

Exhibit 68

Primary Software
 job Development
 category: & Support
 Other
 Secondary Software
 job Development
 category: & Support
 Job ref.: SWG-
 0436579

Software Developer

Job code	SWG-0436579	Job type	Full-time Regular
Work country	USA	Posted	26-Sep-2011
Work city	Littleton, MA	Job role	Software Developer
Travel	No travel	Job role skillset	C
Business unit	App Int SW	Workplace	Traditional Office (IBM building)
HR contact	--	Band	07 to 08
Department	MQ DEVELOPMENT	Division	APPLIC INTEG MIDDLEWARE
Hiring manager	Christopher Klme		

Back

Mail the preview

Commissionable job No

Job description

Our small team develops and supports the industry-leading IBM WebSphere MQ product for the HP NonStop Server platform, and we are gearing up to develop the next major release for this platform.

WMQ for HP NonStop Server is a deep port of the distributed platform code base and function that provides standard function and interfaces while making best use of the underlying platform's capabilities and features such as fault-tolerance, scalability and on-line configurability that the NonStop user community demand.

We are a team that does both development and Level 3 support, as well as a significant amount of direct customer interaction. This arrangement gives even more purpose to your code, and you'll develop your skills better than ever before through the support component. The primary role is for software development activities, but support and consulting directly with customers is a normal and expected secondary role. On our team, the activities being performed at any particular time vary with product lifecycle and business needs.

As a team we are using an Agile development process for our work, and are eagerly embracing short time-boxed iterations, customer feedback, SCRUM techniques and the latest tools to support such an approach.

There are many interesting challenges in designing, implementing and supporting a really great product in this environment.

In addition to the primary required skills, experience with the following is highly desirable in a candidate:

- Pthreads threaded programming and debugging
- Perl scripting
- Design and/or internals of WebSphere MQ on any platform
- Requirements of high availability, parallel and scalable OLTP applications
- Agile development processes
- Experience in a customer facing role such as support or consulting

And experience in the following would also be beneficial for some activities on our team:

- C++ and/or Java programming, debugging and unit testing
- ANT
- Developing, administering or using HP NonStop Server

EXHIBIT	<u>12</u>
WIT:	<u>IS:ME</u>
DATE:	<u>3-7-11</u>
C. Vohlken	

WebSphere MQ (WMQ) is supported currently in two versions (V5.1 and V5.3.1) and on a total of 3 hardware variants of the HP NonStop range.

WebSphere MQ provides a universal messaging backbone to connect virtually any commercial IT system reliably and scalably.

On HP NonStop Server, WMQ is heavily used by the finance, manufacturing and retail industry for mission-critical (24x7x365) applications.
Apply today!

Required

- Bachelor's Degree
- At least 3 years experience in 'C' language programming, debugging and unit testing
- At least 1 year experience in Detailed design of software meeting functional, performance, serviceability requirements
- English: Fluent

Preferred

- Information Technology
- At least 3 years experience in Detailed design of software meeting functional, performance, serviceability requirements
- At least 3 years experience in shell scripting or Unix development
- At least 3 years experience in understand, analyze and modify large and complex software components
- At least 2 years experience in WebSphere MQ application development and/or systems administration
- At least 3 years experience in system level software development with Unix system calls and library functions
- At least 3 years experience in demonstrated commitment to high quality, effective and complete verification of software

IBM is committed to creating a diverse environment and is proud to be an equal opportunity employer. All qualified applicants will receive consideration for employment without regard to race, color, religion, gender, gender identity or expression, sexual orientation, national origin, genetics, disability, age, or veteran status.

Exhibit 69



Hide Details

SWG-0436579 discussion

Thu 12/01/2011 1:30 PM - 2:00 PM

Attendance is **required** for Walter Tuvell

Chair: **Chris Kime/Austin/IBM**

Location: Phone - (512)286-6981, or provide me a number to call

This entry has an alarm. The alarm will go off 20 minutes before the entry starts.

Required: Walter Tuvell/Marborough/IBM@IBMUS

Time zones: This entry was created in a different time zone. The time in that time zone is:
Thu 12/01/2011 12:30 PM CST - 1:00 PM GST

Description

Walter,

I would like to chat with you on the phone about the open job requisition.

I reviewed your résumé (short and long), and have little doubt that you have technical skills that we could use on the project. Of course, we need to make sure that you have an interest in the position and it seems like it would be a good fit. Let me know if this time will work for you or counter with another time - my calendar should be up to date.

Regards,


Chris

Personal Notes

EXHIBIT <u>2</u>
WIT: <u>Kime</u>
DATE: <u>3-7-14</u>
C. Vohiken

Exhibit 70



Re: Thanks for the visit 
Chris Kime to: Walter Tuvell

12/12/2011 01:09 PM

From: Chris Kime/Austin/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Default custom expiration date: 12/11/2012

History: This message has been replied to and forwarded.

Walt,

Thanks again for taking the time to talk with Brian and Harvey last week. I think the conversations were very positive, and I will be following up with my management chain and will keep you posted of developments as they occur. Obviously, given the time of year I cannot make any promises on timelines but I will try to keep you informed of any updates.

Regards,

Chris

=====
=====
Chris Kime
(512)286-6981
IBM/WebSphere
Financial Services Solutions Development
=====
=====

Walter Tuvell Harvey & Brian, I just wanted to t... 12/09/2011 01:51:24 PM

From: Walter Tuvell/Marlborough/IBM
To: Harvey Harrison/Marlborough/IBM@IBMUS, Brian Doherty/Marlborough/IBM@IBMUS
Cc: Chris Kime/Austin/IBM@IBMUS
Date: 12/09/2011 01:51 PM
Subject: Thanks for the visit

Harvey & Brian, I just wanted to thank you for your time yesterday.

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. I felt comfortable with both of you, and I think I'd fit into the team well. I'm also pretty sure I could start adding value early -- I seem to have all the basics covered, just need to ramp up on the specifics of MQ, NonStop and your solution, which (almost) anyone would have to do anyway.

If I left you with with any gaping open questions, my apologies; I'd be happy address them, just ask.

EXHIBIT 6
WIT: Kime
DATE: 3-7-11
C. Vohlken

No matter what happens, I wish you all the best going forward, you've got a Good Thing on your hands.

Cheers!

- Walt

Exhibit 71

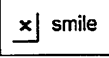

		Dec 13, 2011
Christopher Kime	Hello Dan, can I call you? Or you call me @ 512-286-6981?	13:03:43
dfeldman@us.i...	I'll call you.	13:03:59
Christopher Kime	sorry - just saw your note...	13:04:12
		Dec 13, 2011
Christopher Kime	had a quick q for you when/if you have a moment...	13:48:42
dfeldman@us.i...	I'm back.	14:33:49
Christopher Kime	private screen?	14:34:00
dfeldman@us.i...	mm... I don't know what that means	14:34:18
Christopher Kime	no one can see our conversation 	14:34:29
dfeldman@us.i...	Oh. Correct 	14:34:37
Christopher Kime	Just wanted to ask if Walt was going to receive a PBC 3 evaluation for 2011...	14:34:59
dfeldman@us.i...	based on our conversation that would be my expectation	14:35:11
dfeldman@us.i...	We've been holding off on rating him because of the disability issue...apparently this is HR's preferred practice. If I had to rate him today based on my experience with him I'd probably have to call it a 3.	14:36:31
Christopher Kime	understood. Thanks again for your time and candor.	14:36:58
dfeldman@us.i...	If someone had were to ask me the question I always ask - "Would you hire him again" - the answer would be no.	14:37:25
Christopher Kime	Yes, that's a pretty significant statement. But I appreciate your honesty!	14:37:51
dfeldman@us.i...	[more fully, no, not for this job]	14:37:54
dfeldman@us.i...	Again, there's no question he's a talented guy, it isn't working out in this group, with these responsibilities and this set of relationships.	14:39:06

EXHIBIT <u>8</u>
WIT: <u>Kime</u>
DATE: <u>3-7-14</u>
C. Vohlken

Exhibit 72

**Ongoing "interactive dialog"****Walter Tuvell** to: RUSSELL E MANDEL

02/28/2012 08:11 AM

Kathleen Dean, Al Pfluger, Diane Adams, Chris
 Cc: Kime, Daniel Feldman, John Metzger, Arvind
 Krishna, Pratyush Moghe, Fritz Knabe, Robert
 Bcc: walt.tuvell

From: Walter Tuvell/Marlborough/IBM
 To: RUSSELL E MANDEL/Somers/IBM
 Cc: Kathleen Dean/Fishkill/IBM@IBMUS, Al Pfluger/Fishkill/IBM@IBMUS, Diane
 Adams/Fishkill/IBM@IBMUS, Chris Kime/Austin/IBM@IBMUS, Daniel
 Feldman/Marlborough/IBM@IBMUS, John Metzger/Marlborough/IBM@IBMUS,
 Bcc: walt.tuvell@gmail.com
 Default custom expiration date: 02/27/2013

To CC's:

The reason you're being copied is for purposes of "interactive dialog for reasonable accommodation for disability, as required by law". Basically, Russell Mandel is now saying YOU are responsible for the interactive dialog, and it's "your move". See below. For background, the core documentation is available at http://www.filedropper.com/ibmcomplaint_1.

To Russell Mandel:

1. See item #2, next.

2. You are now are telling me (for the first time) that you're relying on the contents of our phone call of Nov. 17. But, that phone call was explicitly off-the-record. In fact, I asked you for permission to audio-record it and supply you with a copy of the recording, but you refused me. I did take my own notes of the phone call, but surely you can't assume I was able to take really good notes during that session, and in any case the notes I took can't be considered official in any sense. Finally, I asked you for official written notice of the resolution, but you supplied me with a trivial pro-forma reply (free of substantive content) that said the following:

<quote>

As we discussed, I have investigated your concerns, and determined that management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you. While I know this is not the answer you had hoped, please accept my best wishes for the future.

</quote>

Since when are "adverse job actions" in any honest company or professional HR organization permitted to be based upon unsubstantiated/unrecorded rumor/heresay? That won't stand up in any external investigation that may or may not ensue. Therefore, I say again, please provide me with real, accurate, unambiguous reasons for my rejection for the job transfer to Chris Kime's group.

3. You are wrong, I have not been rejected for my 2nd application for transfer. See the attached screenshot, which I just now took. It shows the application is still "under review".



4. You speak of my "particular demands", but that's a false/misleading characterization. The "demands" come, not from me, from my medical disability, as has been duly reported along official IBM channels (esp. IHS) for many months, by my health care-givers.

5. Mgmt and IHS are duly CC'd hereto.

Finally: I am now well along the path to finishing up my 2 new Addenda (to Old and New Complaints), and should be finished in a matter of days.

- Walter Tuvell



JobApplications.png

RUSSELL E MANDEL My answers are provided 02/28/2012 06:52:54 AM

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 02/28/2012 06:52 AM
Subject: Re:

My answers are provided below in blue.

Russell E. Mandel

Concerns and Appeals Program Manager

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)

Walter Tuvell To: Russell Mandel NOTICE AS 02/22/2012 08:32:54 AM

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM@IBMUS
Date: 02/22/2012 08:32 AM
Subject: Re:

To Russell Mandel -

NOTICE: As I've been doing diligently/continuously since last June, this note represents yet another installment in my "interactive dialog" with you/IBM, in service of my: (I) opposition to IBM's illegal acts (regarding discrimination,

discrimination-retaliation, defamation, and IIED); (ii) quest for reasonable accommodation (transfer based upon for well-proven PTSD-induced disability); (iii) pursuit of internal dispute resolution (Open Door, Corporate Open Door, C&A processes, strictly according to all published IBM official policies/procedures/practices).

Last week, I made a simple request to you for clarification of puzzling comments you made. Your response has not been forthcoming. That delay constitutes yet another undue (retaliatory) delay on your part.

So following are some even simpler "process" questions for you. These require no delay whatsoever. I am within my rights to expect very prompt answers to these questions -- and then, responses to the underlying substantive issues represented by these process questions.

1. Do you plan to ever give me the clarifications I requested? If not, then I'll just accept the ambiguity/inaccuracy, and craft my in-process Addenda (for Old Complaint and New Complaint) on that basis.

I believe I have provided sufficient information to respond to all of your concerns and do not agree there is "ambiguity/inaccuracy."

2. Do you plan to ever give me a final determination/decision on my New IDR/C&A Complaint? Insofar as I can tell, that has not yet happened.

If your comment here refers to your complaint sent on January 22 and I agreed to investigate on January 24, the only issue that was eligible for an investigation was whether you were unfairly rejected for the position under Mr. Kime. I have already answered you February 17 and you have now requested further clarification in point #1 (i.e., unprofessional conduct and inability to work cohesively with others). All I can add is that I have already discussed these issues when we closed on your previous investigation and I have nothing to add to that discussion.

3. Do you plan to ever give me a final determination/decision on my application to the Littleton transfer I'm applied in GOM for? Insofar as I can tell, that has not yet happened (and it's been a month, far beyond "undue delay" for GOM process, hence discrimination-retaliatory).

You have already been rejected for that position for the above stated reasons. We've been over this ground before.

4. Do you plan to ever continue interactive dialog for reasonable accommodation (transfer)? If so, then it's "your move".

The interactive dialogue is an ongoing process that is still open and continuing. IBM has been engaging you in an interactive dialogue for several months. Multiple accommodations have been offered. I am aware that John Metzger recently communicated with you to offer reasonable accommodations again, which you rejected because they did not satisfy your particular demands.

5. If you are not the right/official person within IBM I should be interacting with for questions such as these, do you plan to ever tell me who those persons are? I've received emails from Dan Feldman and John Metzger, but I don't know what roles they (or Chris Kime) are playing.

I am the correct person to escalate issues eligible under the Open Door process. You should discuss accommodation requests with Integrated Health Services or your management team.

- Walter Tuvell

Walter Tuvell wrote too fast. Apart from trivial typos... 02/17/2012 01:04:33 PM

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM@IBMUS
Date: 02/17/2012 01:04 PM
Subject: Re:

I wrote too fast. Apart from trivial typos I suppose there's no need to dwell on, I should have mentioned the following:

There's a problem with the July 5 date you cited. Nothing happened on that date. On July 6, the original "lazy scandal" email was sent. However, the Formal Warning Letter cited a different email, on July 20. Please clarify.

Also, it seems you may be trying to equate what you previously called "performance issues" with what you now calling "inability to work cohesively with others". I had thought these were intended to be two different items, because they've such totally different concepts, but upon second glance it seems you might be identifying them. Please clarify this too.

Walter Tuvell Oh? So, now, in addition to "p... 02/17/2012 12:35:53 PM

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM@IBMUS
Date: 02/17/2012 12:35 PM
Subject: Re:

Oh? So, now, in addition to "performance issues", you're throwing "inability to work cohesively with others" and "unprofessional conduct"??

Since you cited the July 5, 2011, date I understand the "unprofessional conduct" to refer to the Formal Warning Letter.

But I still don't understand what "performance issues" and "inability to work cohesively with others" mean. Please be specific, so I know what my problems are, else I won't be able to correct them.

RUSSELL E MANDEL This is to respond to your... 02/17/2012 11:21:05 AM

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 02/17/2012 11:21 AM
Subject:

This is to respond to your inquiry about performance issues. An essential component of any performance assessment includes the ability of the individual to work well with others. The performance issue you and I discussed previously is the inability to work cohesively with other members of a team. In addition to unprofessional conduct, for which you were cited on July 5, 2011; this issue was considered to be a potential obstacle to being successful in the role to be filled.

Russell E. Mandel

Consulting Human Resources Professional
Concerns and Appeals SME

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)

Exhibit 73

Dec 15, 2011

dfeldman@us.i... Hi, Chris...time for a quick question? 11:48:18

Christopher Kime Sure 11:48:27

via ST - on a call 11:48:34

dfeldman@us.i... Tuvell seems to be under the impression that you either are or are likely to move ahead 11:49:49
with him. He's predicating a request for a retroactive change in his STD status on the expectation
that he'll start working for you on 1/3. Is that your understanding?

Christopher Kime No - sorry. Based on your feedback I don't think we will be able to move forward. I said I would 11:51:05
get back to him, and felt pretty positive after initial conversations, but certainly did not make any commitments
yet. Was probably too positive after the feedback from my team members. ☹️ frown

dfeldman@us.i... No problem, I just want to make sure that the HR partner and the lawyer who are 11:53:21
involved have the full story. Thanks! And good luck with filling the position. I guess there are no IBM
System 88 machines out there any more (private labeled Stratus boxes); I was pretty good Stratus
programmer and performance guy back in the day. 😊 smile Have a great holiday!

Christopher Kime Sorry - had to speak on the call so didn't respond immediately. 12:05:43
Yes, I understand your position and need to get back to Walt and set expectations appropriately. I do not envy
you having to deal with HR and lawyers at this point - certainly I did not understand the STD situation and
underestimated its significance.

Re: stratus skills, too bad for me you didn't apply to the position. 😊 smile
Happy holidays to you as well.

EXHIBIT 9
 WIT: Kime
 DATE: 3-2-14
 C. Vohlken

Exhibit 74



RUSSELL E MANDEL to: Walter Tuvell

03/06/2012 11:15 AM

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Default custom expiration date: 03/06/2013

It has come to our attention that you have recently sent multiple emails about your concerns to members of your team outside of the normal HR concern and appeals channels. As you know, the concerns and appeals program is the clearly defined mechanism which allows you to raise your concerns in an orderly way. You were previously advised not to send emails to unnecessary parties about your concerns. It is considered an abuse of the IBM systems and disruptive to IBM's business.

Given this recent misuse of the systems and the fact that you no longer need notes access for business purposes since you are on an LOA awaiting a determination of your LTD application, we are removing your access to Lotus Notes effective immediately.

You can continue to communicate about any pending HR related concerns with myself at (203) 486-4561 or Diane Adams at (508)-382-8534. You can also contact Metlife or Kathleen Dean at (845) 894-9573 if you have any questions about your LTD application

Russell E. Mandel

Concerns and Appeals Program Manager

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)



DEP

DEBORAH SMITH CSR

4-14

Exhibit 75



Re: No building access? 

Walter Tuvell to: RUSSELL E MANDEL

09/14/2011 10:43 AM

Bcc: walt.tuvell

From: Walter Tuvell/Marlborough/IBM

To: RUSSELL E MANDEL/Somers/IBM

Bcc: walt.tuvell@gmail.com

Default custom expiration date: 09/13/2012

Again, you are wrong, and this is harassment. I went to an IBM location yesterday to visit a friend, and my badge didn't work, so I embarrassingly had to phone him to get me in. It also seems I no longer have IBM VPN access to certain w3 sites (in addition to the previously noted lack of Netezza VPN access). Rather than make me guess, why don't you just point me to the policy document that states what people with "disability leave" are prohibited to do? The reason is clear: There is no such policy. And there is no legitimate business reason being served for excluding me. In particular, it would obviously IMPROVE my health if I had the VPN & building accesses restored. I'm being excluded solely in retaliation for my C&A action, not because of the STD at all.

To repeat yet again: My ONE AND ONLY "disability" is that I am legitimately/provably physically/mentally unable to work in the abuse environment I am currently assigned to (Dan Feldman & Co.). I did not have this "disability" when I was hired, it commenced precisely when I initiated my C&A action on June 10, and culminated at my meeting with Dan on Aug 3. My medical/psychological/intellectual condition is perfect, except for that. My medical/psychological health-care providers agree with me: They DO NOT WANT me to return to that abusive environment, because to do so is deleterious to my physical/mental health. I have repeatedly demanded a "workplace accommodation" (per ADA, as well as simple humanity/decency) to be removed from that abuse environment (preferably by firing the evil-doers), and you/IBM have repeatedly refused, insisting that I must remain in that very abusive situation.

You've even insisted that I must return to that abuse, BEFORE you will even process ("discuss with me") my C&A, even you KNOW I CANNOT do that without endangering my health, and even though the C&A policy itself EXPLICITLY states that the full C&A process is available to me while I'm "on leave" (which phrase DOES include STD discovered on w3). That is obviously abusive in and of itself.

All this is in complete violation/breach of the BCG Contract (because the BCG "includes by reference" the terms of the C&A program).

I hereby reinstate my demand that I be accorded my rights, as stated above.

DEPOSITION EXHIBIT #15
MANDEL #15
6-4-11 DS.
04-14
DEBORAH SMITH CSR

RUSSELL E MANDEL You are out on STD. Therefo... 09/14/2011 10:02:16 AM

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 09/14/2011 10:02 AM
Subject: Re: No building access?

You are out on STD. Therefore, you don't need access to IBM facilities since you aren't working. It is easy to return access once you return from STD.

Russell E. Mandel

Consulting Human Resources Professional
Concerns and Appeals SME

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)

Walter Tuvell So, it seems my IBM badge won't... 09/13/2011 02:20:12 PM

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM@IBMUS
Date: 09/13/2011 02:20 PM
Subject: No building access?

So, it seems my IBM badge won't get me into IBM buildings anymore, right?

Exhibit 76

From: Lisa Due
To: Walter Tuvell
CC:
BCC: Daniel Feldman; John Metzger; Diane Adams; Kelli-ann McCabe; RUSSELL E MANDEL
Sent Date: 2011-06-29 16:03:17:000
Received Date:
Subject: *Confidential: Investigation
Attachments:

As you know, I was asked to conduct an investigation into concerns raised regarding your treatment by your manager, Mr. Daniel Feldman.

I have completed my investigation and found that there was insufficient factual information to support your allegations.

Therefore, you should proceed to do your current assignment to achieve the results outlined in your PBC goals. However, if you no longer wish to continue in this role, you may apply for other positions within IBM using the Global Opportunity Marketplace job system:
<http://w3-01.ibm.com/hr/global/OppMarketplace.html>

If you choose to look for another job within IBM, you are required to perform your current job while you pursue the search for a new role.

If you disagree with the findings of my investigation, you can engage Russell Mandel, HR Program Director of Concerns and Appeals, who will review whether the investigation was properly performed under IBM's investigation guidelines. Again, you will be required to perform your current assignment while this review is pending.

Finally, given the investigation has concluded, it is no longer necessary for me to be copied on your notes/correspondence.

Regards,

Lisa Due
19 Skyline Drive



Senior HR Partner/Case Manager
Hawthorne, NY 10532-1596

Exhibit 77

From: Stewart Snyder
To: Kathleen Dean
CC: Al Pfluger
BCC:
Sent Date: 2011-09-13 14:45:12:000
Received Date: 2011-09-13 14:45:17:000
Subject: Re: *IBM Confidential: Walter Tuvell #0G3821
Attachments:

Hi Kathy,

I'd be happy to discuss this with you and Al. Let me know a time, and it likely will be OK, since as of this moment my schedule looks pretty empty.

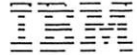
If this employee has the time and wherewithal to write a 250 page diatribe me thinks he dost proetesteth too much!

Stew

B. Stewart Snyder, III, M.D.
Physician Program Manager
IBM Integrated Health Services
Ph: 919.543.6161 FAX: 919.543.0834
Internet: bssnyder@us.ibm.com

International Business Machines, Inc.
Dept. XE6B/Bldg. 205
3039 Cornwallis Road
RTP, NC 27709

The truth is the truth, whether you choose to believe it or not.

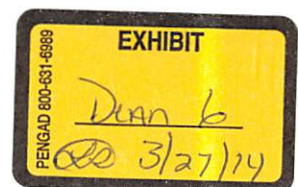


Kathleen Dean---09/09/2011 08:29:07 AM---Dr. Snyder, I am the IBM Nurse Case Manager for IBM employee Walter Tuvell #0G3821. Mr Tuvell has a

From: Kathleen Dean/Fishkill/IBM
To: Stewart Snyder/Raleigh/IBM@IBMUS
Cc: Al Pfluger/Fishkill/IBM@IBMUS
Date: 09/09/2011 08:29 AM
Subject: *IBM Confidential: Walter Tuvell #0G3821

Dr. Snyder,

I am the IBM Nurse Case Manager for IBM employee Walter Tuvell #0G3821. Mr Tuvell has a MTR from his family physician that I have STD Certified from 08/15/2011 to 09/15/2011. The recent MTR is



also from his family physician in which I have sent a note to the employee to have a specialist complete the MTR form since the treatment plan states "psychotherapy to help his acute stress." Family Physician diagnosis: Sleep Disorder & Stress Reaction.

Can you please contact me (and AI) to discuss this case. The employee has sent me 2 emails questioning the IBM MTR that is to be completed by a specialist.

In the meantime, the employee has blind cc'd AI and myself on several lengthy letters to the above executives. HR IST Russell Mandle is dealing with the employee.

I made Dr Campbell aware of this employee through an email on 08/24/2011 which stated, "Thought you should know in case MJS is notified.

An IBM Netezza employee from MA has sent letters to Sam Palmisano, Randy MacDonald, Russell Mandle (HR IST CM), Steve Mills (Armonk, Sr VP & Group Exec Software & Systems), Robert Weber (Armonk, Sr VP, Legal and Regulatory Affairs & General Counsel), and possibly others about his mistreatment by his manager, IBM and so forth. The employee has filed an Open Door (not against medical). He has submitted a 250 + page "complaint"

Currently the employee, Walter Tuvell #0G3821, is out on STD from 08/15/2011 to 09/14/2011 with a diagnosis of Stress Disorder & Stress reaction.

A meeting was held yesterday attendees: HR Partner for MA - Diane Adams, HR IST CM Russell Mandel, Manager Daniel Feldman, Legal Greg Meyer, Legal Larry Bliss, Medical AI Pfluger & Kathy Dean.

No action is required by IBM Medical. HR & Legal are handling the case. "

Thanks, Kathy

Kathleen A. Dean, R.N. COHN, COHC
IBM Health Services Advisor
Integrated Health Services, IBM EFishkill
Phone: (845) 894-9573 or tieline 533-9573
Fax: (845) 892-3226 or tieline 532-3226
email: deanka@us.ibm.com

Exhibit 78

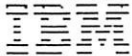
From: Stewart Snyder
To: Kathleen Dean
CC:
BCC:
Sent Date: 2011-10-11 18:37:15:000
Received Date: 2011-10-11 18:37:20:000
Subject: Re: Fw: STD / FYI - reply from Walter Tuvell
Attachments:

He doth protesteth too much, methinks.

B. Stewart Snyder, III, M.D.
Physician Program Manager
IBM Integrated Health Services
Ph: 919.543.6161 FAX: 919.543.0834
Internet: bssnyder@us.ibm.com

International Business Machines, Inc.
Dept. XE6B/Bldg. 205
3039 Cornwallis Road
RTP, NC 27709

The truth is the truth, whether you choose to believe it or not.



Kathleen Dean---10/11/2011 02:29:39 PM---Hello, see note below from Walter Tuvell to HR Russell Mandel. Kathy ----- Forwarded by Kathleen D

From: Kathleen Dean/Fishkill/IBM
To: Stewart Snyder/Raleigh/IBM@IBMUS
Date: 10/11/2011 02:29 PM
Subject: Fw: STD / FYI - reply from Walter Tuvell

Hello, see note below from Walter Tuvell to HR Russell Mandel. Kathy

----- Forwarded by Kathleen Dean/Fishkill/IBM on 10/11/2011 02:28 PM -----

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM@IBMUS
Cc: Al Pfluger/Fishkill/IBM@IBMUS, Kathleen Dean/Fishkill/IBM@IBMUS
Date: 10/11/2011 02:13 PM
Subject: Re: Fw: STD / FYI



Here's something you'll find interesting.

I have just recently learned about "discrimination-retaliation" (I didn't know this concept existed previously, though of course every competent manager/HR person at IBM did). "Discrimination-retaliation" is what happens when an employee files a complaint (just "filing" to employer suffices) involving discrimination to an employer, and the employer retaliates. It is **EQUALLY AS ILLEGAL** as "actual-discrimination" (in particular, for example, it supports penalty remedies). And, very recent laws (both statutory and common) have made it much friendlier to employees. In particular, "retaliation" in this context of "discrimination-retaliation" merely means "tends to dissuade reasonable employees from pursuing their rights (e.g., filing discrimination complaints)". See <http://eeoc.com/guidance/discrimination/discrimination-retaliation> for the basic facts.

Now let's review some facts of my case (these are not exhaustive, merely samples [I'll write up details in my Addendum IV]):

1. Fritz yelled at me on Wed, Jun 8.
2. Dan demoted me on Fri, Jun 10.
3. I initiated the C&A process on Mon, Jun 13, complaining orally to Kelli-ann McCabe about age discrimination.
4. I followed that up on Wed, Jun 15 with an email to Dan Feldman, Kelli-ann and Diane Adams, also complaining about age/sex/race discrimination.
5. I was immediately/seriously retaliated upon (blackballing, etc.), precisely because I filed the complaint (beginning with the "detailed day-by-day plans for 3 weeks, on 4 new projects, on one day's notice, independently", and culminating with the "lazy scandal"/"formal warning letter").
6. As for disability, I have been on STD effective Aug 15, as you (Russell) have known all along. Yet, you've done things such as refuse to progress my C&A while I'm on STD (thereby "denying me access to investigative procedures", despite the fact that IBM policies explicitly state such procedures are available to all employees "on leave", including STD), deny reasonable accommodation (by continually telling me I must return to work under Dan, and/or work with Diane/you), and rescind various electronic and physical access privileges. [Lisa Due's "investigation" was similarly sham, as we know.] According to recent law, all these things also amount to discrimination-retaliation, on the basis of disability.
7. And, you're obviously being supported in your actions by Legal, and Corporate Officers. For, I have complained directly to them, so they cannot pretend to be unaware of the urgency, yet they've delegated to you, knowing exactly what you're doing. So they're all guilty of discrimination-retaliation too.

All the above is provably documented in my Complaint. In short: IBM is supporting discrimination-retaliation against me, knowingly (you can't tell me Legal isn't a party to this, in fact Dan told me so explicitly).

Yet, what you're telling me in your note (included here) is that you've apparently completed your investigation, and you have no intention of removing wrongdoers such as Dan and Diane (and John Metzger, and yourself, among others) from my workplace.

That is **UNACCEPTABLE** – because supporting known-illegal activity is unacceptable. It is completely "reasonable" for me to demand that these wrongdoers be removed from my workplace, and the rule of law restored. For, merely "transferring" me to another location does **NOT** remove the threat. I fully believe that the very same people will attempt to influence the very same punishment upon me (not to mention others!) – namely, discrimination-retaliation, for example by influencing people in the proposed

new location against me. To go through a GOM would require a recommendation from Dan, and I do not believe he would give me a good recommendation. And working with Diane, as you suggest, would also be a sure-fail. Finally, it's entirely obvious that people like you, and John Metzger, and Arvind Krishna, and even Sam Palmisano, would continue to retaliate upon me in future, given half a chance. [And in any case it is not ME who must "find a new position via GOM -- it is YOU/IBM who must make the "reasonable accommodation".]

All this assumes your "investigation" is a fraud/sham. Am I wrong about this? If SO, there's an easy to prove it: Make your findings known to me. I demand, yet again, that you do so. Every day you refuse to afford me my right to the C&A process amounts to an additional count of discrimination-retaliation.

You cannot pretend, as you have in the past, that you'll afford me the C&A rights "when I return to my regular job from STD", because that will NEVER happen. For, I have a well-known (to medical practitioners) type of PERMANENT ("longer than 6 months", as the ADA defines it) disability about working with Dan and others. That fact that the disability is intermittent (only active when I'm under the influence of the abusers) is of no avail to you (according to recent ADA law).

Per your suggestion (in the included note), I have indeed proposed the ONLY reasonable workplace accommodation: Get rid of the wrongdoers, and make IBM stop breaking laws (discrimination-retaliation and all others). There is no alternative. Yet you/IBM have steadfastly stonewalled/covered-up since June.

Time is rapidly running out -- a salary decrease and "constructive dismissal" loom on the horizon. That would be the ultimate adverse job action, which would kill any remaining chance you/IBM have to Do The Right Thing.

RUSSELL E MANDEL---10/10/2011 09:33:54 AM---Your manager is not going to be changed as an accommodation for a medical condition. If you are re

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Cc: Al Pfluger/Fishkill/IBM@IBMUS, Kathleen Dean/Fishkill/IBM@IBMUS
Date: 10/10/2011 09:33 AM
Subject: Re: Fw: STD / FYI

Your manager is not going to be changed as an accommodation for a medical condition.

If you are ready to return to work from Short Term Disability leave, however, we may be able to provide you with another accommodation. For instance, we may be able to assist you with a change in your position by helping you to possibly locate another opportunity through Global Opportunity Marketplace

(GOM). If you are interested in looking for another opportunity on GOM, please let me know. Diane Adams can assist you with your search.

Further, if there are other workplace modifications you would like to propose to help you to perform your current position, please let me know."

Russell E. Mandel

Consulting Human Resources Professional
Concerns and Appeals SME

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)

Walter Tuvell---10/05/2011 10:37:18 AM---Russell - I have today received a note from Dan Feldman concerning reduction of benefits under conti

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM@IBMUS
Cc: Kathleen Dean/Fishkill/IBM@IBMUS, Al Pfluger/Fishkill/IBM@IBMUS
Date: 10/05/2011 10:37 AM
Subject: Fw: STD / FYI

Russell -

I have today received a note from Dan Feldman concerning reduction of benefits under continued STD (his note is included below).

There's a major problem here, and it's all rooted in the ADA (as amended in 2008/9). As you know, I have requested (and continue to request) a reasonable "accommodation", under the ADA. Namely, I am unable to work under my existing work assigned conditions, under Dan and others, at Netezza (because I consider them abusive/hostile, for reasons well documented). I have many times requested/begged to be accommodated, by separating me from those conditions (see for example my email at Complaint, Part II, Appendix R, 06/28/2011 12:09 PM, pp. 83-84).

I claim I do, indeed, satisfy the disability requirements of the ADA (I have read it, so I know). In particular, the medical problem I have has obviously been known from the beginning to be a long-term

one (permanent, i.e., I can never return to work under the currently assigned conditions). Therefore my request for accommodation is a valid one under the ADA. And hence IBM is required by ADA law to provide me with such an accommodation (provided it doesn't cause "undue hardship", which IBM would have a very hard time claiming). Yet you/IBM have utterly failed/refused to do so. I have not even seen a response to my ADA accommodation request (which is separate from my C&A appeal, of course, since the ADA is state/federal law while the C&A is mere "IBM Law"). For example, if there is some process I am supposed to be following with respect to this accommodation request, I do not know what it is (I would be happy to comply with any such process, of course).

Therefore, IBM is currently actively in violation of ADA law.

IBM's refusal to provide me with an ADA accommodation is the very reason I am on STD. The STD was originally supposed to be a stop-gap measure, bridging me to the new situation (in an accommodating position). It is you/IBM, not me, who is responsible for my continuing STD leave, as opposed to returning to work (in an accommodating position). Therefore, if IBM does indeed reduce my STD benefits to 2/3 salary, IBM will be forcibly/unilaterally reducing my income. That is clearly an adverse employment action, and it would obviously form the basis of a constructive discharge claim (based ultimately on ADA violation).

I assume already know all this. I want to make you aware I also know it.

I am copying Health Services on this note. To date, they have "played it straight" with the STD process, so they have no culpability insofar as I am aware. I want to make sure they are knowledgeable about the current/continuing state of affairs, and I hope they choose to continue doing their jobs professionally.

- Walter Tuvell

----- Forwarded by Walter Tuvell/Marlborough/IBM on 10/05/2011 10:00 AM -----

From: Daniel Feldman/Marlborough/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 10/05/2011 08:06 AM
Subject: STD / FYI

Walt,

I received notice today that you have reached 10 weeks of STD for the year (I think you're in week 11 now). I expect you are aware of the details of the policy, but the following is excerpted from the notice I received and I'm sending it to you in case you haven't seen it before:

Based on our records of timecards, W TUVELL has reached 10 weeks of Short Term Disability (STD) benefits. Please ensure that the employee is aware of the following:

- Employees hired prior to 1/1/04 may be eligible to receive continuation of their regular monthly compensation at 100% of pay for each day absent, up to a maximum of 26 weeks.
- Employees hired on or after 1/1/04 with less than 5 years of service may be eligible to receive continuation of their regular monthly compensation for each day absent, up to a maximum of 26 weeks in a period of 12 consecutive months. For the first 13 weeks of absence, STD benefits will be paid at 100% of regular monthly compensation. After 13 weeks of absence, STD benefit level "steps down" to 66-2/3% of pay for the second 13 weeks. After completing 5 years of service, company-paid STD benefits increase to 100% of pay for 26 weeks.

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Exhibit 79

In The Matter Of:
Walter Tuvell vs.
International Business Machines, Inc.

Kathleen Ann Dean
March 27, 2014



**DORIS O. WONG
ASSOCIATES, INC.**

COURT REPORTERS

50 Franklin St., Boston, MA 02110
Phone (617) 426-2432

Original File DEAN.txt

Min-U-Script® with Word Index

1 condition.

2 Q. What is the name of the company that
3 provides that?

4 A. It may have changed, but the last I
5 remember it was Presley Reed.

6 Q. Is that medical guideline tool used with
7 respect to reasonable accommodations?

8 MR. PORTER: Objection.

9 A. Yes.

10 Q. How is it used --

11 MR. PORTER: Object.

12 Q. -- with respect to reasonable accommodations?

13 MR. PORTER: Objection.

14 A. We just review it to see if the
15 accommodations meet what the diagnosis are and what
16 accommodations a doctor may be asking on the medical
17 treatment report form.

18 Q. Now what is the -- well, let me back up.

19 As an IHS case worker, did you have any
20 role with respect to whether a reasonable
21 accommodation should be granted or denied?

22 A. No.

23 Q. Who had the responsibility for deciding
24 whether a reasonable accommodation request was

1 granted or denied?

2 MR. PORTER: Objection to the form.

3 A. Can you re -- say that question again?

4 Q. Sure. Was there a process with respect to
5 either granting or denying a request for reasonable
6 accommodation?

7 MR. PORTER: Objection to the form. She
8 just testified she didn't have any role in that
9 process.

10 Q. You can answer.

11 A. I don't have a role on making any decisions
12 on if somebody has or should get an accommodation or
13 not.

14 Q. I understand that, but my question is: Was
15 there a process to determine whether a request for
16 reasonable accommodation should be accepted or
17 denied?

18 A. Yes.

19 Q. What was that process called?

20 MR. PORTER: Objection.

21 A. The AAT meeting.

22 Q. Who was present at AAT meetings?

23 A. Legal, HR partners, managers, and medical.

24 Q. Did you sit in at these AAT meetings?

1 is the role of the medical people at those meetings?

2 A. We do not disclose any medical document --
3 or medical information about the employee's
4 diagnosis and what --

5 Q. Okay.

6 MR. PORTER: She's not finished.

7 A. Okay. And then what happens is that we
8 inform the team what the MTR states, as in the fact
9 of what the work modifications the doctor has
10 recommended.

11 Q. Is that the only role that the medical
12 people have at the AAT meetings?

13 MR. PORTER: Objection.

14 A. My role.

15 Q. Well, when you say medical, is there a
16 doctor present at the AAT meeting?

17 A. Yes.

18 Q. What department is that doctor from?

19 A. The Integrated Health Services Medical
20 Department.

21 Q. What is the role of that doctor at the AAT
22 meeting?

23 A. His role is to answer any questions that
24 may be presented to him regarding medical concerns

1 workplace accommodation, an AAT meeting would be
2 convened.

3 Q. Was there an AAT meeting convened for Mr.
4 Tuvell?

5 A. You asked me that question already.

6 Q. And what was your answer?

7 MR. PORTER: She said there were meetings,
8 I thought.

9 Q. Was there an AAT meeting for Mr. Tuvell?

10 A. Yes.

11 Q. Was there more than one AAT meeting for Mr.
12 Tuvell?

13 A. Yes.

14 Q. How many AAT meetings were there for Mr.
15 Tuvell?

16 MR. PORTER: Objection.

17 A. I don't remember.

18 Q. Going to the first one, do you recall when
19 that first AAT meeting was?

20 A. I do not remember.

21 Q. Who was at that meeting?

22 A. Legal, HR, medical, manager.

23 Q. When you say "manager," who were you
24 talking about?

1 A. Employee's manager, management chain,
2 managers.

3 Q. Was it Mr. Feldman?

4 MR. PORTER: Objection. You can answer.

5 A. Yes.

6 Q. Okay. And who was there from legal?

7 A. Larry Bliss.

8 Q. And who was there from HR?

9 A. Russell Mandel.

10 Q. And who was there from medical?

11 A. Dr. Stewart Snyder.

12 Q. And did you meet physically in the same
13 room or telephonically?

14 A. Telephonic.

15 Q. Do you recall when this meeting was?

16 A. I do not remember.

17 Q. What was said at this meeting?

18 MR. PORTER: Objection. I'm instructing
19 the witness not to answer on the grounds that it's
20 covered by the attorney-client privilege.

21 Q. Was there a second AAT meeting?

22 MR. PORTER: Objection.

23 A. Yes.

24 Q. Do you recall when that meeting was?

Kathleen Ann Dean - March 27, 2014

1 A. I do not remember.

2 Q. Who was at that second meeting?

3 A. I do not remember everyone present at that
4 meeting.

5 Q. Okay. Of the people who you do remember,
6 who was there?

7 A. Legal, HR, managers, and Dr. Stewart
8 Snyder.

9 Q. Who was there from legal?

10 A. Larry Bliss or Greg Meyer.

11 Q. Who was there from HR?

12 A. I don't know all the HR partners.

13 Q. Was Mr. Feldman at the second meeting?

14 A. I don't remember.

15 Q. What was said at the second meeting?

16 MR. PORTER: Again, we're going to instruct
17 her not to answer on the grounds that it's covered
18 by the attorney-client privilege.

