MOTION to Seal Document *Motion for leave to file Motion to Compel Responses to Plaintiff's First Set of Interrogatories Under Seal* filed by Walter Tuvell.. (Mantell, Robert) (Entered: 01/28/2014) |
| 01/28/2014 | 27 | MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* by Walter Tuvell. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibits 2−5)(Mantell, Robert) (Entered: 01/28/2014) |
| 02/10/2014 | 28 | Assented to MOTION for Extension of Time to February 18, 2014 to File Response/Reply as to 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* by International Business Machines, Inc..(Porter, Matthew) (Entered: 02/10/2014) |
| 02/11/2014 | 29 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 28 Motion for Extension of Time to File Response/Reply re 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* Responses due by 2/18/2014 (Hourihan, Lisa) (Entered: 02/11/2014) |
| 02/18/2014 | 30 | Opposition re 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* filed by International Business Machines, Inc.. (Ackerstein, Joan) |

| | | |
|---|---|---|
| | | (Entered: 02/18/2014) |
| 02/18/2014 | 31 | AFFIDAVIT in Opposition re 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* filed by International Business Machines, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Ackerstein, Joan) (Entered: 02/18/2014) |
| 02/28/2014 | 32 | Judge Denise J. Casper: ELECTRONIC ORDER entered. REFERRING CASE to Magistrate Judge Robert B. Collings Referred for: Events Only (e). Motions referred: 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories*. (Maynard, Timothy) Motions referred to Robert B. Collings. (Entered: 02/28/2014) |
| 03/04/2014 | 33 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered. Counsel for the plaintiff shall file a brief reply memorandum responding to the claims set forth in 30 Opposition to Motion filed by International Business Machines, Inc. that he "failed to engage in a good faith effort to narrow the issues" and "failed to set forth in all instances the interrogatory and/or IBM's response" to the interrogatory. The reply memorandum shall be filed *on or before cob on March 13, 2014.* (Entered: 03/04/2014) |
| 03/12/2014 | 34 | REPLY to Response to 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* filed by Walter Tuvell. (Attachments: # 1 Exhibit Exhibits 1–2, # 2 Exhibit Exhibit 3, # 3 Exhibit Exhibits 4–7, # 4 Exhibit Exhibits 8–9)(Mantell, Robert) (Entered: 03/12/2014) |
| 03/13/2014 | 35 | Assented to MOTION for Leave to File *Affidavit to Correct Defendant's Opposition To Plaintiff's Motion To Compel Responses To Interrogatories* by International Business Machines, Inc.. (Attachments: # 1 Exhibit A)(Ackerstein, Joan) (Entered: 03/13/2014) |
| 03/14/2014 | 36 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered re 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* filed by Walter Tuvell. Upon a review of 34 , the Court will direct the Clerk to schedule a hearing on the motion. However, at the hearing, counsel are to provide the Court with a jointly prepared list detailing each disputed item which remains to be decided by the Court. (Entered: 03/14/2014) |
| 03/17/2014 | 37 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting 35 Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include – Leave to file granted on (date of order)– in the caption of the document. (Dolan, Kathleen) (Entered: 03/17/2014) |
| 03/17/2014 | 38 | ELECTRONIC NOTICE Setting Hearing on Motion 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* : Motion Hearing set for 3/27/2014 at 02:30 PM in Courtroom 23 before Magistrate Judge Robert B. Collings. (Dolan, Kathleen) (Entered: 03/17/2014) |
