
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*

JOINT APPENDIX VOLUME I

A1-A231

United States District Court
District of Massachusetts (Boston)
JOINT APPENDIX - VOLUME I 11292-DJC

Tuvell v. International Business Machines, Inc.
Assigned to: Judge Denise J. Casper

Date Filed: 05/29/2013
Date Terminated: 07/04/2015

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Date Filed	#	Docket Text
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**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

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V.

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Date Filed	#	Docket Text
05/29/2013	<u>1</u>	NOTICE OF REMOVAL by International Business Machines, Inc. (Filing fee: \$ 400, receipt number 0101-4477064 Fee Status: Filing Fee paid) (Attachments: # <u>1</u> Exhibit A-1, # <u>2</u> Exhibit A-2, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Civil Cover Sheet, # <u>6</u> 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	<u>6</u>	Assented to MOTION for Extension of Time to June 24, 2013 to File Response/Reply as to <u>1</u> Notice of Removal, (<i>Complaint</i>) by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 06/03/2013)
06/04/2013	<u>7</u>	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 <u>6</u> 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	<u>10</u>	AMENDED COMPLAINT <i>First</i> against International Business Machines, Inc., filed by Walter Tuvell.(Mantell, Robert) (Entered: 06/06/2013)
06/07/2013	<u>11</u>	STATE COURT Record. (Porter, Matthew) (Entered: 06/07/2013)
06/24/2013	<u>12</u>	ANSWER to <u>10</u> Amended Complaint by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 06/24/2013)
06/25/2013	<u>13</u>	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	<u>14</u>	Judge Denise J. Casper: ORDER entered. Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys(Hourihan, Lisa) (Entered: 06/25/2013)
07/22/2013	<u>15</u>	JOINT STATEMENT re scheduling conference <i>Pursuant to Local Rule 16.1</i> . (Porter, Matthew) (Entered: 07/22/2013)
07/22/2013	<u>16</u>	CERTIFICATION pursuant to Local Rule 16.1 <i>of Defendant International Business Machines, Inc.</i> . (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	<u>20</u>	Judge Denise J. Casper: ORDER entered. SCHEDULING ORDER.(Hourihan, Lisa) (Entered: 07/30/2013)
09/19/2013	<u>21</u>	MOTION for Protective Order <i>With Respect to Inquiries Concerning Plaintiff's Subsequent Employer</i> by Walter Tuvell.(Mantell, Robert) (Entered: 09/19/2013)
10/03/2013	<u>22</u>	Opposition re <u>21</u> MOTION for Protective Order <i>With Respect to Inquiries Concerning Plaintiff's Subsequent Employer</i> filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 10/03/2013)
10/03/2013	<u>23</u>	AFFIDAVIT in Opposition re <u>21</u> MOTION for Protective Order <i>With Respect to Inquiries Concerning Plaintiff's Subsequent Employer of Joan Ackerstein</i> filed by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C)(Ackerstein, Joan) (Entered: 10/03/2013)
12/09/2013	24	Judge Denise J. Casper: ELECTRONIC ORDER entered denying <u>21</u> 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. <u>See</u> D. 22 at 5-6 <u>and cases cited</u> . 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	<u>25</u>	MOTION to Seal Document <i>Motion for leave to file Motion to Compel Responses to Plaintiff's First Set of Interrogatories Under Seal</i> by Walter Tuvell.(Mantell, Robert) (Entered: 01/27/2014)
01/28/2014	<u>26</u>	Withdrawal of motion: <u>25</u> MOTION to Seal Document <i>Motion for leave to file Motion to Compel Responses to Plaintiff's First Set of Interrogatories Under Seal</i> filed by Walter Tuvell.. (Mantell, Robert) (Entered: 01/28/2014)
01/28/2014	<u>27</u>	MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> by Walter Tuvell. (Attachments: # <u>1</u> Exhibit Exhibit 1, # <u>2</u> Exhibit Exhibits 2-5)(Mantell, Robert) (Entered: 01/28/2014)
02/10/2014	<u>28</u>	Assented to MOTION for Extension of Time to February 18, 2014 to File Response/Reply as to <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> by International Business Machines, Inc..(Porter, Matthew) (Entered: 02/10/2014)
02/11/2014	29	Judge Denise J. Casper: ELECTRONIC ORDER entered granting <u>28</u> Motion for Extension of Time to File Response/Reply re <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> Responses due by 2/18/2014 (Hourihan, Lisa) (Entered: 02/11/2014)
02/18/2014	<u>30</u>	Opposition re <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> filed by International Business Machines, Inc.. (Ackerstein, Joan)

		(Entered: 02/18/2014)
02/18/2014	<u>31</u>	AFFIDAVIT in Opposition re <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> filed by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> 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: <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> . (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 <u>30</u> 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 <u>on or before cob on March 13, 2014</u> . (Entered: 03/04/2014)
03/12/2014	<u>34</u>	REPLY to Response to <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> filed by Walter Tuvell. (Attachments: # <u>1</u> Exhibit Exhibits 1-2, # <u>2</u> Exhibit Exhibit 3, # <u>3</u> Exhibit Exhibits 4-7, # <u>4</u> Exhibit Exhibits 8-9)(Mantell, Robert) (Entered: 03/12/2014)
03/13/2014	<u>35</u>	Assented to MOTION for Leave to File <i>Affidavit to Correct Defendant's Opposition To Plaintiff's Motion To Compel Responses To Interrogatories</i> by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit A)(Ackerstein, Joan) (Entered: 03/13/2014)
03/14/2014	36	Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered re <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> filed by Walter Tuvell. Upon a review of <u>34</u> , 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 <u>35</u> 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 <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> : 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	<u>39</u>	AFFIDAVIT of Joan Ackerstein To Correct Opposition To Plaintiff's Motion To Compel in Opposition re <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> filed by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit 1)(Ackerstein, Joan) (Entered: 03/17/2014)
03/18/2014	<u>40</u>	Assented to MOTION to Continue <i>Hearing Date</i> by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 03/18/2014)
03/18/2014	41	Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting <u>40</u> 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	<u>42</u>	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	<u>43</u>	Joint MOTION for Extension of Time for <i>Certain PreTrial Deadlines</i> by International Business Machines, Inc..(Porter, Matthew) (Entered: 04/01/2014)

04/02/2014	44	Magistrate Judge Robert B. Collings: ELECTRONIC ORDER entered granting <u>42</u> 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 <u>27</u> MOTION to Compel <i>Responses to Plaintiff's First Set of Interrogatories</i> 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	<u>46</u>	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	<u>47</u>	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 <u>43</u> 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	<u>52</u>	MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff</i> by International Business Machines, Inc.(Ackerstein, Joan) (Entered: 06/25/2014)
06/25/2014	<u>53</u>	MEMORANDUM in Support re <u>52</u> MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff</i> filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 06/25/2014)
06/25/2014	<u>54</u>	AFFIDAVIT in Support re <u>52</u> MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff Of Joan Ackerstein</i> filed by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I)(Ackerstein, Joan) (Entered: 06/25/2014)
06/30/2014	<u>55</u>	NOTICE of Change of Address or Firm Name by Robert S. Mantell <i>Attorney for Plaintiff</i> (Mantell, Robert) (Entered: 06/30/2014)
07/08/2014	<u>56</u>	MEMORANDUM in Opposition re <u>52</u> MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff</i> filed by Walter Tuvell. (Attachments: # <u>1</u> Exhibit Exh. 1, # <u>2</u> Exhibit Exh. 2, # <u>3</u> Exhibit Exhs. 3–5, # <u>4</u> Exhibit Exhs. 6–7, # <u>5</u> Exhibit Exhs. 8–12, # <u>6</u> Exhibit Exhs. 13–16, # <u>7</u> Exhibit Exhs. 17–18, # <u>8</u> 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: <u>52</u> MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff</i> . (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 <u>52</u> MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff</i> : 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	<u>60</u>	Assented to MOTION for Extension of Time <i>For Identification And Deposition Of Experts</i> 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 <u>52</u> MOTION to Compel <i>Fed. R. Civ. P. 35(a) Mental Examination of Plaintiff</i> 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 <u>52</u> 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 <u>60</u> 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 <u>52</u> , 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 <i>anent</i> the examination are contained in the Court's ruling on Motion {52}. (Entered: 09/17/2014)