19 Q. Was there any other AAT meetings for Mr.
20 Tuvell?

21 MR. PORTER: Objection.

22 A. There was meetings regarding Mr. Tuvell.

23 Q. When was the third meeting?

24 A. I don't remember.

1 Q. Can you go to the first page of Exhibit 6.

2 MR. PORTER: She has it.

3 Q. And the top e-mail is an e-mail from Dr.
4 Snyder to you which was received on September 13th,
5 2011; is that correct?

6 A. Yes.

7 Q. Do you see where he wrote and mentioned a
8 250-page diatribe?

9 A. Yes.

10 Q. What do you think Dr. Snyder meant by that?

11 MR. PORTER: Objection.

12 A. I don't know.

13 Q. Okay. In your understanding, did you feel
14 that Dr. Snyder was diminishing Mr. Tuvell in any
15 way by using the word diatribe?

16 MR. PORTER: Objection to the form.

17 A. No.

18 Q. Did you feel that he was dismissing the
19 complaint by using that word?

20 MR. PORTER: Objection.

21 A. No.

22 Q. To your knowledge, has Dr. Snyder used
23 similar language on other cases?

24 A. Yes.

1 Q. And do you see where it says, "Me thinks he
2 dos proetesteth too much"?

3 A. Yes.

4 Q. What did you think Dr. Snyder meant by that?

5 MR. PORTER: Again, objection to the form
6 of the question.

7 Q. You can answer.

8 A. It's a quote from someone.

9 Q. What was he trying to communicate to you by
10 your understanding?

11 MR. PORTER: I object. She didn't write
12 the e-mail. She's a recipient of the e-mail, and
13 you actually asked the doctor about it during his
14 deposition.

15 Q. You can answer.

16 MR. PORTER: Objection.

17 A. Can you say -- repeat what you said?

18 Q. What was your understanding of Dr. Snyder's
19 statement that, "Me thinks he dost proetesteth too
20 much"?

21 A. The employee wrote a 250-page form with
22 complaints. That's my interpretation of it.

23 Q. And that he was protesting too much?

24 MR. PORTER: Objection.

1 Q. Correct?

2 A. No.

3 Q. No. Okay. Than other than when Dr. Snyder
4 wrote, "Me thinks he dost proetesteth too much," did
5 that indicate any information to you?

6 MR. PORTER: Rob --

7 Q. What is your understanding of that statement?

8 MR. PORTER: Rob, she's already testified.
9 She just gave you the answer. You're asking her to
10 interpret someone else's e-mail.

11 MR. MANTELL: No, I'm asking her her
12 understanding.

13 MR. PORTER: I understand that. But you
14 asked her that, and she answered it already.

15 MR. MANTELL: She did not answer it. She
16 did not answer the question.

17 MR. PORTER: You just didn't like the
18 answer, but she did answer it, and the record speaks
19 for itself, Rob, come on, I mean.

20 Q. What was your understanding of what Dr.
21 Snyder was attempting to communicate when he wrote,
22 "Me thinks he dost proetesteth too much"?

23 MR. PORTER: Objection to the form of the
24 question.

1 MR. PORTER: I object. The document speaks
2 for itself, Rob.

3 A. I'm not involved in the C&A process.

4 Q. Yes. But my question is, as of October 11,
5 2011, was it your understanding that Mr. Tuvell was
6 alleging that IBM was retaliating against him?

7 MR. PORTER: Same objection: The document
8 speaks for itself.

9 A. Yes.

10 Q. Now, what was your understanding of Dr.
11 Snyder's repetition to you on page 1 that quote, "He
12 dost proetesteth too much me thinks"?

13 MR. PORTER: Again, I object. You are
14 asking this witness to interpret what another
15 witness, who just testified last week, wrote.

16 Q. You can answer.

17 MR. PORTER: Objection to the form.

18 THE WITNESS: So, what question is he
19 asking me?

20 Q. What was your understanding of this
21 repetition from Dr. Snyder? What did you believe
22 that Dr. Snyder was attempting to communicate here?

23 MR. PORTER: What are you referring to?

24 MR. MANTELL: "He dost proetesteth too much

1 me thinks."

2 MR. PORTER: So you're asking her what he
3 means by that?

4 MR. MANTELL: Yes.

5 MR. PORTER: Okay. I object. That's -- I
6 object. You can answer if you can.

7 A. That the employee has a complaint and he's
8 talking about it.

9 Q. Okay. Nothing else?

10 A. No.

11 Q. Okay. Did you believe that Mr. Tuvell was
12 protesting too much?

13 MR. PORTER: Objection.

14 A. No.

15 Q. Can you go to Exhibit 14, please.

16 MR. PORTER: Sure.

17 (The document was handed to the witness,
18 and the witness examined the document.)

19 MR. PORTER: She has Exhibit 14. She's
20 going to review it.

21 Okay. She's ready.

22 Q. Do you recognize Exhibit 14?

23 A. Yes, I do.

24 Q. What is this document?

1 that you had any conversation, okay.

2 A. No.

3 Q. So is it fair to say that you did not
4 communicate with Mr. Mandel verbally about Mr.
5 Tuvell outside of earshot of counsel?

6 A. I did not talk to Dr. -- or Russell Mandel
7 outside of our HR meetings, no, or meetings with
8 counsel.

9 Q. Can you go to Exhibit 16, please.

10 (The document was handed to the witness,
11 and the witness examined the document.)

12 MR. PORTER: The witness has Exhibit 16.
13 She's reviewing it.

14 A. I have read the document.

15 Q. Do you recognize this document?

16 A. Yes, I do.

17 Q. What is it?

18 A. It's a document, a Lotus Note to Dr. Snyder
19 on 10/19/2011 telling him that I spoke to the
20 licensed social worker.

21 Q. When did you speak to the licensed social
22 worker?

23 A. As stated in here, on Wednesday the 19th.

24 Q. October 19th, 2011?

Kathleen Ann Dean - March 27, 2014

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1 A. Yes.

2 Q. Okay. And the licensed social worker was
3 Stephanie Ross?

4 A. As indicated on this, yes.

5 Q. Well, in your memory, did you speak to
6 Stephanie Ross on October 19th, 2011?

7 A. Yes.

8 Q. And on the second page of Exhibit 16, are
9 these your notes about the conversation?

10 A. Yes.

11 Q. Why did you speak with Ms. Ross?

12 A. As I had stated before, in talking to an
13 employee's treating physician to let them know what
14 the employee is -- has -- what do I want to say --
15 his medical treatment report form, what's going on:
16 To make sure she's aware of what's going on with the
17 employee and what he has presented to us, medically.
18 So that she can also tell us what's going on to make
19 sure that he's receiving the appropriate medical care.

20 Q. Did you ask Ms. Ross if Mr. Tuvell was
21 dangerous or violent?

22 A. I don't remember.

23 Q. Does page 2 of the Exhibit 16 accurately
24 reflect your interview of Ms. Ross?

1 A. Yes.

2 Q. Did Ms. Ross communicate to you that Mr.
3 Tuvell is suffering from PTSD?

4 A. I don't remember that.

5 Q. Can you go to the first page of Exhibit 16?

6 A. Okay.

7 Q. Move to the third paragraph, it says,
8 "Medical problem: He is suffering from PTSD."

9 Do you see where it says that?

10 THE WITNESS: Where?

11 MR. PORTER: Right here (indicating).

12 A. Okay.

13 Q. Does that refresh your recollection that
14 Ms. Ross reported that Mr. Tuvell had PTSD?

15 A. Yes.

16 Q. And she did report that?

17 A. She didn't state it to me in this form, the
18 written form that I have here.

19 Q. Well, all I'm asking is your recollection
20 of your discussion with Ms. Ross. Did Ms. Ross tell
21 you on October 19th, 2011, that Mr. Tuvell had PTSD?

22 A. Yes.

23 Q. Is it fair to say that on October 19th,
24 2011, (inaudible) the e-mail contained on page 1 of

Exhibit 80



THIRD Open Door

Walter Tuvell to: RUSSELL E MANDEL 03/02/2012 11:46 AM

Kathleen Dean, Al Pfluger, Diane Adams, Chris
Cc: Kime, Daniel Feldman, John Metzger, Arvind
Krishna, Pratyush Moghe, Fritz Knabe, Robert
Lewis Alderton, Amalendu Haldar, Andy McKeen,
Bcc: Andrew Galasso, Ashish Deb, William Ackerman,
Brian Doherty, Harvey Harrison, Brian Maly, Daniel

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM
Cc: Kathleen Dean/Fishkill/IBM@IBMUS, Al Pfluger/Fishkill/IBM@IBMUS, Diane
Adams/Fishkill/IBM@IBMUS, Chris Kime/Austin/IBM@IBMUS, Daniel
Feldman/Marlborough/IBM@IBMUS, John Metzger/Marlborough/IBM@IBMUS,
Bcc: Lewis Alderton/Marlborough/IBM@IBMUS, Amalendu
Haldar/Marlborough/IBM@IBMUS, Andy McKeen/Lexington/IBM@IBMUS,
Andrew Galasso/Marlborough/IBM@IBMUS, Ashish
Default custom expiration date: 03/02/2013

Russell -

In your note to me earlier this week (02/28/2012 06:52 AM), you closed the books on my New Complaint. You did so by stating several new "reasons" for IBM's refusal to transfer me (pursuant to my quest for reasonable accommodation under ADA), attempting to replace earlier-stated illegal reasons by Chris Kime and Dan Feldman. Unfortunately, your stated reasons are STILL ILLEGAL.

Therefore, I have no recourse but to continue my opposition to IBM's illegal/discriminatory ways, as required by the BCG. I hereby file my third Open Door (including Corporate Open Door, Concerns & Appeals, Corporate Trust and Compliance Office).

As documentation in support of this third Open Door, I offer Addendum I to my New Complaint document, entitled *IbmTransfer-Addl.pdf*. It, together with all its companion documents (which now also includes Addendum V to my Old Complaint), is available at <http://www.filedropper.com/wetibmcomplaint>. These documents include a full recounting of everything that's happened.

As required by "IBM Law", the investigation into this matter must be handled by someone other than you, since you are personally involved in serious wrongdoing, contrary to the interests of IBM.

For anyone who wants to communicate with me privately (via non-Notes email), I can be reached at walt.tuvell@gmail.com.

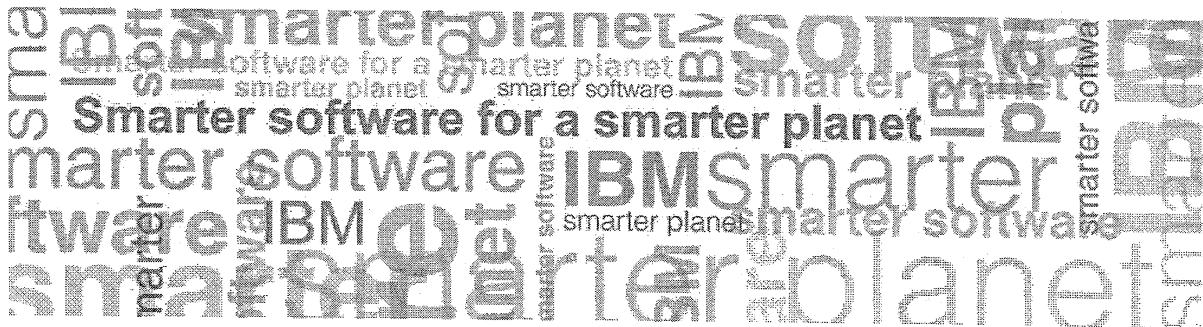
- Walter Tuvell



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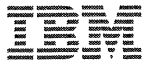
Claims Of Corporate And Legal Misconduct

Addendum V



Walter Tuvell

March 2, 2012



Document History

Rev.	Date	Author	Remarks
1.0	March 2, 2012	Walter Tuvell	First version

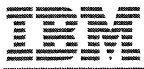
Related Documents

Author	Date	Title
Walter Tuvell	August 18, 2011 (version 1.0)	<i>Claims Of Corporate And Legal Misconduct, in two Parts: Part I (Acts Of Fritz Knabe); Part II (Acts of Dan Feldman, HR, Legal) — Referenced as "original (two-Part) Complaint"</i>
Walter Tuvell	August 28, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum I</i>
Walter Tuvell	September 4, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum II</i>
Walter Tuvell	September 22, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum III</i>
Walter Tuvell	November 3, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum IV</i>
Walter Tuvell	January 22, 2012 (Version 1.1)	<i>Claims Of Interference, And Demand For Transfer — Referenced as "New Complaint"</i>
Walter Tuvell	March 2, 2012	<i>New Complaint, Addendum I</i>
Walter Tuvell	May 24, 2011	<i>PerfScore; Establishing A Model Of Performance Measurement For NPS Systems</i>



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53 Executive Summary — Addendum V

This document is Addendum V to my original two-Part Complaint plus Addenda I-IV.

Hereinafter, the unqualified term “Complaint” includes the original two Parts, plus Addenda I-V, unless otherwise specified.

Note: The years in which events occurred (2011, 2012) are largely self-explanatory, hence are omitted unless necessary to avoid confusion/ambiguity.

53.1 List Of Particulars

- Russell Mandel’s dishonest/sham “findings” to his IDR/C&A “investigation” into my case, constitute a *cover-up*, and discrimination-retaliation (as well as fraud/IIED/etc.). Sections 56–57 below. This is most especially evident because of the very clear “retaliation *per se*” component of the November 17 phone call (Section 57.1, below).
- Additional counts of *defamation*: According to Russell Mandel’s “findings” of his “investigation”, Mandel was given information that I did had failed to provide Fritz with all the support he required. Sections 56–57 below. That is provably false, and was known-false at the time (as proved in Section 57). Therefore, the person(s) who published that known-false information (specifically Fritz, presumably aided by Dan) defamed me to Mandel. Furthermore, to the extent that Mandel himself published that information (as he hints he did, see New Complaint, Addendum I), Mandel committed defamation.
- Additional counts of *actual-discrimination and discrimination-retaliation* (on the basis of disability): You know **all** those instances of behavior I’ve heretofore called “blackballing/harassment/retaliation/IIED/etc.”? Well, now that I understand more about ADA and law, I hereby additionally recast them as *discrimination* as well. For, those acts were all perpetrated by people who *knew at the time* about my PTSD-based disability, yet subjected me to PTSD-inducing abuse and disparate treatment (with respect to how I’d been treated prior to filing my complaints). For, said knowledge was certainly true of Dan, because I’d told him about my disability very early on (no later than December, 2010)¹⁷⁴ — and at that point it was his *affirmative responsibility* (under ADA) to proactively inform others and seek reasonable accommodation for me, *protecting me from attack from anyone else at IBM* (especially Russell Mandel and HR). Even if Dan didn’t inform others, I certainly did, beginning immediately after filing my complaint on June 10 (proof: Section 59, below).¹⁷⁵
- IBM was clearly aware of my need for (ADA-mandated) *reasonable accommodation* already in mid-June (because I was begging to be removed from Dan’s abuse, based on my history of PTSD), yet refused to recognize/acknowledge/discuss it with me

¹⁷⁴ Section 60, below.

¹⁷⁵ Incidentally, this probably explains why Dan/Fritz refused a three-way meeting with me (Complaint, Part I, Section 1.3, second bullet): they were acting as co-conspirators, actively/knowingly using Fritz’s defamation to psychologically abuse me. (Otherwise, why are they using false/pretextual reasons to cover-up their actions? Sections 57.5–6, below.)



for nearly *four months* (the first such acknowledgment was Addendum IV, p. 18, email of 2011-10-10 09:33 AM). That willful stonewalling (“undue delay”) amounts to illegal *refusal to engage in ADA-mandated “interactive process”*.

- *IHS culpability*: In addition to the many-times-repeated refusals, by management (Dan) and HR (Mandel), to negotiate/grant “ADA reasonable accommodation” cited heretofore in this Complaint, we now recognize IHS’s (Integrated Health Services) role in independently committing the same wrongs. Below, Section 59 *passim* and Appendix III *ff*.
- IBM’s illicitly *forcing* me to go onto STD (66⅔%-pay for the second 13 weeks of STD benefits); then onto unpaid leave (0%-pay, until LTD approved, if ever); then onto LTD (50%-pay, if/when approved): these all amount to acts of *adverse job action* (*violations of discrimination law, on the basis of known-disability*), as well as *theft* (illicit deprivation of income). They should have transferred me instead, as reasonable accommodation.
- A more obvious, spontaneous, unforced *self-admission of wrongdoing* than the Transfer Debacle (*New Complaint*, see Section 58 below) cannot be imagined. Namely:
 - Violation of ADA law, admitted by Chris Kime (but blaming his up-line management and HR).
 - Cover-up by Dan.
 - Cover-up-of-cover-up by Russell Mandel.

54 Typos, Etc.

- Part I, p. 19, middle: “I agree” should read “I agreed”.
- Part II, p. 18, fn. 77: “servent” should be “servant”.
- Addendum I, p. 7, paragraph beginning “That is content-free blather”: Change “especially involving two where” to “especially involving two instances where”.
- New Complaint, p. 4: I wrote of “four consecutive MTRs”, but that count was erroneous. There were actually six MTRs submitted. Details are explained in a footnote to the Comments paragraph near the beginning of Section 59, below.
- New Complaint, p. 24: The email dated “2011-21-01 01:25 PM” should be dated “2011-12-05 01:25 PM”.
- New Complaint, p. 29: The email dated “2010-01-03 07:43 AM” should be dated “2012-01-03 07:43 AM”.
- New Complaint, pp. 31-36: In page headers, change “Performance Proposal” to “Complaint”.

Exhibit 81

Robert Mantell

Subject: FW: New Complaint, Addendum II
Attachments: lbmTransfer-AddII.pdf

----- Original Message -----

Subject: New Complaint, Addendum II

Date: Fri, 09 Mar 2012 15:49:11 -0500

From: Walt Tuvell <walt.tuvell@gmail.com>

Reply-To: walt.tuvell@gmail.com

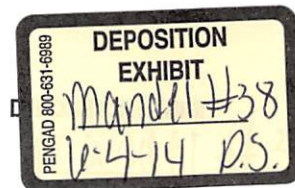
To: rmandel@us.ibm.com

CC: grometty@us.ibm.com, rkaplan@us.ibm.com, dfeldman@us.ibm.com, fknabe@us.ibm.com, knabe@alumi.princeton.edu, jmetzger@us.ibm.com, pmoghe@us.ibm.com, arvindk@us.ibm.com, rjl@us.ibm.com, pomalley@us.ibm.com, rosemr@us.ibm.com, lhattar@us.ibm.com, castelf@us.ibm.com, adamsd@us.ibm.com, tfleming@us.ibm.com, jrmac@us.ibm.com, sam@us.ibm.com, kschwartz@us.ibm.com, awmckeen@us.ibm.com, smcafee@us.ibm.com, rmara@us.ibm.com, bmaly@us.ibm.com, phouliha@us.ibm.com, tonyhart@us.ibm.com, mgutierr@us.ibm.com, jgrif@us.ibm.com, dflaxman@us.ibm.com, jfinnert@us.ibm.com, dalyk@us.ibm.com, jbast@us.ibm.com, dbarrett71@us.ibm.com, lalderto@us.ibm.com, wackerman@us.ibm.com, ahaldar@us.ibm.com, Al Pfluger <adp415@us.ibm.com>, deanka@us.ibm.com, jwentworth@us.ibm.com, agalasso@us.ibm.com, gbooman@us.ibm.com, john.yates@us.ibm.com, pds@us.ibm.com, adeb@us.ibm.com, jshkolni@us.ibm.com, lutzl@us.ibm.com, iamfelix@us.ibm.com, smizar@us.ibm.com, jeffk@us.ibm.com, dagrawal@us.ibm.com, chenh@us.ibm.com, slubars@us.ibm.com, rtitle@us.ibm.com, msporer@us.ibm.com, gdickie@us.ibm.com, ddietterich@us.ibm.com, ttignor@us.ibm.com, lstabile@us.ibm.com, dnoe@us.ibm.com, bbrick@us.ibm.com, bethts@us.ibm.com, ckime@us.ibm.com, kyurhee@us.ibm.com, lisadue@us.ibm.com, campbely@us.ibm.com, mwieck@us.ibm.com, gilliamb@us.ibm.com, blachance@us.ibm.com, pfrancisco@us.ibm.com, vfortin@us.ibm.com, cwarner@us.ibm.com

Russell -

Attached is Addendum II to my New Complaint, incorporating your illegal acts of this week. It is to be considered as part of my Third Open Door, of course.

- Walt



DEBORAH SMITH CSR

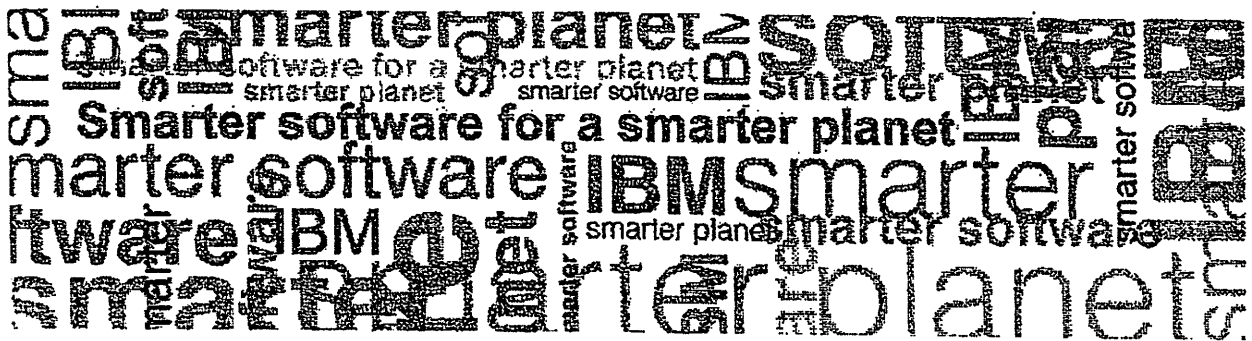
10-4-14



NETEZZA®
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Claims Of Interference, And Demand For Transfer

Addendum II



Walter Tuvell

March 9, 2012



Document History

Rev.	Date	Author	Remarks
1.0	March 9, 2012	Walter Tuvell	First version

Related Documents

Author	Date	Title
Walter Tuvell	August 18, 2011 (version 1.0)	<i>Claims Of Corporate And Legal Misconduct, in two Parts: Part I (Acts Of Fritz Knabe); Part II (Acts of Dan Feldman, HR, Legal) — Referenced as "Old Complaint"</i>
Walter Tuvell	August 28, 2011 (Version 1.0)	<i>Old Complaint, Addendum I</i>
Walter Tuvell	September 4, 2011 (Version 1.0)	<i>Old Complaint, Addendum II</i>
Walter Tuvell	September 22, 2011 (Version 1.0)	<i>Old Complaint, Addendum III</i>
Walter Tuvell	November 3, 2011 (Version 1.0)	<i>Old Complaint, Addendum IV</i>
Walter Tuvell	January 22, 2012 (Version 1.1)	<i>Claims Of Interference, And Demand For Transfer — Referenced as "New Complaint"</i>
Walter Tuvell	March 2, 2012	<i>New Complaint, Addendum I</i>



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22 Executive Summary — Addendum II

This document is Addendum II to my New Complaint plus Addendum I.

Hereinafter, the unqualified term “New Complaint” includes the original New Complaint, plus Addenda I-II, unless otherwise specified.

Note: The years in which events occurred (2011, 2012) are largely self-explanatory, hence are omitted unless necessary to avoid confusion/ambiguity.

22.1 List Of Particulars

- New charge of illegal discrimination-retaliation against Mandel, because of his rescission of my electronic access to Notes and w3, based upon my protected communications.

23 Typos, Etc.

- Old Complaint, Addendum V, p. 19: Change “poor-copy-quality” to “poor-quality-copy”.
- Old Complaint, Addendum V, section 60.4: Add the following item to the bullet-list:
 - *Trusting trust* — At a group meeting (in or about February-March, 2011), I mentioned Ken Thompson’s famous Turing award lecture *Reflections on Trusting Trust* (Comm. ACM, Vol. 27, No. 8, August 1984, pp. 761-763). This was a “classic” paper in computer science ever written (right up there with Dijkstra’s *Go To Statement Considered Harmful*, Comm. ACM, March 1968, Vol. 11, No. 3, pp. 147-148), and it never occurred to me Dan hadn’t heard of it, but that turned out to be the case. I worried this might be perceived as my “being too smart, and showing-up Dan”.

24 Submission Of Third Open Door ...

On Friday, March 2, I submitted my third Open Door complaint. It is based upon Addendum I to the instant New Complaint. Appendix U.

Moreover, at this point in our saga, it had become quite obvious that the culture of illegal/disability corruption at IBM was too widespread/ingrained/embedded for me to remain “quiet” any longer. I had to get “louder” (more forceful in my opposition), because the “usual channels” (Open Door, Corporate Open Door, Concerns & Appeals, Trust and Compliance Office) weren’t working. Too many employees were potentially/probably affected (in danger of discrimination/retaliation/bullying/etc.). *Sound judgment* (see BCG quotes, below) required that I must now “oppose” IBM’s bad behavior more vigorously.



So, to the end of "spreading the word about opposing IBM's illegal/discriminatory behavior" more widely, I took the "louder" step of emailing/CC'ing/BCC'ing²² more people about my complaints than I had done previously, thereby attempting to both (i) *speak up* (see BCG quotes, below) so as to "warn others", and (ii) recruit *additional help* (see BCG quotes, below) in my opposition. Appendix U.

My actions were fully within the scope envisioned/recommended/required by the BCG (pp. 6-7; emphasis added):

■ **Speaking Up**

Your responsibility to know and follow the Business Conduct Guidelines includes reporting potential violations.

- Remember, there are no simple shortcuts or automatic answers for the choices we have to make in business today. No single set of guidelines or policies can provide the absolute last word to address all circumstances. Therefore, we expect IBMers to use *sound judgment* in all of their conduct and *ask for help when needed*.

And, of course, as always, my actions/communications/emails were *protected* under law, as "(reasonable)²³ opposition to illegal/discriminatory practices" (EEOC Compliance Manual, Section 8: Retaliation; document number 915.003, dated 5/20/98; sec. 8-II(B)(2-3); available at <http://www.eeoc.gov/policy/docs/retal.html>; emphasis added):

- **Complaining to anyone** about alleged discrimination against oneself or others.
- *Threatening to file a charge* or other formal complaint alleging discrimination.²⁴
- *Refusing to obey* an order because of a reasonable belief that it is discriminatory.²⁵
- *Public criticism* of alleged discrimination may be a reasonable form of opposition.²⁶
- *Requesting reasonable accommodation*.²⁷

24.1 ... And New Retaliation Thereupon

Naturally, Russell Mandel couldn't pass up this opportunity to immediately, reflexively and gleefully commit new acts of 100% pure (discrimination-)retaliation:

- He rescinded my electronic access rights to Lotus Notes, based self-avowedly upon his animosity to my emails. He informed me he intended to do so, and he did do so,

22. Generally speaking: direct addresses are people more-or-less directly involved; CC's are manager-types; BCC's are employee-types. While I made some attempt to protect employees from retribution by managers, it is realized that Lotus Notes administrators are capable of piecing together all communications, bit-by-bit. (Notwithstanding the exposure caused by the present document.)

23. It is possible for opposition to be "unreasonable," but examination of case-law shows no precedent indicating anything I've done is anywhere near the "unreasonability" standard.

24. I have made no such threats, though Dan falsely, and snidely, accused me of such. Complaint, Part II, Appendix M, email of 06/12/2011 02:44 PM (the "Dear Dr. Tuvell" letter).

25. I have not knowingly disobeyed any orders, though Mandel falsely accuses me of "abuse ... misuse ... of IBM systems". Appendix U.

26. My emails did not constitute "public criticism", of course — the emails were all individually targeted, not publicly posted.

27. To which I must plead "guilty, in spades".



unilaterally (i.e., with no bilateral discussion/negotiation), accompanied with false assertions about his reasons for doing so.

- Also, based upon the same animosity (and accompanied with the same false assertions), he separately (but simultaneously) rescinded my electronic access rights to the whole of IBM's internal network, known as "w3" (short for "WWW" [world-wide web], accessed via VPN [virtual private network] technology). He did this surreptitiously, *without* even informing me of his intent to do so (I discovered it by myself, by happenstance, when I tried to access w3).

Appendix U.

Note that denial-of-access to w3 is much more drastic than denial-of-access to Notes. For, email communications can always be achieved outside of Notes (merely by using normal Internet/network email [which connects to Notes email]). But lack of access to w3 means I could not longer access *any* of IBM's internal resources/services — such as the IBM internal web services, employee handbooks, announcements, the employee database, etc. And most especially, I could no longer access GOM. Thus, I could no longer apply for IBM internal transfers, or even discover what positions were available.

Mandel's acts are illegal (because based directly upon his animosity to my protected email communications).

25 Books On Workplace Bullying

In Appendix V, I list some books on workplace bullying. I wish at least *one* person in authority at the IBM Executive level (or management, or HR, or Legal, or IHS) would read at least *one* of these books. With understanding.

After all, if only a *single* person in authority (of the *dozens* "in-the-know") had "stood up" during this case, at any of numerous junctures, so much wrongdoing and heartache could have been avoided. But instead, they all "laid down together" — as a *United Band Of IBM Bullies*.

As a result, it's now too late for IBM to avoid anything.



APPENDICES — Addendum II

U Email Chain: THIRD Open Door (Mar: 2-6)

■ From: Walter Tuvell
 To: Russell Mandel
 Cc: Al Pfluger, Arvind Krishna, Barbara Brickmeier, Beth Smith, Chris Kime, Daniel Feldman, Diane Adams, Fritz Knabe, Ginni Rometty, John Metzger, Kathleen Dean, Kyu Rhee, Larry Hatter, Lisa Due, Lydia Campbell, Marie Wieck, Mathieu Armand, Pat OMalley, Pratyush Moghe, Randy MacDonald, Richard Kaplan, Robert L Gilliam, Robert LeBlanc, Rose M Trewartha, Samuel J Palmisano, Steve Mills, Tom Fleming, Yvonne Perkins, Zel Hunter
 Bcc: Amalendu Haldar, Andrew Galasso, Andy McKeen, Anthony Hart, Ashish Deb, Brian Doherty, Brian Maly, Daniel Barrett, Daniel Dietterich, Daniel Noe, David Flaxman, Devesh Agrawal, Felix Santiago, Garth Dickie, Gordon Booman, Harvey Harrison, Huamin Chen, Jacob Bast, James Griffin, James L Finnerty, Jason Viehland, Jay Wentworth, Jeffrey Keller, John Yates, Joseph Shkolnik, Kenneth Schwartz, Lawrence Stabile, Lewis Alderton, Michael Sporer, Paul Houlihan, Paul Smith, Richard Title, Ryan Mara, Steve Lubars, Steve McAfee, Thomas Tignor, William Ackerman
 Date: 2012-03-02 11:46 AM
 Subject: THIRD Open Door

Russell -

In your note to me earlier this week (02/28/2012 06:52 AM), you closed the books on my New Complaint. You did so by stating several new "reasons" for IBM's refusal to transfer me (pursuant to my quest for reasonable accommodation under ADA), attempting to replace earlier-stated illegal reasons by Chris Kime and Dan Feldman. Unfortunately, your stated reasons are STILL ILLEGAL.

Therefore, I have no recourse but to continue my opposition to IBM's illegal/discriminatory ways, as required by the BCG. I hereby file my third Open Door (including Corporate Open Door, Concerns & Appeals, Corporate Trust and Compliance Office).

As documentation in support of this third Open Door, I offer Addendum I to my New Complaint document, entitled *IbmTransfer-AddI.pdf*. It, together with all its companion documents (which now also includes Addendum V to my Old Complaint), is available at <http://www.filedropper.com/wetibmcomplaint>. These documents include a full recounting of everything that's happened.

As required by "IBM Law", the investigation into this matter must be handled by someone other than you, since you are personally involved in serious wrongdoing, contrary to the interests of IBM.



For anyone who wants to communicate with me privately (via non-Notes email), I can be reached at walt.tuvell@gmail.com.

- Walter Tuvell

■ From: Walter Tuvell
To: Larry Lutz
Date: 2012-03-03 08:28 AM
Subject: Fw: THIRD Open Door

I neglected to BCC you on this, sorry.

▶*The above email, 2012-03-02 11:46 AM, was included here.*◀

■ From: Walter Tuvell
To: Fritz Knabe ▶*At his alumni.princeton.edu email address.*◀
Date: 03/03/2012 09:03 AM
Subject: Fw: THIRD Open Door

You should know this.

▶*The above email, 2012-03-02 11:46 AM, was included here.*◀

■ From: Walter Tuvell
To: Brian Lachance, Leland Phillips, Matthew Rollender, Peter Smith, Phil Francisco, Vincent Fortin, Wendy Wheeler
Cc: Brian Hess, Clark Warner, Craig Taranto, David Utter, Jeffrey Feinsmith, Prem Yerabothu, Richard Hawkes, William Tsen, William Watts
Date: 2012-03-03 09:17 AM
Subject: Fw: THIRD Open Door

I neglected to CC you, but you need to know about this. I'm opposing the illegal/discriminatory behavior at Netezza/IBM, and I urge you (managers) to join me, for the sake of the regular employees.

▶*The above email, 2012-03-02 11:46 AM, was included here.*◀

■ From: Russell Mandel
To: Walter Tuvell
Date: 2012-03-06 11:15 AM
Subject: ▶*Subject-line omitted.*◀

It has come to our attention that you have recently sent multiple emails about your concerns to members of your team outside of the normal HR concern and appeals



channels. As you know, the concerns and appeals program is the clearly defined mechanism which allows you to raise your concerns in an orderly way. You were previously advised not to send emails to unnecessary parties about your concerns. It is considered an abuse of the IBM systems and disruptive to IBM's business.

Given this recent misuse of the systems and the fact that you no longer need notes access for business purposes since you are on an LOA awaiting a determination of your LTD application, we are removing your access to Lotus Notes effective immediately.

You can continue to communicate about any pending HR related concerns with myself at (203) 486-4561 or Diane Adams at (508)-382-8534. You can also contact Metlife or Kathleen Dean at (845) 894-9573 if you have any questions about your LTD application

Russell E. Mandel

Concerns and Appeals Program Manager
IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600
203-486-4561 (t/l 376-4561)

■ ►This email was sent in error: the succeeding email corrects it.◄

From: Walter Tuvell
To: Russell Mandel
Date: 2012-03-06 04:51 PM
Subject: About your letter

This is in response to your email of earlier today (attached).

Concerning your assertion about "You were previously advised not to send email to unnecessary parties about your concerns": That assertion is false. You cannot point to anything on-the-record to that effect (such as any IBM policy document, or any email). As for anything off-the-record, there exists only one such communication, namely the Nov. 17 phone call, and my (very careful/complete) notes on that phone call are recorded in Complaint, Addendum V, Section 56.6, p. 13. Those notes show I specifically asked you about communications with others, and you pointedly refused to inform me that I could/would be disciplined/reprimanded/retaliated upon for doing any kind of communications with anybody (inside or outside IBM). Moreover, I am obviously not now attempting to "manipulate the investigation", because my emails clearly show a complete lack of manipulation (mere "communication" does not imply "manipulation"), and because at this point the "investigation" (third Open Door) is purely about your own misdeeds, and does not involve any of the other people I've communicated with.



Concerning your assertion about "abuse ... misuse ... of IBM systems": Again, that assertion is false. For the same reasons as cited above (in particular, lack of on- or off-the-record communications), I did not abuse any IBM systems. In particular, the Nov. 17 phone call mentioned only use of storage on IBM systems as a potential abuse, but I've stored my archives on FileDropper.com, not on IBM systems. Certainly, you cannot pretend that use of IBM systems to "oppose illegal activity" is "abuse ... misuse"?

Concerning rescission of access to Lotus Notes: You cite my emails as the reason for denial of access. But, as those email themselves clearly show, their only content/purpose is to "communicate my opposition to IBM's illicit/illegal/discriminatory behavior/acts". Such communications are LEGALLY PROTECTED (at the level of discrimination-retaliation). In other words, your very act of rescinding Notes access (which is a retaliatory act), based upon my protected emails, is ITSELF ILLEGAL.

Concerning the Concerns and Appeals process: I've submitted my third complaint, and I await its investigation/resolution.

Concerning LTD: That process continues.

Concerning communications mechanism: I will continue to use email, as always, but now via Internet email, not Notes. In particular, since it is you who have unilaterally rescinded my Notes access, it is incumbent upon YOU to inform the people working on my "reasonable accommodation interactive dialog", and also the people working on LTD, that they must now use Internet email to communicate with me.

►Attachment: the above email, 2012-03-06 11:15 AM.◄

■ ►This email corrects the erroneous one, preceding.◄

From: Walter Tuvell
To: Russell Mandel
Date: 2012-03-06 04:59 PM
Subject: About your letter

This is in response to your email of earlier today (attached).

1. Concerning your assertion that I was "previously advised not to send email to unnecessary parties about your concerns":

That assertion is false. You cannot point to anything on-the-record to that effect (such as any IBM policy document, or any email). As for anything off-the-record, there exists only one such communication, namely the Nov. 17 phone call, and my (very careful/complete) notes on that phone call are recorded in Complaint, Addendum V, Section 56.6, p. 13. Those notes show I specifically asked you about communications with others, and you pointedly refused to inform me that I could/would be disciplined/reprimanded/retaliated upon for doing any kind of communications



with anybody (inside or outside IBM). Moreover, I am obviously not now attempting to "manipulate the investigation", because my emails clearly show a complete lack of manipulation (mere "communication" does not imply "manipulation"), and because at this point the "investigation" (third Open Door) is purely about your own misdeeds, and does not involve any of the other people I've communicated with.

2. Concerning your assertion about "abuse ... misuse ... of IBM systems":

Again, that assertion is false. For the same reasons as cited in the preceding paragraph (in particular, lack of on- or off-the-record communications), I did not abuse any IBM systems. In particular, the Nov. 17 phone call mentioned only use of storage on IBM systems as a potential abuse, but I've stored my archives on FileDropper.com, not on IBM systems. Certainly, you cannot pretend that use of IBM systems to "oppose illegal activity via email" is "abuse ... misuse" (given that I'm still an IBM employee, hence authorized to use Notes)? For example, you'd get laughed out of court if you tried making that argument in court (disclaimer: this is not a "threat" of court action, just an example).

3. Concerning rescission of access to Lotus Notes:

First: You explicitly cite my emails as the reason for denial of access. But, as the contents of those email themselves clearly show, their only content/purpose is to "communicate my opposition to IBM's illicit/illegal/discriminatory behavior/acts". Such communications are LEGALLY PROTECTED (at the level of discrimination-retaliation). In other words, your very act of rescinding my Notes access (which is a retaliatory act), based upon your explicit citation of said protected emails, is IT-SELF ILLEGAL.

Second: You cite lack of business necessity. That is false. For example, I need to communicate with you about ongoing investigation, and with mgmt/HR concerning "reasonable accommodation interactive dialog", and LTD. The truth of said business necessity is verified by you yourself in this very email, because you go on to give me the telephone contact information of certain persons -- which is, however, wholly inadequate, because any sensible person in my position requires all communications to be on-the-recorded-record (for obvious reasons, and as I have specifically stated many times).

[If, for example, there were some sort of general IBM policy, uniformly enforced, that Notes access is rescinded whenever an employee goes onto unpaid leave, then I'd have no complaint here. But I've found no such policy, and even if there were such a policy, you yourself have just now NOT given it as reason for rescission, rather you've specifically chosen to rely on the illegal noted reason above.]

4. Concerning the Concerns and Appeals process:

My third complaint was duly submitted last Fri (Mar 2), and I now await its investigation/resolution.

But, to that third complaint, I now hereby add: your illegal (discrimination-retalia-



tion) rescission of my access to Notes, as discussed in the preceding paragraph.

5. Concerning LTD:

I continue to pursue that process, per MetLife's direction.

6. Concerning communications mechanism:

I will NOT use telephone. I will continue to use email, as always -- but now it will have to be Internet email, not Notes. Furthermore, since it is you who have unilaterally rescinded my Notes access, it is incumbent upon YOU to inform the people working on my "reasonable accommodation interactive dialog", and also the people working on LTD, that they must now use Internet email to communicate with me.

I hereby authorize you to distribute my email contact information (walt.tuvell@gmail.com) to anybody, any time, for any purpose.

►Attachment: the above email. 2012-03-06 11:15 AM.◄

■ From: Walter Tuvell
To: Russell Mandel
Date: 2012-03-06 5:02 PM
Subject: Oops

I think I just now accidentally sent you 2 emails, both entitled "About your letter", but with different contents.

The first one (dated 4:51 PM) was an error, a finger-slip (an early version, accidentally still lurking in my Drafts folder). Please ignore it.

The second one (dated 4:59 PM) was the one I intended to send. Please heed it.

My apologies.