| 03/17/2014 | 39 | AFFIDAVIT of Joan Ackerstein To Correct Opposition To Plaintiff's Motion To Compel in Opposition re 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* filed by International Business Machines, Inc.. (Attachments: # 1 Exhibit 1)(Ackerstein, Joan) (Entered: 03/17/2014) |
| 03/18/2014 | 40 | Assented to MOTION to Continue *Hearing Date* by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 03/18/2014) |
| 03/18/2014 | 41 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting 40 Motion to Continue. Motion Hearing set for 4/3/2014 at 03:30 PM in Courtroom 23 before Magistrate Judge Robert B. Collings. (Dolan, Kathleen) (Entered: 03/18/2014) |
| 04/01/2014 | 42 | Assented to MOTION to Continue Hearing on Plaintiff's Motion to Compel Responses to Interrogatories to April 22, 2014 by International Business Machines, Inc..(Porter, Matthew) (Entered: 04/01/2014) |
| 04/01/2014 | 43 | Joint MOTION for Extension of Time *for Certain PreTrial Deadlines* by International Business Machines, Inc..(Porter, Matthew) (Entered: 04/01/2014) |

| | | |
|---|---|---|
| 04/02/2014 | 44 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting 42 Motion to Change Hearing Date. Hearing on Motion #27 re–set for 4/22/2014 at 03:15 PM in Courtroom 23 before Magistrate Judge Robert B. Collings. (Dolan, Kathleen) (Entered: 04/02/2014) |
| 04/22/2014 | 45 | ELECTRONIC Clerk's Notes for proceedings held before Magistrate Judge Robert B. Collings: Motion Hearing held on 4/22/2014 re 27 MOTION to Compel *Responses to Plaintiff's First Set of Interrogatories* filed by Walter Tuvell. After hearing, taken under advisement. (Court Reporter: Digital Recording – For transcripts or CDs contact Deborah Scalfani by email at deborah_scalfani@mad.uscourts.gov.)(Attorneys present: Mantell, Porter) (Entered: 04/22/2014) |
| 04/22/2014 | 46 | PARTIES' JOINT LIST OF DISPUTED ITEMS PERTAINING TO PLAINTIFF'S MOTION TO COMPEL RESPONSES TO HIS FIRST SET OF INTERROGATORIES. (Dolan, Kathleen) (Entered: 04/23/2014) |
| 04/23/2014 | 47 | Magistrate Judge Robert B. Collings: ORDER ON PLAINTIFF'S MOTION TO COMPEL RESPONSES TO HIS FIRST SET OF INTERROGATORIES (#27) entered. (Dolan, Kathleen) (Entered: 04/23/2014) |
| 04/23/2014 | 48 | Case no longer referred to Magistrate Judge Robert B. Collings. (Dolan, Kathleen) (Entered: 04/23/2014) |
| 04/28/2014 | 50 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 43 Motion for Extension of Time to Complete Discovery. Fact discovery due by 6/30/14. Plaintiff's expert disclosures due by 5/30/14. Defendant's expert disclosures due by 7/31/14. Expert discovery due by 8/31/14. Summary Judgment Motions due by 10/17/14. Opposition to Summary Judgment Motions due by 11/28/14. (Hourihan, Lisa) (Entered: 04/28/2014) |
| 04/28/2014 | 51 | ELECTRONIC NOTICE OF RESCHEDULING Status Conference set for 7/21/2014 02:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 04/28/2014) |
| 06/25/2014 | 52 | MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff* by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 06/25/2014) |
| 06/25/2014 | 53 | MEMORANDUM in Support re 52 MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff* filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 06/25/2014) |
| 06/25/2014 | 54 | AFFIDAVIT in Support re 52 MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff Of Joan Ackerstein* filed by International Business Machines, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Ackerstein, Joan) (Entered: 06/25/2014) |
| 06/30/2014 | 55 | NOTICE of Change of Address or Firm Name by Robert S. Mantell *Attorney for Plaintiff* (Mantell, Robert) (Entered: 06/30/2014) |