09/18/2014	<u>67</u>	Letter/request (non-motion) from Joan Ackerstein to Magistrate Judge Collings. (Russo, Noreen) (Entered: 09/18/2014)
09/30/2014	<u>68</u>	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 <u>68</u> Motion for Extension of Time to Complete Discovery. Defendant's expert disclosures due by 10/6/14. Plaintiff'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	<u>71</u>	Joint MOTION for Leave to File Excess Pages <i>Permitting the Parties to Each File 25 Page Briefs in Connection with Motion for Summary Judgment</i> by International Business Machines, Inc..(Porter, Matthew) (Entered: 12/05/2014)
12/10/2014	72	Judge Denise J. Casper: ELECTRONIC ORDER entered granting <u>71</u> Motion for Leave to File Excess Pages. Memos by both parties not to exceed 25 pages in length. (Hourihan, Lisa) (Entered: 12/10/2014)
12/15/2014	<u>73</u>	MOTION for Summary Judgment by International Business Machines, Inc..(Ackerstein, Joan) (Entered: 12/15/2014)
12/15/2014	<u>74</u>	Statement of Material Facts L.R. 56.1 re <u>73</u> MOTION for Summary Judgment filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 12/15/2014)
12/15/2014	<u>75</u>	MEMORANDUM in Support re <u>73</u> MOTION for Summary Judgment filed by International Business Machines, Inc.. (Ackerstein, Joan) (Entered: 12/15/2014)
12/15/2014	<u>76</u>	AFFIDAVIT in Support re <u>73</u> MOTION for Summary Judgment of <i>Joan Ackerstein</i> filed by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Exhibit 6, # <u>7</u> Exhibit 7, # <u>8</u> Exhibit 8, # <u>9</u> Exhibit 9, # <u>10</u> Exhibit 10, # <u>11</u> Exhibit 11, # <u>12</u> Exhibit 12, # <u>13</u> Exhibit 13, # <u>14</u> Exhibit 14, # <u>15</u> Exhibit 15, # <u>16</u> Exhibit 16, # <u>17</u> Exhibit 17, # <u>18</u> Exhibit 18, # <u>19</u> Exhibit 19, # <u>20</u> Exhibit 20, # <u>21</u> Exhibit 21, # <u>22</u> Exhibit 22, # <u>23</u> Exhibit 23, # <u>24</u> Exhibit 24, # <u>25</u> Exhibit 25, # <u>26</u> Exhibit 26, # <u>27</u> Exhibit 27, # <u>28</u> Exhibit 28, # <u>29</u> Exhibit 29, # <u>30</u> Exhibit 30, # <u>31</u> Exhibit 31, # <u>32</u> Exhibit 32, # <u>33</u> Exhibit 33, # <u>34</u> Exhibit 34, # <u>35</u> Exhibit 35, # <u>36</u> Exhibit 36, # <u>37</u> Exhibit 37, # <u>38</u> Exhibit 38, # <u>39</u> Exhibit 39, # <u>40</u> Exhibit 40, # <u>41</u> Exhibit 41)(Ackerstein, Joan) (Entered: 12/15/2014)
01/09/2015	<u>77</u>	Joint MOTION for Extension of Time to February 13, 2015 to File <i>papers relating to summary judgment</i> by Walter Tuvell.(Mantell, Robert) (Entered: 01/09/2015)
01/12/2015	78	Judge Denise J. Casper: ELECTRONIC ORDER entered granting <u>77</u> 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	<u>79</u>	MOTION for Leave to File Excess Pages <i>for Opposition to Summary Judgment</i> by Walter Tuvell.(Mantell, Robert) (Entered: 01/16/2015)
02/05/2015	80	Judge Denise J. Casper: ELECTRONIC ORDER entered granting <u>79</u> 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	<u>81</u>	MEMORANDUM in Opposition re <u>73</u> MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015)
02/12/2015	<u>82</u>	Statement of Material Facts L.R. 56.1 re <u>73</u> MOTION for Summary Judgment <i>Plaintiff's Responses to Defendant's Statement of Facts</i> filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015)

02/12/2015	<u>83</u>	Statement of Material Facts L.R. 56.1 re <u>73</u> MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015)
02/12/2015	<u>84</u>	NOTICE OF MANUAL FILING by Walter Tuvell Plaintiff's Exhibits Submitted in Opposition to Defendant's Motion for Summary Judgment re <u>73</u> MOTION for Summary Judgment (Mantell, Robert) (Entered: 02/12/2015)
02/12/2015	<u>85</u>	Amended Opposition re <u>73</u> MOTION for Summary Judgment filed by Walter Tuvell. (Mantell, Robert) (Entered: 02/12/2015)
03/02/2015	<u>86</u>	REPLY to Response to <u>73</u> MOTION for Summary Judgment filed by International Business Machines, Inc.. (Porter, Matthew) (Entered: 03/02/2015)
03/02/2015	<u>87</u>	Statement of Material Facts L.R. 56.1 re <u>73</u> MOTION for Summary Judgment <i>IBM Response to Plaintiff's Statement of Material Facts</i> filed by International Business Machines, Inc.. (Porter, Matthew) (Entered: 03/02/2015)
03/02/2015	<u>88</u>	Supplemental AFFIDAVIT in Support re <u>73</u> MOTION for Summary Judgment of <i>Joan Ackerstein</i> filed by International Business Machines, Inc.. (Attachments: # <u>1</u> Exhibit 117, # <u>2</u> Exhibit 118)(Porter, Matthew) (Entered: 03/02/2015)
03/02/2015	<u>89</u>	MOTION to Strike <i>Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment</i> by International Business Machines, Inc..(Porter, Matthew) (Entered: 03/02/2015)
03/02/2015	<u>90</u>	MEMORANDUM in Support re <u>89</u> MOTION to Strike <i>Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment</i> filed by International Business Machines, Inc.. (Porter, Matthew) (Entered: 03/02/2015)
03/11/2015	<u>91</u>	Opposition re <u>89</u> MOTION to Strike <i>Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment</i> filed by Walter Tuvell. (Attachments: # <u>1</u> Exhibit Exhibits 1 & 2)(Mantell, Robert) (Entered: 03/11/2015)
03/12/2015	<u>92</u>	ELECTRONIC Clerk's Notes for proceedings held before Judge Denise J. Casper: Motion Hearing held on 3/12/2015 re <u>89</u> MOTION to Strike <i>Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to Motion for Summary Judgment</i> filed by International Business Machines, Inc., <u>73</u> MOTION for Summary Judgment filed by International Business Machines, Inc. Arguments. Court takes under advisement <u>73</u> Motion for Summary Judgment; takes under advisement <u>89</u> 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	<u>94</u>	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	<u>95</u>	Judge Denise J. Casper: ORDER entered. JUDGMENT (Hourihan, Lisa) (Entered: 07/08/2015)
08/05/2015	<u>96</u>	NOTICE of Appearance by Andrew P. Hanson on behalf of Walter Tuvell (Hanson, Andrew) (Entered: 08/05/2015)
08/05/2015	<u>97</u>	NOTICE of Withdrawal of Appearance by Robert S. Mantell (Mantell, Robert) (Entered: 08/05/2015)
08/05/2015	<u>98</u>	NOTICE OF APPEAL as to <u>95</u> Judgment, <u>94</u> 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	<u>99</u>	BILL OF COSTS by International Business Machines, Inc.. (Porter, Matthew) (Entered: 08/06/2015)
08/06/2015	<u>100</u>	AFFIDAVIT in Support re <u>99</u> Bill of Costs . (Attachments: # <u>1</u> Exhibit A-AA)(Porter, Matthew) (Entered: 08/06/2015)
08/06/2015	<u>101</u>	Filing fee/payment: \$ 505.00, receipt number 1BST051028 for <u>98</u> MOTION for Leave to Appeal (Caruso, Stephanie) (Entered: 08/06/2015)
08/06/2015	<u>102</u>	Abbreviated Record Sent to the Court of Appeals <u>98</u> Notice of Appeal. (Paine, Matthew) (Paine, Matthew). (Entered: 08/06/2015)
08/19/2015	<u>103</u>	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	<u>104</u>	NOTICE OF APPEAL as to <u>95</u> Judgment, <u>94</u> 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	<u>105</u>	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	<u>106</u>	USCA Case Number 15-1914 for <u>104</u> Notice of Appeal filed by Walter Tuvell. (Paine, Matthew) (Entered: 09/30/2015)
09/30/2015	<u>107</u>	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. (Scafani, Deborah) (Entered: 09/30/2015)
09/30/2015	<u>108</u>	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 (Scafani, Deborah) (Entered: 09/30/2015)
05/13/2016	<u>109</u>	OPINION of USCA as to <u>104</u> Notice of Appeal filed by Walter Tuvell. (Paine, Matthew) (Entered: 05/16/2016)
05/13/2016	<u>110</u>	USCA Judgment as to <u>104</u> Notice of Appeal filed by Walter Tuvell. AFFIRMED... (Paine, Matthew) (Entered: 05/16/2016)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
WALTER TUVELL,)	
)	
Plaintiff,)	
)	C. A. No. 13-cv-11292-DJC
v.)	
)	
INTERNATIONAL BUSINESS MACHINES,)	
INC.,)	
)	
Defendant.)	
_____)	