V Books On Workplace Bullying



NETEZZA
Complaint

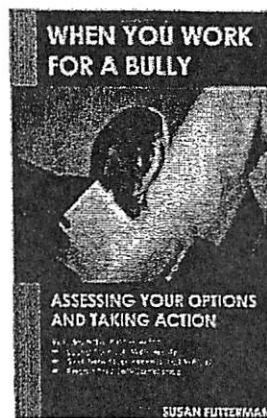
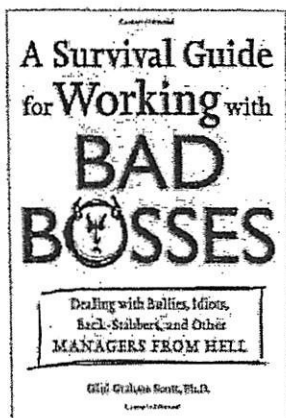
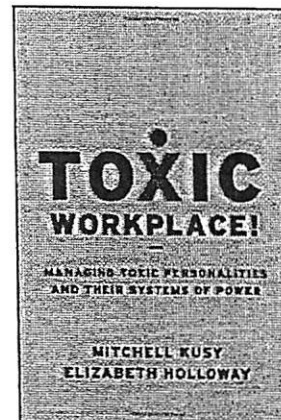
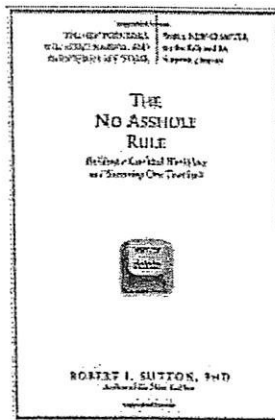
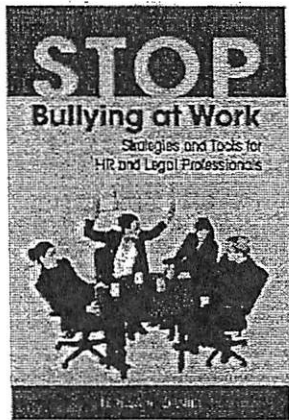
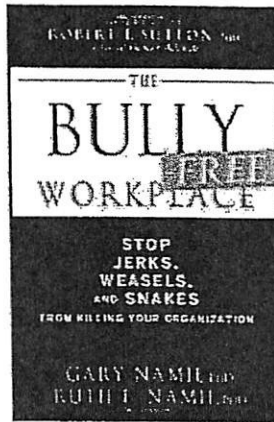
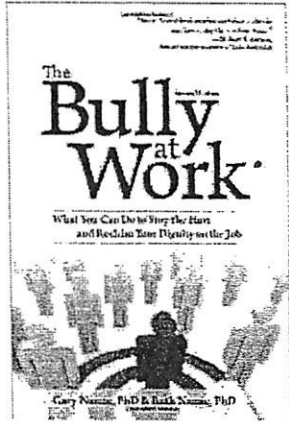


Exhibit 82

Subject:Re: About your letter

Date:Tue, 13 Mar 2012 10:29:46 -0400

From:RUSSELL E MANDEL <rmandel@us.ibm.com>

To:walt.tuvell@gmail.com

On March 6, 2012, IBM restricted your access to IBM systems because you were causing disruption by failing to utilize the proper mechanism for raising concerns about HR related issues. It has come to our attention that you are now using a personal email address to engage in the same conduct. We have discussed on multiple occasions the need for you to direct your issues with IBM and IBM personnel to a limited distribution list, more specifically, to me.

As my previous notes to you stated, the concerns and appeals program is the clearly defined mechanism which allows you to raise your concerns in an orderly way. I am your point of contact for the concerns and appeals process. IBM considers your continuous emailing of copies of your complaint and numerous addenda -- to dozens of people unrelated in any way to the concerns and appeal process -- disruptive to IBM's business.

If this conduct continues, you will be subject to discipline, up to and including termination.

Russell E. Mandel

Concerns and Appeals Program Manager


IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)



Exhibit 83



Re: Transition status for Wed. 
Daniel Feldman to: Walter Tuvell

06/30/2011 08:27 AM

From: Daniel Feldman/Marlborough/IBM
 To: Walter Tuvell/Marlborough/IBM@IBMUS
 Default custom expiration date: 06/29/2012

History: This message has been replied to.

Walt,

My request for status is sincere, please provide me with an update. I pretend nothing; I count on you to respond appropriately to a legitimate request for information.

I believe the assertions of ill-treatment you raised have been investigated appropriately and that there is insufficient evidence to support your claim. I believe that Lisa Due has told you how you can pursue that matter further inside IBM if you choose to do so.

Please cooperate with me as I continue to do my job. I am responsible for assigning work, monitoring progress, changing assignments when necessary, inspecting work product and otherwise ensuring that the work of the Performance Architecture group is performed professionally and effectively. All of my requests for status and plans are fully within the scope of my job and the expectations of my managers and it is reasonable for me to expect you to respond to them.

Please keep your communication professional and appropriate. Sarcasm, assertions of bad faith, refusal to comply with reasonable requests and other such behaviors are inconsistent with success. I would very much like you to succeed.

There are some factual errors stated in your previous communication and implied in this one that need to be corrected:

1. You have not been demoted
2. You are not on a performance plan
3. You do not take direction from Sujatha

There are four days left before your medical leave. I need to know what you expect to accomplish in those four days. I need to ensure that the work is left in a reasonable state on Wednesday, 7/6; one that will enable the legitimate work of the Performance Architecture group to continue during your extended absence. As I will be absent for one of those four days (tomorrow), it is important that the planning be done today. I have a busy day of meetings today and it is essential that we communicate effectively and appropriately. Communication is a two-way street; your cooperation is essential.

I believe you have three projects assigned to you:

1. Plan and construct tests and analyze data so that we can gain an understanding of the actual behavior of disks in the Netezza product under varying workloads

TUVELL000284

2. Plan and construct tests and analyze data so that we can understand the actual behavior of the FPGA component of our system under varying workloads
3. Plan and construct tests and analyze data so that we can understand the implications for performance of doubling the total disk I/O of the Twin Fin product without increasing CPU or internal network resources.

Your reference to a fourth project, I believe, is a reference to the fourth project that Sujatha was working on, establishing the performance criteria for the run-time-restrict project. This is not currently assigned to you and, while discussed briefly during our transition meeting on 6/10, never has been.

Given your seniority, I expect you to plan your work, discuss (in person or via email) your plans with me, change them as necessary based on my review and then to execute against those plans. Sometimes specific investigations will be necessary in order to gain enough understanding of a task in order to plan it appropriately. In those cases, the initial plan might contain a task or tasks representing the investigation and a task for additional planning. I am generally flexible in assessing performance against a plan when I'm usefully informed, in a timely fashion, of the circumstances that necessitated deviation from the plan.

As a first step in planning the next four days of your work, please provide me with a summary of what has been accomplished on the three projects itemized above since they were assigned to you on 6/10. I would like to have the summary by 11:00am today. If you feel this is unachievable, please explain why and propose an alternative deadline. I believe that, given your long tenure in the industry, this should be a straightforward and uncontroversial task.

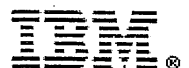
As of now, you are no longer required to provide daily transition reports nor do I expect you to provide a weekly status report for this week. Instead, I expect that you and I will work closely together during the time remaining between now and your medical leave and that by next Wednesday I will have a thorough understanding of your then current status.

Thanks in advance for your cooperation,

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell

No, of course I worked yesterday,...

06/30/2011 07:22:37 AM

From: Walter Tuvell/Marlborough/IBM

TUVELL000285

To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: Kelli-ann McCabe/Marlborough/IBM@IBMUS, Diane Adams/Fishkill/IBM@IBMUS,
Lisa Due/Somers/IBM@IBMUS
Date: 06/30/2011 07:22 AM
Subject: Re: Transition status for Wed.

No, of course I worked yesterday, surely you've seen my contributions to the wiki overnight (I know you follow the wiki closely, so you can pretending now).

The "Nil" meant what it's meant all along with these entirely superfluous "transition updates": nothing to speak of with respect to the demotion, because I didn't interact with Sujatha. That (abbreviated one-liners) is the standard she set with her initial transition update report, and it's exactly what I've been doing all along. You DO know this, you cannot pretend you think the "transition" updates I've been sending all along have accounted for ALL the work I've been doing!

In other words, this letter is obviously intended as harassment, and I take objection to it as such. I guess I should at least thank you for putting in email for me.

Daniel Feldman Walt, I realize you had one or m... 06/30/2011 06:35:14 AM

From: Daniel Feldman/Marlborough/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 06/30/2011 06:35 AM
Subject: Re: Transition status for Wed.

Walt,

I realize you had one or more doctor appointments yesterday. You had indicated that you would be working from home. Is this status 'Nil' because you did not actually work from home yesterday? If so, no problem - please just let me know.

If you did work from home yesterday, what did you work on?

Thanks,

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell Nil. 06/30/2011 04:49:09 AM

TUVELL000286

Exhibit 84

From: Daniel Feldman
To: Lisa Due
CC: Kelli-ann McCabe; Diane Adams; John Metzger
BCC:
Sent Date: 2011-06-30 14:34:21:000
Received Date: 2011-06-30 14:34:31:000
Subject: Fw: Transition status for Wed.
Attachments:

Lisa,

Based on the email below, I believe that Walter Tuvell is continuing to violate his conditions of employment, IBM's business policy guidelines or both. If you concur, please notify him of such and caution him to cease this behavior.

Thank you,

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

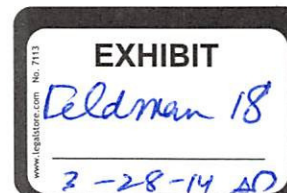
Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com

IBM CORPORATION
MAIL ROOM
3501 MARKET STREET
ARMONK, NY 10504
TEL: 914 419 4600
FAX: 914 419 4601
WWW: www.ibm.com

26 Forest St
Marlborough, MA 01752
United States

----- Forwarded by Daniel Feldman/Marlborough/IBM on 06/30/2011 10:30 AM -----

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: Kelli-ann McCabe/Marlborough/IBM@IBMUS, Diane Adams/Fishkill/IBM@IBMUS, Lisa Due/Somers/IBM@IBMUS
Date: 06/30/2011 07:22 AM
Subject: Re: Transition status for Wed.



No, of course I worked yesterday, surely you've seen my contributions to the wiki overnight (I know you follow the wiki closely, so you can pretending now).

The "Nil" meant what it's meant all along with these entirely superfluous "transition updates": nothing to speak of with respect to the demotion, because I didn't interact with Sujatha. That (abbreviated one-liners) is the standard she set with her initial transition update report, and it's exactly what I've been doing all along. You DO know this, you cannot pretend you think the "transition" updates I've been sending all along have accounted for ALL the work I've been doing!

In other words, this letter is obviously intended as harassment, and I take objection to it as such. I guess I should at least thank you for putting in email for me.

Daniel Feldman---06/30/2011 06:35:14 AM---Walt, I realize you had one or more doctor appointments yesterday. You had indicated that you would

From: Daniel Feldman/Marlborough/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 06/30/2011 06:35 AM
Subject: Re: Transition status for Wed.

Walt,

I realize you had one or more doctor appointments yesterday. You had indicated that you would be working from home. Is this status 'Nil' because you did not actually work from home yesterday? If so, no problem - please just let me know.

If you did work from home yesterday, what did you work on?

Thanks,

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell---06/30/2011 04:49:09 AM---Nil.

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Date: 06/30/2011 04:49 AM
Subject: Transition status for Wed.

Nil.

Exhibit 85

Robert Mantell

From: Walt Tuvell [walt.tuvell@gmail.com]
Sent: Tuesday, May 08, 2012 9:16 PM
To: Diane Adams; Robert Mantell; dfeldman@us.ibm.com
Subject: Re: IBM Business Conduct Guidelines

You must be joking. In my letter earlier today (included below), I wrote "known-false", and I charged you/IBM with "defamation", which of course includes as part of its very definition "falsity". That says very explicitly that your accusation is false. I have of course NOT worked for EMC since Dec 2009 (I started at Netezza in Nov 2010). And you/IBM know it. You can't convincingly pretend otherwise. For that reason, my charge of defamation/retaliation/etc. stands ("wanton disregard for the truth, and with subjective awareness of probable falsity"). Indeed, by your present note, you are continuing your harassment of me.

Furthermore, you cannot convincingly pretend you've relied on my LinkedIn profile. The last time I edited it was in 2009 (when I added the EMC profile), and I haven't touched it since, or even looked at it. I know this for a fact, because I've consciously avoided updating it, or looking at it (for personal reasons). I don't know why it says I've been at EMC for "2007-Present (5 years)"; I'm not a LinkedIn "power user", so I don't know its editorial policies. Perhaps LinkedIn automatically writes things like "Present (5 years)" in profiles that aren't kept up-to-date, but that's just a guess. But it's not my responsibility to figure things like that out -- it is your/IBM's responsibility to do the due-diligence of figuring things like that out, before you recklessly go around discussing it amongst yourselves ("publication") and making wild accusations about me. As a matter of fact, I have myself noticed crazy entries in LinkedIn profiles for various people (not myself, until now), and wondered how they got that way, because it's simply not credible that so many people would be so sloppy as to make such nonsensical mistakes, unless some sort of LinkedIn glitch were to blame.

In any case, no matter what LinkedIn says, you cannot pretend to believe what it says about me/EMC/IBM. For if you were to believe it, you would have to believe that I was somehow employed simultaneously by EMC and IBM beginning in Nov 2010. That's stupidly non-credible on its face, by any stretch of anyone's imagination. For, if I HAD been simultaneously by EMC and IBM, you surely cannot really think I'd be so stupid as to advertise that fact on LinkedIn!

But here's the biggest problem: That entry in LinkedIn for IBM as a past employer for 2010-2012 -- IS A FORGERY! I didn't know it existed until just now. I didn't put it there, and I have no idea how it got there. But I intend to find out. One possibility is that somebody captured my LinkedIn password (from, say, Netezza's network or elsewhere), and used it to forge my LinkedIn profile.

Whoever put that entry in LinkedIn is not merely a defamer. He/she is now most likely a criminal.

On 05/08/2012 06:32 PM, Diane Adams wrote:

Walt,

Your public LinkedIn page states that you have been a Consulting Engineer at EMC from "2007- Present (5 years)". The page also identifies IBM as a "Past" employer. Please answer the question either yes or no - Have you worked for EMC in any capacity, such as a contractor, consultant, or employee during the course of your IBM employment?

If you do not definitively deny that you currently are working for EMC in some capacity or that you have worked for EMC in some capacity during your employment with IBM within 24 hours, IBM will have no choice but to conclude you have had sufficient opportunity to provide an answer to this question.

Diane M. Adams
 Netezza HR Partner
 SWG - Information Management
 508-382-8534
adamsd@us.ibm.com

From: Walt Tuvell <walt.tuvell@gmail.com>
 To: Diane Adams/Fishkill/IBM@IBMus, Robert Mantell <rmantell@Theemploymentlawyers.com>, Daniel Feldman/Marlborough/IBM@IBMus

Date: 05/08/2012 03:49 PM
Subject: Re: IBM Business Conduct Guidelines

Diane -

As you know, my attorney, Rob Mantell, informed IBM's attorney, Joan Ackerstein, by email on May 3: "Mr. Tuvell has done absolutely nothing that would lead you to conclude that he works for or has worked for EMC." [Apart from the work I did for EMC before I joined for IBM, of course.]

That is the truth. And that is where the matter should have ended: as an exploratory conversation between attorneys.

But remarkably, you have now chosen to take this matter to an entirely different level. Namely, by your wordings -- "IBM believes ... you ... are ... in violation", "significant concern", "core values of trust and personal responsibility", "conflict of interest", "it appears that you violated", "seriousness of this situation", "your employment will be terminated" -- you have now chosen, as an officially authorized representative of IBM (as opposed to mere attorney/attorney side-discussion), to falsely impute/accuse me of unethical and/or illegal behavior, and threaten me with termination therefor -- WITH NO CREDIBLE BASIS WHATSOEVER.

If I am wrong about that, then I hereby invite/demand that you produce, forthwith, the credible intelligence (including the names of informers, if any) upon which you base your accusation. If you are able to do so, then I will immediately apologize for, and withdraw, the remainder of the instant email.

But you and I both know you cannot do so. For, if you had such credible basis in your possession, you'd simply terminate me immediately (properly), rather than threaten to terminate me.

That (i.e., the absence of credible basis) means that you personally -- together with whatever person(s) put you up to this (if anyone) -- have now proactively and directly implicating yourselves in known-false (or in wanton disregard for the truth, and with subjective awareness of probable falsity) accusation of me, of committing unethical/illegal acts, specifically in relation to my vocation/profession.

There are at least three problems with this:

(i) It is beyond obvious that you have been in communication with certain other persons (in particular, Joan Ackerstein, perhaps via a chain of other persons) about this matter. That amounts to "publication". Your published, false accusation of reputation-injuring activities by me, therefore amounts to DEFAMATION. That is illegal, of course. Indeed, since your accusation is specifically in regard to my vocation/profession, your false accusation is actually defamation "per se", i.e., it requires no proof of special damage. Nevertheless, special damage has indeed occurred, namely, your threat to terminate me PROVES that my reputation has actually been injured.

(ii) What is the motivating REASON for your defamation, and threat of termination of my employment? That also is beyond obvious: There can be but one and only one reason, namely, retaliation/harassment/bullying/IIED against me for my long-standing claims of age/sex/race/disability discrimination and other wrongdoing (including previous acts of defamation and IIED), and now also for my recent filing of MCAD charge regarding same. Hence, your/IBM's act amounts to yet a NEW act of (defamation-based) RETALIATION. That is also illegal, of course.

(iii) Finally, you specifically cite the BCG. It is a binding contract, as you know (because all employees must certify allegiance to it every year, as a condition of employment). However, the clause of the BCG you cite causes you problems: "providing assistance ... products and services in competition with IBM's current or potential product or service offerings". These are the problems it causes you:

(iii)(a) (1)The wording "providing assistance" is far too non-specific to be enforceable, because there are very many positions with EMC (or any other company) that are too tenuously connected to IBM's legitimate business interests to constitute valid unethical/illegal behavior. (Does playing second base on EMC's softball team constitute "providing assistance"?) (2) The clause is far too broad, because of IBM's very expansive reach of "current" offerings. (3) And the clause is impossibly over-broad, because IBM's "potential" offerings extend literally to EVERY other gainful occupation on the planet. Taken together, these three objections show that the clause is an unconscionable term of contract.

(iii)(b) How many other people at IBM have been prosecuted under this clause of the BCG? On the "no credible basis" standard (discussed above), it must be the case that you have been dunning literally EVERY other IBM employee (equally without credible basis) about such "conflict of interest". If you are not doing that (and I'm sure you aren't), but instead are singling me out for special treatment (I'm sure you are), then it proves that I am being subjected to disparate treatment -- again for the beyond-obvious reason of retaliation/harassment/bullying/IIED.

None of this behavior is surprising, coming from you. It perfectly fits the pattern of culpable conduct you have personally displayed in continuously persecuting me throughout my ordeal of the past year, all the way from advising Dan Feldman to attack me the way he did (as he himself freely volunteered to me), to your present very-long-running stance of completely stonewalling my request for reasonable accommodation via transfer.

By CC'ing Russell Mandel on this email, I hereby submit these unethical/illegal acts of yours to him, as my FOURTH Open Door C&A complaint. (Noting that my THIRD complaint also remains in-process at this time.) Even if he "determines" that acts of true illegality are "beyond the scope" of his investigative ability/responsibility/authority, surely the obvious breach of BCG ethics is not.

- Walt Tuvell

On 05/07/2012 12:48 PM, Diane Adams wrote:

Walt:

This letter is regarding your employment with IBM. IBM believes that you currently are or have been during the course of your employment in violation of one of IBM's Business Conduct Guidelines.

Specifically, it appears that you currently are or have been during the course of your employment with IBM working for EMC Corporation in some capacity, such as an employee, consultant or contractor. That is a matter of significant concern to IBM since it considers EMC to be a competitor and you never asked for consent or obtained it.

IBM has Business Conduct Guidelines which set out the core values of trust and personal responsibility it expects its employees to embrace. One of those Guidelines relates to conflicts of interest. Section 5.1 of IBM's Business Conduct Guidelines states the following:

"An obvious conflict of interest is providing assistance to an organization that markets products and services in competition with IBM's current or potential product or service offerings. You may not, without IBM's consent, work for such an organization in any capacity, such as an employee, a consultant or as a member of its board of directors."

It appears that you violated this Business Conduct Guideline. Given the seriousness of this situation, IBM has determined that your employment will be terminated effective at 5:00 PM on May 8, 2012. If IBM is incorrect about your working with EMC Corporation, please contact me before that time to confirm that you are not currently and have not been at any time while an IBM employee working for EMC as an employee, consultant or contractor.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamsd@us.ibm.com

Exhibit 86

IBM Business Conduct Guidelines

Subject: IBM Business Conduct Guidelines
From: Diane Adams <adamsd@us.ibm.com>
Date: 05/07/2012 12:48 PM
To: Walt Tuvell <walt.tuvell@gmail.com>

Walt:

This letter is regarding your employment with IBM. IBM believes that you currently are or have been during the course of your employment in violation of one of IBM's Business Conduct Guidelines.

Specifically, it appears that you currently are or have been during the course of your employment with IBM working for EMC Corporation in some capacity, such as an employee, consultant or contractor. That is a matter of significant concern to IBM since it considers EMC to be a competitor and you never asked for consent or obtained it.

IBM has Business Conduct Guidelines which set out the core values of trust and personal responsibility it expects its employees to embrace. One of those Guidelines relates to conflicts of interest. Section 5.1 of IBM's Business Conduct Guidelines states the following:

"An obvious conflict of interest is providing assistance to an organization that markets products and services in competition with IBM's current or potential product or service offerings. You may not, without IBM's consent, work for such an organization in any capacity, such as an employee, a consultant or as a member of its board of directors."

It appears that you violated this Business Conduct Guideline. Given the seriousness of this situation, IBM has determined that your employment will be terminated effective at 5:00 PM on May 8, 2012. If IBM is incorrect about your working with EMC Corporation, please contact me before that time to confirm that you are not currently and have not been at any time while an IBM employee working for EMC as an employee, consultant or contractor.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamsd@us.ibm.com

Exhibit 87

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.
Defendant.

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

**DEFENDANT'S FURTHER RESPONSES TO
PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS**

Defendant, International Business Machines, Inc., hereby further responds to Plaintiff's First Request for Admissions as follows:

REQUEST NO. 32

Document marked TUVELL865 is a true and accurate copy of an email, sent and received on or about September 9, 2011, between Plaintiff's email account and the other non-Plaintiff individual(s) indicated in the email header. (See Answer ¶ 65.)

RESPONSE NO. 32

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the dates listed, and that the communication speaks for itself.

REQUEST NO. 37

Document marked TUVELL961 is a true and accurate copy of an email, sent and received on or about November 7, 2011, between Plaintiff's email account and the other non-Plaintiff individual(s) indicated in the email headers. (See Answer ¶ 65.)

RESPONSE NO. 37

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 50

Document marked TUVELL975 is a true and accurate copy of an email, sent and received on or about November 23, 2011, between Plaintiff's email account and the other non-Plaintiff individual(s) indicated in the email header. (See Answer ¶ 83.)

RESPONSE NO. 50

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 60

Documents marked TUVELL1000-1001 are true and accurate copies of an email thread, sent and received on or about December 6, 2011, between Plaintiff's email account and Attorney for Defendant Larry Bliss and Attorney for Plaintiff Robert S. Mantell. (See Answer ¶¶ 91-92.)

RESPONSE NO. 60

Denied. The documents marked TUVELL1000-1001 are copies of an email thread sent and received on December 6, 2011 between IBM Counsel Larry Bliss and Robert Mantell.

REQUEST NO. 65

Document marked TUVELL1009 is a true and accurate copy of an email, sent and received on or about December 28, 2011, between Plaintiffs email account and the other non-Plaintiff individual(s) indicated in the email headers. (See Answer ¶ 96.)

RESPONSE NO. 65

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 67

Documents marked TUVELL1016-1018 are a true and accurate copy of an email (TUVELL1016-1017) and an attachment to that email (1018) which was received by Attorney for Defendant Larry Bliss, on or about January 10, 2012. (See Answer ¶ 99.)

RESPONSE NO. 67

IBM admits that the referenced documents are true and accurate copies email communications and attachments between the parties identified in the email header on the date listed, and that the communications speak for themselves.

REQUEST NO. 68

Documents marked TUVELL1022-1023 are a true and accurate copy of an email thread, sent and received on or about January 16, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶¶ 100-101.)

RESPONSE NO. 68

IBM admits that the referenced documents are true and accurate copies email communications between the parties identified in the email header on the date listed, and that the communications speak for themselves.

REQUEST NO. 69

Documents marked TUVELL1026-1029 are a true and accurate copy of an email thread, sent and received on or about January 18, 2012, and those documents accurately memorialize the communications between Plaintiffs email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 103.)

RESPONSE NO. 69

IBM admits that the referenced documents are true and accurate copies email communications and attachments between the parties identified in the email header on the date listed, and that the communications speak for themselves.

REQUEST NO. 70

Documents marked TUVELL1030-1034 are a true and accurate copy of an email thread, sent and received on or about January 20, 2012, and those documents accurately memorialize the communications between Plaintiffs email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 105.)

RESPONSE NO. 70

IBM admits that the referenced documents are true and accurate copies of email communications between the parties identified in the email header on the date listed, and that the communications speak for themselves.

REQUEST NO. 71

Documents marked TUVELL1035-1040 are a true and accurate copy of an email thread, sent and received on or about January 20, 2012, and those documents accurately memorialize the communications between Plaintiffs email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 106.)

RESPONSE NO. 71

IBM admits that the referenced documents are true and accurate copies of email communications between the parties identified in the email header on the date listed, and that the communications speak for themselves.

REQUEST NO. 74

Documents marked TUVELL1178 and 1180 are a true and accurate copy of an email received on or about January 23, 2012, by Larry Bliss, Attorney for Defendant. (See Answer ¶ 108.)

RESPONSE NO. 74

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 75

Documents marked TUVELL1188-1191 are a true and accurate copy of an email thread, sent and received on or about January 24, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 109.)

RESPONSE NO. 75

IBM denies this Request. The documents marked TUVELL1188-1191 are copies of an email thread sent and received between January 23-24, 2012 between Larry Bliss and Plaintiff's attorney Robert Mantell.

REQUEST NO. 78

Documents marked TUVELL1197-1199 are a true and accurate copy of an email thread, sent and received on or about January 27, 2012, and those documents accurately memorialize the communications between Attorney for Plaintiff Robert Mantell and Larry Bliss, occurring on or about the date identified in each respective header. (See Answer ¶ 112.)

RESPONSE NO. 78

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 83

Documents marked TUVELL1215-1216 are a true and accurate copy of an email thread (disregarding attachments) sent on or about February 16, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 118.)

RESPONSE NO. 83

IBM admits that the referenced documents are true and accurate copies of email communications between the parties identified in the email header on the date listed, and that the communications speak for themselves.

REQUEST NO. 92

Document marked TUVELL1452 is a true and accurate copy of a letter sent by Attorney for Defendant, Joan Ackerstein to Attorney for Plaintiff Robert Mantell, on or about May 3, 2012. (See Answer ¶ 133.)

RESPONSE NO. 92

IBM admits that the referenced document is a true and accurate copy of a letter sent by Attorney for Defendant, Joan Ackerstein to Attorney for Plaintiff Robert Mantell, on or about May 3, 2012, and that the communication speaks for itself.

REQUEST NO. 93

Document marked TUVELL1453 is a true and accurate copy of an email received by Attorney for Defendant, Joan Ackerstein, Esq. on or about May 3, 2012. (See Answer ¶ 133.)

RESPONSE NO. 93

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 94

Document marked TUVELL1461 is a true and accurate copy of an email, sent and received on or about May 7, 2012, between Plaintiffs email account and the other non-Plaintiff individual(s) indicated in the email headers. (See Answer ¶ 134.)

RESPONSE NO. 94

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 95

Documents marked TUVELL1463-1465 are a true and accurate copy of an email thread, sent and received on or about May 8, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed

in all the email headers contained in the thread, occurring on or about the date identified in each respective header, (See Answer ¶¶ 135-137.)

RESPONSE NO. 95

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 96

Documents marked TUVELL1466-1474 are (with the exception described next) true and accurate copy of an email thread, sent and received on or about May 14, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. TUVELL1466-1467 are out of order, and comprise the "attached policy" referred to at the top of TUVELL1470. (See Answer ¶¶ 138-141.)

RESPONSE NO. 96

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 97

Documents marked TUVELL1482-1488 are a true and accurate copy of an email thread, sent and received on or about May 15, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header, (See Answer ¶ 142.)

RESPONSE NO. 97

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 98

Documents marked TUVELL1489-1497 are a true and accurate copy of an email thread, sent and received on or about May 16, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 143.)

RESPONSE NO. 98

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 99

Documents marked TUVELL1498-1507 are a true and accurate copy of an email thread, sent and received on or about May 17, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶ 144.)

RESPONSE NO. 99

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 100

Documents marked TUVELL1509-1510 are a true and accurate copy of an email thread, sent and received on or about May 17, 2012, and those documents accurately memorialize the communications between Plaintiff's email account and the other non-Plaintiff individual(s) listed in all the email headers contained in the thread, occurring on or about the date identified in each respective header. (See Answer ¶¶ 145-146.)

RESPONSE NO. 100

IBM admits that the referenced document is a true and accurate copy of an email communication between the parties identified in the email header on the date listed, and that the communication speaks for itself.

REQUEST NO. 103

Documents marked TUVELL1568-1572 are a true and accurate copy of a letter filed with the Massachusetts Commission Against Discrimination on behalf of Frederick Knabe, on or about May 11, 2012.

RESPONSE NO. 103

IBM admits that the referenced document is a true and accurate copy of a document filed on behalf of Frederick Knabe with the Massachusetts Commission Against Discrimination on or about May 11, 2012, and that the communication speaks for itself.

REQUEST NO. 104

Documents marked TUVELL1573-1650 are a true and accurate copy of a letter filed with the Massachusetts Commission Against Discrimination on behalf of International Business Machines, Inc., Daniel Feldman and Russell Mandel, on or about May 11, 2012.

RESPONSE NO. 104

IBM admits that the referenced document is a true and accurate copy of a document filed on behalf of IBM, Daniel Feldman and Russell Mandel with the Massachusetts Commission Against Discrimination on or about May 11, 2012, and that the communication speaks for itself.

REQUEST NO. 105

Documents marked TUVELL1737-1745 are a true and accurate copy of a charge of discrimination that Plaintiff filed with the Massachusetts Commission Against Discrimination on September 18, 2012.

RESPONSE NO. 105

IBM admits that the referenced document is a true and accurate copy of a charge of discrimination filed by Plaintiff with the Massachusetts Commission Against Discrimination on or about September 18, 2012.

REQUEST NO. 106

Documents marked TUVELL1746-1749 are a true and accurate copy of a letter filed with the Massachusetts Commission Against Discrimination on behalf of Frederick Knabe, on or about December 10, 2012.

RESPONSE NO. 106

IBM admits that the referenced document is a true and accurate copy of a document filed on behalf of Frederick Knabe with the Massachusetts Commission Against Discrimination on or about December 10, 2012, and that the communication speaks for itself.

REQUEST NO. 107

Documents marked TUVELL1750-1824 are a true and accurate copy of a letter filed with the Massachusetts Commission Against Discrimination on behalf of International Business Machines, Inc., Daniel Feldman and Russell Mandel, on or about December 10, 2012.

RESPONSE NO. 107

IBM admits that the referenced document is a true and accurate copy of a document filed on behalf of IBM, Daniel Feldman and Russell Mandel with the Massachusetts Commission Against Discrimination on or about December 10, 2012, and that the communication speaks for itself.

REQUEST NO. 108

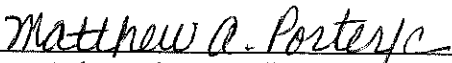
Document marked 1826 is a true and accurate copy of an affirmation page submitted on behalf of IBM to the Massachusetts Commission Against Discrimination on or about December 12, 2012, and applied to the documents marked TUVELL1750-1824.

RESPONSE NO. 108

RESPONSE NO. 108

IBM admits that the referenced document is a true and accurate copy of an affirmation page submitted by IBM to the Massachusetts Commission Against Discrimination on or about December 12, 2012 and relates to documents bates numbered TUVELL1750-1824.

Respectfully submitted,
INTERNATIONAL BUSINESS
MACHINES, INC.




Joan Ackerstein, BBO# 348220
ackerstj@jacksonlewis.com
Matthew A. Porter BBO# 630625
porterm@jacksonlewis.com
JACKSON LEWIS P.C.
75 Park Plaza
Boston, MA 02116
(617) 367-0025; Fax (617) 367-2155

Dated: June 23, 2014

CERTIFICATE OF SERVICE

This is to certify that on June 23, 2014, a copy of the foregoing document was served upon Plaintiff's counsel, Robert S. Mantell, Esq., Rodgers, Powers & Schwartz LLP, 18 Tremont Street, Boston, MA 02108, by electronic and first class mail, postage prepaid.



Jackson Lewis P.C.

Exhibit 88

Re: IBM Business Conduct Guidelines

Subject: Re: IBM Business Conduct Guidelines
From: Walt Tuvell <walt.tuvell@gmail.com>
Date: 05/14/2012 04:31 PM
To: Diane Adams <adamsd@us.ibm.com>

Diane -

This is in response to your email of last Fri, May 11.

1. Concerning PLOA:

According to the Personal Leave Of Absence policy document you sent/cite, in order for me to be on PLOA status, it is a requirement that I must first apply for PLOA (and subsequently receive approval for said application from management). No such application ever existed, in any format. Therefore I am provably NOT on PLOA.

[Incidentally, I note the PLOA page you sent was updated just a few days ago, on May 2. Hence it is inapplicable to me. Please supply me with the previous version that is applicable to me. Note also that the page abbreviates Personal Leave of Absence inconsistently, as "PLOA" in the page title and once near the top of the page, and "LOA" elsewhere. But note also that the abbreviation "LOA" is nondeterminative, because it is also used in other contexts to refer to other kinds of "leave" -- see the reference to "Skills for Growth LOA" in the attached screenshot. And the unadorned word "leave" appears to be defined nowhere, so it must presumably be interpreted according to its common-language meaning ("excused absence from work"). Also, I now have no access to w3 or other IBM resources, so please send me a copy of ALL "employee handbook-like" items, w3 or elsewhere.]

Instead of PLOA, what actually happened is that both Dan and you preemptively granted me unpaid leave (in writing) -- freely without prompting from me (in particular, no application/approval), and unconditionally (time deadlines only, but no citation of policy). When you did so, you never mentioned "personal leave of absence", nor did you require that I "apply" for PLOA, nor did you mention or point me to the policy you sent governing PLOA. To the contrary, you specifically stated I was being granted unpaid leave for the specific purpose of resolving issues concerning LTD insurance benefits with MetLife. This is a "health-related" leave granted by IBM, and NOT a "personal" leave sought by me. To that end, see the attached "smoking gun" screenshot -- it shows (in the listing at the left-hand side) that PLOA is in a totally separate category from "health-related leaves"; PLOA is a category of leave totally inapplicable to me. You, as an "HR professional", MUST KNOW that very well.

Hence, the PLOA policy you sent/cite doesn't apply to me. The fact that the PLOA policy includes a "seek written permission" requirement, but no such requirement exists elsewhere (in particular, not in employment contract or BCG), is proof that IBM intends such a requirement to apply only to PLOA, but not elsewhere. Therefore that requirement does not apply to me.

The fact that you now falsely claim otherwise, and threaten my position based on false assertion of inapplicable policy, clearly constitutes yet another act of retaliation.

But it gets worse than that. For you assert, as a matter-of-fact, "You are clearly in violation of that policy". That statement-of-fact is known-false (by the preceding), and injurious to my reputation (because it impugns my reputation with respect to employment/vocation/profession). It is also published, because you CC'd Dan Feldman -- not to mention your beyond-obvious consultation with others. Therefore, it is proven defamatory.

Consequently, I hereby add the instant incident to my FOURTH Open Door C&A.

2. Concerning your/IBM's reliance upon LinkedIn:

As I have stated, all the information I have ever submitted to LinkedIn is perfectly true, appropriate, and correct when submitted. I'm in the process of attempting to find out how the incorrect information came to appear on LinkedIn.

The appropriate/prudent course of action for you to have taken was to simply ask me: "We've seen your LinkedIn profile, and it appears to indicate concurrent employment at EMC and IBM, what's up with that?" -- and not the intimidating/retaliatory/defamatory course of action you did undertake. And then, if you weren't satisfied with my answer (as you indicate you still aren't), all you need to do is ask EMC for the definitive dates of my employment (if you do that, presumably EMC will request my permission to disclose the information, to which I will consent). Your deliberate avoidance of this well-known commonsense approach, in favor of confrontation and intimidation, speaks to IBM's retaliatory mindset.

Incidentally: Now that you've drawn my attention to the problems with LinkedIn, I plan to close my LinkedIn account. Please let me know if you have any objection to my plan to close my Linked account.

3. Concerning your statement that I "have an obligation to cooperate with management":

I am now, always have, and always will, "cooperate with management", to the extent consistent with my medical limitations, and the protection of my rights under civil law.

The definition of "cooperation" applicable under the present circumstances is, embodied in the employment and BCG contracts (and other "employee handbook" items, all of which need to be interpreted in the light of prevailing circumstances,

Re: IBM Business Conduct Guidelines

as is true of all contracts). In those contracts, it is stated that I may not participate in activities giving rise to conflict of interest. I have not done so, and I have so informed IBM.

Note that the concept of "interpretation in light of prevailing circumstances" is contemplated and codified in the BCG itself (p. 6, parenthetical comment added): "Remember, there are no simple shortcuts or automatic answers for the choices we have to make in business today. No single set of guidelines [such as the BCG itself!] or policies can provide the absolute last word to address all circumstances. Therefore, we expect IBMers to use sound judgment in all of their conduct and ask for help when needed."

Which brings up a subsidiary point. You have now cited an "employee handbook" item (the PLOA policy webpage) as if it were contractual. I agree with that subsidiary point. It validates a point of mine, wherein I've cited many of IBM's webpages (and other writings) over time as if they were contractual. Thank you.

4. Concerning "information" (as you put it) on where I am now working:

The BCG (p. 26) requires me to "consult" with IBM about potential conflicts of interest, and I agree that's reasonable as a general precept (though I was unaware of this clause until I just now read it). And I have done that. But note that the term "consult" is not defined by the BCG, and as always must be interpreted in the context of circumstances.

To that end, I am willing to respond to reasonable questions about what I am doing, to satisfy IBM that I am not acting in conflict with my role at IBM. I will respond to such questions without revealing to IBM information that will allow IBM to continue to hurt me. Given IBM's consistent unilateral unethical/illegal behaviors against me, I am fully/reasonably justified in fearing back-channel retribution, sabotaging/undermining my current employment situation, if I were to reveal my employer's identity. And that is the ONLY reason I refuse to reveal that identity (as opposed to "hiding a conflict of interest" or anything else).

For example, I hereby volunteer the following "information": Insofar as I've been able to determine (and, yes, I've explicitly made inquiries), IBM is simply not a competitor of my new company. IBM equipment/software/services seems never to have appeared as an RFP opponent, for example. Quite the contrary, the ONLY "information" about IBM I've heard/seen anywhere in my new company is that "our stuff integrates with IBM's stuff, insofar as it appears in customer environments at all, but IBM's presence there is vanishingly tiny". This is not competition, but complementarity, favorable to IBM's legitimate business interests (which is puny, given the paucity of IBM in our environment) -- precisely the opposite of "conflict of interest".

The BCG nowhere requires me to reveal the identity of my employer (that requirement only exists in the PLOA policy, see above). The BCG only requires me to avoid conflict-of-interest, and to "consult" with IBM thereunto. That's exactly what I've done, and what I've promised to do going forward. To the extent we disagree about this, a trusted third party may be needed to adjudicate. I'm comfortable taking that route.

5. Concerning your threat of presumption of engagement in competitive employment:

Such a presumption would be both false and totally unjustified. For, I've given you (above) an averment/awareness of the very-probable falsity of such a presumption. The reason such a presumption is "very-probably" false is this: nothing I've said/written to date, in the many hundreds of pages of testimony I've supplied to you regarding my case, has been false -- or exaggerated, misinterpreted, misleading, incomplete, or even disputed/challenged. That puts the weight of probability clearly on my side (>99.999%) [noting that the applicable legal standard is merely "preponderance of the evidence", >50%].

Again, I'm comfortable taking this to an unbiased trier-of-fact. Any such presumption on your part will easily be seen for what it actually is, namely, a fig-leaf attempt to falsely mask the ultimate act of discrimination-based retaliation: wrongful termination, and consequent avoidance of my two in-process Open Door C&A investigations, and request for reasonable accommodation via transfer.

6. Concerning retaliation per se:

I've written about the concept of "retaliation per se" previously. IBM is now engaging in yet another dimension of this. Namely, all these false attempts of yours to "trap" me in a conflict-of-interest situation has taken place in the context of my MCAD charge. What began as a simple inquiry into my current job status between lawyers has morphed into EXPLICIT HARASSMENT/INTIMIDATION, by coercing me to respond to your threats within ridiculous very short "faux emergency" deadlines (just 1-2 business days, no doubt hoping I'd be traveling and accidentally miss out). There is no reason whatsoever for such short deadlines, and I demand they cease.