| 07/08/2014 | 56 | MEMORANDUM in Opposition re 52 MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff* filed by Walter Tuvell. (Attachments: # 1 Exhibit Exh. 1, # 2 Exhibit Exh. 2, # 3 Exhibit Exhs. 3–5, # 4 Exhibit Exhs. 6–7, # 5 Exhibit Exhs. 8–12, # 6 Exhibit Exhs. 13–16, # 7 Exhibit Exhs. 17–18, # 8 Exhibit Exhs. 19–20)(Mantell, Robert) (Entered: 07/08/2014) |
| 07/10/2014 | 57 | Judge Denise J. Casper: ELECTRONIC ORDER entered. REFERRING CASE to Magistrate Judge Robert B. Collings Referred for: Events Only (e). Motions referred: 52 MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff*. (Maynard, Timothy) Motions referred to Robert B. Collings. (Entered: 07/10/2014) |
| 07/10/2014 | 58 | ELECTRONIC NOTICE issued requesting courtesy copy of Docket No. 54 and Docket No. 56. Counsel who filed these documents are requested to submit a courtesy copy to the Clerk's Office as soon as possible. **These documents must be clearly marked as a Courtesy Copy for Magistrate Judge Robert B. Collings and reflect the document number assigned by CM/ECF.** (Dolan, Kathleen) (Entered: 07/10/2014) |

| | | |
|---|---|---|
| 07/14/2014 | 59 | ELECTRONIC NOTICE Setting Hearing on Motion 52 MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff* : Motion Hearing set for 7/21/2014 at 02:30 PM in Courtroom 23 before Magistrate Judge Robert B. Collings. (Dolan, Kathleen) (Entered: 07/14/2014) |
| 07/17/2014 | 60 | Assented to MOTION for Extension of Time *For Identification And Deposition Of Experts* by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 07/17/2014) |
| 07/21/2014 | 61 | ELECTRONIC Clerk's Notes for proceedings held before Magistrate Judge Robert B. Collings: Motion Hearing held on 7/21/2014 re 52 MOTION to Compel *Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff* filed by International Business Machines, Inc. After hearing, taken under advisement. (Court Reporter: Digital Recording – For transcripts or CDs contact Deborah Scalfani by email at deborah_scalfani@mad.uscourts.gov.)(Attorneys present: Mantell, Ackerstein) (Entered: 07/21/2014) |
| 07/21/2014 | 62 | ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Status Conference held on 7/21/2014. Counsel report on the status of the case. Court not inclined to move the 10/17/14 summary judgment deadline. Defendant to respond to plaintiff's settlement demand by 8/4/14. Court will hold off ruling on D. 60 until Magistrate Judge Collings decides D. 52. Hearing on Summary Judgment Motion or, if none filed, Initial Pretrial Conference set for 1/22/2015 02:00 PM in Courtroom 11 before Judge Denise J. Casper. The parties shall confer regarding the topics identified under Local Rule 16.5(d) and shall prepare and submit a joint pretrial memorandum in accordance with Local Rule 16.5(d) no later than five (5) business days prior to the pretrial conference. The pretrial memorandum shall also propose deadlines for the filing of motions in limine, proposed jury instructions, proposed jury voir dire and a proposed trial date. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Robert Mantell for the plaintiff. Joan Ackerstein for the defendant.) (Hourihan, Lisa) (Entered: 07/22/2014) |