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 proceeding 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 Caucasian, 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 receives 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 protestations 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 pendency 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 pendency 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 avilment 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 reassignment 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 accommodation 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 violation 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 avilment of STD leave, and notes that his avilment 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 accommodations 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 rescission 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 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.

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 accommodations.

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 avilment 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 avilment 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
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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

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.
Defendant.

C.A. No. 13-CV-11292-DJC

**ANSWER AND AFFIRMATIVE DEFENSES OF
DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC.**

Defendant International Business Machines, Inc. (“IBM”) for its Answer to the First Amended Complaint of Plaintiff Walter Tuvell, responds to the numbered paragraphs of the First Amended Complaint as follows:

PLAINTIFF’S PRELIMINARY STATEMENT

Plaintiff’s “Preliminary Statement” consists of argument and conclusions of law to which no response is required. To the extent a response may be required, the “Preliminary Statement” is denied.

PARTIES

1. IBM lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore denies them, except IBM admits that Plaintiff is male.

2. IBM admits the allegations contained in this paragraph, except IBM submits that Plaintiff’s interpretation of Massachusetts law constitutes a legal conclusion to which no response is required.

3. IBM admits that Russell Mandel is an employee of IBM, and holds the title of Program Director of Concerns & Appeals, Labor & Employee Relations.

4. IBM admits that Daniel Feldman is an employee of IBM.
5. IBM admits that Fritz Knabe is a former employee of IBM.

PLAINTIFF'S ALLEGATIONS CONCERNING JURISDICTION AND VENUE

6. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff filed Charges of Discrimination with the MCAD and the EEOC and that EEOC Right to Sue letters have been issued, the terms of which speak for themselves.

7. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required.

ALLEGED FACTS

8. IBM lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph.

9. IBM admits the allegations contained in this paragraph.

10. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM lacks knowledge or information sufficient to form a belief as to Plaintiff's alleged medical condition as described in this paragraph and alleged treatments therefor.

11. IBM lacks knowledge or information sufficient to form a belief as to Plaintiff's alleged medical condition as described in this paragraph and alleged treatments therefor.

12. IBM denies the allegations contained in this paragraph.

13. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, and states that the terms and conditions of its policies speak for themselves.

14. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

15. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Knabe sent an email to Plaintiff on June 10, 2011, and IBM states that the email and the other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

16. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

17. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff and Mr. Feldman had a meeting on June 10, 2011, and IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

18. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies

the allegations, except IBM admits that during the course of Plaintiff's employment certain job assignments and responsibilities were transitioned to Sujatha Mizar, a woman, and from Ms. Mizar to Plaintiff.

19. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff had a longer work history than Ms. Mizar.

20. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Feldman sent Plaintiff an email on June 12, 2011, and IBM states that the email and the other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

21. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on June 13, 2011, Plaintiff met with Ms. McCabe, and on June 14, 2011, Plaintiff sent Ms. McCabe an email, and IBM states that the email and communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

22. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on June 15, 2011, Mr. Feldman sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

23. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on June 15, 2011, Plaintiff sent an email to Mr. Feldman, Ms. McCabe and Ms. Adams, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

24. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent several emails to Ms. Adams and Ms. McCabe on June 16, 2011, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

25. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent an email to Ms. Adams on June 16, 2011 at or about 3:58 PM, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

26. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on June 16, 2011, Mr. Feldman sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

27. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies

the allegations, except IBM admits that Plaintiff sent an email to Mr. Feldman, Ms. Adams, Ms. McCabe, and Ms. Due on June 17, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

28. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent an email to Ms. Due on June 23, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

29. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Feldman and other IBM employees emails between June 24 and June 28, 2011, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

30. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Feldman and others an email on June 27, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

31. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent multiple emails to Ms. Due on June 28,

2011, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

32. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about June 29, 2011, Ms. Due sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

33. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about June 29, 2011, Ms. Due sent an email to Plaintiff, and IBM further states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

34. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM on or about June 29, 2011, Plaintiff sent an email to Mr. Mandel and other IBM employees, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

35. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except on or about June 30, 2011, Mr. Feldman sent Plaintiff an email, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

36. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Feldman an email on June 30, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

37. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Feldman an email on June 30, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

38. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about June 30, 2011, Plaintiff sent an email to Mr. Feldman, Ms. Due, Ms. Adams, and Ms. McCabe, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

39. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about July 1, 2011, Plaintiff sent an email to Mr. Mandel, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

40. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies

the allegations, except on or about July 5, 2011, Plaintiff sent an email to Mr. Mandel, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

41. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about July 5, 2011, Mr. Feldman sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

42. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about July 5, 2011, Plaintiff sent an email to Mr. Mandel, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

43. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about July 6, 2011, Plaintiff and Mr. Feldman exchanged emails, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

44. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent an email to Mr. Feldman and Garth Dickie on July 6, 2011, and Mr. Feldman sent an email to Plaintiff on July 11, 2011, and IBM states that

the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

45. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on or about July 20, 2011, Plaintiff sent an email to Mr. Feldman and Mr. Dickie, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

46. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff and Mr. Feldman had a meeting on August 3, 2011, at which Mr. Feldman presented Plaintiff with a Warning Letter concerning Plaintiff's workplace behavior, and IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

47. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff and Mr. Feldman had a meeting on August 3, 2011, at which Mr. Feldman presented Plaintiff with a Warning Letter concerning Plaintiff's workplace behavior, and IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

48. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff and Mr. Feldman had a meeting on August 3, 2011, at which Mr. Feldman presented Plaintiff with a Warning Letter concerning Plaintiff's

workplace behavior, and IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

49. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff and Mr. Feldman had a meeting on August 3, 2011, at which Mr. Feldman presented Plaintiff with a Warning Letter concerning Plaintiff's workplace behavior, and IBM further states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

50. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on August 3, 4, and 5, 2011, Plaintiff sent emails to Mr. Mandel, Ms. Adams, and several other IBM employees, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

51. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on August 5, 2011, Plaintiff sent an email to Ms. Adams and Mr. Mandel, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

52. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on August 5, 2011, Mr. Mandel sent an email to Plaintiff,

and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

53. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on August 11, 2011, Plaintiff exchanged emails with Kathleen Dean, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them, and IBM lacks knowledge sufficient to form a belief as to the truth of the allegations concerning Plaintiff's alleged medical condition and any treatments therefor.

54. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on August 11, 2011, Plaintiff sent an email to Mr. Feldman, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

55. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states Plaintiff's Medical Treatment Form dated August 15, 2011 speaks for itself and IBM denies Plaintiff's mischaracterization of it.

56. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff was certified for Short Term Disability on August 15, 2011.

57. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on August 18, 2011, Plaintiff made a Corporate Open Door Filing, which speaks for itself.

58. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Mandel sent an email to Plaintiff on August 25, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

59. IBM denies the allegations contained in this paragraph.

60. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel emails on August 25 and 31, 2011, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

61. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on September 4, 2011, Plaintiff filed an "Addendum II" to his August 18, 2011 Open Door Filing, which speaks for itself.

62. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's access to the Netezza system was restricted during his medical leave of absence, that Plaintiff and Mr. Mandel exchanged emails on

September 7, 2011, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

63. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email dated September 7, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

64. IBM denies the allegations contained in this paragraph.

65. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states the Medical Treatment Forms for Plaintiff dated September 7, 2011 and October 12, 2011 speak for themselves and IBM denies Plaintiff's mischaracterizations of them, and IBM admits that Plaintiff's Short Term Disability Leave was extended.

66. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff and Mr. Mandel exchanged emails on September 13 and 14, 2011, and IBM states that the emails and other communications identified in this paragraph, including IBM's policies, speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

67. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on September 14,

2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

68. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff an email to Richard Kaplan on September 21, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

69. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 5, 2011, Mr. Feldman sent an email to Plaintiff, and Plaintiff sent an email to Mr. Mandel, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

70. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 10, 2011, Mr. Mandel sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

71. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 17, 2011, Plaintiff sent an email to Ms. Dean, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

72. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 17, 2011, Plaintiff sent an email to Ms. Dean, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

73. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 17, 2011, Mr. Mandel sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

74. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 18, 2011, Mr. Mandel sent Plaintiff an email, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

75. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 18, 2011, Plaintiff sent Mr. Mandel an email, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

76. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandell an email on October 19, 2011,

and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

77. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on October 19 and 20, 2011, Plaintiff exchanged emails with Mr. Feldman and Ms. Adams, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

78. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on November 2 and 3, 2011, Mr. Feldman and Plaintiff exchanged emails, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

79. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff filed an "Addendum IV" to his Open Door filing on November 3, 2011, which speaks for itself..

80. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's counsel sent a letter to Mr. Mandel dated November 9, 2011, and IBM states that the letter and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

81. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's Open Door Filing was investigated and rejected and that Plaintiff was advised of same.

82. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on November 22, 2011, Mr. Feldman sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

83. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on November 23, 2011, Plaintiff sent Ms. Adams an email, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

84. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on November 23 and 25, 2011, Plaintiff and Mr. Mandel exchanged emails, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

85. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM lacks knowledge or information sufficient to form a belief as to the

truth of the allegations concerning Plaintiff's job search, except IBM admits that Plaintiff applied for the identified position.

86. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on November 28, 2011, Mr. Feldman sent an email to Plaintiff, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

87. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on November 28, 2011, Plaintiff sent an email to Mr. Feldman, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

88. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Chris Kime was the hiring manager for the identified position and that Mr. Kime sent Plaintiff an email on December 1, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

89. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent an email to Mr. Kime on December 1, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

90. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on December 5, 2011, Mr. Feldman and Plaintiff exchanged emails, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

91. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on December 6, 2011, Larry Bliss and Plaintiff's attorney exchanged emails, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

92. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on December 6, 2011, Larry Bliss and Plaintiff's attorney exchanged emails, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

93. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff interviewed for the identified position on December 8, 2011.

94. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on December 12, 2011, Mr. Kime emailed Plaintiff, that on December 16, 2011 Plaintiff emailed Mr. Kime and others, and IBM states that the emails and

other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

95. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Feldman sent Plaintiff an email on December 16, 2011, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

96. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that IBM received a Medical Treatment Form for Plaintiff dated December 16, 2011, which speaks for itself and IBM denies Plaintiff's mischaracterizations of it, and IBM admits that Plaintiff's Short Disability was approved for the period from December 20, 2011 through January 24, 2011.

97. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Kime sent Plaintiff an email on January 6, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

98. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Kime sent Plaintiff an email on January 6, 2012, that Plaintiff sent Mr. Kime an email on December 9, 2011, and IBM states that the email and other

communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

99. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's counsel sent Mr. Bliss an email dated January 10, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

100. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent an email to Mr. Feldman on January 11, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

101. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Feldman sent an email to Plaintiff dated January 16, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

102. The allegations contained in this paragraph have been withdrawn in the First Amended Complaint and therefore no response is required. To the extent that they may be construed as requiring a response, they are denied.

103. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Feldman an email on January 18, 2012,

and states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

104. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff was given the opportunity to review GOM opportunities within IBM.

105. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Feldman sent Plaintiff an email on January 20, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

106. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Feldman an email on January 20, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

107. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on January 20 and 22, 2012, Plaintiff filed an Open Door Complaint, which speaks for itself.

108. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's counsel sent Mr. Bliss an email on January 23,

2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

109. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Bliss sent an email to Plaintiff's counsel on January 24, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

110. IBM admits the allegations contained in this paragraph.

111. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them, except IBM admits Plaintiff applied for the referenced position.

112. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's counsel sent Mr. Bliss an email on January 27, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

113. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff applied for Long Term Disability benefits on February 8, 2012, and states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

114. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on February 9, 2012, Plaintiff emailed Mr. Feldman and Mr. Mandel, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

115. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Mandel sent an email to Plaintiff on February 14, , 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

116. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on February 16, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

117. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Metzger sent Plaintiff an email on February 15, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

118. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Metzger an email on February 16,

2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

119. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on February 17, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

120. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Mandel sent Plaintiff an email on February 28, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

121. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on February 28, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

122. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on March 2, 2012, Plaintiff filed an Open Door Complaint, which speaks for itself.

123. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies

the allegations, except IBM admits that Mr. Mandel sent Plaintiff an email on March 6, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

124. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel several emails on March 6, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

125. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff's access to IBM's computer systems was restricted in or about March of 2012.

126. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on March 6, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

127. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that his badge access was restricted in or about February of 2012.

128. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies

the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on March 6, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

129. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that on March 9, 2012, Plaintiff filed an "Addendum II" to his Open Door Complaint, which speaks for itself.

130. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the referenced Charge of Discrimination speaks for itself.

131. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Mandel sent Plaintiff an email on March 13, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

132. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Ms. Adams and Plaintiff exchanged emails on April 25, 2012, and IBM states that the emails and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

133. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that IBM's counsel sent a letter to Plaintiff's counsel dated

May 3, 2012, that Plaintiff's counsel sent IBM's counsel an email dated May 3, 2012, and IBM further states that the letter, email, and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

134. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Ms. Adams sent Plaintiff an email on May 7, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

135. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Ms. Adams an email on May 8, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

136. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Ms. Adams sent Plaintiff an email on May 8, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

137. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Ms. Adams an email on May 8, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

138. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Ms. Adams sent Plaintiff an email on May 9, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

139. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Ms. Adams an email on May 10, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

140. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Ms. Adams sent Plaintiff an email on May 11, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

141. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Ms. Adams an email on May 14, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

142. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Ms. Adams sent Plaintiff an email on May 15, 2012, and

IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

143. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Ms. Adams an email on May 16, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

144. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Plaintiff sent Mr. Mandel an email on May 17, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

145. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Feldman sent Plaintiff an email on May 17, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

146. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that Mr. Feldman sent Plaintiff an email on May 17, 2012, and IBM states that the email and other communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

147. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM admits that AccessData took possession of an IBM-issued laptop and power supplies from Plaintiff.

COUNT I
ALLEGED FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS
UNDER THE ADA AND M.G.L. C. 151B, §§ 4(16), 4(4A)

148. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

149. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

150. IBM denies the allegations contained in this paragraph.

151. IBM denies the allegations contained in this paragraph.

152. IBM denies the allegations contained in this paragraph.

153. IBM denies the allegations contained in this paragraph.

COUNT II
ALLEGED FAILURE TO REASONABLY ACCOMMODATE PLAINTIFF
UNDER THE ADA AND M.G.L. C. 151B, §§ 4(16), 4(4A)

154. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

155. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations.

156. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

157. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the policies identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

158. IBM denies the allegations contained in this paragraph.

159. IBM denies the allegations contained in this paragraph.

160. IBM denies the allegations contained in this paragraph.

161. IBM denies the allegations contained in this paragraph.

162. IBM denies the allegations contained in this paragraph.

COUNT III
ALLEGED FAILURE TO ASSIST IN HELPING PLAINTIFF OBTAIN REASONABLE
ACCOMMODATION OF REASSIGNMENT TO VACANT POSITION
UNDER THE ADA AND M.G.L. C. 151B, §§ 4(16), 4(4A)

163. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

164. IBM denies the allegations contained in this paragraph.

165. IBM denies the allegations contained in this paragraph.

166. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations.

167. IBM denies the allegations contained in this paragraph.

COUNT IV

ALLEGED FAILURE TO REASSIGN PLAINTIFF TO OPEN JOB POSTINGS SWG-0456125 AND SWG-0436579 UNDER THE ADA AND M.G.L. C. 151B, §§ 4(16), 4(4A)

168. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

169. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations.

170. IBM denies the allegations contained in this paragraph, except IBM admits that Plaintiff interviewed for the referenced position.

171. IBM denies the allegations contained in this paragraph.

172. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations.

173. IBM denies the allegations contained in this paragraph.

COUNT V

ALLEGED FAILURE TO REASSIGN PLAINTIFF TO OPEN JOB POSTINGS SWG-0456125 AND SWG-0436579 ALLEGEDLY 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 UNDER THE ADA AND M.G.L. C. 151B, §§ 4(16), 4(4A)

174. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

175. IBM denies the allegations contained in this paragraph, except IBM admits Plaintiff applied for the identified position.

176. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

177. IBM denies the allegations contained in this paragraph.

178. IBM denies the allegations contained in this paragraph.

179. IBM denies the allegations contained in this paragraph.

180. IBM denies the allegations contained in this paragraph, except IBM admits Plaintiff applied for the identified position.

181. IBM denies the allegations contained in this paragraph.

182. IBM denies the allegations contained in this paragraph.

COUNT VI
ALLEGED TANGIBLE JOB ACTIONS ON ACCOUNT OF HANDICAP,
RETALIATION, GENDER, RACE, AGE, AND/OR ANY COMBINATION THEREOF
UNDER THE ADA AND M.G.L. C. 151B, §§ 4(16), 4(4A)

183. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

184. IBM denies the allegations contained in this paragraph.

185. IBM denies the allegations contained in this paragraph.

186. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

187. The allegations contained in this paragraph consist of argument and conclusions of law, to which no response is required. To the extent a response may be required, IBM denies

the allegations, except IBM states that the communications identified in this paragraph speak for themselves and IBM denies Plaintiff's mischaracterizations of them.

188. IBM denies the allegations contained in this paragraph.

189. IBM denies the allegations contained in this paragraph.

COUNT VII
ALLEGED HARASSMENT ON THE BASIS OF HANDICAP, RETALIATION,
GENDER, RACE, AGE, AND/OR ANY COMBINATION THEREOF UNDER M.G.L. C.
151B, §§ 4(1), 4(4), 4(4A), 4(16), AND THE ADA

190. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

191. IBM denies the allegations contained in this paragraph.

192. IBM denies the allegations contained in this paragraph.

193. IBM denies the allegations contained in this paragraph.

194. IBM denies the allegations contained in this paragraph.

COUNT VIII
ALLEGED FAILURE TO INVESTIGATE AND REMEDIATE HARASSMENT ON THE
BASIS OF HANDICAP, RETALIATION, GENDER, RACE, AGE, AND/OR ANY
COMBINATION THEREOF UNDER M.G.L. C. 151B, §§ 4(1), 4(4), 4(4A), 4(16), AND
THE ADA

195. IBM repeats and incorporates by reference its responses to the preceding paragraphs.

196. IBM denies the allegations contained in this paragraph.

197. IBM denies the allegations contained in this paragraph.

198. IBM denies the allegations contained in this paragraph.

199. IBM denies the allegations contained in this paragraph.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The First Amended Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff is not disabled within the meaning of M.G.L. c. 151B and/or the ADA.

THIRD AFFIRMATIVE DEFENSE

Plaintiff was not a qualified handicapped individual or a qualified individual with a disability within the meaning of M.G.L. c. 151B and/or the ADA.

FOURTH AFFIRMATIVE DEFENSE

IBM did not regard or perceive Plaintiff as disabled within the meaning of M.G.L. c. 151B and/or the ADA.

FIFTH AFFIRMATIVE DEFENSE

IBM provided any and all accommodations to Plaintiff which were reasonable under the circumstances and would not have caused IBM an undue hardship and therefore Plaintiff has no claim under M.G.L. c. 151B and/or the ADA.

SIXTH AFFIRMATIVE DEFENSE

Any actions which IBM took regarding Plaintiff's employment were taken in good faith for legitimate business purposes and were consistent with principles of law.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages are barred, in whole or in part, by his failure to mitigate damages.

EIGHTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any damages, such damages were not caused by any acts and/or omissions of IBM and/or anyone for whom IBM is responsible.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, estoppel, or unclean hands.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims for damages are barred by the after acquired evidence doctrine.

TWELFTH AFFIRMATIVE DEFENSE

IBM reserves its right to add such additional affirmative defenses which may become evident during the course of this litigation.

PRAYERS FOR RELIEF

WHEREFORE, IBM respectfully requests that this Court:

1. Dismiss the First Amended Complaint in its entirety with prejudice;
2. Enter Judgment for IBM; and
3. Grant such other relief as may be just and proper.

Respectfully submitted,

INTERNATIONAL BUSINESS
MACHINES, INC.,

By its attorneys,

/s/ Joan Ackerstein

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Dated: June 24, 2013

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 June 24, 2013.

/s/ Matthew A. Porter

Jackson Lewis LLP

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

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 INVESTIGATION 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,

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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,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES,
INC.,

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 than 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. Thermo 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 than 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 INVESTIGATION 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 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 avilment 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
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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

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES,
INC.,

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 than 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 Yahoo 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 unfavorable. 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 Desensitization 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, avilment 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

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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,
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 Facts¹

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 than 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 unfavorable. 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 avilment 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 Desensitization 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, avilment 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
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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.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.
Defendant.