- Walt

On 05/11/2012 03:10 PM, Diane Adams wrote:

IBM has a legitimate business need to ensure that its competitive position in the marketplace is not compromised. We advised you of the basis of IBM's concern with your employment; your LinkedIn page states that you have been a consultant at EMC from 2007 to the present and that your employment with IBM ended in 2012.

Re: IBM Business Conduct Guidelines

IBM's Leave of Absence Policy requires employees to seek written permission to work for another employer while on an LOA. Please see attached policy and the language under, "Working for Another Employer While on an LOA." You are clearly in violation of that policy.

As an IBM employee you have an obligation to cooperate with management. We are asking you to cooperate by providing information on where you are working. Please provide that information by 5:00pm on Monday, May 14, 2012. If you do not do this, we will have no choice but to presume you are engaged in competitive employment and act accordingly.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamsd@us.ibm.com

From: Walt Tuvell <walt.tuvell@gmail.com>
To: Diane Adams/Fishkill/IBM@IBMUS
Date: 05/10/2012 09:38 AM
Subject: Re: IBM Business Conduct Guidelines

No. I will NOT inform you where I am currently working. There is NO requirement, under either BCG or employment contract, that I do so. There is only a requirement that I abide by the terms of those contracts, and I hereby affirm that I have faithfully done so throughout the entirety of my tenure at IBM, and will continue to do so.

I will, however, tell you why I refuse to inform you where I now work. The reason is that I fear IBM, either by rogue individuals or corporately, would happily use such information to work back-channels to get me fired (even though that would constitute tortious interference with advantageous relationship).

On 05/09/2012 05:18 PM, Diane Adams wrote:

Walt:

Thanks for your response. IBM needs to ensure that a current employee is not engaged in competitive employment. Please advise where you have been working during your leave.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamsd@us.ibm.com

From: Walt Tuvell <walt.tuvell@gmail.com>
To: Diane Adams/Fishkill/IBM@IBMUS, Robert Mantell <rmantell@Theemploymentlawyers.com>, Daniel Feldman/Marlborough/IBM@IBMUS, RUSSELL E MANDEL/Somers/IBM@IBMUS
Date: 05/08/2012 09:40 PM
Subject: Re: IBM Business Conduct Guidelines

It was an inadvertent error of mine to include Rob Mantell on this note. I'd intended to include Russell Mandel instead. Sorry.

On 05/08/2012 09:15 PM, Walt Tuvell wrote:

Re: IBM Business Conduct Guidelines

You must be joking. In my letter earlier today (included below), I wrote "known-false", and I charged you/IBM with "defamation", which of course includes as part of its very definition "falsity". That says very explicitly that your accusation is false. I have of course NOT worked for EMC since Dec 2009 (I started at Netezza in Nov 2010). And you/IBM know it. You can't convincingly pretend otherwise. For that reason, my charge of defamation/retaliation/etc. stands ("wanton disregard for the truth, and with subjective awareness of probable falsity"). Indeed, by your present note, you are continuing your harassment of me.

Furthermore, you cannot convincingly pretend you've relied on my LinkedIn profile. The last time I edited it was in 2009 (when I added the EMC profile), and I haven't touched it since, or even looked at it. I know this for a fact, because I've consciously avoided updating it, or looking at it (for personal reasons). I don't know why it says I've been at EMC for "2007-Present (5 years)"; I'm not a LinkedIn "power user", so I don't know its editorial policies. Perhaps LinkedIn automatically writes things like "Present (5 years)" in profiles that aren't kept up-to-date, but that's just a guess. But it's not my responsibility to figure things like that out -- it is your/IBM's responsibility to do the due-diligence of figuring things like that out, before you recklessly go around discussing it amongst yourselves ("publication") and making wild accusations about me. As a matter of fact, I have myself noticed crazy entries in LinkedIn profiles for various people (not myself, until now), and wondered how they got that way, because it's simply not credible that so many people would be so sloppy as to make such nonsensical mistakes, unless some sort of LinkedIn glitch were to blame.

In any case, no matter what LinkedIn says, you cannot pretend to believe what it says about me/EMC/IBM. For if you were to believe it, you would have to believe that I was somehow employed simultaneously by EMC and IBM beginning in Nov 2010. That's stupidly non-credible on its face, by any stretch of anyone's imagination. For, if I HAD been simultaneously by EMC and IBM, you surely cannot really think I'd be so stupid as to advertise that fact on LinkedIn!

But here's the biggest problem: That entry in LinkedIn for IBM as a past employer for 2010-2012 -- IS A FORGERY! I didn't know it existed until just now. I didn't put it there, and I have no idea how it got there. But I intend to find out. One possibility is that somebody captured my LinkedIn password (from, say, Netezza's network or elsewhere), and used it to forge my LinkedIn profile.

Whoever put that entry in LinkedIn is not merely a defamer. He/she is now most likely a criminal.

On 05/08/2012 06:32 PM, Diane Adams wrote:

Walt,

Your public LinkedIn page states that you have been a Consulting Engineer at EMC from "2007- Present (5 years)". The page also identifies IBM as a "Past" employer. Please answer the question either yes or no - Have you worked for EMC in any capacity, such as a contractor, consultant, or employee during the course of your IBM employment?

If you do not definitively deny that you currently are working for EMC in some capacity or that you have worked for EMC in some capacity during your employment with IBM within 24 hours, IBM will have no choice but to conclude you have had sufficient opportunity to provide an answer to this question.

Diane M. Adams
 Netezza HR Partner
 SWG - Information Management
 508-382-8534
adamsd@us.ibm.com

From: Walt Tuvell <walt.tuvell@gmail.com>
 To: Diane Adams/Fishkill/IBM@IBMUS, Robert Mantell <rmantell@Theemploymentlawyers.com>, Daniel Feldman/Marlborough/IBM@IBMUS
 Date: 05/08/2012 03:49 PM
 Subject: Re: IBM Business Conduct Guidelines

Diane -

As you know, my attorney, Rob Mantell, informed IBM's attorney, Joan Ackerstein, by email on May 3: "Mr. Tuvell has done absolutely nothing that would lead you to conclude that he works for or has worked for EMC." [Apart from the work I did for EMC before I joined for IBM, of course.]

Re: IBM Business Conduct Guidelines

That is the truth. And that is where the matter should have ended: as an exploratory conversation between attorneys.

But remarkably, you have now chosen to take this matter to an entirely different level. Namely, by your wordings -- "IBM believes ... you ... are ... in violation", "significant concern", "core values of trust and personal responsibility", "conflict of interest", "it appears that you violated", "seriousness of this situation", "your employment will be terminated" -- you have now chosen, as an officially authorized representative of IBM (as opposed to mere attorney/attorney side-discussion), to falsely impute/accuse me of unethical and/or illegal behavior, and threaten me with termination therefor -- WITH NO CREDIBLE BASIS WHATSOEVER.

If I am wrong about that, then I hereby invite/demand that you produce, forthwith, the credible intelligence (including the names of informers, if any) upon which you base your accusation. If you are able to do so, then I will immediately apologize for, and withdraw, the remainder of the instant email.

But you and I both know you cannot do so. For, if you had such credible basis in your possession, you'd simply terminate me immediately (properly), rather than threaten to terminate me.

That (i.e., the absence of credible basis) means that you personally -- together with whatever person(s) put you up to this (if anyone) -- have now proactively and directly implicating yourselves in known-false (or in wanton disregard for the truth, and with subjective awareness of probable falsity) accusation of me, of committing unethical/illegal acts, specifically in relation to my vocation/profession.

There are at least three problems with this:

(i) It is beyond obvious that you have been in communication with certain other persons (in particular, Joan Ackerstein, perhaps via a chain of other persons) about this matter. That amounts to "publication". Your published, false accusation of reputation-injuring activities by me, therefore amounts to DEFAMATION. That is illegal, of course. Indeed, since your accusation is specifically in regard to my vocation/profession, your false accusation is actually defamation "per se", i.e., it requires no proof of special damage. Nevertheless, special damage has indeed occurred, namely, your threat to terminate me PROVES that my reputation has actually been injured.

(ii) What is the motivating REASON for your defamation, and threat of termination of my employment? That also is beyond obvious: There can be but one and only one reason, namely, retaliation/harassment/bullying/IIED against me for my long-standing claims of age/sex/race/disability discrimination and other wrongdoing (including previous acts of defamation and IIED), and now also for my recent filing of MCAD charge regarding same. Hence, your/IBM's act amounts to yet a NEW act of (defamation-based) RETALIATION. That is also illegal, of course.

(iii) Finally, you specifically cite the BCG. It is a binding contract, as you know (because all employees must certify allegiance to it every year, as a condition of employment). However, the clause of the BCG you cite causes you problems: "providing assistance ... products and services in competition with IBM's current or potential product or service offerings". These are the problems it causes you:

(iii)(a) (1)The wording "providing assistance" is far too non-specific to be enforceable, because there are very many positions with EMC (or any other company) that are too tenuously connected to IBM's legitimate business interests to constitute valid unethical/illegal behavior. (Does playing second base on EMC's softball team constitute "providing assistance"?) (2) The clause is far too broad, because of IBM's very expansive reach of "current" offerings. (3) And the clause is impossibly over-broad, because IBM's "potential" offerings extend literally to EVERY other gainful occupation on the planet. Taken together, these three objections show that the clause is an unconscionable term of contract.

(iii)(b) How many other people at IBM have been prosecuted under this clause of the BCG? On the "no credible basis" standard (discussed above), it must be the case that you have been dunning literally EVERY other IBM employee (equally without credible basis) about such "conflict of interest". If you are not doing that (and I'm sure you aren't), but instead are singling me out for special treatment (I'm sure you are), then it proves that I am being subjected to disparate treatment -- again for the beyond-obvious reason of retaliation/harassment/bullying/IIED.

None of this behavior is surprising, coming from you. It perfectly fits the pattern of culpable conduct you have personally displayed in continuously persecuting me throughout my ordeal of the past year, all the way from advising Dan Feldman to attack me the way he did (as he himself freely volunteered to me), to your present very-long-running stance of completely stonewalling my request for reasonable accommodation via transfer.

By CC'ing Russell Mandel on this email, I hereby submit these unethical/illegal acts of yours to him, as my FOURTH Open Door C&A complaint. (Noting that my THIRD complaint also remains in-process at this time.) Even if he "determines" that acts of true illegality are "beyond the scope" of his investigative ability/responsibility/authority, surely the obvious breach of BCG ethics is not.

- Walt Tuvell

On 05/07/2012 12:48 PM, Diane Adams wrote:

Walt:

Re: IBM Business Conduct Guidelines

This letter is regarding your employment with IBM. IBM believes that you currently are or have been during the course of your employment in violation of one of IBM's Business Conduct Guidelines.

Specifically, it appears that you currently are or have been during the course of your employment with IBM working for EMC Corporation in some capacity, such as an employee, consultant or contractor. That is a matter of significant concern to IBM since it considers EMC to be a competitor and you never asked for consent or obtained it.

IBM has Business Conduct Guidelines which set out the core values of trust and personal responsibility it expects its employees to embrace. One of those Guidelines relates to conflicts of interest. Section 5.1 of IBM's Business Conduct Guidelines states the following:

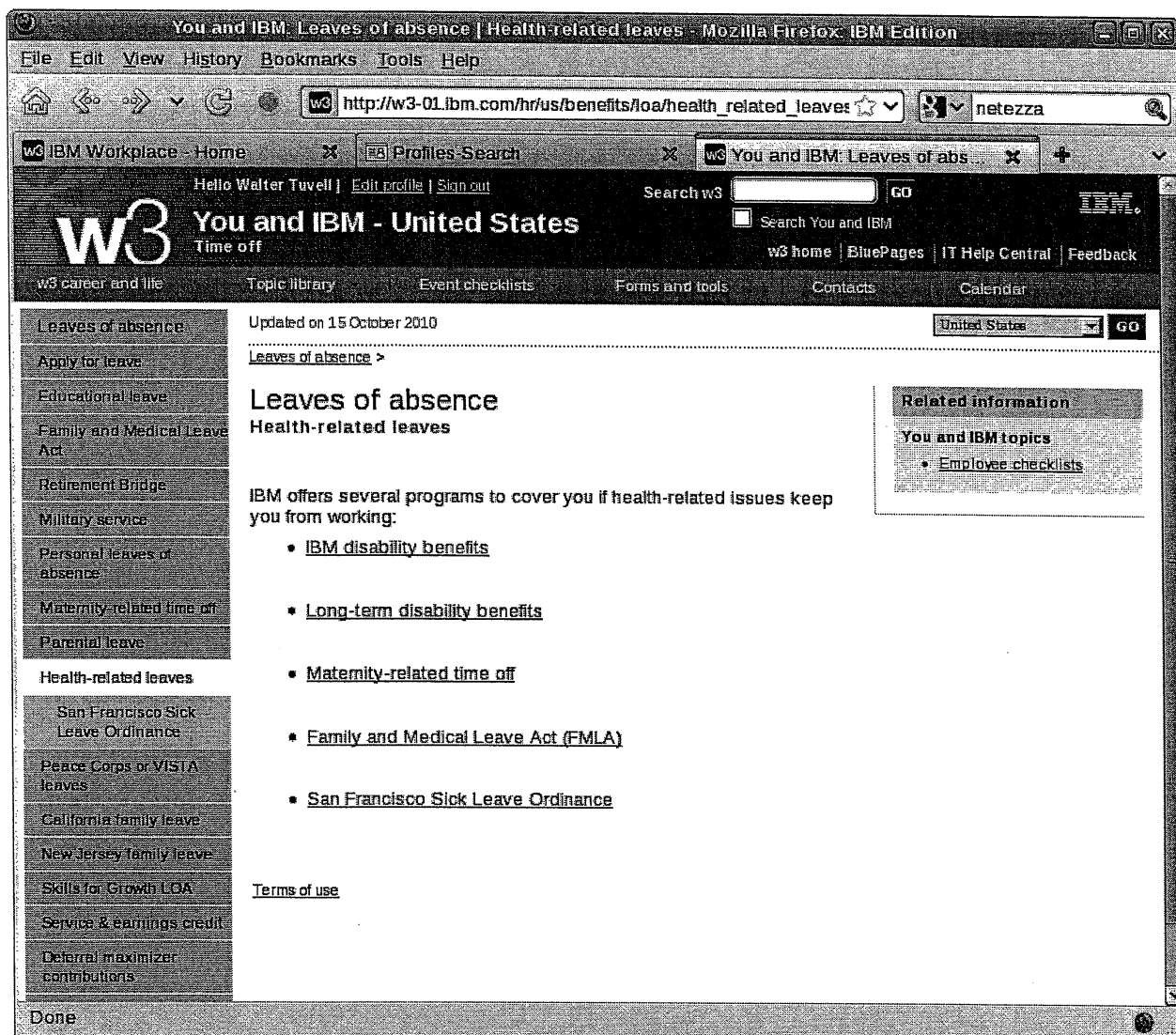
"An obvious conflict of interest is providing assistance to an organization that markets products and services in competition with IBM's current or potential product or service offerings. You may not, without IBM's consent, work for such an organization in any capacity, such as an employee, a consultant or as a member of its board of directors."

It appears that you violated this Business Conduct Guideline. Given the seriousness of this situation, IBM has determined that your employment will be terminated effective at 5:00 PM on May 8, 2012. If IBM is incorrect about your working with EMC Corporation, please contact me before that time to confirm that you are not currently and have not been at any time while an IBM employee working for EMC as an employee, consultant or contractor.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamds@us.ibm.com

—Screenshot-LeaveOfAbsenceIncludesSTD.png

Re: IBM Business Conduct Guidelines



Attachments:

Screenshot-LeaveOfAbsenceIncludesSTD.png

116 KB

Exhibit 89

Re: Fwd: Re: IBM Business Conduct Guidelines

Subject: Re: Fwd: Re: IBM Business Conduct Guidelines
From: Diane Adams <adamsd@us.ibm.com>
Date: 05/15/2012 02:42 PM
To: Walt Tuvell <walt.tuvell@gmail.com>
CC: Daniel Feldman <dfeldman@us.ibm.com>

Walt,

IBM has been attempting for approximately the past two weeks to find out if you are engaged in competitive employment. The reason for that is that your LinkedIn page states that you are. You did not immediately deny that employment. Now that you have denied employment with EMC, you are asking IBM to take it on faith that you are not working for a competitor. IBM is not prepared to do that.

As you know, IBM is engaged in a highly competitive industry. For that reason, IBM employees may not work for a competitor in any capacity without obtaining consent.

IBM should not have to ask this question repeatedly. Please advise IBM where you currently are working by 5pm tomorrow.

Diane M. Adams
Netezza HR Partner
SWG - Information Management
508-382-8534
adamsd@us.ibm.com

From: Walt Tuvell <walt.tuvell@gmail.com>
To: Daniel Feldman/Marlborough/IBM@IBMUS, RUSSELL E MANDEL/Somers/IBM@IBMUS
Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 05/14/2012 04:44 PM
Subject: Fwd: Re: IBM Business Conduct Guidelines

I intended to CC you two.

----- Original Message -----

Subject: Re: IBM Business Conduct Guidelines
Date: Mon, 14 May 2012 16:31:24 -0400
From: Walt Tuvell <walt.tuvell@gmail.com>
To: Diane Adams <adamsd@us.ibm.com>

Diane -

This is in response to your email of last Fri, May 11.

1. Concerning PLOA:

According to the Personal Leave Of Absence policy document you sent/cite, in order for me to be on PLOA status, it is a requirement that I must first apply for PLOA (and subsequently receive approval for said application from management). No such application ever existed, in any format. Therefore I am provably NOT on PLOA.

[Incidentally, I note the PLOA page you sent was updated just a few days ago, on May 2. Hence it is inapplicable to me. Please supply me with the previous version that is applicable to me. Note also that the page abbreviates Personal Leave of Absence inconsistently, as "PLOA" in the page title and once near the top of the page, and "LOA" elsewhere. But note also that the abbreviation "LOA" is nondeterminative, because it is also used in other contexts to refer to other kinds of "leave" -- see the reference to "Skills for Growth LOA" in the attached screenshot. And the unadorned word "leave" appears to be

Exhibit 90

In The Matter Of:
Walter Tuvell vs.
International Business Machines, Inc.

B. Stewart Snyder, III, M.D.
March 19, 2014



**DORIS O. WONG
ASSOCIATES, INC.**

COURT REPORTERS

50 Franklin St., Boston, MA 02110
Phone (617) 426-2432

Original File SNYDER.txt
Min-U-Script® with Word Index

B. Stewart Snyder, III, M.D. - March 19, 2014

85

1 believed that his condition would improve if he
2 didn't have to report back to Dan Feldman.

3 Q. Okay. And in light of this e-mail that
4 we've just read of September 21st, 2011 did you
5 investigate the possibility of assigning Mr. Tuvell
6 to a different supervisor?

7 MR. PORTER: Objection. I -- I think he's
8 testified that he wasn't part of the accommodation
9 process for him.

10 A. To answer your --

11 Q. I don't --

12 A. To answer your question, no.

13 Q. Okay. Did you direct anyone else to
14 investigate whether Mr. Tuvell would be able to
15 return to work under a -- a different supervisor?

16 A. No.

17 Q. And why not?

18 A. Because IBM policy is pretty clear that
19 supervisors aren't changed because an employee's not
20 getting along with their current supervisor.


21 Q. And is that policy in writing?

22 A. I do not know.

23 Q. Then how -- how do you know that the policy
24 is clear?

Exhibit 91



Re: 
Walter Tuvell to: Lisa Due
Bcc: walt.tuvell

06/23/2011 01:43 PM

From: Walter Tuvell/Marlborough/IBM
To: Lisa Due/Somers/IBM
Bcc: walt.tuvell@gmail.com
Default custom expiration date: 06/22/2012

Lisa, what you've written doesn't seem to map to what I was saying:

1. Sujatha wrote the 1-page doc I sent you, about the 4 projects that Sujatha had been doing, that now I'm supposed to be picking up, not things I'm handing off to her.
2. The stuff I handed off to her was in very good shape, because I'm very organized, and I explained it to her in about an hour (of course that didn't get her to understand the underpinnings, just enough to "push the button", but at least she was productive immediately). The opposite is the case for the stuff she's handing off to me.
3. Her write-up was basically one-line descriptions, as you saw, **NONE OF WHICH I had any idea about previously**. I have no idea why you say "I know all the steps". I obviously know **NONE** of the steps, because I know **NOTHING** of these projects of Sujatha's.
4. Nevertheless, Dan tried to coerce me into writing a day-by-day 3-week schedule, based on Sujatha's 1-page doc, giving me one day to do it! **ONE DAY!** Yes, of course, the "time frame is of concern"!
5. Yet, when I asked him what he wanted me to do, by giving me an example, he couldn't do it, because he's never asked anyone to do such a thing before. And I've never seen such a thing before either, even though I do have very extensive experience. Without having any idea of what to do, and no example, it is indeed "impossible to succeed" -- because anything I do, Dan can say it wasn't what he wanted. That is harassment, pure and simple.
6. Anyone with an ounce of sense knows that such a schedule (day-by-day, 3 weeks, starting from scratch on new technologies) is impossible anyway. When one approaches an unknown technology (not to mention 4 of them!), you have no idea the direction it's going to take after the first step. So, if a 3-week schedule were written, it would necessarily have to be revised already after the very first step, in which case the abusive manager tells the employee they are in violation of the schedule. I know this trick: it's called blackballing.
7. Finally, this so-called "transition" is something Dan and Fritz cooked up in secret anyway, and shoved it down my throat, with no input from me whatsoever. It's not a "transition" just because Dan calls it that. It's punishment, period. Under the circumstances, how am I supposed to cope? I have made it quite clear to HR that I am nearly incapacitated now by recurrence of PTSD, just as Dan knew I would be (because we talked about it, many times). I cannot now eat (because of stomach problems caused by this anxiety), I cannot sleep (because of lack of food, and

mind-spinning perseveration), I cannot concentrate (because of lack of sleep, and intrusive thoughts), and I've started seeing my psychological health-care professionals again about this problem, including psycho-medication. I have begged HR to release from the grasp of the likes of Dan, yet I'm still forced to be here, more vulnerable than ever, and tortured beyond my ability to stand it. Isn't there supposed to be some sort of policy against discrimination on the basis of disability, by forcing me to continue working with/for my tormentor (and if having debilitating PTSD isn't considered a disability, I don't know what is)? Yes, "rape" isn't too strong a word, even though it's not of the sexual kind.

- Walt

Lisa Due Walt, this looks like a very sma... 06/23/2011 01:10:55 PM

From: Lisa Due/Somers/IBM
 To: Walter Tuvell/Marlborough/IBM@IBMUS
 Date: 06/23/2011 01:10 PM
 Subject: Re:

Walt, this looks like a very small project plan to me that you then will help map out the activities under each bullet. This does not seem out of the realm especially if you are the senior member (and obviously know all the steps) and Sujatha may need guidance (you mentioned she is not on your technical level). During a transition, this is not an "impossible- to- succeed" request because you have the technical expertise to map the project out specifically. (I have seen/done many of these myself.)

You may want to ask Daniel for an extension if the time frame is of concern.

Regards,

Lisa Due
 Senior HR Partner/Case Manager
 IBM CHQ Human Resources
 HR Integrated Services Team (IST)
 Phone: +1-914-784-6177
 e-mail: lisadue@us.ibm.com

19 Skyline Drive
 Hawthorne, NY 10532-1596
 United States of America



Walter Tuvell Lisa, attached it the very thin o... 06/20/2011 10:59:02 AM

From: Walter Tuvell/Marlborough/IBM
 To: Lisa Due/Somers/IBM@IBMUS
 Date: 06/20/2011 10:59 AM
 Subject:

Lisa, attached it the very thin outline, all of which I had zero knowledge about previously, that Dan gave me 1 day to come up with a 3-week day-by-day workplan for!

Given that neither I nor anyone I know has seen anything remotely approaching this kind of onerous task heretofore, if this isn't harassment/bullying/blackballing, then I don't know what is. It is clearly intended to be an impossible-to-succeed

task.


I would very much welcome an unbiased third-party assessment of this.

- Walt

[attachment "SujathaMizar_ProjectStatus_061011.pdf" deleted by Lisa Due/Somers/IBM]

Exhibit 92



Re: Return to work? 

Walter Tuvell to: Daniel Feldman
Cc: walt.tuvell

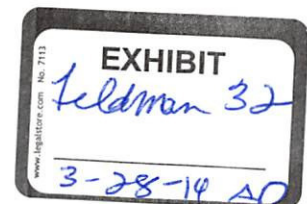
11/28/2011 02:02 PM

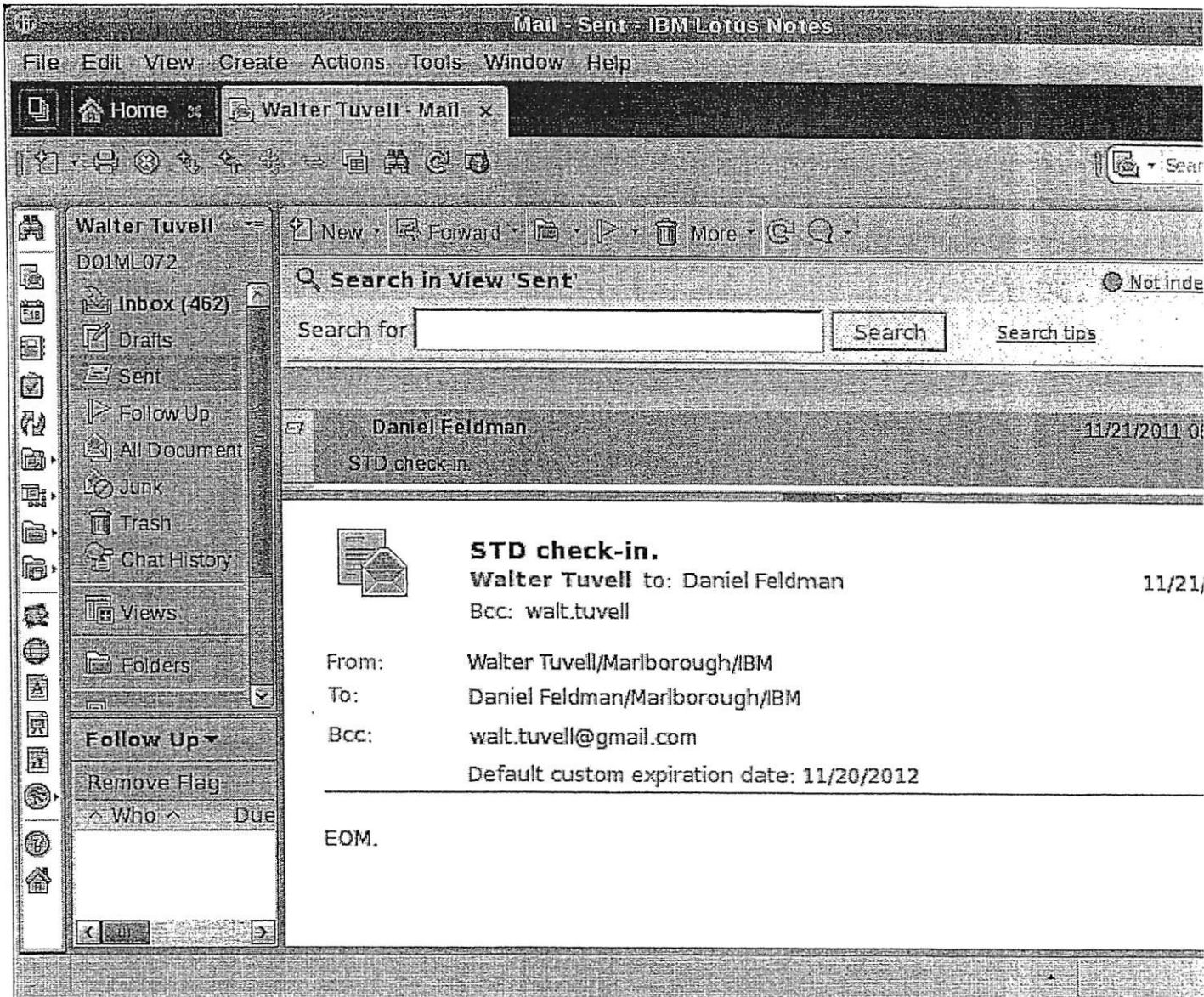
From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: walt.tuvell@gmail.com
Default custom expiration date: 11/27/2012

I sent an STD check-in last week (see below screenshot), and I'm doing so this week (with this very note). Please confirm receipt just so I can be confident that these e-mails are reaching you. I understand that I should be checking in each week, and I want to be seen as complying with this rule. Thank you.

In response to your e-mail, I will be unable to return to work early from my scheduled disability leave. In fact, the thought of returning to work under your 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 at this moment; I wish it were different.

It is for this reason that I have pressed for a transfer of some sort as a reasonable accommodation. I appreciate your suggestion to find other opportunities on GOM. I found a single position which is appropriate, and I have applied for it. I would appreciate it if you could be of assistance in helping my application succeed. Let me know if I can provide any further information.





Daniel Feldman | Hi, Walt, I haven't received a che... | 11/28/2011 08:58:22 AM

From: Daniel Feldman/Marlborough/IBM
 To: Walter Tuvell/Marlborough/IBM@IBMUS
 Date: 11/28/2011 08:58 AM
 Subject: Return to work?

Hi, Walt,

I haven't received a check-in from you since the week before last and you haven't replied to my most recent email about return to work. Please advise me of your plans.

Thanks,

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

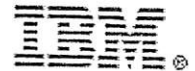
Phone: 508 382 8480

E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

Exhibit 93

E-mail: dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell

Dan - I am writing in response to...

01/18/2012 07:44:44 PM

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 01/18/2012 07:44 PM
Subject: Re: Transfer problems

Dan -

I am writing in response to your e-mail of January 16, 2012, including your comments with respect to my denied transfer, and my ongoing requests for reasonable accommodations.

You write that I was rejected for the transfer, posting SWG-0436579, because "the team did not think you were the right fit for the position." I note that your reason given, not the right fit, is about as vague, non-specific, and subjective as an explanation can get.

However, the clear, objective evidence, which I am bound to believe, is that my "fit" was not what motivated my rejection. On January 6, 2012, Chris Kime wrote to me, stating, "Unfortunately, I have discussed your situation with my up-line management and 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."

Mr. Kime clearly asserts that my disability leave status is the primary reason for my rejection. If I was not the right fit, at least from the perspective of the team, why was my situation elevated to up-line management? (Another e-mail from Mr. Kime, dated December 12, 2011 confirms that he advanced my application up through his management chain, which would be a curious endeavor for someone concluding that I was not the right fit). Moreover, it defies credulity that Mr. Kime would lie about considering my STD as a primary factor. It has been suggested that he relied on the STD to let me down easy; however I fail to see how rejecting me based on STD lets me down easier than "not the right fit," which is the very definition of a non-substantial, easy let-down. Why would Mr. Kime prevaricate, and rely on a much more hostile-sounding reason?

There are other reasons why I believe firmly that my status as a disabled person on medical leave is the true reason for the rejection. My medical leave has formed the basis of several negative actions taken against me. First, my access to IBM buildings was withdrawn based on my medical leave. This is confirmed by Russell Mandel's e-mail to me of September 14, 2011, as well as my personal failed attempts to enter the Littleton building in December 2011 and January 2012. See Complaint Addendum

TUVELL001037

III, at 13-14 ("You are out on STD. Therefore, you don't need access to IBM facilities since you aren't working. It is easy to return access once you return from STD"). Second, I was blocked from accessing the Netezza VPN, based on my medical leave. Mr. Mandel wrote that I would be denied VPN access as so long as I remain out on STD. See Complaint Addendum III, at 12-13 ("While you are out on STD, you have no need to access heritage Netezza systems. Once you return to work, it will be easy to return your access"). On December 16, 2011, you reaffirmed that my system access would be severed during the pendency of my medical leave. Third, IBM refused to act on my August 18, 2011 Complaint to the IBM Corporate Open Door process, expressly due to my disability leave. Despite a policy requirement for prompt review, Mr. Mandell asserted, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." See Complaint Addendum I, at 68. He only responded to my complaint (completely and unfairly rejecting it), after receiving multiple demands from me objecting to this lapse. So, my disability leave has been the express basis for repeated adverse actions, including the failed transfer application.

The fact that you would assert your false explanation that my rejection was due to lack of right fit is very distressing to me, given the strength of the evidence to the contrary. Your e-mail of January 16 with respect to my rejection leads me to conclude that you will continue to rely on falsehoods to hurt, victimize and disparage me (as you have in the past), should I go back to work under you. As you know, I suffer from PTSD, a disability, and I have been on leave as a reasonable accommodation. Your behavior in the past, and your false statement of January 16, 2012, places me in an excruciating position. Since you have long had knowledge of my PTSD, I must conclude that you are acting this way, with knowledge of the pain it causes. For this reason, in order to feel safe and preserve my health, I do not see any workable scenario in which I could continue to work under you. 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 you.

I have asked, and continue to ask for transfer or reassignment outside the GOM process, to different supervision, but I have been refused each time. I hereby renew my request.

I have utilized the GOM process, and was rejected under plainly discriminatory circumstances. Did you have any input into the decision? I request that you let me know what input you had, and what information you conveyed to the team.

Since IBM has apparently taken the idea of reassignment or transfer off the table unless it is through the GOM process, 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?

- Walt

Daniel Feldman

Walt: You were not hired for the

01/16/2012 10:26:53 AM

From: Daniel Feldman/Marlborough/IBM

TUVELL001038

To: Walter Tuvell/Marlborough/IBM@IBMUS
Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 01/16/2012 10:26 AM
Subject: Re: Transfer problems

Walt:

You were not hired for the position mentioned below because the team did not think you were the right fit for the position. HR reviewed the situation with the hiring manager to ensure that the decision was made for legitimate business reasons.

You can continue to look for jobs on GOM. Diane can work with you on looking for opportunities on GOM, if you need any assistance.

In the meantime, of course, you have a job on my team.

I believe you know that you are expected to return to work on January 25 once your Short Term Disability Benefit concludes, unless you find another position or apply for Long Term Disability.

Further, as you know, many weeks ago we offered you the opportunity to discuss proposed accommodations for you to return to your current position. Apparently you have decided not to explore this possibility with IBM but it does remain available to you. If there are other potential accommodations you would like to discuss (other than changing managers), please let me know.

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell	Dan: As you know, I have taken s...	01/11/2012 12:58:02 PM
---------------	-------------------------------------	------------------------

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 01/11/2012 12:58 PM
Subject: Transfer problems

Dan,

As you know, I have taken short term disability as a reasonable accommodation for my handicap. On November 23, in response to my requests for further

accommodation, you wrote an e-mail suggesting that I apply for other positions through the GOM system. I applied and was interviewed for a posting SWG-0436579. However, on January 6, 2012, Mr. Klme informed me that I was rejected for the transfer based on the fact that I am currently serving on STD. I believe this rejection constitutes retaliation based on my requesting or utilizing the reasonable accommodation of medical leave. It is ironic that availing myself of one type of reasonable accommodation is being used to prevent me from utilizing another type of reasonable accommodation.

Moreover, the rejection appears to close off the one avenue you suggested to accommodate my disability, other than continued leave. Is there any other options, any other positions, any other reporting structures, that you can think of that would help me return to IBM as a productive employee?

- Walt

Exhibit 94

Robert Mantell

From: Robert Mantell
Sent: Friday, January 27, 2012 5:34 PM
To: 'Larry Bliss'
Subject: RE: Confidential--Walt Tuvell

Larry,

I want to respond to your e-mail of January 24, 2012. You state that Mr. Tuvell's position is "not that he is unable to perform the essential functions of his job." That is incorrect. Mr. Tuvell's current job requires him to work under Mr. Feldman, in an atmosphere that triggers intense PTSD symptoms for Mr. Tuvell. Mr. Tuvell has been on medical leave based on his medical incapacity to perform the essential functions of his job, and that leave has been supported by medical documentation, including an MTR of December 19, 2011, stating the "only modification that would be possible is a change of supervisor and setting." On January 18, 2012, Mr. Tuvell wrote to Mr. Feldman, "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 you." Mr. Tuvell has asserted his medical incapacity, IBM has accepted the documentation of medical incapacity, and has approved medical leave. Therefore, your assertion that Mr. Tuvell is declaring that he is capable of performing the essential functions of his current job is simply not true.

Mr. Tuvell can work with and for others at IBM, including Mr. Kime, because his disability permits him to do so.

Mr. Tuvell has offered two important suggested reasonable accommodations: allow him to stay in his position under a different supervisor, or reassign him to a vacant position. You claim that transferring the supervisor is not a reasonable accommodation. Actually that it not true. Transfer to a different supervisor, depending on the facts, may be a valid reasonable accommodation. *Ralph v. Lucent Technologies*, 135 F.3d 166, 171-172 (1st Cir. 1998) (employer changed supervisors as a reasonable accommodation); *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122-123 (2nd Cir. 1999). The burden of demonstrating the reasonableness of the request rests on the plaintiff. *Kennedy*, 193 F.3d at 122-123. I note that IBM's own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. About Your Job, June 2009, section 2.3.1.2.

However, even if it is the case that transferring the supervisor, and permitting Mr. Tuvell to continue in his present position under a different manager is not a required reasonable accommodation, Mr. Tuvell is then forced to request the only remaining alternative accommodation. He is seeking reassignment to a vacant position for which he qualified. That is a reasonable accommodation specifically provided for in the ADA. I know of no exception in the ADA, or any case, for that matter, that curtails the notion of reassignment as accommodation, when an employee, for purposes of a psychiatric disability, seeks to leave a work environment perceived as hostile and which causes intolerable symptoms. Significantly, you cite to no authority.

You note that IBM has offered the reasonable accommodations of [1] the opportunity to take time out for medical appointments, and [2] including a second line manager to handle formal performance reviews. These suggestions, which assume that Mr. Tuvell continues to work under Mr. Feldman, were offered only after Mr. Tuvell and his medical care provider had certified that continuing to work under Mr. Feldman is not medically feasible. IBM's offered accommodation, which requires Mr. Tuvell to violate the orders of his medical care provider, is not adequate, under the law.

You note that IBM is not required to offer the accommodation specifically requested by the employee. Actually, it is required to offer the accommodation that is requested, if there is no other feasible solution. You have offered no solutions which are consistent with Mr. Tuvell's or his medical provider's assessment of his medical condition. Moreover, IBM has actively encouraged Mr. Tuvell to seek a transfer as a reasonable accommodation (see Feldman e-mail of November 23, 2011), and so it would seem that both parties would be in agreement that this is a valid mechanism for accommodation.

Consequently, it is requested that IBM change its position, and immediately offer Mr. Tuvell the transfer that he applied for, or another position for which he is qualified.

Robert S. Mantell
Rodgers, Powers & Schwartz LLP
18 Tremont St.
Suite 500
Boston, MA 02108
617 742-7010, ext. 305
RMantell@TheEmploymentLawyers.com

-----Original Message-----

From: Larry Bliss [mailto:blissl@us.ibm.com]
Sent: Tuesday, January 24, 2012 8:21 PM
To: Robert Mantell
Subject: Re: Confidential--Walt Tuvell

Robert:

I am writing in response to your email.

IBM strongly disagrees with your characterization of the facts and the law. IBM has fully complied with the Americans with Disabilities Act (ADA).

Mr. Tuvell's position is that he cannot work for a particular manager, not that he is unable to perform the essential functions of his job. Indeed, Mr. Tuvell has repeatedly made it quite clear in numerous communications that he can perform the job, but just can't work under the direction of Dan Feldman. The ADA does not require IBM to transfer Mr. Tuvell or change Mr.

Feldman as Mr. Tuvell's manager as a reasonable accommodation since Mr. Tuvell is capable of performing the job.

Mr. Tuvell's case is easily distinguishable from *Smith v. Midland Brake, Inc.*, which dealt with an employee whose maladies were so severe that he could not physically perform a job on a break assembly line. Mr. Tuvell can perform his job, so the reasoning of the case clearly does not apply.

As I am sure you know, the EEOC guidance states employers are not required to offer the accommodation specifically requested by the employee. Accordingly, IBM is not obligated to transfer Mr. Tuvell simply because he requested it.

IBM has repeatedly engaged in an interactive dialogue and offered multiple reasonable accommodations to Mr. Tuvell. In fact, in a recent email, IBM offered Mr. Tuvell the opportunity to attend medical appointments for treating his alleged condition. While IBM was not obligated to switch Mr.

Tuvell's manager, IBM even offered to have Mr. Tuvell's second line manager handle important human resource related discussions with Mr. Tuvell, such as delivering performance feedback. Mr. Tuvell refused these accommodations. The Company consistently conveyed its openness to

an interactive dialogue but your client apparently took the position the specific accommodation he requested is the one and only accommodation that was acceptable to him.

Based on Mr. Tuvell's last email to Mr. Feldman, he stated he is going to apply for Long Term Disability (LTD). While IBM expects most employees to commence the LTD application process while they are still on Short Term Disability (STD), IBM is granting Mr. Tuvell an unpaid leave of absence so he can attempt to take advantage of the generous IBM LTD benefit program.