| 08/18/2014 | 63 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting 52 Motion to Compel. I rule that the plaintiff has put his mental condition in issue and that there is good cause for defendant's requested mental examination. In short, plaintiff in 2012 was referred to his own psychiatrist, one Dr. Anderson, who made his own diagnosis that the plaintiff had PTSD. Whether Dr. Anderson testifies as a "treating psychiatrist" or as an "expert," he will most certainly testify that the plaintiff has been and is suffering from PTSD. The defendant is entitled in these circumstances to have plaintiff examined by their own psychiatrist. Defendant does not have other means of obtaining an independent evaluation, and plaintiff's argument that the defendant must rely on records generated during plaintiff's treatment by providers of plaintiff's choice lacks merit in the circumstances of this case. The deposition may be videotaped and a copy provided to plaintiff's counsel at defendant's request. The plaintiff will retain any privileges during the questioning by defendant's expert. The Court otherwise rejects plaintiff's proposed "conditions" to the examination. Counsel shall agree on a date and time and defendant's counsel shall communicate that information to the Court so that an Order pursuant to Rule 35 may be entered. No costs or attorney's fees. (Entered: 08/18/2014) |
| 08/19/2014 | 64 | Case no longer referred to Magistrate Judge Robert B. Collings. (Dolan, Kathleen) (Entered: 08/19/2014) |
| 09/02/2014 | 65 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 60 Motion for Extension of Time for Identification and Deposition of Experts. Expert disclosures due by 9/30/14. Expert depositions to be completed by 10/28/14. (Hourihan, Lisa) (Entered: 09/02/2014) |
| 09/17/2014 | 66 | Magistrate Judge Robert B. Collings: ELECTRONIC ORDER PURSUANT TO RULE 35(a), Fed. R. Civ. P., ENTERED. In accordance with the Court's ruling on Motion 52 , the plaintiff is ORDERED to submit to a mental examination by Ronald Schouten, M.D., on Friday, September 19, 2014 from 9:00 A.M. to 1:00 P.M. at Dr. Shouten's office at One Bowdoin Square, 9th floor, 15 New Chardon Street, Boston, Massachusetts. The conditions *anent* the examination are contained in the Court's ruling on Motion {52]. (Entered: 09/17/2014) |

| | | |
|---|---|---|
| 09/18/2014 | 67 | Letter/request (non−motion) from Joan Ackerstein to Magistrate Judge Collings. (Russo, Noreen) (Entered: 09/18/2014) |
| 09/30/2014 | 68 | Joint MOTION for Extension of Time to For Certain Pretrial Deadlines by International Business Machines, Inc..(Porter, Matthew) (Entered: 09/30/2014) |
| 10/31/2014 | 69 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 68 Motion for Extension of Time to Complete Discovery. Defendant's expert disclosures due by 10/6/14. Plaitniff's supplemental disclosures due by 10/6/14. Expert discovery due by 11/25/14. Summary Judgment Motions due by 12/15/14. Opposition to Summary Judgment due by 1/26/15. Hearing on summary judgment set for March 12, 2015 at 3:00PM. NO FURTHER EXTENSIONS ANTICIPATED. (Hourihan, Lisa) (Entered: 10/31/2014) |
| 10/31/2014 | 70 | ELECTRONIC NOTICE of Hearing.Hearing set for 3/12/2015 03:00 PM in Courtroom 11 before Judge Denise J. Casper. (Hourihan, Lisa) (Entered: 10/31/2014) |
| 12/05/2014 | 71 | Joint MOTION for Leave to File Excess Pages *Permitting the Parties to Each File 25 Page Briefs in Connection with Motion for Summary Judgment* by International Business Machines, Inc..(Porter, Matthew) (Entered: 12/05/2014) |
| 12/10/2014 | 72 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 71 Motion for Leave to File Excess Pages. Memos by both parties not to exceed 25 pages in lenght. (Hourihan, Lisa) (Entered: 12/10/2014) |
| 12/15/2014 | 73 | MOTION for Summary Judgment by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 12/15/2014) |
| 12/15/2014 | 74 | Statement of Material Facts L.R. 56.1 re 73 MOTION for Summary Judgment filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 12/15/2014) |