C.A. No. 13-CV-11292-DJC

PLAINTIFF WALTER TUVELL'S NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3 & 4, Plaintiff Walter Tuvell hereby gives notice that he appeals to the United States Court of Appeals for the First Circuit from the Memorandum and Order dated July 6, 2015 and entered on July 7, 2015, granting summary judgment on all Counts, and from the Final Judgment dated July 8, 2015.

Respectfully submitted,

The Plaintiff,
By his Attorney

/s/ Andrew P. Hanson

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on August 5, 2015, through the CM/ECF system, which will be sent electronically to all counsel of record who are registered participants of the Court's CM/ECF system, and I hereby certify that paper copies will be sent to all non-registered participants.

/s/ Andrew P. Hanson

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

Civil Action
No. 13-11292-DJC

v.

March 12, 2015
2:52 p.m.

INTERNATIONAL BUSINESS
MACHINES, INC.,

Defendant.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MA 02210

DEBRA M. JOYCE, FCRR
Official Court Reporter
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on March 12, 2015.)

THE CLERK: Civil action 13-11292, Walter Tuvell v. IBM.

Would counsel please state your name for the record?

02:53 MR. MANTELL: For the plaintiff, Robert Mantell.

THE COURT: Good afternoon, counsel.

MS. ACKERSTEIN: Good afternoon. For the defendant, Joan Ackerstein and Matthew Porter.

THE COURT: Good afternoon.

MR. PORTER: Good afternoon, your Honor.

MR. MANTELL: Your Honor, I have my client, Walter Tuvell, with me. Would it be okay for him to sit --

THE COURT: He may, if you'd like to, sure.

Counsel -- good afternoon, sir.

02:53 Counsel, I know we're here on the defendant's motion for summary judgment. I also know there's a motion to strike which addresses certain of the affirmations by the -- assertions by the plaintiff in his supporting papers and some exhibits.

I think Ms. Hourihan may have talked to you about

1 time, but to the extent you want to use any of your time to
2 address the motion to strike, I've read those papers as well.

3 Counsel?

4 MS. ACKERSTEIN: Thank you, your Honor.

5 I'd like to speak principally about the motion for
6 summary judgment.

7 IBM has moved for judgment on the complaint in its
8 entirety. There are eight claims in the complaint, and while
9 there has been a lot of paper filed with the Court, your Honor,
02:54 10 the fact of the matter is, this is a case where there are very
11 few facts in dispute and also not much by the way of hard
12 economic loss. The plaintiff has acknowledged that he got
13 another job and the lost wages amount to \$21,000.

14 But the fact is, there are very few facts in dispute,
15 and I think it would help the Court if I just briefly outline
16 the facts which really are the subject of agreement.

17 Mr. Tuvell is a mathematician, a computer developer.
18 He began his employment with IBM in January of 2011 when IBM
19 acquired a company for whom he had been employed for a couple
02:55 20 of months.

21 From January to May 18th of 2011, he worked for IBM
22 uneventfully. What happens next between May 18th and June 9th
23 of 2011 are two ordinary workplace interactions which probably
24 happen all the time in workplaces.

25 On May 18th, Fritz Knabe, a man to whom the plaintiff

1 has a dotted line reporting authority, is unhappy the plaintiff
2 has not given him work product in a timely manner. He makes a
3 comment to Dan Feldman, the plaintiff's manager, and says he's
4 disappointed that the work has not been done in a timely
5 fashion. Mr. Feldman has a conversation with the plaintiff to
6 report that Mr. Knabe is unhappy. The plaintiff becomes
7 extraordinarily distressed about that interaction and over the
8 next few weeks is difficult to work with, demanding a meeting
9 about what happened. And about June 9th there is another
02:56 10 kerfuffle between Fritz Knabe and the plaintiff in which voices
11 are raised. Fritz Knabe then goes to Dan Feldman and says he
12 doesn't think he can work with the plaintiff any longer.

13 As a result of that, Mr. Feldman does what, again, is
14 not uncommon in a workplace. He says, I'm going to switch
15 assignments. So he meets with the plaintiff and he says,
16 Instead of working with Fritz Knabe, I'm going to put you on
17 another assignment and we're going to take another employee in
18 my group and have her work with Mr. Knabe. That employee
19 happens to be female, South Asian, and younger, and therefore,
02:57 20 the plaintiff immediately concludes that this is race, sex, and
21 gender discrimination. And so from about that point, June
22 13th -- and this is outlined in his complaint, which is very
23 detailed. From about June 13th to the end of June, his effort
24 is in talking to human resources at IBM about his concerns
25 about what happened with Mr. Feldman and Mr. Knabe and his

1 claim that he has been demoted, although there is no change in
2 his salary, no change in his rank. Because he feels he's doing
3 different work that was done by somebody with a master's
4 instead of a PhD, he calls it a demotion.

5 For most of July of 2011, he is out of work. He has
6 some cosmetic surgery done for two weeks and he takes a week's
7 vacation. And then on August 1st or 2nd he returns to work,
8 and on August 3rd, he has another interaction with Mr. Feldman,
9 his supervisor, which he thinks is inappropriate. He gets a
02:58 10 warning for some of his behavior.

11 He then decides as of August 11th, he notifies IBM
12 he's going on leave. He begins his leave on August 15th,
13 that's acknowledged by IBM on August 17th of 2011. At that
14 point, the plaintiff never returns to work.

15 Now, towards --

16 THE COURT: And the leave at that point is medical
17 leave?

18 MS. ACKERSTEIN: Medical leave.

19 THE COURT: Okay.

02:58 20 MS. ACKERSTEIN: In June, after immediately claiming
21 sex, race, and gender discrimination because the person who
22 changed places with him and takes on his workload is of a
23 different status, he also concludes that he's being
24 discriminated against because he suffers, according to him,
25 from post-traumatic stress disorder diagnosed in 2001, again,

1 according to him, for which he had been under treatment for
2 something like 18 years.

3 On August 15th, IBM gets the first medical report from
4 the healthcare provider who's treating him. That is repeated
5 in September, October, November, and December. All of those
6 reports indicate that the plaintiff is totally impaired from
7 work, and they describe the symptoms of his either stress,
8 anxiety, PTSD, the diagnoses vary, an inability to work with
9 people, inability to manage conflict, poor judgment, and the
02:59 10 like, but severe or serious impairment.

11 Now, at that point, in December, there's a new form
12 completed by his social worker, who continues to say he suffers
13 from serious impairment, he's totally impaired from his job,
14 maybe there's a possibility with a different supervisor or a
15 different circumstance he might be able to work, but she
16 considers him to be seriously impaired.

17 Now, the claims, your Honor, there are eight claims in
18 the complaint. The first five are all a form of disability
19 discrimination, failure to accommodate, engage in the
03:00 20 interactive process, et cetera. And for purposes of the
21 defense, the key point here is that for all of those first five
22 claims, the plaintiff fails to state a *prima facie* case because
23 he is not a qualified handicapped individual. His healthcare
24 providers have said he is totally impaired from employment,
25 and, therefore, he is not entitled to a reasonable

1 accommodation, he is not able to do the essential functions of
2 his job.

3 Having said that, IBM has a secondary defense, your
4 Honor, which is that he was reasonably accommodated. He was
5 permitted to take leave, he was paid short-term disability
6 leave. When that ran out, IBM continued to allow him to be on
7 leave. And so IBM says, as to all of those claims, there is no
8 failure to accommodate, but, more importantly, he was not a
9 qualified handicapped person because his own physician
03:01 10 certified to IBM that he was not able to work.