Finally, Mr. Tuvell can appeal internally any action that is eligible for review under IBM's HR appeal programs. It is my understanding his latest appeal is under review.

Regards,

Larry Bliss
Counsel
IBM
1 New Orchard Road
Armonk, New York 10504

(914) 499-4867
(914) 499-6085 (fax)
Tie line: 641-4867
blissl@us.ibm.com

PREPARED BY IBM ATTORNEY / PRIVILEGE REVIEW REQUIRED

This e-mail and its attachments, if any, may contain information that is private, confidential, or protected by attorney-client, solicitor-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify me of the misdirection by reply e-mail.

Exhibit 95

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

AFFIDAVIT OF STEPHANIE ROSS, LICSW

I, Stephanie Ross, LICSW, hereby depose and state:

1. I am a graduate of Gettysburg College and have a Masters degree in Social Work from the University of Pennsylvania. I was licensed to practice social work (LICSW) in Massachusetts in or about 1984. I have received post-graduate training in psychodynamics and psychotherapy. I have been a practicing psychotherapist for over 25 years.
2. I am qualified to diagnose and treat Posttraumatic Stress Disorder (PTSD). I am trained in Eye Movement Desensitization and Reprocessing (EMDR), which is a qualified technique used to treat PTSD patients. I have treated PTSD patients in the course of my practice.
3. I have worked professionally with Mr. Tuvell on many occasions since I first met him in 1993, both privately, and together with his spouse, Linda King. I have worked with Mr. Tuvell privately approximately 250 times, and have additionally worked with Mr. Tuvell and Ms. King as a couple on many other occasions.
4. Mr. Tuvell is a highly intelligent and capable individual, who places much of his self-worth in his ability to work, as both a means to provide for his family, and to attain high technical accomplishments in his career as a computer scientist.
5. I have diagnosed Mr. Tuvell as suffering from PTSD. I have also diagnosed Mr. Tuvell as having Acute Stress Reaction and Adjustment Disorder with Mixed Anxiety and Depression. 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 my presence, he has wept uncontrollably when describing his experiences. Mr. Tuvell is subject to irritability and outbursts. He, however, has never threatened or harmed anyone, and is not a danger to himself or others.

6. Mr. Tuvell has a very deep sense of and commitment to justice, and, as an aspect of his illness, has a very depleted ability to tolerate unfairness and rule breaking. One of his coping mechanisms is to dwell on the issue, and document the situation in great detail, in an effort to understand, explain, be heard, communicate, and correct the injustice. In this sense Mr. Tuvell can sometimes have extreme responses to particular stimuli.
7. Based on my long-standing professional relationship with Mr. Tuvell, I have personally observed the dramatic changes in his conduct and demeanor, occurring after he developed PTSD, and during subsequent active episodes of PTSD.
8. To manage his PTSD, I have treated Mr. Tuvell with psychotherapy as well as EMDR. I have encouraged Mr. Tuvell to take medications to deal with the symptoms of his illnesses. Mr. Tuvell has been prescribed medication for his symptoms from his primary care provider. I also referred him to Dr. Frank Gaustella Anderson for evaluation and medication as well.
9. Mr. Tuvell's PTSD became manageable prior to his employment at IBM, and was well-managed when he joined IBM (Netezza). However, his PTSD and other emotional limitations left him vulnerable to exacerbation, which he experienced during his time at IBM. Mr. Tuvell was medically able and qualified to perform his work at IBM if he was not being harassed. However, to the extent that Mr. Tuvell was subjected to a hostile work environment, I felt that it was medically advisable to keep him out of work, instead of subjecting him repeatedly to harmful activating triggers.
10. On or about October 12, 2011, I submitted the attached Medical Treatment Report, marked TUVELL897-898 to IBM. The document accurately reflected my medical assessment of Mr. Tuvell, as well as my suggestions for accommodating Mr. Tuvell's medical condition in the workplace.
11. On or about November 3, 2011, I submitted the attached Medical Treatment Report, marked TUVELL919-920 to IBM. The document accurately reflected my medical assessment of Mr. Tuvell, as well as my suggestions for accommodating Mr. Tuvell's medical condition in the workplace.
12. On or about December 19, 2011, I submitted the attached Medical Treatment Report, marked TUVELL1007-1008 to IBM. The document accurately reflected my medical assessment of Mr. Tuvell, as well as my suggestions for accommodating Mr. Tuvell's medical condition in the workplace.

13. On or about January 23, 2012, I submitted the attached Attending Physician Statement, marked TUVELL1182-1185 in support of Mr. Tuvell's application for Long Term Disability benefits. The document accurately reflected my medical assessment of Mr. Tuvell.
14. On or about January 31, 2012, I prepared the attached Addendum to Met Life Attending Physician Statement, marked TUVELL1200. The document accurately reflected my medical assessment of Mr. Tuvell.
15. On or about September 28, 2012, I submitted the attached letter marked TUVELL2239-2240 to MetLife Disability. The document accurately reflected my medical assessment of Mr. Tuvell.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY


Stephanie Ross, LICSW

Date 12/13/13

Exhibit 96

From: Kathleen Dean
To: Stewart Snyder
CC: Al Pfluger
BCC:
Sent Date: 2011-10-19 19:03:03:000
Received Date:
Subject: *IBM Confidential: Walter Tuvell - conversation with his Therapist.
Attachments:

Dr. Stew.

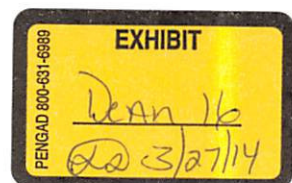
Stephanie Ross LICSW Speciality Psychotherapist called on Wednesday the 19th. I originally had a meeting set up with her at 1PM but she caught me off guard and called sooner. I spoke with her 1st and then I had Al come in the office. Needless to say, it was hard to get a word in with her talking so much. I have not shared this with HR Russell Mandel, waiting to speak with you. Kathy & Al.

Summary of conversation:

Medical problem - he is suffering from PTSD. Weekly therapist appointments.



Kathleen A. Dean, R.N. COHN, COHC
IBM Health Services Advisor
Integrated Health Services, IBM EFishkill
Phone: (845) 894-9573 or tieline 533-9573
Fax: (845) 892-3226 or tieline 532-3226
email: deanka@us.ibm.com



October 19, 2011

Spoke with therapist, who has known Walter Tuvell and his family for over 20 years. Some of the things she brought up during this conversation were:

- Walt is hardworking smart, intelligent, and takes enormous pride in his work.
- Work is his life.
- Willing and works long hours for his job. Brilliant, gives 100% to his job.
- He is not crazy. He is absolutely sane and has no violent tendencies.
- He has a strong sense of justice.
- Being yelled at in front of others and then being demoted.
- He has difficulty sleeping and eating. He is in distress. He is angry and irritable. Walt feels like he has been violated and treated unjustly. He feels he has been shut out and there has been no communication.
- His therapist feels that Walt has medical problems from this situation. She sees him weekly.
- She mentioned him being stonewalled, blackballed, being yelled at in front of others. No one sat down and talked to him about what had occurred and why. Communication & interaction not done.
- No one had set up a meeting with him, his manager and others to explain what had occurred and why. Walt doesn't know why this has happened. He can not figure it. If work is not adequate than explain to him – back it up logically as to why.
- She mentioned in Walt's perspective that there was not an adequate investigation by HR, no communication by his manager/others regarding the situation that occurred and the demotion.
- Feelings of having been threatened. He is now dealing with this enormous injustice. He is looking for an explanation why this occurred.
- Walt is concerned that he was being set up to fail.
- He has lost trust in management and HR. She stated Walt feels the original HR did not listen and advocate. She did not investigate further. She did not put them in the same room to discuss. He lost trust in HR.
- Need to repair trust which may not be able to retract without feeling like he is put in a corner. Looking for an apology.
- Walt worked for Netezza and then IBM. Happy he was able to keep the same job. Another position such as a transfer, will take him away from the original job he loves to do.

Exhibit 97

CONFIDENTIAL

ATTENDING PHYSICIAN STATEMENT



Metropolitan Life Insurance Company
P.O. Box 14590
Lexington, KY 40511
Fax: 1-800-230-9531

Instructions for completing the claim form:

- 1. Complete all applicable areas of the claim form.
- 2. Sign the claim form.
- 3. Fax this claim form to expedite your claim - retain original for your records.

The following section must be completed and signed by the employee/patient. Any fee for the completion of this form is the patient's responsibility. Occupation

Name-MUST ANSWER <u>Walter Tuve II</u>	Social Security Number or MetLife Alt ID# MUST ANSWER <u>269-44-2708</u>	Employer <u>IBM</u>
---	---	------------------------

I hereby authorize my physician to release any information acquired in the course of examination or treatment.

Signature of Employee WE Tuve II Date 1/23/12 Date of Birth 6/19/47

The following section must be completed and signed by the attending physician. The purpose of this report is to assist us in making a disability determination. Please complete all applicable sections of this form. A MetLife claim representative may telephone your office if additional information is needed.

History

Symptoms result from: Injury Illness Is condition work-related? Yes No

Initial date of treatment 6/22/11 Most recent date of treatment 1/18/12

Did you advise the patient to cease the above noted occupation? Yes No If Yes, Date _____

** Did advise not to return to specific job environment*

Names and Phone Numbers of the providers the patient was referred to:

Name	Phone #	Name	Phone #
<u>Middlesex Family Practice</u>	<u>781-944-0600</u>		

Has patient been hospitalized? Yes No If Yes, Day Confined _____ Through _____

Name and address of facility _____

Diagnosis and Treatment

Primary ICD-9 309.1 - 81 Diagnosis Post Traumatic Stress Disorder

Secondary ICD-9 _____ - _____ Diagnosis _____

Subjective Symptoms
Problems with eating, sleeping, anxiety, anger, hyperarousal + reactivity in the face of trauma

Objective Findings (Include copies/results of any x-rays, lab tests, EKG's, MRI's, scans and office notes) related stimuli.

Current and Recommended Treatment Plans weekly psychotherapy to decrease symptoms of stress + anxiety, recover self-esteem, support family relationships since re-traumatization and help return to full functioning.

If surgery performed/anticipated, provide the following:

CPT-4 _____ Procedure _____ Date _____

Medications prescribed (names, dosages)

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Name of Employee: Walter Tuvel

Social Security Number: 269-44-2708

Psychological Functions

Check applicable box below

- Class 1 - Patient is able to function under stress and engage in interpersonal relations (no limitations)
- Class 2 - Patient is able to function in most stress situations and engage in some interpersonal relations (slight limitations)
- Class 3 - Patient is able to engage in only limited stress situations and engage in only limited interpersonal relations (moderate limitations)
- Class 4 - Patient is unable to engage in stress situations and engage in interpersonal relations (marked limitations)
- Class 5 - Patient has significant loss of psychological, physiological, personal and social adjustment (severe limitations)

Remarks: Patient has good functioning in the absence of trauma related stimuli, but significant limitation at current job setting with trauma related stimuli.

What stress factors or problems with interpersonal skills have affected patient's ability to perform, the duties of his or her job?
Fear, anxiety, hyper reactivity, sleep difficulties + depression.

Is patient competent to endorse checks and direct use of the proceeds? Yes No

Physical Capabilities

(a) Patient's ability to: (circle)

	Hours								(check)		
Sit	0	1	2	3	4	5	6	7	8	<input type="checkbox"/> Continuously	<input type="checkbox"/> Intermittently
Stand	0	1	2	3	4	5	6	7	8	<input type="checkbox"/> Continuously	<input type="checkbox"/> Intermittently
Walk	0	1	2	3	4	5	6	7	8	<input type="checkbox"/> Continuously	<input type="checkbox"/> Intermittently

(b) Patient's ability to: (circle)

Climb	Yes	No
Twist/bend/stoop	Yes	No
Reach above shoulder level	Yes	No
Operate a motor vehicle	Yes	No

(c) Patient's ability to lift/carry: (check)

	Never	Occasionally	Frequently	Continuously
	0%	1-35%	36-66%	67-100%
Up to 10 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11 to 20 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21 to 50 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
51 to 100 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Over 100 lbs.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

(d) Patient's ability to perform repetitively: (circle)

	Right Hand		Left Hand	
Fine finger movements	Yes	No	Yes	No
Eye/hand movements	Yes	No	Yes	No
Pushing/pulling	Yes	No	Yes	No
Dominant hand	R		L	

(e) In your opinion, why is patient unable to perform job duties?

(f) Patient can work a total of _____ hours per day?

(g) Do you expect improvement in any area?
(If so please comment and give dates/timeframes.)

Cardiac

Functional Capacity (American Heart Association) Complete only if applicable.

- Class 1 (No Limitation) Class 2 (Slight Limitation) Class 3 (Marked Limitation) Class 4 (Complete Limitation)

Blood Pressure (latest reading) _____ / _____ as of (date) _____ / _____

Is patient in a cardiac rehabilitation program?

Prognosis

Have you advised patient to return to work?

- Yes If Yes, date of return _____ To regular occupation Full Time Part Time
- No If Not, please explain _____ To any other occupation Full Time Part Time

Any work/activity restrictions applicable (please be specific)

Rehab

Do you suggest that the patient become involved in any of the following? Please check as many as apply. If so, was this discussed with the patient? Yes No

- Physical Therapy Pain Management Program Vocational Rehabilitation
- Occupational Therapy Work Hardening Program Psychological Counseling
- Cardiac Rehabilitation Job Modification Other _____

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Disability Claim Statement (Continued)

Fraud Warning (continued):

New Jersey – Any person who knowingly files a statement of claim containing false or misleading information is subject to criminal and civil penalties.

New Mexico – Any person who knowingly presents a false or fraudulent claim for payment of a loss or benefit or knowingly presents false information in an application for insurance is guilty of a crime and may be subject to civil fines and criminal penalties.

Ohio – A person who with intent to defraud or knowing that he is facilitating a fraud against an insurer, submits an application or files a claim containing false or deceptive statement is guilty of insurance fraud.

Oklahoma – WARNING: Any person who knowingly and with the intent to injure, defraud or deceive any insurer, makes any claim for the proceeds of an insurance policy containing any false, incomplete, or misleading information is guilty of a felony.

Oregon – A person who knowingly and with intent to defraud an insurance company, files a claim containing false, incomplete or misleading information material to such claim, may be guilty of insurance fraud.

Pennsylvania – Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or a statement of claim containing any materially false information or conceals for the purpose of misleading, information concerning a fact material there to commits a fraudulent insurance act, which is a crime and subjects such person to criminal and civil penalties.

Puerto Rico – Any person who knowingly and with the intention to defraud includes false information in an application for insurance or file, assist or abet in the filing of a fraudulent claim to obtain payment of a loss or other benefit, or files more than one claim for the same loss or damage, commits a felony and if found guilty shall be punished for each violation with a fine of no less than five thousands dollars (\$5,000), not to exceed ten thousands dollars (\$10,000); or imprisoned for a fixed term of three (3) years, or both. If aggravating circumstances exist, the fixed jail term may be increased to a maximum of five (5) years; and if mitigating circumstances are present, the jail term may be reduced to a minimum of two (2) years.

Tennessee, Virginia, Washington – It is a crime to knowingly provide false, incomplete or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines and denial of insurance benefits.

Texas – Any person who knowingly presents a false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison.

Signature of Physician: <u>Stephanie Ross</u>	Date: <u>1/23/2012</u>
---	------------------------

Stephanie Ross, LICSW
 742 Massachusetts Ave.
 Arlington, MA 02476

Exhibit 98

Volume I
Pages 1 to 271
Exhibits 1 to 20

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

-----		-x
WALTER TUVELL,		:
Plaintiff,		:
		:
vs.		:
		:
INTERNATIONAL BUSINESS		:
MACHINES, INC.,		:
Defendant.		:
		:
		:
-----		-x

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

DEPOSITION OF WALTER E. TUVELL, JR., a witness called on behalf of the Defendant, taken pursuant to the Federal Rules of Civil Procedure, before Ken A. DiFraia, Registered Professional Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Offices of Jackson Lewis P.C., 75 Park Plaza, Boston, Massachusetts, on Friday, May 16, 2014, commencing at 10:14 a.m.

PRESENT:

Rodgers, Powers & Schwartz LLP
(by Robert S. Mantell, Esq.)
18 Tremont Street, Suite 500,
Boston, MA 02108,
RMantell@TheEmploymentLawyers.com
617.742.7010
for the Plaintiff.

(Continued on Next Page)

1 Q. Well, you wrote something called "Sleepless
2 in Boston. How Microsoft Raped my Family While
3 Recruiting Me, January 24 to April 20, 1997," didn't
4 you?

5 **A. Sounds right.**

6 Q. That's a long document that you sent to
7 three individuals at Microsoft. Actually, you sent
8 it to more than three individuals, but it was
9 directed to Meg MacGougan, Margaret Johnson, and
10 David Thompson?

11 **A. I believe she pronounced it "MacGougan,"**
12 **but yes.**

13 Q. And you also sent a copy of this to Bill
14 Gates?

15 **A. I believe I did.**

16 Q. Who was Bill Gates at the time you sent him
17 this missive?

18 **A. Chairman and CEO of Microsoft.**

19 Q. The document is about your experience of
20 being recruited by them and then being told they
21 were withdrawing the job offer?

22 **A. Yes, but, again, the withdrawal was not the**
23 **real issue. The real issue was raping my family, as**
24 **I wrote there and explained earlier.**

1 Q. The rape was what, that they said your wife
2 did not appear to want to move to Washington?

3 **A. Yes. They didn't exactly say that, but**
4 **they basically said she's not a fit wife to be a**
5 **Microsoft employee's wife.**

6 Q. Was it an injury to her? I mean, did you
7 consider this a rape because of what they said about
8 your wife as opposed to about you?

9 **A. It was both. She was devastated, and I was**
10 **too. I say that not because of what she said to me**
11 **but because of what I observed of her. I'm not**
12 **breaking that spousal privilege.**

13 Q. What is it that they said about you that
14 was devastating?

15 **A. Nothing in particular. I mean, they**
16 **admitted they lied when they said I had bad business**
17 **judgment and that's why they were not hiring me.**
18 **That didn't bother me at all, except for the fact**
19 **that they lied and tried to blame me when it was**
20 **really her that they were blaming.**

21 Q. Mr. Tuvell, I believe the circumstances are
22 reversed, that they first indicated that it was your
23 family's unwillingness to move, and then only after
24 you pushed back on that did they say it was your

1 **A. 1997 or so, yes.**

2 **Q. I'm trying to find out what trauma that**
3 **diagnosis was based on.**

4 **A. Right. It was based on exactly the**
5 **Microsoft incident, and again, it's not the mere**
6 **fact of withdrawal of a job offer. It's what I call**
7 **in colloquial language the rape of my family,**
8 **blaming my family for something that they had no**
9 **business getting into.**

10 **MS. ACKERSTEIN:** Why don't we take a short
11 break.

12 (Recess at 3:08 p.m.)

13 (Matthew A. Porter, Esq., exits)

14 **BY MS. ACKERSTEIN:** (3:28 p.m.)

15 **Q. You would like to say something?**

16 **A. I would like to add to the events that**
17 **happened on or about June 8th to June 15th.**

18 **Q. We have just taken a break. Did you confer**
19 **with your attorney during that break?**

20 **A. Yes, but not about this.**

21 **Q. Did you confer about this case?**

22 **A. No. When I say "not about this," I mean**
23 **not about this thing that I wanted to add to the**
24 **record.**

1 arrangement, but in that case they were -- you know,
2 I don't know how to say it, asking, offering me to
3 come back to work.

4 Apart from that instance -- well, I think
5 that's the only time I would characterize anyone as
6 asking me to come back to work, which is what I
7 believe you said.

8 Q. No, it isn't what I said, but since you
9 raised that, I will ask you about that. In or
10 February of 2012, a proposal was made to you that if
11 you wanted to come back to work, your performance
12 reviews and so forth would be done by Mr. Metzger?

13 A. Yes.

14 Q. And you turned that down?

15 A. I did.

16 Q. My question to you was from the time you
17 went out on a medical leave on August 15, 2011,
18 nobody asked you to physically make an appearance at
19 an IBM facility?

20 MR. MANTELL: Objection.

21 A. That's incorrect.

22 Q. Who asked you to come to an IBM facility?

23 A. Chris Kime did, to come and interview with
24 his people at the Littleton facility.

1 Q. Other than Chris Kime calling you to come
2 to the Littleton facility when you were
3 interviewing, was there any other occasion when you
4 had to be at an IBM facility?

5 A. **I don't think so.**

6 Q. When you worked in Cambridge, you had a
7 badge for the Cambridge building?

8 A. **I think it was a proximity badge to get
9 into the room, yes.**

10 Q. When you were no longer on Wahoo, didn't
11 they take your Cambridge badge?

12 A. **Yes. I think they gave that to Sujatha.**

13 Q. You didn't complain when they took that
14 Cambridge badge, did you?

15 A. **No.**

16 Q. You didn't have any need to go to Cambridge
17 anymore, and Sujatha did, right?

18 A. **Right.**

19 Q. Then you had a badge that got you into the
20 Marlborough building?

21 A. **Yes, two badges actually.**

22 Q. What two badges did you have?

23 A. **Well, I had the previous Netezza badge,
24 which, if I'm remembering correctly, that one was a**

1 **proximity badge. I also had the IBM employee badge**
2 **with my picture on it. That would have been just an**
3 **ID badge.**

4 Q. You had a badge that got you into the
5 Marlborough building?

6 A. **I believe that is correct.**

7 Q. But the ID did not get you into a building?
8 It did not open a door?

9 A. **Right. It was just, you know, you were**
10 **supposed to wear it and people recognized you were**
11 **supposed to be there.**

12 Q. Where was the interview with Chris Kime?

13 A. **Littleton.**

14 Q. You didn't have a badge to get into the
15 Littleton building, did you?

16 A. **So I guess I'm misremembering. I did have**
17 **a badge that was supposed to get me into the**
18 **Littleton building. Let me think.**

19 All right, what may be the case was there
20 was an overlap of period when I had to carry two
21 badges -- yes. It's when they were rekeying it for
22 the IBM standards or something.

23 At any rate, the question now is about the
24 Littleton building. I did have a badge. It was an

1 **IBM badge, not the previous Netezza badge. That was**
2 **also a proximity badge. It was supposed to get me**
3 **into the Littleton building, yes.**

4 Q. What makes you think it was supposed to do
5 that?

6 A. Because what happened is the first time
7 when I went there for that interview with two people
8 in Chris Kime's group, the badge didn't let me in.
9 I did observe other people walking up and using
10 their similarly appearing proximity badges to get
11 into the proximity sensor, just like I tried to do.
12 Mine did not.

13 I went to the security office there in
14 Littleton. They said, "Oh, the thing should be
15 working. We will reactivate it." They did. The
16 next time I went to the Littleton building, that
17 badge did get me into the building.

18 Q. So you were there twice?

19 A. At least twice. It may have been three
20 times. Actually, previously when Digital owned that
21 building many years ago, I was there a couple of
22 times.

23 Q. I'm not talking about Digital. Did you
24 think we were talking about Digital, Mr. Tuvell?

1 **A. No. You asked about the building.**

2 **Q. Did you think I was interested in when it**
3 **was a Digital building?**

4 **A. I thought you were interested in the**
5 **building. That's what you asked me.**

6 **Q. I'm just trying to understand where you are**
7 **coming from because --**

8 **A. I'm just trying to be as precise and**
9 **complete as possible. I don't see anything wrong**
10 **with that. I have a good memory.**

11 **Q. Is this the way you behaved when you were**
12 **at IBM? You would try to be as precise and literal as**
13 **possible?**

14 **MR. MANTELL: Objection.**

15 **A. I tried to be as precise as possible. When**
16 **you say "literal," that could be interpreted in many**
17 **ways. You are the lawyer. I'm trying to be as**
18 **lawyer-like as possible. I know lawyers try to be**
19 **very literal.**

20 **Q. At IBM, until you were interviewing with**
21 **Chris Kime or for the Chris Kime position, did you**
22 **ever have occasion to go into the Littleton**
23 **building?**

24 **A. Yes, I did.**

1 Q. When was that?

2 **A. It was when we first transitioned from**
3 **Netezza to IBM. At that time, of course, we only**
4 **had Netezza badges. We were told to go to our**
5 **choice of a couple of places that they named, of**
6 **which one was the Littleton building, to get our new**
7 **IBM badges. I took Sujatha Mizar in my car. We**
8 **went to Littleton, got our badges, then went back to**
9 **Marlborough.**

10 Q. On that occasion you did not yet have an
11 IBM badge; is that it?

12 **A. Right. We got our badges right there.**

13 Q. What is the second time you went to the
14 Littleton building?

15 **A. I think it was for the interview with Chris**
16 **Kime's people, the two people.**

17 Q. What was the date?

18 **A. That would have been -- okay. It was early**
19 **December, perhaps even the 1st, when I talked to**
20 **Chris Kime on the phone. Then I had an interview**
21 **there in Littleton with his two people. I would**
22 **guess that was right around the end of the first**
23 **week of December. Let's say 5, 6, 7, something like**
24 **that.**

1 Q. Who were the two people you interviewed
2 with?

3 **A. There were two names: Harvey Harrison and**
4 **Brian Dougherty.**

5 Q. What time was the interview?

6 **A. I don't know. I believe it was more**
7 **towards the morning than the afternoon.**

8 Q. What is the address of the building you
9 went to?

10 **A. That Littleton building is a really big**
11 **one, but I think it had an address of something like**
12 **550 King Street in Littleton, Mass.**

13 Q. Is there a main entrance with a guard?

14 **A. Yes.**

15 Q. Was there a guard sitting there?

16 **A. I don't know. I didn't go to the main**
17 **entrance.**

18 Q. What entrance did you go into?

19 **A. The side entrance.**

20 Q. You went into the employee entrance?

21 **A. I think employees go into both entrances.**
22 **The entrance I went into is a side entrance near one**
23 **of the bigger parking lots. That's where I parked,**
24 **and so that's the entrance I went in.**

1 them was the VPN, virtual private network, to
2 Netezza. That one, you might call it, legacy
3 Netezza. It was a preexisting VPN. It's electronic
4 access. That's what this VPN stuff means. It means
5 when you are off site, you can log into this VPN and
6 your computer thinks it's in the same network as
7 everybody else in the building. Everybody uses it
8 there. That's number one.

9 Q. Well, when did you discover that your
10 Netezza access had been limited?

11 A. That seems fairly early. "Fairly early"
12 meaning fairly soon after I submitted these first
13 two volumes of my IDR.

14 Q. Well, it's after you were on your medical
15 leave, isn't it?

16 A. Yes.

17 Q. Why were you trying to get access to
18 Netezza?

19 A. Because I was doing work for IBM.

20 Q. But you didn't need to do work because you
21 were on a medical leave.

22 MR. MANTELL: Objection.

23 Q. Isn't that true?

24 A. Yes.

1 position with Chris Kime?

2 **A. I'm the one who discovered it on their**
3 **internal GOM facility, yes.**

4 Q. When you did that, you still had access?

5 **A. Yes. I believe I discovered that in late**
6 **November 2011.**

7 Q. You also allege that work at home days were
8 treated as sick days and that that was retaliatory.

9 What is that?

10 **A. There were a number of days -- I think**
11 **approximately five -- when I worked at home. It was**
12 **very common for people to work at home. No one**
13 **objected to that. No one, except for these five**
14 **days I'm talking about here, treated them as sick**
15 **days.**

16 By "sick day," I mean it's one that is
17 counted against your STD allotment for a year. You
18 are given only a certain number, 13 weeks, at IBM to
19 have STD days on full salary. Then you are given
20 another 13 weeks to be on two-thirds salary, or at
21 least you were at that time.

22 To have work at home days treated as STD
23 days, that means they reduce your allotment of those
24 13 weeks. Now, I needed to use all those 13 weeks,

1 plus the second 13 weeks as well.

2 The fact of the matter is those days when I
3 was working at home, the only sense in which I was
4 "sick" was I could not be around Dan Feldman because
5 of my obvious PTSD reaction.

6 Nevertheless, I did complete technical work
7 as per my job title on those days just as if I had
8 taken an unexceptional day at home, which people
9 often did just telling their manager, "Hey, I want
10 to work at home this day." That's the amount of
11 work I got done those days.

12 Q. But he told you not to. Dan Feldman told
13 you not to work.

14 MR. MANTELL: Objection.

15 A. I'm not sure about that for all of these.
16 I think there may have been one when he told me not
17 to work, or when he suggested it. He never actually
18 told me not to work until the very end, when he
19 said, "Don't do any more work." All the others were
20 more like suggestions, like "You don't have to work
21 if you are going to work at home," stuff like that.

22 I absolutely did work. He absolutely
23 didn't object to my working after I worked. He in
24 fact has said in his own documentation that I used

Exhibit 99



Re: Breach of corporate conduct standards 

Walter Tuvell to: RUSSELL E MANDEL

08/05/2011 03:08 PM

Cc: Diane Adams

Bcc: walt.tuvell

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM
Cc: Diane Adams/Fishkill/IBM@IBMUS
Bcc: walt.tuvell@gmail.com
Default custom expiration date: 08/04/2012

In the first place, you are incorrect about that third-party statement. I have solid reasons for believing that unethical/harassing/etc. behavior has occurred, based upon the following 2 sets of facts: (i) the Gordon/Dan use of the phrase "raison d'etre" is more severe than my use of the word "lazy" (and the latter led to a formal warning letter); (ii) the facts I related in my preceding note about the treatment of me vis-a-vis Garth/Dan vs. the treatment of Gordon/Dan vis-a-vis Amal, properly states in full a prima facie case for discrimination on the basis of race/color/genetics/religion/ethnicity/national origin (no further facts or evidence than those states is required for a "prima facie case"). Therefore the following quotation is applicable:

<quote source="BCG, p.8, in relevant part">

If you know of, or have good reason to suspect, an unlawful or unethical situation ..., immediately report the matter through any of IBM's Communication Channels:

- Your manager is usually the best place to start
- IBM Human Resources
- Concerns and Appeals programs

...

IBM will promptly review your report of unlawful or unethical conduct, and will not tolerate threats or acts of retaliation against you for making that report.

</quote>

Here's another applicable quotation (note it speaks of "employee found to have engaged", it does not specify who the complainer/reporter should be, but we know from the preceding quotation that the complainer/reporter can be anybody):

<quote source="About Your Job, p. 9, in relevant part">

IBM is committed to provide a work environment free from ... harassment based on race, color, genetics, religion, ..., national origin, ethnicity, The company has a zero tolerance level for such conduct in the work environment, and any IBM employee found to have engaged in such behavior will be disciplined.

</quote>

In the second place, the main thrust of my complaint was not to complain on behalf of Amal, but rather on my own behalf. Perhaps that paragraph near the end about Amal being non-Caucasian was confusing. So here is a shorter re-statement of the core of my complaint (omitting that part about Amal):

Upon information and belief, I claim that I am being subjected to (mis-)treatment, based upon a set of facts similar to (but less severe than) those those involved in the Gordon/Dan/Amal incident. Namely, I am being punished (by being issued the formal warning letter), but Gordon and Dan are not. I claim the sole reason for this disparate mistreatment is that I have invoked the C&A process, and for no other reason. This mistreatment constitutes (i) harassment/hostile-workplace/bullying/blackballing/etc. of me, and (ii) tampering with the C&A process. The active perpetrators of this mistreatment are Dan Feldman and Diane Adams (Dan explicitly told me so), together with some person or persons in Legal whose identities I do not know (Dan told me that too). This mistreatment is explicitly forbidden by IBM, according to the following quotations (in addition to final paragraph of the preceding quotation):

<quote source="About Your Job, p. 10, in relevant part">

If you believe you have been the victim of harassment, you are encouraged to report the conduct to management. You may, as you believe appropriate under the circumstances, report incidents of harassment directly to your manager, your senior management, or the human resource department. ... All complaints of such conduct will be investigated promptly and dealt with appropriately. Threats or acts of retaliation or retribution by any manager or other supervisory personnel against employees for use of IBM's communications channels or appeals process will not be tolerated by the company; such conduct, when determined to have occurred, will result in discipline.

</quote>

<quote source="Concerns And Appeals Program, p. 4" comment="square-brackets in original, presumably indicating emphasis">

[Anyone tampering or attempting to tamper with the Concerns and Appeals Program by actions such as intimidation, threats, harassment, etc., will be subject to disciplinary action].

</quote>

Finally, just in case there is any doubt at all that my concern about the "human-being-ness" of Amal constituting a protected characteristic, here's the quotation I was basing it on:

<quote source="About Your Job, p. 8">

Diversity in IBM means welcoming all people to the workplace without regard to factors unrelated to job performance. It is a way of life that began almost 80 years ago when the company started to expand internationally. Today, the notion of diversity goes well beyond differences in nationality.

In fact, IBM's definition of diversity includes all the human characteristics that make us unique as individuals. It includes everyone and excludes no one. Race, geographic origin, culture, lifestyle, age, disability, color, genetics, sexual orientation, gender, gender identity or expression, economic status, marital status, religion are just some of the characteristics that define us as people. So do our needs - the need, for example, to take care of children or aging parents.

</quote>

It is likely that there exist many more IBM policy/process/procedure statements, but I'm sure all of them augment/support those above (i.e., do not try to "walk back" from them), but discovering those is unnecessary to establishing IBM's liability for the above (and I have indeed obviously "relied upon" these statements, to my detriment [cf. contract law, contra proferentem, etc.]).

Based upon, and amended by, the above, I hereby re-assert my complaint first asserted in my note entitled "Breach of corporate conduct standards".

RUSSELL E MANDEL IBM does not accept third-pa... 08/05/2011 01:07:51 PM

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 08/05/2011 01:07 PM
Subject: Re: Breach of corporate conduct standards

IBM does not accept third-party employee complaints. If Mr. Haldar has a complaint about his treatment, he should complain using the C&A process.

Russell E. Mandel

Consulting Human Resources Professional
Concerns and Appeals SME

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)

Walter Tuvell Diane, Dan Feldman told me that... 08/05/2011 10:22:17 AM

From: Walter Tuvell/Marlborough/IBM
To: Diane Adams/Fishkill/IBM@IBMUS
Cc: RUSSELL E MANDEL/Somers/IBM@IBMUS
Date: 08/05/2011 10:22 AM
Subject: Breach of corporate conduct standards

Diane, Dan Feldman told me that you personally, in your role as IBM/Netezza Steady-State HR Leader, were responsible for deciding that my use of the word "lazy" in an email (to Dan and Garth Dickie), together with the apology and explanatory material that accompanied it, required that I be issued the "formal Warning letter" he gave me on Wed. (While I completely disagree that action was warranted in any way, I am committed to doing my best to satisfy its requirements and ultimately get it rescinded, via whatever means exist for doing so under IBM policy/procedure/practice,

though nobody has as yet given me any information whatsoever about how to go about doing that, and I hereby request somebody/you to do so.) [Dan also told me that you and he collaborated with IBM Legal, but he didn't supply me with any contacts there, so I cannot CC the appropriate person(s) on this email, so I do rely on you to forward it.]

Therefore, I write you now to inform you of a similar (but even worse) incident that happened yesterday. It is my understanding of the IBM Business Conduct Guidelines (BCG) and Concerns And Appeals Program (C&A), that my knowledge of said incident requires me to report it, and also requires you to promptly issue similar (but even more severe) formal warning letters to the perpetrators involved in the incident (Gordon Booman and Dan Feldman). [The reason this is an "even worse" incident is that in the case of the "lazy" incident I apologized* as soon as Dan pointed out it was an inappropriate use of language, and there exists a standardized/well-known/innocent usage of the word "lazy" amongst the participants in that discussion (programmers), which I explicitly explained* as soon as possible (that is, as soon as I recovered it from my memory). But no such explanation has been forthcoming from the current incident, despite Dan's involvement in it -- and it is he, after all, the person who (together with you/HR/Legal) seems to be spearheading the current thrust to provide explicit explanations/sanitizations for all potential/possible (mis-)interpretations of all words used in the workplace, no matter how absurd/inane/insane such (mis-)interpretations may be.] For, if no such warning letters are issued, a suspicion could/would be raised that the C&A Process I'm currently involved in (as I know you and Dan are very well aware) is being tampered with, which is expressly forbidden by the terms of both the BCG and C&A, and I'm sure nobody would want such suspicions to be raised. As executive in charge of the C&A Program, I'm CC'ing Russell Mandel, to make sure all this is being done on the up-and-up.

The incident I refer to is contained in the 2 emails included below. I received these emails as an authorized member of the "netezza-perf-arch" group. For typographical convenience, I've here transcribed them from Notes format to ASCII format. There were additional emails involved in the whole discussion, but those others were irrelevant for the purposes of the critical incident I'm reporting, so they are omitted here. Despite this omission, the whole email discussion is to be interpreted as a single unit (for all the emails were "included by reference", and in most cases that "inclusion" was actually physical [via actual inclusion of the content of previous emails within the content of succeeding ones], not merely logical). This omission is done, not as an attempt to repress evidence, but only for the sake of brevity/readability/convenience. (In any case, the full content of all the emails are archived in IBM document retention databases, and are discoverable there by investigatory processes such as C&A. I would welcome that, of course.)

To be specific, the issue is that Gordon published the sentence: "I think the regression test you describe is Amal's raison d'etre...No?"

The problem is the phrase "raison d'etre", which is a French phrase meaning "reason for existence" (there can be no misinterpretation of this, there is no other meaning of the phrase). So this sentence, taken at the face value of its plain meaning (as Dan has adamantly pointed out to me it must, in this case not even involving a

"(mis-)interpretation"), states that the reason for existence of Amal (Amalendu Haldar) is the regression test. This devalues all other aspects of Amal (such as his human-being-ness, for example), so it is offensive, intimidating, harassment, bullying, etc.. This is something that IBM does not tolerate (BCG, p. 10: "IBM will not tolerate ... comments that ... encourage or permit an offensive or intimidating work environment").

I hasten to add here that in my non-work life, and at all other places I've ever worked (including IBM/Netezza until I invoked the C&A process), this kind of language has never been an issue (except in service of obvious/coordinated "blackballing" harassment). In those places, which consist of people who are intelligent, well-meaning and mature individuals, of good character and high integrity (i.e., just a person of "IBM values"), such language has always been regarded as a "mere manner-of-speaking" -- "a throw-off, for the sake of brevity of communication, that the auditors can safely be assumed to automatically translate to have its clearly intended/innocent meaning". In those other environments, only the truly stupid would try to torture such manner-of-speaking language into something unrecognizable by the majority of man/woman-kind. So I personally would never, in the past, have regarded this kind of language as an issue (I would have auto-translated it into something like "I think regression testing is something that Amal is supposed to be doing, don't you?"). But I now know from painful first-hand experience that this is not the case at the "new IBM/Netezza". Therefore, the actions I laid out above must now be undertaken, lest suspicions be raised.

Certainly, Gordon is the primary perpetrator here, but Dan is a close second, since he specifically states he's "adding Amal". By explicitly coupling Amal with the discussion about Amal in this way (whether or not Dan actually did bring Amal's attention to it), Dan is supporting Gordon's characterization about Amal's reason for existence. Therefore, Dan must be considered a co-conspirator with Gordon, and Dan merits the same severe scrutiny as Gordon.

All other people involved in this discussion (except me) also merit some sort of reprimand/training, because they silently tolerated the prohibited language/behavior.

Note one final thing. Amal is non-Caucasian. This is to be distinguished from Dan and Garth, who are Caucasian. If non-IBM-acceptable-language is permitted to be perpetrated upon Amal, but not upon Dan/Garth, then a further suspicion can/will be raised about discrimination based upon "race, color, religion, ..., national origin, genetics, ... other factors that are unrelated to IBM's legitimate business interests" (BCG, p. 10). Since "raison d'etre" is French, perhaps Gordon/Dan thought Amal would be unable to understand it (neither English nor French is his native language)? In any case, I'm sure nobody would want such suspicions of discrimination to be raised.

- Walter Tuvell

*Footnote: "Never make misrepresentations or dishonest statements to anyone. If you believe that someone may have misunderstood you, promptly correct the misunderstanding. Reporting inaccurate or incomplete information, or reporting information in a way that is intended to mislead or misinform those who receive it, is

strictly prohibited and could lead to serious consequences." (BCG, p. 14)

EMAIL #1:

From: Gordon Booman/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: Larry Lutz/Marlborough/IBM@IBMUS, Fritz Knabe/Marlborough/IBM@IBMUS, Jay
Wentworth/Marlborough/IBM@IBMUS, John Metzger/Marlborough/IBM@IBMUS,
netezza-perf-arch, Steve McAfee/Marlborough/IBM@IBMUS
Date: 08/04/2011 01:38 PM
Subject: Re: Trunk performance regressions

You can log bugs by symptom, or by cause. As a developer, I prefer cause. Which is why I am suggesting some more investigation to narrow it down. There are good reasons for symptom, but it leads to way too many tickets.

I think the regression test you describe is Amal's raison d'etre...No?

EMAIL #2:

From: Daniel Feldman/Marlborough/IBM@IBMUS
To: Gordon Booman/Marlborough/IBM
Cc: Larry Lutz/Marlborough/IBM@IBMUS, Fritz Knabe/Marlborough/IBM@IBMUS, Jay
Wentworth/Marlborough/IBM@IBMUS, John Metzger/Marlborough/IBM@IBMUS,
netezza-perf-arch, Steve McAfee/Marlborough/IBM@IBMUS
Date: 08/04/2011 02:36 PM
Subject: Re: Trunk performance regressions

Adding Amal as his name has come up a couple of time.