| 12/15/2014 | 75 | MEMORANDUM in Support re 73 MOTION for Summary Judgment filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 12/15/2014) |
| 12/15/2014 | 76 | AFFIDAVIT in Support re 73 MOTION for Summary Judgment *of Joan Ackerstein* filed by International Business Machines, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34, # 35 Exhibit 35, # 36 Exhibit 36, # 37 Exhibit 37, # 38 Exhibit 38, # 39 Exhibit 39, # 40 Exhibit 40, # 41 Exhibit 41)(Ackerstein, Joan) (Entered: 12/15/2014) |
| 01/09/2015 | 77 | Joint MOTION for Extension of Time to February 13, 2015 to File *papers relating to summary judgment* by Walter Tuvell.(Mantell, Robert) (Entered: 01/09/2015) |
| 01/12/2015 | 78 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 77 Motion for Extension of Time to File to this extent. Opposition to summary judgment motion due by 2/13/15. Reply brief due by 3/2/15. (Hourihan, Lisa) (Entered: 01/12/2015) |
| 01/16/2015 | 79 | MOTION for Leave to File Excess Pages *for Opposition to Summary Judgment* by Walter Tuvell.(Mantell, Robert) (Entered: 01/16/2015) |
| 02/05/2015 | 80 | Judge Denise J. Casper: ELECTRONIC ORDER entered granting 79 Motion for Leave to File Excess Pages. Allowed up to 25 pages ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include − Leave to file granted on (date of order)− in the caption of the document. (Maynard, Timothy) (Entered: 02/05/2015) |
| 02/12/2015 | 81 | MEMORANDUM in Opposition re 73 MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015) |
| 02/12/2015 | 82 | Statement of Material Facts L.R. 56.1 re 73 MOTION for Summary Judgment *Plaintiff's Responses to Defendant's Statement of Facts* filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015) |

| | | |
|---|---|---|
| 02/12/2015 | 83 | Statement of Material Facts L.R. 56.1 re 73 MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015) |
| 02/12/2015 | 84 | NOTICE OF MANUAL FILING by Walter Tuvell Plaintiff's Exhibits Submitted in Opposition to Defendant's Motion for Summary Judgment re 73 MOTION for Summary Judgment (Mantell, Robert) (Entered: 02/12/2015) |
| 02/12/2015 | 85 | Amended Opposition re 73 MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015) |
| 03/02/2015 | 86 | REPLY to Response to 73 MOTION for Summary Judgment filed by International Business Machines, Inc.. (Porter, Matthew) (Entered: 03/02/2015) |
| 03/02/2015 | 87 | Statement of Material Facts L.R. 56.1 re 73 MOTION for Summary Judgment *IBM Response to Plaintiff's Statement of Material Facts* filed by International Business Machines, Inc.. (Porter, Matthew) (Entered: 03/02/2015) |
| 03/02/2015 | 88 | Supplemental AFFIDAVIT in Support re 73 MOTION for Summary Judgment *of Joan Ackerstein* filed by International Business Machines, Inc.. (Attachments: # 1 Exhibit 117, # 2 Exhibit 118)(Porter, Matthew) (Entered: 03/02/2015) |
| 03/02/2015 | 89 | MOTION to Strike *Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment* by International Business Machines, Inc..(Porter, Matthew) (Entered: 03/02/2015) |
| 03/02/2015 | 90 | MEMORANDUM in Support re 89 MOTION to Strike *Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment* filed by International Business Machines, Inc.. (Porter, Matthew) (Entered: 03/02/2015) |
| 03/11/2015 | 91 | Opposition re 89 MOTION to Strike *Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment* filed by Walter Tuvell. (Attachments: # 1 Exhibit Exhibits 1 & 2)(Mantell, Robert) (Entered: 03/11/2015) |