11 THE COURT: And is my memory correct from the record
12 that the medical opinions that he -- that the plaintiff
13 proffers here relate the PTSD not just to a particular
14 supervisor but to the workplace?

15 MS. ACKERSTEIN: The PTSD was diagnosed some years
16 earlier in 2001 relating to an incident he had with Microsoft.
17 There is no origin given by the healthcare providers other than
18 he has PTSD.

19 Now, the other claims, your Honor, in addition to the
03:02 20 disability claims, there are three claims of tangible harms
21 that the plaintiff suffered due to age, national origin, race,
22 disability, discrimination, and retaliation, also harassment in
23 the workplace, also a failure to investigate due to all of
24 those claims.

25 The adverse actions and the harassment that the

1 plaintiff articulates are not sufficient under the law to
2 constitute either adverse actions or harassment. The adverse
3 actions he points to, for example, are while he's on leave,
4 they deny his use of a computer, and his ability to come into
5 the building. That is not a serious harm. The adverse action
6 requires some real harm to the person. If he's on medical
7 leave, he's not coming into the building anyway.

8 Likewise, the harassment. The case law is pretty
9 clear that in order to have harassment, you need severe and
03:03 10 pervasive behavior of a -- a kind that falls within the context
11 of some sort of discrimination based on a protected
12 characteristic.

13 In this case, what Mr. Tuvell is complaining about is
14 the e-mails that he's getting, but there's nothing in there
15 that's harmful to him, it's just that they don't agree with his
16 view of what happened. They are not changing his manager, they
17 are not agreeing that he's been subject to discrimination or
18 retaliation, and, therefore, he sees that as harassment.

19 Perhaps the clearest instance of this being
03:03 20 Mr. Tuvell's view being different than IBM's view is his claim
21 of a failure to investigate. There were two investigations
22 done with clear reports that he has that he's seen. One case
23 there were nine witnesses interviewed, in another case there
24 were seven. One report is 19 pages, another is 15. Mr. Tuvell
25 takes issue with the investigation because he doesn't agree

1 with the conclusion.

2 And if I could just address the termination, your
3 Honor, because the plaintiff also claims that his termination
4 is due to discrimination and retaliation, and that is sort of
5 key. He's on leave, IBM is continuing to try and accommodate
6 him. They say, Look, you've acknowledged there is no manager
7 you can have, we don't have another manager for you, we're not
8 prepared to change your manager, but we will identify somebody
9 else who will be the person who takes care of reviewing your
03:04 10 performance, so come back to work. That's an accommodation
11 they offer in January and February of 2012. Come back to work,
12 John Metzger will review your performance. We'll allow to you
13 take time off for doctor's appointments. He refuses. And
14 then, on February 28th, he has a job offer from Imprivata, he
15 starts that on March 12, 2012.

16 He never discloses while he's on leave to IBM that he
17 has a job. When IBM believes he's working for someone else
18 because of his LinkedIn page, they start corresponding with him
19 and asking him, Who are you employed by? We have a business
03:05 20 conduct guideline that says you cannot work for a competitor,
21 we need to know if you are. He refuses to divulge it. They
22 say to him, If you continue to refuse to tell us who you're
23 employed by, we will have no choice but to terminate you. He
24 refuses, and he's terminated. And so the business conduct
25 guideline is the basis of that termination.

1 THE COURT: Counsel, I think you're at the end of your
2 time, but let me ask you one other question.

3 In regards to the retaliation claim in regards to the
4 plaintiff not being given the other job that he applies for --

5 MS. ACKERSTEIN: Yes.

6 THE COURT: -- am I correct that at the time that
7 happens, he's out on disability? Is he out on --

8 MS. ACKERSTEIN: He's out on disability leave, and the
9 hiring manager did not know that the plaintiff had made claims
03:06 10 about discrimination at IBM, which prevents any kind of causal
11 connection between his protected activity and the fact that he
12 didn't get the job.

13 THE COURT: Thank you, counsel.

14 Counsel?

15 MR. MANTELL: Thank you, your Honor.

16 If I have time, I will go over the facts, but I want
17 to address the arguments of law that have been made here today
18 first.

19 The medical treatment forms that were submitted in
03:07 20 this case, submitted to IBM, say that Mr. Tuvell is able to
21 work if he gets reasonable accommodation. And Exhibit 28 says
22 the only modification that would be possible is change of
23 supervisor and setting.

24 On January 23rd, the same social worker, who has been
25 treating Mr. Tuvell for many times with over 250 individual

1 sessions and many more sessions and couple's therapy, says that
2 she can't -- that he can't return to the specific job
3 environment, but he has good functioning in the absence of
4 trauma-related stimuli. The only course of recovery
5 required -- Tuvell required, a reassignment by the company. On
6 September 28, 2012, she says, In a new setting with different
7 people, it is possible that Mr. Tuvell could function quite
8 well and attain -- and attend his work.

9 Mr. Tuvell at the same time within IBM was saying the
03:08 10 same thing, I can't work with you, Mr. Feldman, but I can work
11 elsewhere. And ostensibly, they said, Okay, apply elsewhere.
12 They didn't say, You're totally disabled, you can't work
13 anywhere. They said, Go apply. So that's what he did.

14 So Mr. Tuvell could work if he just got away from the
15 triggers that exacerbated his PTSD. We know he's right,
16 because in May 2012 -- March 2012, he gets another job at a
17 different company. He's been there for three years. So he's
18 not -- and he's working full time, not totally disabled at all,
19 he just has to get away from the trigger.

03:08 20 So this is not an example of the august doctrine on
21 totally disability.

22 THE COURT: But doesn't the fact that he's out on
23 disability cut against the argument that he is qualified for
24 this position? I mean, to stay on the first prong for a moment
25 before I move to accommodation, doesn't that cut against on

1 this record? Doesn't that cut against a finding as to his
2 being qualified?

3 MR. MANTELL: Not at all, because the Supreme Court in
4 the Cleveland case, the Sullivan case, in Massachusetts the
5 Labonte case all say that assertions of total disability are
6 completely consistent with the allegation of qualifications so
7 long as it's your position that you could do the work with
8 reasonable accommodation. And you can. And in their reply,
9 they seek to distinguish this line of cases saying, Well, no,
03:09 10 that's only for Social Security. But we have cases making --
11 saying that it's for private, you know, short-term disability
12 and private plans including --

13 THE COURT: Counsel, I know the line of cases you're
14 talking about, I think it's the Sullivan, Labonte --

15 MR. MANTELL: Right --

16 THE COURT: -- case, but doesn't there have to be a
17 showing that whatever accommodation you're seeking will
18 actually allow you to perform your duties? Was there any -- is
19 there any showing of that here?

03:10 20 MR. MANTELL: Yes. We have Ms. Ross saying he can do
21 it, the medical statements that I've just quoted to you. Also,
22 we have the fact that Mr. Tuvell has worked for the past three
23 years, more than three years full time. He's not being
24 harassed, he can do the work. So we have that.

25 Also, the cases say that it doesn't have to be a

1 guarantee that it will work, in fact, the cases say if one
2 reasonable accommodation doesn't work, you have to try and try
3 again. And I have the cases in the memorandum, if you'd like
4 me to find them. But you don't have to have a guarantee, you
5 just have to have a possibility, and that's enough showing.

6 But he's saying over and over -- in fact, he tried to
7 work from home during sick leave. This is, yet, another piece
8 of direct evidence of animus. He's working from home, he's on
9 sick leave, he's contributing on the Wiki page, and

03:11 10 Mr. Feldman, the supervisor, goes to HR and says, We have to
11 stop him from doing this because that will show that he
12 deserves a reasonable accommodation and can work away from me.
13 So he's not saying, Oh, Mr. Tuvell is not being properly
14 supervised, this work is deficient, he's saying, No, we have to
15 stop him to undermine his claim of reasonable accommodation.