Well, I think the formal regression testing associated with a release, change in hardware, etc, is the original motivation for Amal's group. I think there's a slightly different question about automating some basic perf sanity checking at or near check-in time.

The symptom v. cause question is interesting. I'm ok with the idea of spending a little more time on the first level of diagnosis.

-Dan.

Exhibit 100

**GUIDANCE FOR AN INTERVIEW DESIGNED TO OBTAIN
INFORMATION FROM THE ORIGINATOR OF AN ALLEGATION
OF DISCRIMINATION and/or RETALIATION**

- Start with simple questions that the interviewee should find easy to answer so that he/she has a chance to become comfortable with you as the interviewer. Sample questions may include: How long have you been employed by IBM? Have you worked in other companies before coming to IBM? What is your job role at IBM? Do you generally work in an office setting? Remotely? From home?
- Describe the composition of his/her team. (Number of people on the team, matrix relationships, physical locations where work is performed, etc.) Where is your manager located?
- When and where did the alleged act(s) of discrimination and/or retaliation occur? Press for details and specifics.
- Get a description of the activity that is alleged to be discriminatory and/or retaliatory. Who was present? What exactly was said? Who said it? To whom was it said? Is there any documentation available related to the alleged act?
- What was your first reaction to the alleged act? Did you inform any one in management at the time of the incident? At a later date?
- How was the alleged action of discrimination manifested? (e.g does it involve Compensation? Opportunity? Promotion? Awards? PBC rating? etc.)
- Do you have an opinion as to the possible basis for this discrimination? (e.g. Age, Gender, Race or other protected category?)
- Do you believe this alleged discrimination and/or retaliation happened to others as well as yourself? If yes, when did it occur?
- Have you discussed this incident with others in your work group since the incident occurred? If yes, who did you share it with? What was the reaction from others?.
- Are you aware of anyone else with knowledge of this incident? If yes, how were they made aware of the incident?
- Are you aware of same or similar incidents of this kind ever happening before in your work group? (If the response is yes, consider asking the same questions asked in the first incident as they relate to the second incident.)
- If this is an allegation of retaliation, what is the nature of the original incident where the Originator raised a complaint or exercised some legally protected right which they now feel they are being negatively impacted for raising?

- Inform the interviewee that in the course of this investigation, others will be interviewed in order to fully investigate the facts of the case.
- Review, secure and retain any documentation associated with this interview.

GUIDANCE FOR AN INTERVIEW DESIGNED TO OBTAIN INFORMATION FROM THE PERSON ALLEGED TO HAVE DISCRIMINATED

- What is your current position? (e.g. Team Lead, Manager, etc.) What teams do you manage/lead? Where the employees you manage/lead are located? What teams do you interact with as part of your job responsibilities? If a manager, how long have you been an IBM manager?
- The investigator should describe the incident being investigated, being careful to share only the details of this investigation necessary at his point. Assess the interviewee's reaction to the allegation. Be clear that you are investigating the allegation and his/her involvement in the incident.
- Explain to the interviewee that he/she is alleged to have been responsible for the incident of alleged discriminatory or retaliatory behavior. Ask for his/her perspective on the incident and the allegation.
- If the interviewee asserts no knowledge of the incident and denies involvement and/or knowledge in the incident, consider the appropriateness of continuing.
- If the interviewee acknowledges an awareness of the incident, process with the following questions.
- Confirm the relationship between the interviewee and the originator of the complaint.
- If the alleged discrimination involved a selection process, be sure to understand the process itself (e.g. compensation planning, team based decision making, resource action, etc.) Asked for copies of all documentation used in the process to support the decision at the heart of the allegation.
- Ascertain the names, job roles, salary bands of others in the comparison group with the originator. Assess how they were treated in the selection.
- Ascertain the names of anyone who was part of the review process for the selection (e.g. upline management, HRP) Consider interviewing these individuals as part of your investigation.
- Would there be any reason for the originator to have raised this complaint if there was no basis in fact?

GUIDANCE FOR INTERVIEWING OTHERS WITH RELEVANT INFORMATION REGARDING THE COMPLAINT OF DISCRIMINATION and/or RETALIATION

- What is your relationship to the originator of this complaint? (e.g. co-worker? Former manager, extended team member? Etc.) NOTE: Do not interview

anyone outside of IBM until you have reviewed it with Procurement and IBM Legal)

- Describe the incident being investigated, being careful to share only the details of this investigation necessary at his point. Assess the reaction of the interviewee to the allegation. Be clear that you are investigating the allegation and his/her possible knowledge of the incident.
- If the interviewee asserts no knowledge of the incident and denies involvement and/or knowledge in the incident, consider the appropriateness of continuing.
- If the interviewee acknowledges an awareness of the incident. Ask the interviewee to describe the incident from his/her perspective. Ensure he/she describes the incident from his/her personal account and is not repeating a summary of the event shared with them by someone else.
- Ask for any verbal or written comments made or observed in conjunction with the incident
- Ask if the allegation is surprising. Is he/she aware of any similar allegations in the past?
- Does he/she know of others who have knowledge of this incident? Who? How did they become aware of the incident?
- Has he/she spoken with anyone else about the incident?
- Are they aware of any additional information that would be helpful to you investigation?

ANALYSING INFORMATION GATHERED IN AN INVESTIGATION OF ALLEGED DISCRIMINATION TO DETERMINE FINDINGS.

Once the Investigator has conducted all interviews and gathered all pertinent data relating to the case, he/she will need to analyze that data along with other inputs in order to assess the facts and come to an appropriate conclusion. Other inputs may include using the tools available in the country to identify any trends, e.g. survey data, prior Confidentially Speaking reports and/or Open Door reports, Warning Letters, executive/line manager interviews etc. (NOTE: This is not an exhaustive list.)

The Investigator must be clear that they have identified the appropriate peer group when comparing the originator with others. Generally, peers are the same skill set, same or similar band level, similar locations, same or similar management chain, etc. Documents related to the incident of alleged discrimination should be gathered. Reach out to SMEs to help with an assessment if necessary. (E.g. Compensation, Sales Plan administrators, Resource Actions Programs office. etc.)

The Investigator will also need to consider any past precedent and examples of previous cases in order to compare this incident to others, especially with regard to the outcome (Non HR Investigators, your HR Case Manager will be able to provide you with an anonymous summary of similar cases).

The Investigator may also find it useful to talk to the HR Partner of the business where the alleged incident occurred in order to understand the culture/climate in that business, and therefore better understand the context in which the alleged incident took place.

As well as considering whether the incident was unfair or unreasonable, the Investigator should consider IBM's policy on discrimination when coming to a conclusion, so as to decide if the incident represents a breach of that policy. This will also ensure that the Investigator has assessed if a breach of any of the strands of discrimination law has occurred.

For non HR Investigators, the Investigator should talk the case through with their HR Case Manager contact as it will help to discuss/process the Investigators thoughts, test their rationale and also provide for a useful sounding board. The Case Manager may also suggest other sources for the Investigator to explore before coming to a conclusion.

ANALYSING INFORMATION GATHERED IN AN INVESTIGATION OF ALLEGED RETALIATION TO DETERMINE FINDINGS.

Basically, retaliation means "getting back" at an employee for raising or threatening to raise, a complaint against another employee (often a superior) or against the Company. It is manifested in some negative or "adverse" action because of the fact that the employee has raised a complaint or exercised some legally protected right.

Any employee who raises a concern through IBM's internal appeals channels or who exercises any legal rights can be protected from retaliation. This can include:

- Filing an Open Door, Panel Review, Confidentially Speaking or Grievance (informal or formal)
- Opposing unlawful conduct
- Participating in proceedings before a court or government agency
- Filing a complaint with a government agency
- Filing a lawsuit against you as a manager or against the Company
- Requesting job related accommodations to address issues such as disabilities or other medical conditions, religious requirements or military service needs
- Being a "whistleblower" who raises ethical, financial, safety or other concerns

It is also important to remember that an individual can be protected from retaliation even if they don't actually file a complaint or a lawsuit. For example, an employee can be protected from retaliation if:

- An employee has a close association with someone who has exercised their legal rights. For example, it would be inappropriate to terminate an employee because his or her spouse has participated in employment discrimination litigation.
- The employee has merely made a threat or statement that he or she intends to file a charge with a government agency or bring a lawsuit against IBM

Retaliation can take many forms and no list can ever hope to cover every situation. Some examples of adverse actions that may be considered retaliation include:

- Unjustified negative performance ratings
- Unjustified refusal to provide pay increases or performance based incentive payments
- Denial of promotions or job assignments
- Less favorable job or territory assignments
- Refusal to hire
- Termination, including unjustified selection for a resource action
- Negative references
- Unjustified surveillance or monitoring of employee activities
- Exclusion from team meetings
- Limiting access to training or professional development activities otherwise available to other employees
- Harassment, threats or intimidation of any kind
- Unjustified refusal to provide accommodation requests or requests for leaves of absence
- Any other actions that are likely to deter reasonable people from pursuing their rights or encouraging other employees from pursuing their rights

REVIEW AND APPROVAL REQUIREMENTS FOR INVESTIGATIONS INVOLVING A FINDING OF DISCRIMINATION AND/OR RETALIATION

(To Be Determined By Work Stream #6)

RESOURCES FOR DISCRIMINATION INVESTIGATION

Knowledge Warehouse
Global Concerns and Appeals
(web address)
Global Diversity
(web address)

More to be added.....

Exhibit 101

Robert Mantell

From: Dubois, Paul (Boston) <Paul.Dubois@jacksonlewis.com>
Sent: Thursday, October 23, 2014 2:12 PM
To: Robert Mantell
Cc: Ackerstein, Joan (Boston); Porter, Matthew A. (Boston)
Subject: RE: Tuvell v. IBM

Rob,

I agree that my earlier email confirms the stipulation.

Thanks,
Paul

From: Robert Mantell [mailto:rmantell@theemploymentlawyers.com]
Sent: Thursday, October 23, 2014 1:28 PM
To: Dubois, Paul (Boston)
Cc: Ackerstein, Joan (Boston); Porter, Matthew A. (Boston)
Subject: RE: Tuvell v. IBM

Thank you. In light of that stipulation, I will regard that Rule 37.1 matter to be resolved. To be clear, I believe that your email below perfects the stipulation. Do you agree to that characterization? If not, please send me a separate signed version of the stipulation. Otherwise, please confirm that your statement below constitutes the formal stipulation.

Robert S. Mantell
Rodgers, Powers & Schwartz LLP
111 Devonshire Street
4th Floor
Boston, MA 02109
617 742-7010, ext. 201
RMantell@TheEmploymentLawyers.com

From: Dubois, Paul (Boston) [mailto:Paul.Dubois@jacksonlewis.com]
Sent: Thursday, October 23, 2014 11:11 AM
To: Robert Mantell

Cc: Ackerstein, Joan (Boston); Porter, Matthew A. (Boston)
Subject: RE: Tuvell v. IBM

Hi Rob,

In lieu of making Lisa Due or anyone else available for further deposition regarding the training materials IBM produced last month, IBM will stipulate that "IBM11375-IBM11459 constitute materials generated and maintained in the usual course of business at IBM, that these documents were in effect during the period of Mr. Tuvell's employment with IBM, and that these materials are the materials that were referenced by Lisa Due on pages 25-27 of her deposition."

Paul

Paul Dubois
Attorney at Law
Jackson Lewis P.C.
75 Park Plaza, 4th Floor
Boston, MA 02116

617.367.0025: Main
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Representing Management Exclusively in Workplace Law and Related Litigation

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From: Robert Mantell [<mailto:rmantell@theemploymentlawyers.com>]

Sent: Wednesday, October 15, 2014 12:17 PM

To: Dubois, Paul (Boston); Ackerstein, Joan (Boston); Porter, Matthew A. (Boston)

Subject: Tuvell v. IBM

Hi Paul,

To confirm our conversation, you stated that IBM would soon produce to Plaintiff the draft of Mr. Mandel's report, referred to on IBM11117. Thank you.

In addition, Plaintiff is suggesting, to resolve outstanding issues involving the recently produced training materials, that IBM enter the following stipulation: "IBM11375-IBM11459 constitute materials generated and maintained in the usual course of business at IBM, that these documents were in effect during the period of Mr. Tuvell's employment with IBM, and that these materials are the materials that were referenced by Lisa Due on pages 25-27 of her deposition."

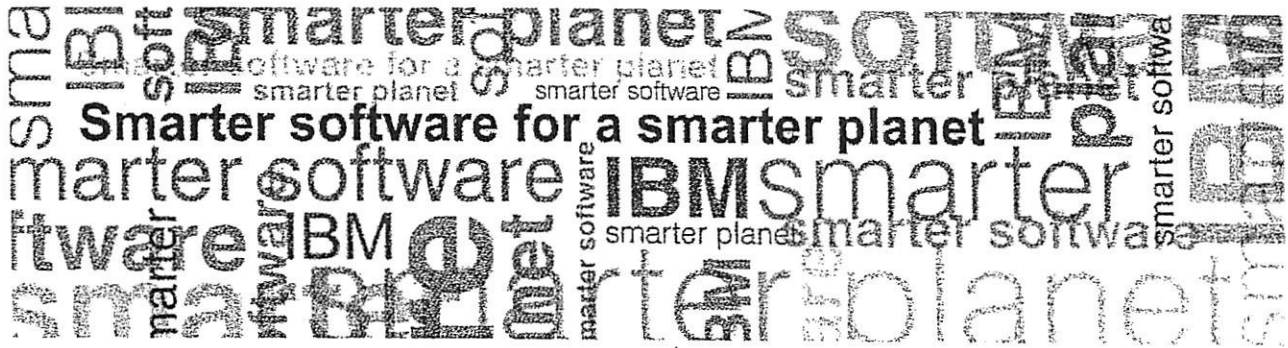
Robert S. Mantell
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111 Devonshire Street
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Boston, MA 02109
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Exhibit 102



Claims Of Corporate And Legal Misconduct

Addendum I



Walter Tuvell

August 28, 2011



Document History

Rev.	Date	Author	Remarks
1.0	August 28, 2011	Walter Tuvell	First draft

Related Documents

Author	Date	Title
Walter Tuvell	August 18, 2011 (version 1.0)	<i>Claims Of Corporate And Legal Misconduct</i> , in two Parts: <i>Part I (Acts Of Fritz Knabe)</i> ; <i>Part II (Acts of Dan Feldman, HR, Legal)</i> — Referenced as " <i>original (two-Part) Complaint</i> "
Alan Beaulieu	2005 (1 st ed.) 2009 (2 nd ed.)	<i>Learning SQL</i> , O'Reilly



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28 Executive Summary — Addendum I

This document is Addendum I to my original two-Part Complaint (see Related Documents).¹¹¹ It documents additions and corrections to the original Complaint, and logically forms an extension of the original Complaint itself. This addendum “incorporates the original Complaint by reference”, including its terminology, Related Documents, numbering scheme, etc.

Hence, hereinafter, the unqualified term “Complaint” includes the original two Parts, plus now this Addendum I, unless otherwise specified. Additional addenda may be published in future as circumstances warrant.

28.1 List Of Particulars

- On July 5, Dan “offered” to “help me with my communication style”, by “vetting” my published materials for “inappropriate material”. I allege this was a hoax, for the sole purpose of harassment/abusive-workplace/IIED, with the ultimate purpose (which was actually realized) of fabricating false “cause” for dismissal (namely, the whole “lazy” scandal).¹¹²
- After I duly/properly submitted my original Complaint, IBM officials refused to respond “promptly” to the submission (not even an acknowledgment of receipt for a full week) — and further delay was proposed, based on my STD status. These delays: (i) constituted hostile work environment, because they violated IBM Law promises of “prompt” action to employee problems; (ii) constituted hostile workplace, because of their basis in knowing the *reason* for my STD status; (iii) violated IBM Law, which guarantees prompt action irrespective of STD status; (iv) constituted illegal (ADA) disability discrimination (because of STD status).
- By means of its “BCG Program”, IBM has established “IBM Law” as a contractual “condition of employment”. By all the anti-“IBM Law” actions conducted to date (conducted by its agents, named throughout my Complaint), IBM is in breach of that contract, and even guilty of unconscionable contract.

29 Typos, Etc.

In this Section, we list various typographical errors (and/or other typographical “infelicities”) discovered in the original Complaint since its publication. None are of substantive consequence; some are merely cosmetic.¹¹³

The abbreviations “top/mid/bot” mean “roughly top/middle/bottom of page”; and “fn.” stands for “footnote”.

111. The original (two-Part) Complaint document is stable (permanently “frozen”) at its 1.0 version (dated August 18, 2011) — it will not be changed or updated. Instead, any “additions and/or corrections” to the original Complaint will be published as Addenda, of which the present document is the first installment. This “append-only” practice comports with legal custom (though legal “addenda” are called “amendments”).

112. Though, I averted actual dismissal by vigorous prosecution of this Complaint, together with STD leave.

113. Of course, we limit our error-correction to only the body of the Complaint, not the Appendices.



- Part I, p. 6 mid: “summarization sentence” should read “ summarization sentences”.
- Part I, p. 9, fn. 14: “leading to Dan” should read “leading Dan”.
- Part II, p. 7, bot: strike “blacking-out” (that’s not quite synonymous with syncope).
- Part II, p. 10, fn. 63: “performancs” should read “performance”.
- Part II, p. 11, fn. 65: “[nzVtCapture.sh],” should read “(nzVtCapture.sh, Appendix O).”.
- Part II, p. 14, bot: “Appendix R or S” should read “Appendix S or T”.
- Part II, p. 14, bot: “so I send her a copy” should read “so I sent her a copy”.
- Part II, p. 25, bot: “didn’t see Blktrace help out” should read “didn’t see how Blktrace would help out”.
- Part II, p. 18, bot: The phrase “that’s not what the thrust of my case was about at all” should be italicized.
- Part II, p. 19, top: In “states no reasons”, “reasons” should be italicized.
- Part II, p. 24, fn. 91: “way a manager” should be “why a manager”.
- Part II, p. 26, fn. 97: “Language” would read better as “Circumlocution”.
- Part II, p. 30 mid: “Appendix AD” should read “Appendix DD”.

30 “Lazy” In *Learning SQL*

On Saturday, August 20, I just happened to be leafing through a book of mine, *Learning SQL* (first edition, see Related Documents),¹¹⁴ when I noticed it used the word “lazy” in substantively the *very same way* I did (Appendix Z), i.e.: “If you’re lazy, you can ...”. Appendix GG.a. Nothing surprising about that, of course — such wording has never before raised eyebrows in the whole history of the world previous to Dan’s “lazy” scandal.

But then, out of due diligence, I wondered: Hmm, my edition is from 2005, that’s a “long time” ago in this industry, I wonder if the word “lazy” might have become “disturbing” in the technical community in the interim? So I looked up the second edition (2009) of the same book. The *identical* passage occurs in both editions. Appendix GG.b. If that “lazy” passage were so “bad”, you’d think somebody would have complained to the author/publisher, and the wording would have been changed/apologized — wouldn’t you?

Oh yes, did I mention that the IBM/Netezza NPS (Network Performance Server), which I/Dan/Fritz/(John, etc) all work on, is a “SQL server” (that is, communicates/interacts with the world using the SQL language)? So, the book *Learning SQL* is directly applicable to this Complaint.

Also, did I mention that *Learning SQL* is a well-known, widespread, standard/elementary introduction the SQL language (not some obscure academic tome that nobody knows about)?

114- I’d already read it previously, but it’s a life-long (“bookworm”) habit of mine to idly leaf through books previously read, just to sort-of “reawaken/solidify/question the knowledge by repetition/visitation”.



And that the author, Alan Beaulieu, lives/works in the Greater Boston area — so his use of “lazy” isn’t some kind of locality-based idiom, offensive in the Greater Boston area (where Netezza’s Marlboro office is located), but not elsewhere.

As if there were ever any question.¹¹⁵

31 Blktrace Finale

A major focal point of Dan’s attack on me throughout has been my work on the Blktrace work item I inherited from Sujatha. Part II, Section 13.

See Appendix U for the status of the published Blktrace wiki page as of June 27. After I submitted my original Complaint on August 18, I was finally able to spend some time “finishing” the Blktrace work.¹¹⁶ The final product is, of course, excellent work, as all my work has always been. Appendix HH.^{117,118}

This totally “puts the lie” to any “(faux) concerns” Dan pretended to have about my technical work.

32 Dan: Vetting

(The material in this Section was intended to appear in the original Complaint, Part II, but was omitted due to time deadline/pressure.¹¹⁹)

On July 5, at Dan’s “Three Behavior Issues” reconciliation meeting (Section 17), Dan “offered to help me with my communication issues”, by “volunteering” to “vet” my written materials (principally emails) before I published them. Of course I didn’t know it at the time, but it wasn’t Dan alone who came up with this “vetting” idea — Diane Adams and a lawyer were certainly involved, by Dan’s admission (“nor have I ever”, Section 20.1).

-
115. It would be trivial to exhibit innumerable similar usages of “lazy”, if necessary, by scanning through enough books/magazines, doing Google searches, etc. But that’s not really necessary, is it? Can we just stop pretending now? “Lazy” (and “lazy”-like) phrases are universal, idiomatic figures-of-speech — not trenchant social commentary. If there were ever a “smoking gun” for abusive/hostile/IIED work-environment, the “lazy” scandal is obviously it. Put another way: The “Lazy” scandal is exactly the sort of thing that all reasonable people uniformly react to instinctively by thinking/saying, in shocked disbelief: “That’s outrageous!” In fact, this reaction is precisely the informal test for the tort of IIED — also known as the “tort of outrage”.
116. Of course, almost any project can potentially be extended *ad infinitum*. I’m talking here about “finishing Blktrace to the extent the project had been proposed to date, absent chasing down TBD’s, possible future extensions, etc.; and anyway Dan ordered me to stop working on it (Appendix II).” Total effort for the delivered Blktrace work was ~10 days charged to IBM/Netezza (the rest was freely contributed by me, from my spare time, during evenings, weekends and STD leave).
117. Note that some of the longer tables in Appendix HH are truncated by the printing/reproduction process, but the missing material is only of technical interest. Enough of the wiki page is properly reproduced to convey the “substantive gist” of the work. (In any case, a complete wiki page is available, in “MHT” format, and of course the original exists in the Netezza “Confluence” wiki server.)
118. A simple comparison quickly reveals that my Blktrace work meets, and generally greatly exceeds, the standard set by all other work on the Netezza wiki. Such a comparison (as of August 25) is possible during discovery, by the history mechanism of the “Confluence” wiki technology used at Netezza.
119. I was in too much fear/rush at the time to hurry-up and file the original Complaint before I got (illicitly/illegally) fired.



At the time, I didn't take his suggestion of vetting "seriously" (in the true sense of "serious", as opposed to "Dan's fabricated faux-serious"), because after all I'd never had any problems along these lines in the past. Nevertheless, just to be sure I was "playing Dan's 'game', according to his rules", I did try (in all seriousness) to search my memory to make sure of my innocence. The only potential example I came up with was an interaction I'd had with Brian Maly, but Dan said that was not a problem. Appendix Y.

Later, of course, the illicit "vetting" thing became very "faux-serious" indeed, because it provided Dan the "cover" he wanted/needed for his whole "lazy" scandal. Appendix Z
07/11/2011 07:33 AM.

Due to the feverish speed with which Dan "rushed to judgment" (trying to fire me over the "lazy" scandal), and the fact that I'd been on leave for over 3 weeks (July 7-31), there was only one other example of the "vetting" tactic that can be exhibited. Appendix JJ.

I also alluded to "vetting" at Appendix KK 08/04/2011 03:54 PM.

Obviously, I allege the whole "vetting" scheme was a fraudulent hoax, not intended for its stated purpose of "helping me with my communication style", but for the sole purpose of harassment/IIED, with the ultimate goal of fabricating a false "cause" for dismissal — as was actually accomplished with the "lazy" scandal.

33 Dan's Public Embarrassment

Since Dan's demotion of me on June 10 (but never before that date), Dan has made a lot of noise about "oversight of my work", "providing me guidance", etc. E.g., Section 13; Appendix R; Appendix II.

That is content-free blather (connived with HR, according to Dan's "nor have I ever", Section 20.1) — concocted as a transparent smokescreen for continued harassment, abusive workplace, seeking-false-reasons-for-dismissal, IIED, etc. Plain proof has already been given in this Complaint, especially involving two where I've solved problems Dan himself had tried but failed at.¹²⁰ But in case there is any doubt left, one final example will be presented now.

Appendix KK. As a result of Dan's demotion of me, Sujatha had inherited my work on Wahoo, and had run into some issues that seemed to indicate "trunk performance regression" (i.e., that the NPS code base was becoming infiltrated with code that exhibited unacceptable performance degradation). Nearly two months after taking over my Wahoo work, Sujatha approached Dan about this issue.¹²¹ Dan double-checked ("reviewed her work-product") and confirmed her conclusion.

So Dan took the extraordinary measure of "going loudly public" with his/Sujatha's finding, in an impressively large high-level email conversation — no doubt in a prideful attempt to enhance his/Sujatha's value in the eyes of the company, and not incidentally to drive home to everyone how great a job was being done in Wahoo-land now that he'd removed me from it.

But that scheme backfired. As the email discussion developed, it turned out that the problem was due, not to NPS regression at all, but to Sujatha's running her tests incorrectly. The

120. PerfScore: Section 2.4, footnote #23, Appendix R 06/17/2011 09:27 AM. nzVtCapture.sh: Section 11, footnote #65, Appendix O.

121. Sujatha shouldn't be criticized here — she was no doubt following Dan's orders on how to proceed.



whole “crisis” was a tempest-in-a-teapot. By unwarrantedly “crying wolf”, Dan had given himself a big black eye in public.

The irony is that it could have been easily avoided. The right thing for Dan/Sujatha to have done was to ask me to take a look (I would have spotted Sujatha’s mistake immediately). Dan’s desire to “rub my nose in it” blew up in his face.

So much for Dan’s “oversight and guidance” prowess.

34 Proof Of Employment

On Saturday, August 20, I received an email from HR, informing me that my “move”/relocation from the Cambridge office to the Marlboro office had been formally completed. Appendix LL. I had already been reporting to Marlboro since June 13 (Section 6.1), but this formality (employee database updating) had been long-delayed by Dan’s inaction.

What was most interesting about that email was not the information about the move itself, but that it confirmed my employment status (as of August 19). This is interesting for the purposes/“standing” of my Complaint, because it shows me as an “employee-in-good-standing” (i.e., I hadn’t been fired yet, so my Complaint was properly filed).¹²²

35 Filing Of Original Complaint

On Thursday, August 18, I formally filed my original Complaint to the IBM Corporate Open Door process, as well as the Confidentially Speaking process, by email (pursuant to C&A Sections 2.5 and 4.3, BCG p. 8, etc.). Appendix MM.

36 Russell Mandel: Justice Delayed¹²³

For a full week following the submission of my original Complaint, I received no response whatsoever from anyone — not even an acknowledgment of receipt-of-filing. Yet, IBM had been fully aware that my submission of the Complaint was imminent (Appendix Q: 08/02/2011 03:07 PM, 08/02/2011 04:18 PM), and was even aware of the urgency of prompt action (Appendix AA.b, especially 8/04/2011 07:13 PM).

This delay was: (i) contrary to the provisions of “IBM Law” (BCG + AYJ + C&A), which consistently guarantees “prompt”¹²⁴ (“~couple of days”) response to employee problems. Hence it constituted another act of hostile-workplace.

Therefore I followed-up by email on August 25. Appendix NN.

122. Admittedly, IBM hasn’t made a “lack-of-standing” argument to date; but it doesn’t hurt to plan ahead. As of the date of this Addendum I, my IBM/Netezza network credentials still work (though I’ve noticed some irregularities, e.g., some service disruptions when I try CC’ing some emails to my personal [non-IBM] email account).

123. “Justice delayed is justice denied.” — Traditional legal maxim. Attribution in this exact form uncertain, but probably originating in the *Magna Carta*, 1215-97 (various versions), clause 40 (underline emphasis added): “We will not sell, nor will we deny or delay, right or justice” (*Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam*).

124. BCG, pp. 7, 8: “IBM will promptly review your report ...”



Finally, Russell Mandel responded later that day (August 25), after his “returning from vacation”.¹²⁵ In his response, Russell stated he wouldn’t “discuss [my] concerns directly with [me]” until I returned from STD leave.

This further attempt at delay/postponement of investigation/justice¹²⁶ constituted: (ii) continued/ongoing illicit hostile-workplace, because he knew¹²⁷ the very reason I was on STD leave was due completely to the very abuse/IIED inflicted upon me by this case.

Furthermore, Russell’s attempted delay was: (iii) contrary to the stated terms of IBM Law, which everywhere emphasizes prompt dealings with employee concerns — explicitly including employees “on leave”.¹²⁸ In other words, by his misinterpretation of the “on leave” clause, this was now the *second time*¹²⁹ Russell exposed himself as *corrupt and/or incompetent* — because the “on leave” clause was a term of IBM Law that he, as “C&A SME”, *knew or should have known*.

Finally, Russell’s attempted delay constituted: (iv) discrimination on the basis of (mental health) disability. Hence it was contrary to the Americans with Disabilities Act (ADA) — thus illegal.

37 IBM Law: Contractual Nature; Non-Optionality

It is extremely important to point out that “IBM Law” constitutes a *binding, enforceable contract* — bilaterally (that is, it binds not only the employee, but also IBM).¹³⁰ That’s because IBM Law (the cornerstone of which is the BCG, but the BCG “incorporates by reference” many other documents, see BCG p. 31) constitutes a *condition of employment* at IBM. Specifically, *all* IBM employees in general (and I myself in particular; Section 20.2) are *required (non-optionally)* to review and formally *certify* (“pledge allegiance”) to the BCG — yearly. This is called the “BCG Program”. Appendix OO.

In this (contractual) light, it is very significant to note that my filing-of-[cC]omplaint (both small-“c”-complaint and big-“C”-Complaint) was *non-optional*. I was actually *required (non-optionally)* to file a report — and likewise IBM is *required (non-optionally)* to investigate my report, and to *affirmatively (non-optionally) “not tolerate”* retaliation — by the very strict, unambiguous and “non-optional” wording¹³¹ of the BCG itself (p. 8, emphases added):

- “If you know of, or have good reason to suspect, an unlawful or unethical situation or believe you are a victim of prohibited workplace conduct, *immediately report* the matter through any of IBM’s Communications Channels ...”

125. I don’t know “on whose behalf” Russell responded: I’d submitted my Complaint to the Corporate Open Door and Confidentially Speaking processes, not to his C&A process.

126. For the purposes of C&A investigation, “vacation-time” is not a qualifying condition. It’s not mentioned as such in IBM Law, and it’s certainly not the sort of thing any competent professional operation (as IBM’s C&A program claims to be) would fail to plan back-up for.

127. I had explained my STD situation in the Complaint, Section 26.

128. The “IBM Law” documents I have available to me don’t seem to specify whether or not the term “leave” applies to “STD”. However, that usage is “usual and customary”; therefore I am justified in adopting that usage in the context of IBM Law (by the principle of *contra proferentem*).

129. The first time was documented in Section 22.

130. And the principle of *contra proferentem* surely applies to the BCG in fullest force.

131. The wording is so clear, *contra proferentem* need not even be invoked here.

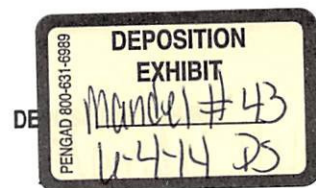
Exhibit 103

IBM's U.S. Concerns and Appeals Program

Concerns and Appeals Program (Open Door, Panel Review & Confidentially Speaking)

Document number USHR102

May 19, 2008



DEBORAH SMITH CSR

W-4-14

Notices

This book is intended to provide descriptions of certain IBM programs in which you may be eligible to participate. IBM reserves the right, at its discretion, to amend, change or terminate any of its benefits plans, programs, practices or policies, as the company requires. Nothing contained in this book shall be construed as creating an expressed or implied obligation on the part of IBM to maintain such benefits plans, programs, practices or policies.

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1. Overview of IBM's U.S. Concerns and Appeals Program

From time to time an employee may have a problem, question or concern that, if not addressed, could affect job satisfaction and work performance. There are three processes in the IBM's U.S. appeals program which provide a timely and thorough investigation of employee issues and concerns when a resolution cannot be reached by working with management: Open Door, Panel Review, and Confidentially Speaking. Frivolous, trivial, or repetitious issues will not be addressed under the program. Normally, an employee must come forward on his/her own behalf to initiate an Open Door or Panel Review.

While an employee may choose any of the three appeals processes, when issues arise, careful consideration should be given to the appeals process selected. Panel Review decisions cannot be appealed through the Open Door process and vice versa. A Confidentially Speaking concern may be converted to a Panel Review or Open Door before a response is given. Additionally, when an appeal is requested, the individual responsible for administering the process has sole discretion to determine the scope of the investigation which may be conducted.

An employee, including an employee on leave of absence, a former employee, and a retiree, who has fully executed a separation or similar agreement releasing IBM from all claims is ineligible to use IBM's appeals program for anything that happened prior to his/her signing that document.

[Anyone tampering or attempting to tamper with the Concerns and Appeals Program by actions such as intimidation, threats, harassment, etc., will be subject to disciplinary action].

1.1 Open Door

The Open Door process reviews actions or inactions by management which directly related to and affect an employee. All issues, except policy decisions and operational business issues, are eligible for review under this process. The process will not accept situations over which it has no jurisdiction, such as setting or changing company policy; amending operating schedules or general levels of pay and benefits; evaluating position bands; or operational business decisions. The intent of the process is to ensure an objective and thorough review of the issues. The process will not make legal determinations. It will, however, determine whether the employee was treated fairly.

1.2 Panel Review

Under the Panel Review process, a panel of employees and managers will decide appeals involving how the interpretation and/or application of specific company policies, procedures, or established practices affects employees. The panel will not accept situations over which it has no jurisdiction, such as setting or changing company policy; amending operating schedules or general levels of pay and benefits; evaluating position bands; or operational business decisions. No Panel Review will be convened if circumstances are such that, in the opinion of the corporate employee relations special programs staff, the issues should be addressed through another internal appeals process. The intent of the process is to ensure an objective and thorough review of the issues. The process will not make legal determinations. It will, however, determine whether the employee was treated fairly.

1.3 Confidentially Speaking

Confidentially Speaking is a confidential two-way communications channel that an employee can use to raise concerns, express opinions, report inappropriate or questionable acts or Business Conduct Guidelines issues, or obtain information on company-related subject.

2. Open Door

The Open Door process reviews actions or inactions by management that directly and personally impact an employee. Normally, an employee must come forward on his/her own behalf to initiate an Open Door.

When an Open Door is requested, the individual responsible for the process has sole discretion to determine the scope of any investigation which may be required. Under such an investigation, a trained investigator, usually a senior manager, is assigned to gather relevant facts and recommend a resolution to the reviewing executive. The investigation and conclusion are designed to take place in a timely fashion. Normally, the entire process will take between 30-60 business days. This time period may be extended depending on various factors, such as the complexity of issues and availability of the parties involved.

However, there are instances when such a formal process is unnecessary. Based on the issues and facts presented by the employee, there may be enough information to give the employee an answer without meeting with him/her or requiring a structured investigation.

The incident or issue which the employee wishes to appeal should, under normal circumstances, be brought to the attention of management within 90 days of the issue or incident. Only on an exception basis will the Open Door process accept issues older than 90 days.

2.1 Employee Eligibility

All regular full-time and part-time employees, supplemental employees, employees on a leave of absence, and retirees are eligible to use the Open Door process. In addition, a former employee, who within 90 days of his/her departure brings forth issues related to his/her employment, is also eligible. However, any employee that has fully executed a separation or other agreement releasing IBM from all claims is not eligible to use any of the appeals processes for any issues that occurred before they signed the separation agreement.

2.2 Issue Eligibility

All issues, except policy decisions and operational business issues, are eligible under this process. The Open Door process will not accept situations over which it has no jurisdiction, such as setting or changing company policy; amending operating schedules or general levels of pay and benefits; evaluating position levels; or operational business decisions. Examples of eligible issues are: performance appraisals, dismissals, compensation. Examples of ineligible issues are: technical direction, mission transfers, benefit changes.

2.3 A Necessary First Step for the Open Door Process

Before an employee may use the Open Door process, he/she must give management an opportunity to resolve the concern.

The employee must discuss the issue with his/her first-line manager. If the employee has already discussed the issue and is not satisfied with the manager's response and wishes to pursue the matter further, the employee must contact the next level of management or the first level of management not involved in the issue.

If the employee disagrees with that second management response, the employee may pursue the Open Door process, providing the issue is eligible.

2.4 Open Doors to the Corporate Office

The corporate office includes those senior executives who report directly to the chairman. Concerns directed to the corporate office will be acknowledged to the employee by the corporate employee

relations special programs staff. The concern will be assigned to an appropriate executive for handling, such as division general managers or other senior executives.

Appeals sent to the corporate office will be reviewed by the individual responsible for the process on the corporate staff. If that person concludes it is necessary or appropriate, recommendations and comments will be made to the appropriate senior executive before the final decision is made.

2.5 Requesting an Open Door

Any employee with a problem that has not been resolved satisfactorily by the two levels of management may bring the matter to the attention of senior management in the operating unit or to the local human resources manager.

A corporate Open Door may be requested through the Essential Links on the On Demand Workplace or directly via [http://w3.ibm.com/hr/global/concerns_and_appeals/]. Employees may also initiate an Open door through a letter to the appropriate executive, sending a Lotus Note to APPEALS/Armonk/IBM or by calling tieline 641-4147 or outside number 914-499-4147. Normally, within two business days, the employee will receive a phone call to discuss the appeal. At that time, the employee will be told which executive has been assigned to handle the Open Door. The extension listed above will accept collect calls.

2.6 The Investigator

The investigator is the representative of the executive to whom the appeal was assigned. Whenever practical, an investigator will be assigned from the local area. The investigator, however, must not have been involved in the issue being investigated and, in IBM's opinion, is sufficiently removed organizationally from the employee to provide objectivity.

The investigator's primary responsibility is to provide an objective and thorough review of the issues. In addition, the investigator is responsible for recommending: any disciplinary action management should take, an action plan to prevent the issue(s) from recurring, and an action plan to ensure an equitable result for the employee making the appeal.

2.7 The Investigation

Under normal circumstances, the investigator should interview both the employee initiating the Open Door and his/her management. In addition, the investigator should consider interviewing others who may have relevant first-hand knowledge of the facts and circumstances, including individuals suggested by the employee. At the investigator's discretion, these interviews can be handled by phone or in person. However, the investigator reserves the right to determine with whom he/she will speak during the investigation.

2.8 Communicating the Decision

Open Door investigations under normal circumstances should be closed with the employee over the phone. However, closure may be in person if in the judgment of the investigator circumstances warrant it. In addition, the employee will usually receive a written response from the reviewing executive.

3. Panel Review

3.1 Employee Eligibility

The Panel Review process is open to regular full-time and part-time employees. In addition, a former employee, who within 90 days of his/her departure brings forth issues related to his/her employment, is also eligible.

3.2 Issue Eligibility

Panel Review is an issues-related appeals process that has been created to review appeals of management decisions involving how the interpretation and/or application of specific company policies, procedures, or established practices affect an employee. The actual policies, procedures, or established programs are not eligible under this process, nor are issues already being considered through the Open Door process .

The panel cannot accept situations over which it has no jurisdiction, such as setting or changing company policy; amending operating schedules or general levels of pay and benefits; evaluating position bands; or operational business decisions. The intent of the program is to ensure an objective and thorough review of the issues. The process will not make legal determinations. It will, however, determine whether the employee was treated fairly.

The incident or issue which the employee wishes to appeal should, under normal circumstances, be brought to the attention of management within 90 days of the issue or incident. Only on an exception basis will the Panel Review process accept issues older than 90 days.

Examples of eligible and ineligible issues include, but are not limited to, the following:

ELIGIBLE ISSUES	INELIGIBLE ISSUES
Compensation	Benefits
Demotions	Harassment
Discrimination*	Layoffs
Dismissals	Medical
Favoritism	Mission transfers
Leaves of absence	Resource actions
Manager	Selection of managers
PBC	Amending operating schedules
Promotions	Technical direction
Request for transfers	Trivial, frivolous, or repetitious issues
Retribution	
Unfair treatment	
Work assignments, schedules	

* The process will review those issues, such as unfair treatment relating to compensation, dismissal, promotions, etc., that lead an employee to believe he/she has been discriminated against.

3.3 A Necessary First Step For The Panel Review Process

Before an employee may use the Panel Review process, he/she must give management an opportunity to resolve the concern.

The employee must discuss the issue with his/her first-line manager. If the employee has already discussed the issue and/or is not satisfied with the manager's response and wishes to pursue the matter further, the employee must contact the next level of management or the first level of management not involved in the issue.

If the employee disagrees with that second management response, the employee may pursue the Panel Review process, providing the issue is eligible.