| 03/12/2015 | 92 | ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Motion Hearing held on 3/12/2015 re 89 MOTION to Strike *Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment* filed by International Business Machines, Inc., 73 MOTION for Summary Judgment filed by International Business Machines, Inc. Arguments. Court takes under advisement 73 Motion for Summary Judgment; takes under advisement 89 Motion to Strike. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Robert Mantell for the plaintiff. Joan Ackerstein and Matthew Porter for the defendants.) (Hourihan, Lisa) (Entered: 03/12/2015) |
| 07/07/2015 | 94 | Judge Denise J. Casper: ORDER entered. MEMORANDUM AND ORDER. The Court ALLOWS IBM's motion for summary judgment, D.73. In addition, the Court DENIES IBM's motion to strike, D. 89, as moot. (Maynard, Timothy) (Entered: 07/07/2015) |
| 07/08/2015 | 95 | Judge Denise J. Casper: ORDER entered. JUDGMENT (Hourihan, Lisa) (Entered: 07/08/2015) |
| 08/05/2015 | 96 | NOTICE of Appearance by Andrew P. Hanson on behalf of Walter Tuvell (Hanson, Andrew) (Entered: 08/05/2015) |
| 08/05/2015 | 97 | NOTICE of Withdrawal of Appearance by Robert S. Mantell (Mantell, Robert) (Entered: 08/05/2015) |
| 08/05/2015 | 98 | NOTICE OF APPEAL as to 95 Judgment, 94 Memorandum & ORDER by Walter Tuvell. ( (Fee Status: Filing Fee Paid)) NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm. US District Court Clerk to deliver official record to Court of Appeals by 8/25/2015. (Hanson, Andrew) Modified on 8/5/2015 (Castilla, Francis). Modified on 8/6/2015 (Paine, Matthew). (Entered: 08/05/2015)** |

| | | |
|---|---|---|
| 08/06/2015 | 99 | BILL OF COSTS by International Business Machines, Inc.. (Porter, Matthew) (Entered: 08/06/2015) |
| 08/06/2015 | 100 | AFFIDAVIT in Support re 99 Bill of Costs . (Attachments: # 1 Exhibit A−AA)(Porter, Matthew) (Entered: 08/06/2015) |
| 08/06/2015 | 101 | Filing fee/payment: $ 505.00, receipt number 1BST051028 for 98 MOTION for Leave to Appeal (Caruso, Stephanie) (Entered: 08/06/2015) |
| 08/06/2015 | 102 | Abbreviated Record Sent to the Court of Appeals 98 Notice of Appeal. (Paine, Matthew) (Paine, Matthew). (Entered: 08/06/2015) |
| 08/19/2015 | 103 | TRANSCRIPT ORDER FORM by Walter Tuvell for proceedings held on 03/12/2015 before Judge Denise J. Casper, Transcript due by 10/19/2015. (Hanson, Andrew) (Entered: 08/19/2015) |
| 08/05/2015 | 104 | NOTICE OF APPEAL as to 95 Judgment, 94 Memorandum & ORDER by Walter Tuvell NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 8/25/2015. (Paine, Matthew) (Entered: 09/30/2015)** |
| 09/30/2015 | 105 | Notice of correction to docket made by Court staff. Correction: Docket Entry 98 Notice of Appeal Corrected Because: The Notice of Appeal Was Filed Under the Wrong Appeal Event By Counsel Hanson. (Paine, Matthew) (Entered: 09/30/2015) |
| 09/30/2015 | 106 | USCA Case Number 15−1914 for 104 Notice of Appeal filed by Walter Tuvell. (Paine, Matthew) (Entered: 09/30/2015) |
| 09/30/2015 | 107 | Transcript of Motion Hearing held on March 12, 2015, before Judge Denise J. Casper. COA Case No. 15−1914. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 10/21/2015. Redacted Transcript Deadline set for 11/2/2015. Release of Transcript Restriction set for 12/29/2015. (Scalfani, Deborah) (Entered: 09/30/2015) |
| 09/30/2015 | 108 | NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above−captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general−info.htm (Scalfani, Deborah) (Entered: 09/30/2015) |
| 05/13/2016 | 109 | OPINION of USCA as to 104 Notice of Appeal filed by Walter Tuvell. (Paine, Matthew) (Entered: 05/16/2016) |
| 05/13/2016 | 110 | USCA Judgment as to 104 Notice of Appeal filed by Walter Tuvell. AFFIRMED... (Paine, Matthew) (Entered: 05/16/2016) |