16 And in fact, that is Exhibit 111. It says, My concern
17 is that if we don't continue to notify him he can work during
18 his leave, then we are allowing Walt to create a track record
19 of IBM using work product created by him while on leave and
03:12 20 from home to establish a *prima facie* case for a claim of
21 accommodation.

22 So they're trying to undermine him during this time.
23 So he can do the work, we know that as a fact, and his doctors
24 attest to it at the time. So he has created a genuine issue of
25 material fact on this point.

1 Now, they have argued that the leave they provided was
2 sufficient, reasonable accommodation. I've provided to this
3 Court many cases saying that, no, leave, especially unpaid
4 leave, as it turned into, is not a reasonable accommodation
5 when there are other accommodations that would permit the
6 plaintiff to go to work, further his career opportunities, and
7 experience an equal playing field. That's the whole purpose of
8 the handicap discrimination law, is to allow people to go to
9 work and be productive.

03:13 10 THE COURT: But what do you say to your sister's point
11 that the reasonable accommodation requirements are a two-way
12 street? And if I'm remembering the record correctly, the
13 plaintiff, at some point during this leave, takes another job
14 with another employer. Doesn't that suggest that there isn't a
15 two-way street on trying to achieve a reasonable accommodation?
16 Not just that the employer engage in a process of whether or
17 not there's reasonable accommodation, but that the plaintiff
18 does as well.

19 MR. MANTELL: I would say that the record shows dozens
03:13 20 of efforts of the plaintiff to request reasonable
21 accommodation, provide reasonable accommodation.

22 He allows them to actually speak to his therapist, and
23 they have notes to try to figure out what's going on here.
24 They take in medical records. He's requesting reasonable
25 accommodation many, many times.

1 He only took the job in March 2012 after all this
2 happened out of economic necessity because they stopped paying
3 him completely. And maybe I'll jump ahead to the termination
4 point.

5 They say, We think you're working at EMC, and we don't
6 want you working for a competitor. He says, I'm not working
7 for EMC. They say, We think you are. He says, I give you
8 permission, go talk to EMC, I'll sign something, figure out,
9 make sure that I'm not there, but also to make sure I'm not
03:14 10 working for a competitor, I'm willing to approach a third
11 party, a trusted third party, give them all the information
12 just to satisfy you that I am not competing with you. Fair
13 point, I agree, I shouldn't be competing, let's figure it out.

14 They fire him anyway. They don't respond to that,
15 okay? They claim he was violating a policy, but we know that
16 that policy did not apply to him at the time, because it was a
17 personal leave policy and he wasn't on personal leave.

18 So, yes, that -- their argument on that is pretextual,
19 and again, it's completely consistent with his claim that he
03:15 20 was qualified to work full time at a high level.

21 Now, you asked a question before about his disability
22 being related to IBM in general or the particular building he
23 was working with, and the record is that he had the difficulty
24 with that particular building, but IBM had many buildings, and
25 in fact, he applied for a transfer to the Littleton office,

1 which is a different building. So he would have no problem
2 going there and entering. In fact, he interviewed there, had
3 no problems with that. His interactions with the people
4 interviewing him were professional, competent, they attest to
5 that.

6 So with respect to the harassment, one of the things
7 that IBM ignores is the idea that false criticisms, knowingly
8 false criticisms of work can contribute to a harassing work
9 environment. That's a point that you made in the White v.
03:16 10 DaVita case, and you cited the Noviello v. City of Boston case,
11 1st Circuit case for that. And here we have a litany of false
12 criticisms lodged against him, and in fact, ridiculous ones.

13 When Mr. Tuvell was presenting some work product to
14 his boss, he said the work product is here, but if you're lazy,
15 click this link, and they criticize him for that.

16 Well, guess what, for a month beforehand, they had
17 been planning on disciplining him. We know that, because they
18 have their e-mails and we have the drafts of the discipline
19 more than a month before the discipline issued and more than a
03:17 20 month before this "lazy" comment even occurred. They were
21 setting him up, and they were criticizing him falsely on other
22 occasions, too. We know this, this is on paper.

23 THE COURT: Counsel, I'm going to have to ask you to
24 wrap it up, but I will look back at the record, particularly at
25 the things that you're pointing me to today.

1 MR. MANTELL: Okay.

2 Wrapping up, there's extremely strong direct evidence
3 of handicapped discrimination and retaliation here. In fact,
4 the transfer, he's rejected because he says -- because the
5 decision maker says, You're on short-term disability, and
6 that's going to create a problem bringing you back on.

7 With respect to the investigation, there were many
8 allegations that Mr. Tuvell brought up, which they acknowledged
9 were never investigated, never ruled on, such as the fact that
03:17 10 the transfer was retaliatory or that it represented a failure
11 to reasonably accommodate. They acknowledge that they failed
12 to investigate many of his claims of discrimination. It's in
13 there.

14 So thank you very much, I appreciate it. If you have
15 any question, let me know.

16 THE COURT: Thank you, counsel.

17 I'll give you a moment or two to respond.

18 MS. ACKERSTEIN: Thank you very much, your Honor.

19 I would like to make a couple of points.

03:18 20 The -- Mr. Mantell read from an MTR statement by one
21 of the health care providers where he suggests that the
22 provider was saying the plaintiff was no longer totally
23 impaired. That one is dated December 16th. So there is no
24 dispute that in August, September, October, November, all of
25 the reports indicated that he was totally unable to report to

1 work. In this last one in December, Ms. Ross indicates that it
2 might be possible that the plaintiff could work in a different
3 setting with a different supervisor. And at her deposition she
4 said it's only a possibility. She wasn't certain. And in
5 fact, the plaintiff testified to just being in the vicinity of
6 IBM in mid-December and flipping out in a car with his wife and
7 daughter.

8 But the point is, the case law is very clear that the
9 plaintiff does not get his choice of a reasonable
03:19 10 accommodation. And he was accommodated with leave, and while
11 there are cases that Mr. Mantell cites that suggest that
12 reasonable accommodation does not include leave or may not --
13 may require something other than leave, those are cases where
14 the plaintiff's healthcare provider said they could return to
15 work in some fashion. And so there's a case, for example,
16 where somebody couldn't handle a gun, a police officer, but
17 there were other things he could do. That is not this case,
18 because four of these reports disable Mr. Tuvell entirely from
19 working, and additionally, the last one is only a possibility
03:20 20 that some other setting might work.

21 And finally, in the suggestion that it's IBM that is
22 at fault, I do want to remind the Court that IBM has pointed
23 out that Mr. Tuvell failed to engage in the interactive
24 process. The only thing he really wanted was a change of
25 manager, which he was not required under federal law to get or

1 under state law, and when he was asked, as he started to be out
 2 on leave, Please go see a specialist, and then later, Since
 3 you've been out six to eight weeks already, please see a
 4 psychiatrist, that's part of the interactive process,
 5 Mr. Tuvell was unwilling to do that.

6 And so we believe that after a careful review of the
 7 record, the Court should enter judgment for IBM.

8 THE COURT: Thank you.

9 Counsel, and I'm going to have to cutoff argument
 03:20 10 there, counsel, but I assure you that I will go back and look
 11 at your papers carefully.

12 I will take the matter under advisement.

13 MR. MANTELL: Thank you, your Honor.

14 THE CLERK: All rise.

15 (Court adjourned at 3:21 p.m.)

16 - - - - -

17 CERTIFICATION

18 I certify that the foregoing is a correct transcript
 19 of the record of proceedings in the above-entitled matter to
 20 the best of my skill and ability.

21
 22
 23
 24 /s/Debra M. Joyce
 Debra M. Joyce, FCRR
 25 Official Court Reporter

September 30, 2015
 Date