3.4 Initiating A Panel Review

The employee may request a Panel review through the Essential Links on the On Demand Workplace or directly via [http://w3.ibm.com/hr/global/concerns_and_appeals/]. Employees may also initiate a Panel Review in writing (hardcopy or electronically) to his/her local human resources (HR) manager, who will then contact the corporate employee relations special programs staff. Included in this request should be: a description of the facts and circumstances leading to the issues or concerns the employee wants the panel to resolve, the names of any individuals who have relevant first-hand knowledge of the facts and circumstances (and why they are needed), and the desired outcome.

The HR manager will develop a summary of issues as well as a list of any individuals having relevant first-hand knowledge of the facts and circumstances based on input provided by the employee.

Human resources is responsible for all administrative duties associated with the program, including setting up the meeting and providing the summary and individuals list described above to the panel in advance of the panel session.

3.5 Choosing The Panel

The panel consists of five voting members: three employees and two managers. A non-voting representative from human resources will coordinate all activities associated with the appeal.

All panel members will be selected from regular full-time employees who currently demonstrate satisfactory performance. No one may serve while on notice for violating a Condition of Employment. It is anticipated that panel members will serve no more than once or twice a year. Each panel will review only one employee's concern(s).

Serving on the panel is voluntary. Members are responsible for ensuring an objective investigation based solely on the facts. Anyone tampering or attempting to tamper with the panel by actions such as intimidation, threats, harassment, etc., will be subject to disciplinary action.

Anyone connected with the employee or his/her issue may not serve on the panel reviewing the appeal. In addition, anyone having (or are perceived to have) a personal or professional relationship with the employee, such as friends, relatives, co-habitants, subordinates, managers, co-workers, etc., may not serve on the panel. Also, the representative from HR may not coordinate the panel if he/she provides advice and counsel to the function from which the dispute arose.

Panel members are selected randomly by both the employee and the manager named in the appeal. The following steps will be taken to select panel members:

1. The employee randomly selects five employee panel members. The manager then chooses three of these people to serve on the panel.
2. (If the employee is non-exempt, the employee pool from which the five "employees" are chosen will contain the names of non-exempts only. If the employee is exempt, the pool used will contain exempt employees only. If the employee is a manager, the pool will contain the names of managers organizationally at the same level as the employee.)

3. The manager then randomly selects three manager panel members from a list of managers organizationally at the same level as him/her. The employee chooses two of these people to serve on the panel.
4. (If the employee is a manager, the management pool will include managers at least one organizational level above the employee.)
5. One non-voting representative from human resources is assigned by the site/area HR manager to coordinate the panel's proceedings.

Before any employee serves on a panel, he/she will receive training.

3.6 The Investigation

The panel will listen to both the employee and the manager and will determine who else has relevant information. Panel members may individually ask the employee and the manager questions. The human resources representative may also ask the employee and manager questions. Site human resources has the responsibility of gathering the appropriate information the panel needs to come to a decision.

The employee, manager, and individuals with relevant facts will present their information privately to the panel and normally in the following order: employee, manager, and other individuals.

3.7 Making And Communicating The Decision

Upon completion of the investigation, the panel will meet in private to discuss the information and make its decision. Appropriate documentation necessary for the panel to reach a decision may be requested by the panel.

The panel has the ability to uphold, modify, or change the outcome of situations, but cannot impose penalties more severe than those originally imposed. In addition, the panel cannot award monetary damages, other than those required to make the employee whole, such as back pay. IBM reserves the right to vacate the panel's decision if that decision violates the law or any IBM policy or practice, or in any other way exceeds the panel's authority.

Every voting member must vote; no abstentions are permitted; and the voting will be by secret ballot. The panel's decision is final for both the employee and management and may not be appealed through other IBM grievance channels.

Human resources will review the decision with both the employee and the manager and then notify the employee and all appropriate managers of the decision in writing.

While the decision is by majority vote, all panel members must abide by it.

4. Confidentially Speaking

IBM established the Confidentially Speaking program more than 45 years ago, yet it has never been more relevant to our business. A tangible example of our values in practice, Confidentially Speaking lets employees express concerns on any company-related subject, whether related to their own job (such as benefits, careers, safety, or bureaucracy), or involving violations of our Business Conduct Guidelines (including suspicions of fraud, theft, improper business practices, and other ethical issues).

Since the program's founding, Confidentially Speaking submitters' identities have remained confidential, known only to the Confidentially Speaking administrator. To maintain the program's integrity, no one else is told who the submitter is, even those investigating the submission, without the writer's permission. The program's track record for maintaining confidentiality has been perfect since the program began.

Confidentially Speaking may not always be the appropriate channel to obtain information about specific employee human resources issues, such as your base pay increases or promotions. Without the investigator knowing your identity, he or she will likely be unable to resolve your concerns. For those types of issues, consider using either Open Door or Panel Review.

4.1 Employee Eligibility

Regular full-time and part-time employees and supplemental employees, as well as employees on leave of absence, are eligible to use the Confidentially Speaking process.

4.2 Issue Eligibility

Any company-related subject may be raised in a Confidentially Speaking concern. However, no frivolous, trivial, or repetitious issues will be accepted under this process.

4.3 How the Confidentially Speaking Process Works

Employees may submit a Confidentially Speaking concern through the Essential Links on the On Demand Workplace or directly via [http://w3.ibm.com/hr/global/concerns_and_appeals/]. Employees may also initiate a concern via e-mail, send a note with details of your question or concern to: Confidentially Speaking/White Plains/IBM.

To send a Confidentially Speaking via mail or fax, you can write a letter (marked "Personal") and send it to:

Lynea St. Pier
U.S. Confidentially Speaking Administrator
IBM Corporation, Zip 41X
2070 Route 52
Hopewell Junction, NY 12533

Secure fax: tieline 532-6775/(845) 892-6775

In addition to your written submission, you may request a confidential interview with the investigator. This interview may take place in person or anonymously by phone.

In most cases a reply is prepared and the Confidentially Speaking administrator reviews it for accuracy and completeness. Your reply will be sent to you according to the option you choose on the writer questionnaire. If a reply is mailed, it will be sent to your home via the external mail.

Replies or status reports are generally sent within 20 days. In those instances when a reply is not prepared, you will receive an acknowledgment from the Confidentially Speaking administrator detailing what is being done with the Confidentially Speaking concern.

Exhibit 104



THIRD Open Door

Walter Tuvell to: RUSSELL E MANDEL

03/02/2012 11:46 AM

Kathleen Dean, Al Pfluger, Diane Adams, Chris
Cc: Kime, Daniel Feldman, John Metzger, Arvind
Krishna, Pratyush Moghe, Fritz Knabe, Robert
Lewis Alderton, Amalendu Haldar, Andy McKeen,
Bcc: Andrew Galasso, Ashish Deb, William Ackerman,
Brian Doherty, Harvey Harrison, Brian Maly, Daniel

From: Walter Tuvell/Marlborough/IBM
To: RUSSELL E MANDEL/Somers/IBM
Cc: Kathleen Dean/Fishkill/IBM@IBMUS, Al Pfluger/Fishkill/IBM@IBMUS, Diane
Adams/Fishkill/IBM@IBMUS, Chris Kime/Austin/IBM@IBMUS, Daniel
Feldman/Marlborough/IBM@IBMUS, John Metzger/Marlborough/IBM@IBMUS,
Bcc: Lewis Alderton/Marlborough/IBM@IBMUS, Amalendu
Haldar/Marlborough/IBM@IBMUS, Andy McKeen/Lexington/IBM@IBMUS,
Andrew Galasso/Marlborough/IBM@IBMUS, Ashish
Default custom expiration date: 03/02/2013

Russell -

In your note to me earlier this week (02/28/2012 06:52 AM), you closed the books on my New Complaint. You did so by stating several new "reasons" for IBM's refusal to transfer me (pursuant to my quest for reasonable accommodation under ADA), attempting to replace earlier-stated illegal reasons by Chris Kime and Dan Feldman. Unfortunately, your stated reasons are STILL ILLEGAL.

Therefore, I have no recourse but to continue my opposition to IBM's illegal/discriminatory ways, as required by the BCG. I hereby file my third Open Door (including Corporate Open Door, Concerns & Appeals, Corporate Trust and Compliance Office).

As documentation in support of this third Open Door, I offer Addendum I to my New Complaint document, entitled *ibmTransfer-Addl.pdf*. It, together with all its companion documents (which now also includes Addendum V to my Old Complaint), is available at <http://www.filedropper.com/wetibmcomplaint>. These documents include a full recounting of everything that's happened.

As required by "IBM Law", the investigation into this matter must be handled by someone other than you, since you are personally involved in serious wrongdoing, contrary to the interests of IBM.

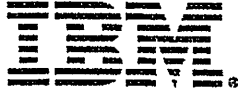
For anyone who wants to communicate with me privately (via non-Notes email), I can be reached at walt.tuvell@gmail.com.

- Walter Tuvell



DEBORAH SMITH CSR

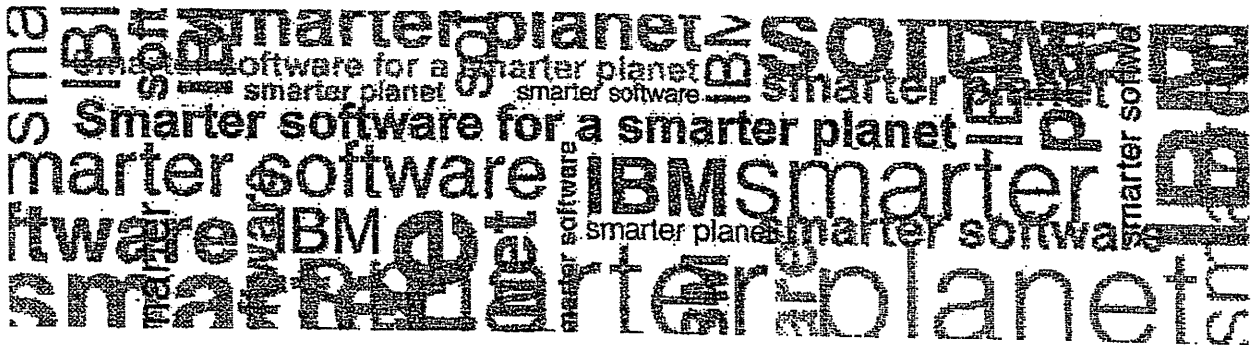
64-14



NETEZZA®
Complaint

Claims Of Corporate And Legal Misconduct

Addendum V



Walter Tuvell

March 2, 2012



Document History

Rev.	Date	Author	Remarks
1.0	March 2, 2012	Walter Tuvell	First version

Related Documents

Author	Date	Title
Walter Tuvell	August 18, 2011 (version 1.0)	<i>Claims Of Corporate And Legal Misconduct, in two Parts: Part I (Acts Of Fritz Knabe); Part II (Acts of Dan Feldman, HR, Legal) — Referenced as "original (two-Part) Complaint"</i>
Walter Tuvell	August 28, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum I</i>
Walter Tuvell	September 4, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum II</i>
Walter Tuvell	September 22, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum III</i>
Walter Tuvell	November 3, 2011 (Version 1.0)	<i>Claims Of Corporate And Legal Misconduct, Addendum IV</i>
Walter Tuvell	January 22, 2012 (Version 1.1)	<i>Claims Of Interference, And Demand For Transfer — Referenced as "New Complaint"</i>
Walter Tuvell	March 2, 2012	<i>New Complaint, Addendum I</i>
Walter Tuvell	May 24, 2011	<i>PerfScore; Establishing A Model Of Performance Measurement For NPS Systems</i>



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53 Executive Summary — Addendum V

This document is Addendum V to my original two-Part Complaint plus Addenda I-IV.

Hereinafter, the unqualified term “Complaint” includes the original two Parts, plus Addenda I-V, unless otherwise specified.

Note: The years in which events occurred (2011, 2012) are largely self-explanatory, hence are omitted unless necessary to avoid confusion/ambiguity.

53.1 List Of Particulars

- Russell Mandel’s dishonest/sham “findings” to his IDR/C&A “investigation” into my case, constitute a *cover-up*, and discrimination-retaliation (as well as fraud/IIED/etc.). Sections 56–57 below. This is most especially evident because of the very clear “retaliation *per se*” component of the November 17 phone call (Section 57.1, below).
- Additional counts of *defamation*: According to Russell Mandel’s “findings” of his “investigation”, Mandel was given information that I did had failed to provide Fritz with all the support he required. Sections 56–57 below. That is provably false, and was known-false at the time (as proved in Section 57). Therefore, the person(s) who published that known-false information (specifically Fritz, presumably aided by Dan) defamed me to Mandel. Furthermore, to the extent that Mandel himself published that information (as he hints he did, see New Complaint, Addendum I), Mandel committed defamation.
- Additional counts of *actual-discrimination and discrimination-retaliation* (on the basis of disability): You know all those instances of behavior I’ve heretofore called “blackballing/harassment/retaliation/IIED/etc.”? Well, now that I understand more about ADA and law, I hereby additionally recast them as *discrimination* as well. For, those acts were all perpetrated by people who *knew at the time* about my PTSD-based disability, yet subjected me to PTSD-inducing abuse and disparate treatment (with respect to how I’d been treated prior to filing my complaints). For, said knowledge was certainly true of Dan, because I’d told him about my disability very early on (no later than December, 2010)¹⁷⁴ — and at that point it was his *affirmative responsibility* (under ADA) to proactively inform others and seek reasonable accommodation for me, *protecting me from attack from anyone else at IBM* (especially Russell Mandel and HR). Even if Dan didn’t inform others, I certainly did, beginning immediately after filing my complaint on June 10 (proof: Section 59, below).¹⁷⁵
- IBM was clearly aware of my need for (ADA-mandated) *reasonable accommodation* already in mid-June (because I was begging to be removed from Dan’s abuse, based on my history of PTSD), yet refused to recognize/acknowledge/discuss it with me

¹⁷⁴ Section 60, below.

¹⁷⁵ Incidentally, this probably explains why Dan/Fritz refused a three-way meeting with me (Complaint, Part I, Section 1.3, second bullet): they were acting as co-conspirators, actively/knowingly using Fritz’s defamation to psychologically abuse me. (Otherwise, why are they using false/pretextual reasons to cover-up their actions? Sections 57.5-6, below.)



for nearly *four months* (the first such acknowledgment was Addendum IV, p. 18, email of 2011-10-10 09:33 AM). That willful stonewalling (“undue delay”) amounts to illegal *refusal to engage in ADA-mandated “interactive process”*.

- *IHS culpability*: In addition to the many-times-repeated refusals, by management (Dan) and HR (Mandel), to negotiate/grant “ADA reasonable accommodation” cited heretofore in this Complaint, we now recognize IHS’s (Integrated Health Services) role in independently committing the same wrongs. Below, Section 59 *passim* and Appendix III *ff*.
- IBM’s illicitly *forcing* me to go onto STD (66⅔%-pay for the second 13 weeks of STD benefits); then onto unpaid leave (0%-pay, until LTD approved, if ever); then onto LTD (50%-pay, if/when approved): these all amount to acts of *adverse job action* (violations of discrimination law, on the basis of known-disability), as well as *theft* (illicit deprivation of income). They should have transferred me instead, as reasonable accommodation.
- A more obvious, spontaneous, unforced *self-admission of wrongdoing* than the Transfer Debacle (*New Complaint*, see Section 58 below) cannot be imagined. Namely:
 - Violation of ADA law, admitted by Chris Kime (but blaming his up-line management and HR).
 - Cover-up by Dan.
 - Cover-up-of-cover-up by Russell Mandel.

54 Typos, Etc.

- Part I, p. 19, middle: “I agree” should read “I agreed”.
- Part II, p. 18, fn. 77: “servent” should be “servant”.
- Addendum I, p. 7, paragraph beginning “That is content-free blather”: Change “especially involving two where” to “especially involving two instances where”.
- New Complaint, p. 4: I wrote of “four consecutive MTRs”, but that count was erroneous. There were actually six MTRs submitted. Details are explained in a footnote to the Comments paragraph near the beginning of Section 59, below.
- New Complaint, p. 24: The email dated “2011-21-01 01:25 PM” should be dated “2011-12-05 01:25 PM”.
- New Complaint, p. 29: The email dated “2010-01-03 07:43 AM” should be dated “2012-01-03 07:43 AM”.
- New Complaint, pp. 31-36: In page headers, change “Performance Proposal” to “Complaint”.

Exhibit 105

Subject: Re: Corporate Open Door -- what is going on?
From: Walter Tuvell <wtuvell@us.ibm.com>
Date: 08/31/11 13:05
To: RUSSELL E MANDEL <rmandel@us.ibm.com>

Typos (all trivial/obvious):

"I AM NOT DISABLED ONLY FROM '(NORMAL) WORK'" should read "I AM DISABLED ONLY FROM '(NORMAL) WORK'".

"must remains Notes" should read "must remain Notes".

"We say how" should read "We saw how".

"'long-form' submissions" should read "'long-form' submission".

"paragaph" should read "paragraph".

----- Forwarded by Walter Tuvell/Marlborough/IBM on 08/31/2011 12:57 PM

From: Walter Tuvell/Marlborough/IBM
 To: RUSSELL E MANDEL/Somers/IBM@IBMUS
 Date: 08/31/2011 10:04 AM
 Subject: Re: Corporate Open Door -- what is going on?

Concerning your personal involvement in the investigation: My objection to this has already been stated in multiple places, with reasons (another one of which occurs in this very note of yours, see next paragraph), and I hereby reassert my position.

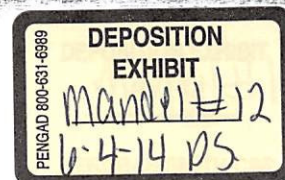
Concerning your insistence upon "STD disqualification": Your position is wrong, as a matter of contract law, as I have already stated and hereby reassert (Complaint Addendum I, Section 36). According to "IBM Law" ("BCG Contract"), I have the right to a full C&A investigation, explicitly regardless of my "STD leave" status. Your reassertion of your wrong position, even though you were duly notified of the correct position, will now be entered into my Complaint Addendum II as an additional "count" of breach of contract (not to mention hostile workplace, etc.). You are very well aware that I am fully capable of conducting "C&A business" (and that the only reason I can't do "technical business", per the STD, is because of the IIED that will be inflicted upon me by Dan & his cohorts-in-blackballing). Indeed, this note is just one more in a continuing string of proofs thereof. By refusing to accord me my rights to a full/proper C&A investigation, you are therefore knowingly preventing me from "recovering" sufficiently to "return to work" -- that is, you yourself are affirmatively "coercing me to remain 'disabled' (in the sense of my current STD leave)".

This same result can be arrived by the "other" ("ADA law", as opposed to "IBM Law") direction. The ADA defines "disability" as "a physical or mental impairment that substantially limits a major life activity". While it's true that the determination of whether any particular condition is considered a disability is made on a case-by-case basis, it's also clear that "inability to work at one's '(normal) occupation' due to blackballing/IIED, which includes inability to maintain consciousness" obviously qualifies. The key here is "(normal) occupation", which in my case means "as a technical member of staff, under Dan & co-conspirators" (given IBM's stance in refusing to distance me from them). Notably, "(normal) occupation" does NOT mean "processing my Open Door case" -- THAT, I am NOT "disabled" to do. Only I (together with my personal consultations with health-care providers, and their certification thereof) have the expertise/authority to decide the extent to which I am or am not "disabled". I AM NOT DISABLED ONLY FROM "(NORMAL) WORK" -- NOT FROM CONDUCTING MY C&A CASE. YOU/IBM ARE NOT QUALIFIED/AUTHORIZED TO MAKE SUCH A DISABLEMENT DETERMINATION.

Therefore, for both the above reasons (IBM Law and ADA law), I hereby renew my demand that you stand down from your wrongful "STD disqualification" position, and for you to inform me you have done so.

Concerning "discussing with me" and "speak directly": The mode of "discussion"/communication must remain Notes email until other arrangements can be mutually arranged, for obvious reasons (namely, it all must remain "on-the-record").

Concerning "lengthy submissions": The submissions are no more "lengthy" than required by the situation. We say how improperly Lisa Due handled the "short-form" submission (Complaint, Section 15). The



incompetence/corruption of the entire C&A process (as I have alleged it) is the reason the "long-form" submissions is required. I tried doing it the "informal" way, but IBM's dishonesty (as I have alleged it) has now forced me to do it the "formal" way (or "legalistic" way if you prefer that characterization).

Concerning "ongoing updates" and your "normal practice": We have proof (because we've already tried it, see preceding paragraph) that the "normal practice" doesn't work (it's failed miserably so far), so it cannot be trusted. In order to ensure a higher chance of success this time, improved communications (among other things) are necessary. This is especially appropriate to achieve truth/justice in any case which is as "lengthy"/complex at this one, as you yourself acknowledge. Namely, resolving "little problems" in an continuous manner throughout the process is far preferable, from a process point-of-view, to trying to "debug the whole thing in one gulp". Therefore I hereby renew my request/demand for improved communication/dialog, in the form of daily updates (even if it's of the "nothing happened today" variety).

Concerning "appropriate IBM channels": I of course will conduct myself according to all known-to-me IBM policies/processes/procedures/practices. That's exactly what I've been doing do date, most recently via Corporate Open Door (I was supposed to contact the executive committee, which I did, but nobody would even respond to me about it until you did yesterday). I have no particular desire to "disturb" anyone, only to involve them appropriately, which is what I did. So I won't CC them anymore (unless/until it may become appropriate again in future).

- Walt Tuvell

From: RUSSELL E MANDEL/Somers/IBM
 To: Walter Tuvell/Marlborough/IBM@IBMUS
 Date: 08/30/2011 01:40 PM
 Subject: Re: Corporate Open Door -- what is going on?

I am investigating your concerns and have been working on them. As I previously explained to you, I am simply not going to discuss with you the concerns you raised while you are out on STD since you are not supposed to be working during this time. However, that did not mean that the investigation and my review of your lengthy submissions did not already commence. It just meant we would speak directly upon your return.

I do not normally provide detailed updates of my investigations and plan to follow that same practice in your case.

Finally, communications about your concerns and the investigation process must be distributed through the appropriate IBM channels. If you have any additional issues or information regarding your complaints, please communicate with me alone since I am investigating your concerns, rather than disturbing senior IBM executives who will not be directly involved in the investigation process. Therefore, please cease sending or carbon copying emails to senior executives about the concerns you raised that I am investigating going forward.

Thank you

Russell E. Mandel

Consulting Human Resources Professional
 Concerns and Appeals SME

IBM
 MD 266
 150 Kettletown Road
 Southbury, CT 06488-2600

203-486-4561 (t/1 376-4561)

From: Walter
 Tuvell/Marlborough/IBM

To: Samuel J Palmisano/Armonk/IBM@IBMUS, Randy MacDonald/Armonk/IBM@IBMUS, Steve Mills/Somers/IBM@IBMUS,
 Robert
 Weber/Armonk/IBM@IBMUS, Lynea St Pier/Fishkill
 /IBM@IBMUS

Cc: RUSSELL E MANDEL/Somers/IBM@IBMUS, Arvind Krishna/Watson/IBM@IBMUS, Pratyush Moghe/Marlborough/IBM@IBMUS,
David Flaxman/Bethesda
/IBM@IBMUS
Date: 08/30/2011 12:31
PM
Subject: Corporate Open Door -- what is going
on?

All -

As I wrote last week (Thur, Aug 25), I demanded/expected (with clear justification) to hear from Russell Mandel (via IBM official Notes email) yesterday (Mon, Aug 29) about the current status of my case. He did not contact me.

I have NO IDEA at this point who I'm supposed to be communicating with about this matter, because NOBODY WILL TALK TO ME. That's why I'm addressing this note to everybody who "should" be the major stakeholders in this matter. Given that we are all signatories to the "BCG Program" Contract (as I pointed out in my Addendum I, Section 37), IBM (through an assigned agent, under control of you people) is legally bound to take notice and "do the right thing" (i.e., investigate and prosecute my Complaint) -- and do it "promptly", according to the BCG's own term. You/IBM are manifestly NOT being "prompt", or even doing anything insofar as I can tell (Russell Mandel even stated in writing an illegal reason for his non-promptness). Therefore, I now consider you/IBM to now be in breach of the BCG contract. And every day you/IBM continue these delaying tactics just compounds the misconduct. How can this be helping you/IBM?

Corporate officers: According to the "Corporate Open Door" documentation (in the C&A document): "Concerns directed to the corporate office will be acknowledged to the employee by the corporate employee relations staff." That has not happened. Also: "The concern will be assigned to an appropriate executive for handling, such as division general managers or other senior executives." That hasn't happened either. These things were supposed to happen "promptly" (BCG, pp. 7, 8), but they didn't (and it's now too late to be "prompt"). What is going on?

Linea St. Pier: According to the "Confidentially Speaking" documentation (in the C&A document), you're supposed to contact me about the Complaint I've filed with you. You've never done that. Not even a single word. If you're deferring to others, you need to tell me that (and who it is you're deferring to). According to C&A, p. 18, Confidentially Speaking is a "tangible example of our values in practice". Is this kind of "silent treatment" your idea of an "IBM Value"? What is going on?

Russell Mandel: You're the last person who conversed with me (by email, last Thur), but now you've gone silent. How hard can it be to drop me a line about what's happening? It could be as simple as "I'm waiting for replies from the accused", or "Legal is reviewing"? Even a simple "Nothing to report today" would be sufficient, yet you didn't even do that. What is going on?

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email ("no third-part complaints" and "STD/leave disqualification from due process"), Russell Mandel has proven he's not qualified to hear my case, so somebody else needs to be appointed. But there's even an over-riding reason Russell can't be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in "blackballing me", and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: "The investigator, however, must not have been involved in the issue being investigated and, in IBM's opinion, is sufficiently removed organizationally from the employee to provide objectivity." Who is that person? What is going on?

As you know, I'm currently on STD leave due to an easily understandable and fully legitimate reason: the illicit/illegal stress Dan Feldman and others are inflicting upon me, which is very severe and debilitating, not to mention illegal (have you ever been "knocked out" by direct/intended psychological attack/IIED?). Over the course of this affair, I have many, many times demanded to be removed from Dan's "leadership" (if you can call it that), but to date have been blindly/unthinkingly refused (sometimes explicitly, sometimes implicitly). Yet my reasons for said demand are fully documented (and truthful!) and reasonable. This puts you/IBM again in breach of BCG Contract (AYJ p. 10): "In certain circumstances, it may be appropriate to transfer the offender to another department or location. If

requested by the victim, he or she may be transferred to another department or location." Though this demand remains in effect, I hereby renew it.
What is going on?

The only reason I can think of at this point for your/IBM's continued delay is to "wait me out", hoping that either: (i) I'll make some kind of minor/trivial slip-up (along the lines of the "lazy" scandal), so you can falsely fire me; or (ii) I'll exhaust STD protection, and be forced/coerced to work under Dan again, which I am physically/mentally incapable of doing (I CANNOT let myself be put into another "berate-until-you-faint" situation), so you can fire me for "non-performance" (even though I am perfectly capable of doing first-rate work if you'll just enable me to do so in a non-abusive/bullying/blackballing environment, as demanded above). If these are your reasons for delay, I allege (as part and parcel of the allegations in my Complaint, and it's obvious anyway) that they are illicit/improper/immoral/unethical/illegal. If these aren't your reasons for delay, you need to tell me your reasons (if there's a "good" reason, I sure can't think of it). What is going on?

WHAT IS GOING ON?

- Walt Tuvell

Exhibit 106

III. CHRONOLGY

November – December, 2010 – Mr. Feldman hired Mr. Tuvell into his Netezza product performance team on November 10, 2010. Mr. Tuvell's responsibilities include measuring product performance and developing mathematical models for predicting the performance of new products. Mr. Tuvell was assigned to support Mr. Knabe and his team, who were working on a new product with the code name "Wahoo." During this time frame IBM was in the process of acquiring Netezza.

January 1, 2011 – Netezza was acquired by IBM.

May 18, 2011 -- Mr. Knabe told Mr. Feldman that he was frustrated with his inability to get Mr. Tuvell to do work he believed he had asked for including moving too slowly and getting the tooling and tests done in a timely manner and even having to do the above work himself. Mr. Feldman said that he would discuss the issue with Mr. Tuvell.

Later that day, Mr. Feldman met with Mr. Tuvell. Mr. Tuvell had some papers that he wanted to show Mr. Feldman. Before reviewing them, Mr. Feldman said that he wanted to discuss an issue that Mr. Knabe had raised (i.e., that Mr. Knabe was frustrated with getting graphs that succinctly summarize Wahoo resource utilization across a number of test cases) and they needed to figure out how to make it so that Mr. Knabe wouldn't be frustrated. Mr. Tuvell states that Mr. Feldman told him that Mr. Knabe was "ripping mad" at Mr. Tuvell for "disobeying his orders" and "not producing the Excel graphics for him" that he asked for. Though Mr. Tuvell also states that the above is a "paraphrase" but "an accurate portrayal of the impact" Mr. Feldman's words had on him at the time and the actual words "may have been somewhat different" because he was "so shocked" that he "cannot now recall" the precise wording. However, he denies that Mr. Feldman said that he told Mr. Tuvell that Mr. Knabe was "frustrated" that he had not "picked up on Mr. Knabe's suggestion that he create an Excel graphic depiction of his work.

Mr. Feldman states that Mr. Tuvell became visibly agitated and argued that what Mr. Knabe wanted was inferior to what he was already providing and then complained "quite loudly" that Mr. Knabe was "going behind his back." Mr. Feldman continues that Mr. Tuvell stated that he was "pissed, Mr. Feldman attempted to move the conversation back to a discussion of what was necessary to improve Mr. Knabe's satisfaction, and Mr. Tuvell continued arguing in a raised voice that this was all because Mr. Knabe expected Mr. Tuvell to read Mr. Knabe's mind. Mr. Tuvell states that he tried to explain to Mr. Feldman that Mr. Knabe had never asked him to do anything and certainly not produce Excel graphics, but Mr. Feldman "seemed to be deaf" to Mr. Tuvell's story. He goes on to state that he "became more and more frustrated/upset."

Mr. Feldman states that at this point Mr. Tuvell rose from his seat, threw the papers in his hand onto Mr. Feldman's desk and said "I'm leaving." Mr. Feldman responded by asking him if he was leaving the meeting or leaving the office. Mr. Tuvell responded that he was leaving the office. Mr. Feldman then asked Mr. Tuvell if he needed to do anything with Mr. Tuvell's papers. Mr. Tuvell responded that he took the papers from Mr.

Deleted: Feldman

Feldman's hand, leaned over Mr. Feldman and threw the papers into the recycle basket and said "Here, let me make this easy for you!"

Mr. Tuvell states that at some point, he decided that he was getting "nowhere," became "really rather angry (incensed, defamed, 'mad as hell')" and stood up to leave. Then realizing this would be "unprofessional," he asked Mr. Feldman if he could leave. To which Mr. Feldman responded in the affirmative. At that point, Mr. Feldman asked what should he do with the papers Mr. Tuvell had brought into the office, "extending them... with both his hands." Mr. Tuvell responded "Here, I'll help you;" took the papers "gently" from Mr. Feldman's hands and "threw them (silently and emphatically", but not violently or threateningly" into the paper recycling bin. Mr. Feldman then asked him where was he going and Mr. Tuvell responded home. Mr. Feldman enquired if he was coming back and Mr. Tuvell responded "not today." However, Mr. Tuvell does remember stating that he thought Mr. Knabe was a "workplace bully."

INVESTIGATOR'S NOTE: Mr. Tuvell refers to this issue in his May 16-22 weekly progress report as "Oh yes, there was a new kerfuffle about Fritz, who apparently claims I now need to have an expertise in mind-reading. Have escalated the issue to DanF. I won't be surprised if Fritz succeeds in getting it swept under the rug as a 'mere communication issue'. I speak/understand English, I don't know what language he's using. Call me a cynic."

May 19, 2011 – There are a series of e mails between Mr. Tuvell, Mr. Feldman and Mr. Knabe, while Mr. Tuvell worked from home because he was "still quite mad" about what occurred on May 18. In the emails he states he has some doctor's visits and does not feel well enough to come into work and may miss a meeting that Mr. Knabe may have discussed but had not scheduled. Mr. Tuvell's states to Mr. Feldman this is "more mind reading." Mr. Feldman responds that he is not concerned if Mr. Knabe was imprecise in his scheduling and he was thinking of ways to get this on a "sustainable, professional footing" and he is open to any serious suggestions. Mr. Tuvell responds that we need a three-way conversation and "A bully can't be ignored, else they'll keep on bullying."

May 23-24, 2011 – Mr. Feldman states that he met with Mr. Tuvell and reiterated that Mr. Knabe is both Mr. Tuvell's and Mr. Feldman's customer, and it is incumbent on them to figure out how to meet Mr. Knabe's needs. Mr. Feldman goes on to state that Mr. Tuvell continued to complain that Mr. Knabe was expecting him to read his mind and began to reiterate the substance of the conversations he had with Mr. Knabe about the graphing deliverable. Mr. Feldman stated he saw no point in rehashing these conversations and that the point was to make things work moving forward. Mr. Feldman states that he then asked Mr. Tuvell to clearly specify the next iteration of the work to be done including a schedule to be used as a mechanism for ensuring that there was agreement among the three of them about what Mr. Tuvell's deliverables would be. Mr. Tuvell remembers this as a request to keep a "day-by-day written journal (emails) of work and communications" between Mr. Tuvell and Mr. Knabe, so Mr. Feldman could keep "closer tabs" on the situation. However, Mr. Tuvell did provide an e mail with a plan on May 23. In addition, Mr. Tuvell states that he had conversations with both Mr. Knabe alone, and with Mr.

Knabe and Mr. Feldman in which they agreed that Mr. Knabe should have more direct control over Mr. Tuvell's time or have Mr. Tuvell work directly for Mr. Knabe. Both Mr. Knabe and Mr. Tuvell deny ever agreeing to having Mr. Tuvell work directly for Mr. Knabe. [DJF- I don't remember the suggestion that Tuvell work directly for Knabe ever being broached.]

Mr. Tuvell requested a three-way meeting between Mr. Knabe, Mr. Feldman and Mr. Tuvell to discuss the events of the prior week. Mr. Feldman refused because he wasn't interested in mediating a dispute but in building credibility by delivering results. [NOTE: Mr. Tuvell states that he believes that Mr. Feldman's refusal to have a three-way conversation was a "way to intentionally construct a hostile work environment" around Mr. Tuvell.]

Deleted: Tuvell

May 26, 2011 – Mr. Feldman states that he met with Mr. Tuvell for a "one-on-one" status check and Mr. Tuvell responded to several of his questions with sarcasm about Mr. Knabe and the work product of other members of the team. Mr. Feldman goes on to state that Mr. Tuvell stated that Mr. Feldman had placed him "on a performance plan." Mr. Feldman responded that he was not on a performance plan and that the kind of detailed supervision he was using was designed to ensure that the tasks that needed to be done got done and that Mr. Knabe would not have the opportunity to change an agreement without Mr. Feldman being aware of it promptly.

Mr. Feldman also states that Mr. Tuvell said "quite loudly" that what Mr. Feldman perceived as sarcasm was really Post Traumatic Stress Disorder (PTSD) and depression. He then told Mr. Feldman that he suffered from depression, was being medicated for it, and that his current situation with Mr. Knabe reminded him of a prior job where another employee had spread falsehoods about him and that he had successfully sued that co-worker for defamation. Mr. Feldman responded that if he had the help he needed with his medical issues that IBM has resources that he could take advantage of. Mr. Tuvell responded that he had all the help he needs.

June 8, 2010 – Mr. Tuvell sent a lengthy e mail to Mr. Knabe, carbon copying Mr. Feldman, that was titled "Comments on some miscommunications" which discussed the Mr. Tuvell's efforts to run performance tests. In it, Mr. Tuvell states that Mr. Tuvell [I expect you mean Mr. Knabe here] made an "absurd statement" by stating that "since you haven't finished the host CPU gathering work yet (i.e., nzmon), it seems the bad Wahoo software isn't slowing you down." The e mail also states that Mr. Lubars "labored in essential isolation" from Mr. Tuvell on a model until Mr. Lubars finally asked Mr. Tuvell about the work and then Mr. Tuvell heard Mr. Tuvell tell Mr. Knabe that Mr. Tuvell had already done "95%" of what was needed and later "97.5%" of what was needed," or in other words, there was a clear miscommunication Mr. Lubars and Mr. Knabe. He also states in this note that "Does it seem there may be a pattern of miscommunication here?" Mr. Lubars had seen this note and commented that this is an example of Mr. Tuvell's "insulting" e mails, and that all Mr. Tuvell did was to "change the sign" of a value which makes it far from getting Mr. Lubars 95-97 ½ % anywhere nor was there any miscommunication between Mr. Knabe and himself (Mr. Lubars). [NOTE: Mr. Lubars

states that this an example of an insulting e mail from Mr. Tuvell, in that it implies that Mr. Tuvell was doing most of the work and Mr. Lubars was “lost.” He also states there was no “miscommunication” between Mr. Tuvell and himself.]

June 9, 2011 – Mr. Tuvell states that Mr. Feldman asked him if he could think of why Mr. Knabe would “yell” at him. Mr. Tuvell responded it could be either that Mr. Knabe was “under a lot of stress,” “threatened” by Mr. Tuvell or “was going insane.” To which Mr. Feldman responded that Mr. Tuvell needed to try thinking of to “patch over” his difficulties with Mr. Knabe. At this point, Mr. Tuvell asked for another “three-way” meeting, which Mr. Feldman refused.

June 10, 2010 – Mr. Tuvell states that Mr. Feldman told him that he had met with Mr. Knabe the previous day and Mr. Feldman had decided that Mr. Knabe and Mr. Tuvell could no longer work together. Therefore, he would have Mr. Tuvell and Ms. Sujatha Mizar, another member of Mr. Feldman’s team switch job assignments. Mr. Tuvell considers this a “demotion” because Ms. Mizar is “very junior” to Mr. Tuvell.

Mr. Tuvell states that he told Mr. Feldman he wished to lodge a complaint. Mr. Feldman referred Mr. Tuvell to Ms. Kelli-ann McCabe, the “legacy Netezza” HR representative or Ms. Diane Adams, HR Partner. He also told Mr. Feldman that not only is Mr. Knabe a “bully,” but that he hesitated to call him a “liar” because the word implies an “intent to deceive, but he believes since the “yelling incident” that Mr. Knabe is “consciously promulgating falsehoods with an intent to deceive.” Mr. Tuvell states that Mr. Feldman told him that Mr. Knabe said the same things about Mr. Tuvell.” Both Mr. Feldman and Mr. Knabe deny ever stating that Mr. Knabe called Mr. Tuvell a “liar” or a “bully.”

Comment [DJF1]: I don't believe I ever said this because I can't imagine why I would.

June 10, 2011 – Mr. Tuvell sent an e mail to Mr. Knabe about miscommunication, carbon copying Mr. Feldman, stating that when he told Mr. Knabe to get off his back was a result of Mr. Knabe making a statement that “was so nonsensical” that he could not even logically “parse it in the instant given” and the “illogic was so off-the-wall” that he “was unable to analyze it in-the-moment,” his only response to Mr. Knabe raising his voice was to raise his own voice. He goes on to offer his “apologies for raising” his “voice enough to make himself heard” and wanted to wish Mr. Knabe and his team the “best possible success going forward.”

Mr. Knabe responded, carbon copying Mr. Feldman, that he appreciated the “words of encouragement” and “support for the ongoing performance work,” and he was disappointed in how their “working relationship on this project” had “come apart,” and was sorry for any “embarrassment and anger” he may have provoked “when raising his voice.”

INVESTIGATOR’S NOTE – Mr. Tuvell included his June 5-12 weekly progress report to Mr. Feldman was attached to his note. Below are some of the excerpts from that progress report are included below:

“Late on Wed afternoon (before my error, above, was known), Fritz [*sic* Mr. Knabe] published to me and Steve [*sic* Mr. Lubars] a list of 5 "upcoming performance tests", which I completed by Fri (and I assume Steve completed his part too). Actually some of the things Fritz suggested were worthless, as 'must' have been obvious to Fritz, but it's his manner to arbitrarily assign scut work to me (seemingly due to neuroses of his own, as has become increasingly clear to me).”

“BTW, have you noticed that all the above were 5 days of work packed into only 3 days? I did this voluntarily, of course, as I always step up where above-and-beyond-the-call-of-duty is required. Nevertheless, that good deed didn't go unpunished, because Fritz shat upon me in public (Camb office) with lies, bullying/harassment and yelling, and surreptitiously (behind my back, refusing to talk to me face-to-face) causing me to be 'fired' from the Wahoo project on Fri. This was an 'illegal' adverse job action (in the IBM sense, perhaps even in the civil law sense), because it was a consummated false defamation of me (IBM policy calls it "harassment"), totally without due process.”

“The very act of Fritz's having gone to Dan behind my back, and falsely accusing me of being a liar and bully (as Dan told me he did), already amounts to such an 'illegal' act. Additionally compounding that defamation is the further public humiliation of unilateral removal from the most excellent high-profile position on Wahoo, to what seems (to me and others, just ask a disinterested third-party observer) to be a highly symbolic deportation to Siberia. I felt unjustly accused and unjustly acted upon. Nevertheless, Dan [*sic* Feldman] reiterated his many-times repeated mantra that his ONL.Y [his word] interest is in helping the Wahoo project succeed (thereby excluding interests in such minor niceties as justice to me, if it came at the expense of Wahoo/Fritz).”

June 12, 2010 – Mr. Feldman responded to Mr. Tuvell's June 5-12 weekly progress report he "... not believe that you have correctly reported our conversations and I deny that you are being punished in any way." He also made comment that since Mr. Tuvell had previously made it clear that he had sued a former employer, he wanted future conversations be in the presence of a Human Resources representative and that all written communications copy a Human Resources representative. Mr. Tuvell's interpretation of this note is that Mr. Feldman went "adversarial." Ms. McCabe and Mr. Feldman's manager, Mr. John Metzger were on copy of the note.

June 13, 2011 – Mr. Tuvell responded to Mr. Feldman's note, in part to make the following clarification – he did not say Mr. Feldman was "actively punishing" Mr. Tuvell, but that this constituted an "adverse job action," because when somebody "disappears from a project in the middle of the night, only to show up on limbo, it speaks silent volumes to the organization." And this additional clarification as well – while Mr. Tuvell did mention once that he had been involved in a case of "workplace harassment/defamation once before, ... extremely similar to the one that has now been "inflicted," he stated this not as a "threat" or "warning," "as your note seems to subliminally imply ("protecting ... interests"), but as a point of information that 'I know what I'm talking about' ..."

June 10, 2011 – Mr. Feldman asked Mr. Tuvell and Ms. Mizar to provide a “brief e mail at the end of every business day detailing the transition tasks” completed and alerting Mr. Feldman “to any problems or issues’ they might encounter. Ms. Mizar responded with a report that day, requesting Mr. Tuvell to add anything she might have forgotten. Mr. Tuvell states that since her report seemed to be “perfectly adequate” he did not “bother adding anything.”

Deleted: 14

June 15, 2011 – Mr. Feldman sent an e mail to Mr. Tuvell stating that while he received a report from Ms. Mizar, he did not receive one from Mr. Tuvell. He goes on to state that perhaps he “was not sufficiently clear,” that he required from both of them in their own words and to do until notified otherwise. Mr. Tuvell interprets this as firing off a “nasty-gram,” “dunning” Mr. Tuvell for not providing him with a report. Mr. Tuvell goes on to state that this was a “total absurdity” and an example of “consummated harassment” because of all the of e mails Mr. Tuvell had received from Mr. Feldman in the past “none had carried anywhere near this level of seething animosity.” Mr. Tuvell further states that the “smarmy tone” of Mr. Feldman’s e mail “was undisguised, blatant, stiff, hostile, demeaning, snide and condescending” and Mr. Tuvell “recognized this as the opening salvo of overt warfare.”

June 15, 2011 – Mr. Tuvell responded to Mr. Feldman in a e mail stating “Oh Come On. OK, you want a status report, I’ll give you a status report. It is identical to Sujatha’s. As if you didn’t know that was obviously going to be the case, and which is the reason I didn’t bother sending you this redundant, useless information... Dan, I’m very sorry to observe you now showing your true colors in this way. As long as you insist on interacting with me in this sort of blatant (not even an attempt at subtlety) snide harassment/retaliation... But you and Fritz now appear to be on a campaign of actively persecuting me (this email of yours is a sample piece of evidence)....”

June 16, 2010 – Mr. Feldman sent Mr. Tuvell an e mail at 10:25 AM asking Mr. Tuvell to provide him a first draft for a detailed (one-day granularity) schedule for his work on his assigned projects between now and the beginning of Mr. Tuvell’s medical leave by the end of the following day. Mr. Feldman states that he could use the outline they had developed on the whiteboard and that Ms. Mizar had subsequently documented as the beginning of such a schedule. [NOTE: Mr. Tuvell was scheduled to be out on Short Term Disability from July 10-24 and to be on vacation from July 24-31.]

June 17, 2011 – Mr. Tuvell responded to Mr. Feldman that the manner and tone of the note is “consistent with an industry badgering/harassment technique, known in some circles as ‘blackballing’ (portrayed falsely by the unscrupulous as a ‘performance plan’ that just happens to come out of the blue, without need and without warning).” This is done by a manager giving an employee some kind of onerous task to perform, then no matter how well the employee performs it, the manager claims it wasn’t good enough.” Mr. Tuvell goes on to state that he has no idea what Mr. Feldman wants, because nobody had ever requested him to provide a 3-week day-by-day schedule; and therefore “it’s an impossible-to-succeed blackballing task.”

June 30, 2011 – Mr. Tuvell’s transition status note to Mr. Feldman included the following:

“Sujatha [*sic* Mizar] had previously been using an unbelievably poor solution... It’s actually hard to believe she herself invented this, did she or did somebody else put her up to it? In other words, now that I’ve seen what she’s doing..., the data she’s collected heretofore should now be considered suspicious/unreliable until proven innocent.

I’ve also heard Devesh [*sic* Agrawal] complain about the inability to capture virtual tables... But again all he’s done is complain, and suggest increasing the size of the ring buffer beyond 16 MB, by modifying the source code and recompiling (a terrible idea, an arbitrarily large size is needed, in every build, not oneoffs)! But in his case, that’s certainly his idea, nobody else planted that idea into his head, because he’s a fully capable developer. Why didn’t he just go fix it?

As you know, this effort is far above-and-beyond the call of duty (a constant refrain with my work, as had always been recognized up until June 10). The job as Sujatha ‘transitioned’ it to me was merely to run her scripts, then give the results to Garth so he can ‘post-process’ this data in any way he sees fit to derive more useful statistics and ‘pretty graphs’ (as she herself defined the task in email to me). In other words, my new job was to be a ‘script monkey’, as you’ve so colorfully described this kind of work many, many times. Fully consistent with the harassing demotion you’ve subjected me to...”

June 30, 2011 – Mr. Feldman responded “I appreciate your initiative in solving the ring buffer wrap around problem... However, I didn’t assign you this task and you didn’t communicate with me about your intention to undertake it. While I agree that it is important and useful, it may not have been the best use of the limited time available prior to your medical leave and by pursuing it without communicating with me you have undermined my ability to make the best decision about how a scarce resource (your time and talent) are allocated. I believe that more effective communication will avoid this kind of thing in the future. Those are precisely the kinds of decisions I’m expected to make.

I have to caution you once more against the unprofessional tone of certain parts of your email. In particular, you appear to be engaged in *ad hominem* [*sic* “at the person”] attacks against both Sujatha and Devesh and this is inappropriate and unnecessary; you can take credit for work you’ve done without casting aspersions on your colleagues.”

June 30, 2011 -- Mr. Tuvell states in an e mail to Mr. Feldman that he was doing just the opposite of making an “*ad hominem* insinuation,” in that he “praised” Ms. Mizar “as someone” whom he did not believe “designed the scripts she was running” and he “took special care to call Mr. Agrawa a “fully capable developer.”

Mr. Tuvell also comments that he was capable of making any “arbitrary off-the-wall *ad hominem* attacks against anybody and anything with impunity if I had wanted to,” because this discussion was under the aegis of both manager-employee communication and the HR Concerns and Appeals processes.

July 5, 2011 – Mr. Feldman warned Mr. Tuvell that in order to continue to maintain his employment with IBM, he would have to behave in a professional non-disruptive manner and follow management direction. Mr. Tuvell states that he could not keep up with Mr. Feldman and asked Mr. Feldman to e-mail him a copy of the behaviors he needed to avoid. Mr. Feldman sent an e-mail as requested:

-
- Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes);
 - Conduct in the workplace that creates, encourages, or permits an inappropriate work environment;
 - Failure to follow management direction (for example, refusing to develop a plan for how you would spend your time prior to your medical leave)."
-

July 6, 2011 -- Mr. Tuvell responded to the above e-mail. He asked for examples of when he exhibited the behaviors or made comments outlined in the first bullet above that had happened prior to June 8, because all statements made after that date were "under the protected aegis of HR processes" which therefore enjoys "absolute privilege." [NOTE: While an employee is entitled to complain about inappropriate actions on the part of their management and/or their peers, there is nothing in the IBM HR processes that gives an employee free range to demonstrate any of the behaviors or comments listed in the first bullet above.]

As to the next two bullets, Mr. Tuvell stated all he did was to defend himself in his "conduct" and never "refused" to follow management direction. He just was supplied with insufficient guidance to create the project plan required; and he has never seen anyone outside of a project manager asked to provide such a plan. [NOTE: In the investigator's experience, employees from all skills are routinely asked to provide project plans.]

Mr. Feldman responded that the point of bringing these expectations to Mr. Tuvell's attention was to ensure that Mr. Tuvell was aware that they are fundamental conditions of employment for all IBM employees, doing so was in no way an accusation, and this is the process that IBM management would follow with any employee who appeared to need the education. Mr. Feldman offered for either himself or an IBM professional to discuss anything of which Mr. Tuvell was unsure.

July 6, 2011 -- Mr. Tuvell responded in an email that he could think of one example in which a Mr. Brian Maly wrote an email discussing the security of single-overpass wiping of hard disks and Mr. Tuvell responded that this was based on information that was at least a decade out of date. Mr. Maly "stonewalled, claiming he had 'personal experience' (unspecified) that what he wrote was correct. That was cool if true (as I thought both then and now): maybe he's worked at the CIA or in academia, where that kind of work is really done?" Mr. Tuvell goes on by stating he sent a relevant paper to the e-mail group,

and if this was the kind of thing where people were "talking behind my back at how nasty I am, then he wanted to know what's a better way of handling things.

Mr. Feldman responded that he would alert Mr. Tuvell when he saw any behavior that seemed to be inappropriate and he hoped this would help Mr. Tuvell to "re-calibrate" his "discourse." However, Mr. Tuvell need to be careful not to exceed the bounds of tolerable behavior/comments and advised him not to push the "send" button until he had re-read what he wrote. He also stated that it was "perfectly fine and even necessary" to disagree with colleagues when a mistake was made, but it was necessary to do so in a way that cannot be construed as an attack on individuals "motives, intentions or competence. Mr. Feldman offered to provide an "independent review" of Mr. Tuvell's communication.

July 6, 2011 – Mr. Tuvell sent an e mail to Mr. Feldman and Mr. Garth Dickie stating that he had update the "wiki" and that they could easily find the information by searching the wiki for "blktrace" or "if you're lazy you can just click" the link he provided in the note.

July 11, 2011 -- Mr. Feldman responded thanking Mr. Tuvell for getting this taken care of the above before starting his time off and under the heading of helping with Mr. Tuvell's communication style, using the term "lazy" was the sort of thing Mr. Tuvell wanted to avoid.

July 10-24, 2011 -- Mr. Tuvell was out on Short Term Disability (STD).

July 24-31, 2011 – Mr. Tuvell was out on vacation.

August 3, 2011 – Mr. Feldman asked Mr. Tuvell what were his work plans (got me nice and relaxed in order for his upcoming attack to have maximum effect) for the rest of the week. Mr. Tuvell responded that he had accomplished most of his work "Blktrace" while he was recuperating after surgery. Therefore, he planned to spend the rest of the week (i.e., the next two days) to work on his Appeal as was previously agreed as we had three times in writing. Mr. Tuvell provides as proof of this agreement three e mails: 1) his June 26 – July 3 weekly progress report states that he started the IBM Concerns and Appeals process and that it will "take a non-trivial amount" of his time therefore he "will properly charge the time to the company; 2) in a July 5, 2011 e mail to Mr. Feldman, Mr. Tuvell stated that he spent part of his July 1st working on his appeal; 3) in an August 3, 2011 e mail to Mr. Feldman, Mr. Tuvell states that he worked on "blktrace" during his time off because he was going to need some time to write his appeal.

Mr. Feldman responded that he could not spend the full two days just working on his Appeal. Quoting Mr. Tuvell, "Dismayed and provoked by Dan's statement, I react instinctively, leaning forward, and letting my voice get a little louder than normal (he had after all provoked, me, and my guard is down from the preceding semi-cordial forty-five minutes), saying: 'Now wait a minute, Dan.' The pounce complete, now Dan sinks his fangs. He says: 'If you yell at me one more time I'll fire you! I ordered you not to work

Comment [DJF2]: It was during the 7/7 – 7/24 period that Walt both apologized for the use of the term lazy and then apologized for his apology in both cases on email addressed to Garth Dickie and me.

Comment [DJF3]: Lisa Due's letter finalizing her investigation established the terms under which he could pursue his appeal.

during your STD and you disobeyed orders. I need to have a full workday from you every scheduled workday. You must continue your work on Blktrace full-time for the rest of the week. I hesitantly (out of fear) tried to explain that I only mildly raised my voice out of provocation, I hadn't "really yelled", certainly not in the sense that Fritz certainly had, but Dan said "I don't care, you can't do that [i.e., pseudo-yell, or whatever-you-did] in here."

July 20, 2011 – Mr. Feldman giving Mr. Tuvell a formal "Warning Letter Without Restrictions." The warning letter in part states he had violated the "proper workplace behavior" condition of employment by exhibiting:

- "Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments verbally or via notes; specifically, your email of 20 July 2011 addressed to Garth Dickie and me;
- Conduct in the workplace that creates, encourages, or permits an inappropriate work environment.

Mr. Feldman states that he decided to place Mr. Tuvell on notice because of Mr. Tuvell's escalating inflammatory e mails and speech aimed at Mr. Knabe, Mr. Mr. Agrawa, Ms. Mizar and himself which did not respond to counseling. [NOTE: It is common to provide this type of behavior. In more serious cases warning letters include restrictions such as no salary increase, no promotions and no job movement unless in the best interests of the company for a specified period of time, as well as impact on salary, PBC assessments, etc.]

Comment [DJF4]: Well, the diction isn't mine. I never used the terms "ordered" or "every scheduled workday".

Exhibit 107



Re: New Open Door & Corporate Open Door Complaint

Ginni Rometty, Randy MacDonald, Robert Walter Tuvell to: Weber, RUSSELL E MANDEL, Samuel J Palmisano, Steve Mills

01/22/2012 08:13 AM

Cc: Arvind Krishna, Daniel Feldman, Pratyush Moghe Bcc: walt.tuvell

Default custom expiration date: 01/21/2013

To All -

It is necessary for me to re-send this note.

This morning, I checked the upload site for lbmComplaint.zip (http://www.filedropper.com/lbmcomplaint), and I discovered it didn't work for some reason (it yields a zero-byte file). I don't know what happened. To the extent I may have made a mistake, please accept my apologies.

Therefore I find it necessary to upload lbmComplaint.zip again, to a new site (http://www.filedropper.com/lbmcomplaint_1). I have now tested this new upload site several times, using several browsers, to make quite sure it is working properly this time.

This meant I had to modify the lbmTransfer.pdf document (to document the new upload site), creating version 1.1. Since I had to touch the document anyway, I took the opportunity to also fix some typos, and add some additional language for clarification purposes.

The revised document is attached hereto, in two forms: one with change-markup (so you can see what's changed), and one in clean-copy.

- Walt Tuvell



lbmTransfer-1.1.pdf



lbmTransfer-1.1-MARKUP.pdf

Walter Tuvell

To All - Pursuant to my best understanding, in g...

01/20/2012 04:41:34 PM

From: Walter Tuvell/Marlborough/IBM To: RUSSELL E MANDEL/Somers/IBM@IBMUS, Ginni Rometty/Southfield/IBM@IBMUS, Samuel J Palmisano/Armonk/IBM@IBMUS, Steve Mills/Somers/IBM@IBMUS, Randy MacDonald/Armonk/IBM@IBMUS, Robert Weber/Armonk/IBM@IBMUS Cc: Arvind Krishna/Watson/IBM@IBMUS, Pratyush Moghe/Marlborough/IBM@IBMUS, Daniel Feldman/Marlborough/IBM@IBMUS Date: 01/20/2012 04:41 PM Subject: New Open Door & Corporate Open Door Complaint

To All -

Pursuant to my best understanding, in good faith, of IBM's Open Door and Corporate Open Door (Concerns & Appeals) policies/processes/procedures, I hereby submit the attached new complaint for your consideration.

I anticipate your timely attention and participation in this matter.

TUVELL001090

DEPOSITION EXHIBIT #33 1-4-14 DS 686AD 800-631-6986

DEBORAH SMITH CSR

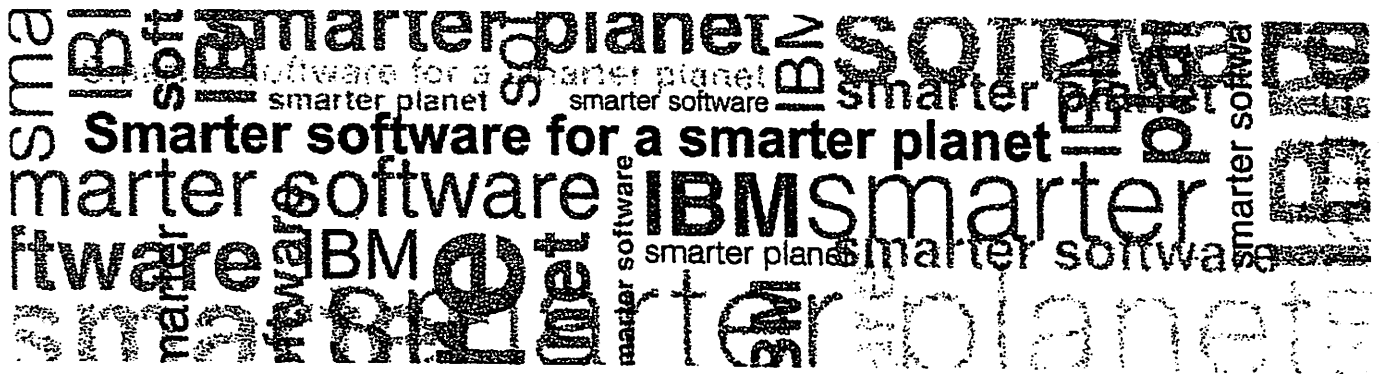
- Walter Tuveil



NETEZZA®
Complaint

Claims of Interference, And Demand For Transfer

Irregularity And Illegality With IBM Internal Transfer



Walter Tuvell

January 22, 2012



employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

- *IBM's limiting my search for transfer opportunities to only to those listed in GOM fails to comply with the ADA:*

[Question] Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?

[Answer] Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.

- *IBM's passively pointing me to GOM, and its foot-dragging throughout, fails to comply with the ADA:*

[Question] Does an employer have to notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?

[Answer] The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time. In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.

An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks. When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

- *IBM's rejecting my transfer on the grounds of "right fit", or on any other grounds (such as, say, concern about short-term tenancy), fails to comply with the ADA:*

[Question] Does reassignment mean that the employee is permitted to compete for



a vacant position?

[Answer] No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

15 Allegations & Accusations

For the reasons put forth above, I hereby make the following allegations and accusations.

IBM has wantonly violated the ADA, by refusing to properly interact with me for the purpose of obtaining reasonable accommodation by reassignment (transfer), by committing the following impermissible acts:

- IBM failed to assist me in identifying an existent funded vacant position (apart from merely permitting me to use the GOM process, in the same manner as all other employees).
- After I myself found such a position, for which I was universally acclaimed to be qualified by education, training and experience, and I actively applied for it, IBM required me to additionally interview for it.
- IBM rejected me for said position, on the stated grounds that (i) I was "on STD", or alternatively that (ii) I wasn't the "right fit".

I believe that Chris Kime's rejection letter (Appendix L) provides direct evidence of discrimination and retaliation by IBM, based on disability (actual or "regarded-as", based upon my taking medical leave as accommodation therefor).

I suspect that Chris Kime's up-level management and operations people are involved in wrongdoing in this matter.⁶

I question whether Dan Feldman was involved somehow in undermining my application for transfer.

I believe Dan Feldman is actively engaged in a cover-up, and that Diane Adams is supporting him in his effort.

16 Demands

For the reasons put forth above, I demand that all illegal (and otherwise illicit) activities against me cease immediately.

I also demand that I be granted the transfer to SWG-0436579, as described herein, forthwith.

6. For the record, I believe Chris Kime himself was originally an innocent, naïve, "drive-by-shooting" victim in this matter, but whose arm was twisted by person(s) unknown to me, though including at least Dan Feldman and Chris's up-line management, and certain operations (presumably meaning HR) staff.

Exhibit 108



Russ Mandel 6/27/11

Rules of court of law don't exactly apply to the business environment. One of the things that differentiates IBM from others is this organization that investigates appeals.

Manager is treating different than everyone else... making sure you are doing your job.

Think being too nice to the manager, from complex case perspective. Employee didn't bring the complaint.

Tell the ee: manager/hr communicated complain re; whether tmstreated, find no reason to conclude that.

Now up to manager to manage the employee. Then turn it over to HR/ manage as performance.


No need to place him in another role. Like a tantrum for a 2 yr old, they will learn to do it again if you give in what they need.

I prefer respect but fear is not a bad second choice.

 6/27/11

Doesn't want to have walt know his name.

He seems to think that someone has reported him and wants to know who and

Working on this team since November, he has been a big part of that... after many months getting close to msmts striving for... fritz - do you have those numbers yet, I can't wait to see them... don't think test run now walt has those numbers in them... walt blew up and it was uncomfortable and strange. After walt left that day,  said it was uncomfortable. If he was the manager, he would not want walt on

the team or the environment, no matter how frustrated, or whoseever fault, there is a way to not talk at work.

This is a very tight team, office in Marlborough 500-600 people, the small team here is handpicked by Fritz ... 6 people. That resulted in changes.

Rather than Fritz saying this is not working out, that was inappropriate, he may have said others were uncomfortable with him too....

First line of Walt's email - who called him a being a bully and a liar - even a warped interpretation...

Walt's writing is very aggressive. Not sure of what was reported to whom, he wrote back to [REDACTED] had a feeling it was not you... it is not your fight. Very strong and lots of hostility.

Read the cc, and copied him on emails to Fritz, somewhat delusional...

Fritz never raised his voice, not aggressive or accusatory, nothing to feel uncomfortable in front of peer.

There are debug stats, Walt bar stats, hundred g/g, atomics, tpcps test, g/its snaps, perf and walk, non waho, no wahoo, -d no wahoo and -dwahoo... debug and turbo build.

100 g/g non ballooned... easy to misunderstood, Everyone gets confused, easy for Fritz to get confused.

Walt: God damn it I am sick of this shit, you understood and acknowledged and get off my back...

selfconscious and by the emails... belled all this anger and extensive issue.

Fritz said he would put it all in writing.

[REDACTED] said Walt's emails were insulting - trying to encourage him... file formats were unusual..95 % of the way there - just change the sign... 97 1/2 % was him encouraging him. It was not him doing most of the project as Walt implied nor was he lost... as Walt mentioned - no miscommunication.

Prior Friday, Walt and Devesh and [REDACTED] asked what do we need to have ready by Monday - task 3 was taken by [REDACTED]... go around. Walt said he did the zeimon on the Spu. Which is what [REDACTED] said... not a big deal.

Behavior and email from Walt – reminds him of mentally unstable girlfriends – world view is quite different of what actually transpired.

Very tense, twitchy, intense guy, but we are all nerdy misfits but we tolerate each other.

██████ was in Marlborough and Fritz at a conf., trying to use the desktop sharing thing, 30 min of a half hour meeting. Awkward that it took long for the meeting to start... and how Fritz blew up at that... but Fritz did not blow up.

Let's get to the meeting.

Why would he want to be at a place where he is unhappy if he feels that way, then why was he not moving to another group. Don't be indignant if you think they don't like you, and then act the way he does.

Believes it was unambiguous, and Fritz misunderstood, but Walt ascribed intent to this. Fritz was trying to understand how got to this point and Walt acted as if someone had intent. Not sure it was going by that name at the time (Walt bar).

Close out with John Metzger and Diane Adams and Kelli-Ann McCabe 6/28/11

Rules of court of law don't exactly apply to the business environment. One of the things that differentiates IBM from others is this organization that investigates appeals.

Manager is treating different than everyone else... making sure you are doing your job.

Now up to manager to manage the employee. Then turn it over to HR/ manage as performance.

No need to place him in another role. Not really anything for defamation – there is nothing for us to do... follow the normal work guidelines.

We are allowed to give perf feedback.

Moved to a diff mgmt team – hesitant to do that for sake of moving a problem, we are not going to move you, b/c investigation determined that there was no problem – your job is here and we looked into this and we have determined that there was a perf issue for xyz reason, now you are on another project with a different client and you can succeed.

Investigation is done, nothing to demonstrate there is a problem, there is a process, you can go look for another position if you don't want to be in this role anymore.

If he doesn't like the result, he is still expected to do his job.
If he refuses to do his job, expected to not challenge every manager email and be disruptive. He will be evaluated as someone who doesn't take direction, his performance based on his PBC, and can turn into a COE Issue or perf Issue.

We have the right to move people around. This is standard b/c perf feedback was given, he may disagree with it, but not a problem with it.

We have managers who manage and tell people what to do and he is to follow the direction of his manager and if his manager is not behaving, he can go to HR. He should not be allowed to get away by not allowing himself to be managed.

If it annoying or unprofessional, manager can end the meeting / get off the phone or remove him from the situation.

Can escalate to Russ

Write letter to Walt:

Reinforce message: as we discussed, the inappropriate notes/language... any

Additional note refuting the work is unacceptable

PBC goals / performance against

No factual support that there is a problem

Do your job

Continue to do your job or find another one

You should no longer copy me on your notes.

I will have a close out with Dan and me. And let kelli, diane and John know the results of meeting with Dan.

Tell the ee: manager/hr communicated complaint re; weather mistreated, find no reason to conclude that.

Debriefed 6/29/11 with Dan Feldman

Explained next steps, close out.

Exhibit 109

From: Diane Adams
To: Daniel Feldman
CC: Kelli-ann McCabe; Lisa Due
BCC:
Sent Date: 2011-06-30 20:47:08:000
Received Date:
Subject: *Confidential: Re: Warning Letter
Attachments:

My only concerns with giving him the formal warning letter now are the following:

- he says he is sick, but then says he's able to work (this is such a mixed msg. i'm concerned that providing him this letter when he admitted to having health issues could be construed as IBM not being considerate of his condition)
- we like to always counsel someone first before issuing the formal warning letter. based on the notes, it appears that he was advised not to send inappropriate notes, but i'm not sure he's been counseled on his conduct in the workplace or his failure to follow mgmt direction). If he has been counseled on his conduct in the workplace & failure to follow mgmt direction, pls advise.

I suggest waiting til the next work day that he is actually working to have a discussion (could be by phone if he's working remotely) to outline the 3 focus areas & your expectation that there will be no further incidents.

- ÿ Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes);
- ÿ Conduct in the workplace that creates, encourages, or permits an inappropriate work environment;
- ÿ Failure to follow management direction (for example, refusing to develop a plan for how you would spend your time prior to your medical leave).

After having the discussion with Walt, pls document the discussion (what you said, what walt said) & keep handy for reference. Then, if there is another incident, we'll then issue the letter.

Diane M. Adams
Netezza Steady State HR Leader
508-382-8534
adamsd@us.ibm.com

Daniel Feldman---06/30/2011 04:10:32 PM---In the emails this morning, I have cautioned him about his obnoxious writing and told him that he mu

From:Daniel Feldman/Marlborough/IBM
To:Diane Adams/Fishkill/IBM@IBMUS
Cc:Kelli-ann McCabe/Marlborough/IBM@IBMUS
Date:06/30/2011 04:10 PM
Subject:Re: *Confidential: Warning Letter



In the emails this morning, I have cautioned him about his obnoxious writing and told him that he must do the tasks I assign him. I can take these matters up with him in person on Tuesday (should he come to work) and then hold the letter in reserve for his next transgression after that. I'll communicate whatever you tell me in whatever order you tell me via whatever medium you tell me. I simply need him to realize that he's out of runway and as soon as possible.

Now, I did have a phone call with Kelli and John Metzger this morning where Kelli said that we'd send the warning as soon as I felt it was necessary and had a transgressive example. The example that I think is sufficient is his first email to me this morning (he copied all the HR parties) in response to my response to his content-free status report.

Let me know how you want to proceed.

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Diane Adams--06/30/2011 04:00:05 PM--Did you ever advise Walt on these issues previously? Either via email, phone or in-person? Diane M

From: Diane Adams/Fishkill/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Date: 06/30/2011 04:00 PM
Subject: Re: *Confidential: Warning Letter

Did you ever advise Walt on these issues previously? Either via email, phone or in-person?

Diane M. Adams
Netezza Steady State HR Leader
508-382-8534
adamds@us.ibm.com

Daniel Feldman--06/30/2011 03:53:16 PM--I haven't had a face-to-face conversation with Walt since 6/10. -Dan.

From: Daniel Feldman/Marlborough/IBM
To: Diane Adams/Fishkill/IBM@IBMUS
Date: 06/30/2011 03:53 PM
Subject: Re: *Confidential: Warning Letter

I haven't had a face-to-face conversation with Walt since 6/10.

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com

26 Forest St
Marlborough, MA 01752
United States

Diane Adams--06/30/2011 03:38:45 PM--Dan, one question..... Did you verbally advise Walt (prior to this letter) of the 3 points outline

From: Diane Adams/Fishkill/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Date: 06/30/2011 03:38 PM
Subject: Re: *Confidential: Warning Letter

Dan, one question.....

Did you verbally advise Walt (prior to this letter) of the 3 points outlined? If so, I think it would be good to include that these areas were previously discussed with him.

Diane M. Adams
Netezza Steady State HR Leader
508-382-8534

adamsd@us.ibm.com

Daniel Feldman---06/30/2011 01:25:46 PM---Diane, I have made two modifications: I added an example at the place you indicated

From: Daniel Feldman/Marlborough/IBM

To: Diane Adams/Fishkill/IBM@IBMUS

Date: 06/30/2011 01:25 PM

Subject: Re: *Confidential: Warning Letter

Diane, I have made two modifications:

1. I added an example at the place you indicated
2. I modified the language around the deadline for certifying that he has read the BCG.
- 3.

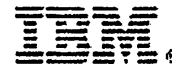
-Dan.

[attachment "Warning letter Behavior draft - Tuvell.doc" deleted by Daniel Feldman/Marlborough/IBM]

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480

E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

Diane Adams---06/30/2011 12:55:31 PM---Dan, I've edited the warning letter to apply to Walt. However, there is a section where I've reques

From: Diane Adams/Fishkill/IBM

To: Daniel Feldman/Marlborough/IBM@IBMUS

Cc: Kelli-ann McCabe/Marlborough/IBM@IBMUS

Date: 06/30/2011 12:55 PM

Subject: *Confidential: Warning Letter

Dan, I've edited the warning letter to apply to Walt. However, there is a section where I've requested your input. Pls add your input & advise if any other changes are needed. I'll then take to Legal for their approval so you can send to Walt once he is back to work.

[attachment "Warning letter Behavior - Tuvell.doc" deleted by Daniel Feldman/Marlborough/IBM]

Diane M. Adams
Netezza Steady State HR Leader
508-382-8534
adamsd@us.ibm.com

Exhibit 110

----- Forwarded by Kelli-ann McCabe/Marlborough/IBM on 06/14/2011 11:46 AM -----

From: Daniel Feldman/Marlborough/IBM
To: John Metzger/Marlborough/IBM@IBMUS, Kelli-ann McCabe/Marlborough/IBM@IBMUS
Date: 06/13/2011 04:56 AM
Subject: Walt Tuvell

John and Kelli,

I copied you both on an email to Walt that I sent on Sunday. I have also copied you both on my email notifying you and all members of my group (including Walt) that I will be working from home this morning. I'm doing so because I am concerned that Walt is irrational and potentially dangerous. He has disclosed to me that he suffers from Post Traumatic Stress Disorder and depression and has on a number of occasions raised his voice to me and risen from his chair in anger when discussing his work and his relationship with his colleagues. Walt's last email to me is quite bizarre, mixing normal status reporting with complaints and threats. This is outside my experience of normal for professionals in high technology.

I'm not sure what the best way to proceed here is nor am I sure on IBM policy in these matters. I don't wish to provoke Walt in any way and so I'm working from home this morning. I am concerned that he is angry with Fritz Knabe. The email from him seems to suggest that he is beginning to perceive me as a source of mistreatment in the same way as he does Fritz. I think it would be prudent to disable his badge-based access to both the Cambridge and Marlborough offices until competent authorities are satisfied that he is not a threat to anyone in the office.

I'm sorry to have to escalate this, but I really don't think Walt's behavior is predictable and I don't want my presence to act as any kind of trigger. I also don't want to be harmed by him and I think it is safer for me to avoid the office until we have a plan for how to deal with him.

I've encountered a similar situation once in the past, while working for a start-up. An employee behaved in a way that her manager, a subordinate of mine, found threatening. We terminated her employment immediately and contracted with a private firm for a week of on-site, armed security. We felt that this was the right thing to do for the safety of our employees although the employee never returned to the office. I imagine there is a way for IBM to take a similar action.

I'd like to talk to either or both of you as soon as practical this morning so that we can discuss how to proceed. Walt usually arrives at the office between 8:00 and 8:30 but, as his recent email attests, he can be in much earlier than this.

Thanks,

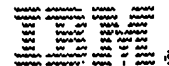
-Dan.

Daniel J. (Dan) Feldman



Director, Netezza Performance Architecture
Software Group, Information Management

Phone:508 382 8480
E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

----- Forwarded by Diane Adams/Fishkill/IBM on 06/14/2011 11:55 AM -----
From:Kelli-ann McCabe/Marlborough/IBM

To:Diane Adams/Fishkill/IBM@IBMUS

Date:06/14/2011 11:53 AM

Subject:Fw: Explanation, to some extent

*** Please note my new email address.***

Kelliann McCabe
Vice President of Human Resources
Netezza, an IBM Company
26 Forest St.
Marlborough, MA 01752
+508 382 8556 DIRECT
+508 397 1680 MOBILE
+508 382 8510 FAX
mccabek@us.ibm.com

----- Forwarded by Kelli-ann McCabe/Marlborough/IBM on 06/14/2011 11:49 AM -----

Exhibit 111

From: Daniel Feldman
To: Diane Adams
CC: John Metzger
BCC:
Sent Date: 2011-08-22 12:15:29:000
Received Date: 2011-08-22 12:15:38:000
Subject: Walt Tuvell
Attachments:

Hi, Diane,

It appears that Walt is working during his leave. He has made substantial updates to a wiki page, indicating that he has spent time coding new programs and analyzing data. This is certainly counter to our instructions to him not to work from home during his illness. Further, he is making it clear by doing this work that he is accessing IBM systems and yet he has not responded to my email of a week ago asking for contact phone numbers. Also, he is pursuing the work without consulting with me, informing me of what he is doing, confirming that I want him to do it, etc. In other words, he is working his own agenda and ignoring my legitimate demands for accountability.

Do our policies around STD require the employee to forebear from working during his/her leave? If so, should we be notifying the STD case worker?

My concern is that 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 the prima facie basis for a claim for accomodation - 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.

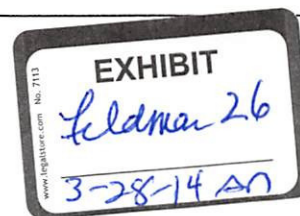
Please advise on all these issues.

Thanks,

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

Exhibit 112



Re: <subject omitted in original> 
Walter Tuvell to: RUSSELL E MANDEL
 Bcc: walt.tuvell

02/16/2012 08:05 AM

From: Walter Tuvell/Marlborough/IBM
 To: RUSSELL E MANDEL/Somers/IBM
 Bcc: walt.tuvell@gmail.com
 Default custom expiration date: 02/15/2013

I don't understand what you're talking about.

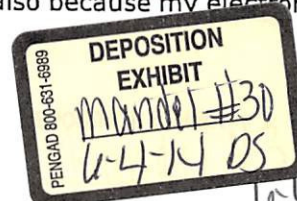
In the first place, I've never even been through the PBC process (hence never been asked to produce a PBC), so that can't be the basis of anything, so it can be ignored altogether (any mention of PBC is unnecessary/useless here).

Turning to the real point of your note, I don't know what "performance issue(s)" you're talking about. I've searched everything I have available to me (including my "complete HR employee file"), and I can find absolutely NOTHING ANYWHERE about any kind of performance issue.

In fact, everything I can find says exactly the opposite. The only formal evaluation I've received (from Dan, dated Feb 22, 2011) shows all performance metrics at-or-above expectation-level. Even so, Dan told me at the time that his grading was misleadingly "low", because the review covered only a few months, so he necessarily couldn't rate me as "high" as I really deserved.

At the time of the interactions with Fritz that I complained to Dan about (Excel graphics, yelling in public), the only thing Dan ever said was that he thought Fritz and I "could no longer work together" (Complaint, Part I, bottom of p. 24). He refused to specify any further details, but merely indicated some kind of vague "communication gap" or "personality conflict/mismatch". As Dan well knew (because I told him so), Fritz's erratic behavior (I called it defamation and bullying) exacerbated my PTSD symptoms (protected by law, since Dan had ample prior specific knowledge of my PTSD, and of my peculiar susceptibility to both defamation and psychological abuse/bullying), which caused me to immediately complain to Dan about Fritz's behavior. Dan refused my many requests for a 3-way meeting to iron things out, but in no way did Dan at any time ever indicate there was any kind of performance issue involved.

Indeed, the exact opposite is the case. Dan explicitly denied any kind of performance issue existed, when he wrote on June 30 (Complaint, Part II, top of p. 65): "You are not on a performance plan." In the same email, he also outlined 3 projects -- later dropped to 2, by Dan's own initiative, not mine -- that he wanted me to work on, which I did in fact fully complete, on time with quality, by the time I out on STD (Aug 15). One of those projects, "nzVtCapture", I completed with far greater generality and quality than anyone even suspected could be done. The other project, "blktrace", I went above-and-beyond the call-of-duty on, by generating new results and adding them to the project's wiki page even after I went out on STD; but Dan then forbade me from continuing to do that work, so I was forced to stop (Complaint, Addendum I, Appendix II, p. 57). [In fact, as I write this, I have some additional results in a file that I'd planned to add to the wiki, but I cannot do so because of Dan's order, and also because my electronic access to the



DEBORAH SMITH CSR

TUVELL001212

wiki has been rescinded.]

So, pray tell me, what is this seemingly non-existent "performance issue(s)" of which you speak?

RUSSELL E MANDEL have looked into the co 02/14/2012 01:39:41 PM

From: RUSSELL E MANDEL/Somers/IBM
To: Walter Tuvell/Marlborough/IBM@IBMUS
Date: 02/14/2012 01:39 PM
Subject:

I have looked into the complaint you made that you were denied an opportunity as a result of being disabled. Having done so, I can advise that the decision was not because of a disability.

To date, there is not yet a PBC for you. Without a PBC, it would be difficult to approve the decision to hire if that was the decision made. Since there was no PBC, there was a need to make an assessment of performance and based on that assessment, the conclusion was that the performance issues we discussed previously would present a problem to your success in the role to be filled.

Russell E. Mandel

Consulting Human Resources Professional
Concerns and Appeals SME

IBM
MD 266
150 Kettletown Road
Southbury, CT 06488-2600

203-486-4561 (t/l 376-4561)

Exhibit 113



Re: Transfer problems

Walter Tuvell to: Daniel Feldman

Cc: Diane Adams

Bcc: walt.tuvell

01/18/2012 07:44 PM

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM
Cc: Diane Adams/Fishkill/IBM@IBMUS
Bcc: walt.tuvell@gmail.com
Default custom expiration date: 01/17/2013

Dan -

I am writing in response to your e-mail of January 16, 2012, including your comments with respect to my denied transfer, and my ongoing requests for reasonable accommodations.

You write that I was rejected for the transfer, posting SWG-0436579, because "the team did not think you were the right fit for the position." I note that your reason given, not the right fit, is about as vague, non-specific, and subjective as an explanation can get.

However, the clear, objective evidence, which I am bound to believe, is that my "fit" was not what motivated my rejection. On January 6, 2012, Chris Kime wrote to me, stating, "Unfortunately, I have discussed your situation with my up-line management and 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."

Mr. Kime clearly asserts that my disability leave status is the primary reason for my rejection. If I was not the right fit, at least from the perspective of the team, why was my situation elevated to up-line management? (Another e-mail from Mr. Kime, dated December 12, 2011 confirms that he advanced my application up through his management chain, which would be a curious endeavor for someone concluding that I was not the right fit). Moreover, it defies credulity that Mr. Kime would lie about considering my STD as a primary factor. It has been suggested that he relied on the STD to let me down easy; however I fail to see how rejecting me based on STD lets me down easier than "not the right fit," which is the very definition of a non-substantial, easy let-down. Why would Mr. Kime prevaricate, and rely on a much more hostile-sounding reason?

There are other reasons why I believe firmly that my status as a disabled person on medical leave is the true reason for the rejection. My medical leave has formed the basis of several negative actions taken against me. First, my access to IBM buildings was withdrawn based on my medical leave. This is confirmed by Russell Mandel's e-mail to me of September 14, 2011, as well as my personal failed attempts to enter the Littleton building in December 2011 and January 2012. See Complaint Addendum III, at 13-14 ("You are out on STD. Therefore, you don't need access to IBM facilities

TUVELL001026

since you aren't working. It is easy to return access once you return from STD"). Second, I was blocked from accessing the Netezza VPN, based on my medical leave. Mr. Mandel wrote that I would be denied VPN access as so long as I remain out on STD. See Complaint Addendum III, at 12-13 ("While you are out on STD, you have no need to access heritage Netezza systems. Once you return to work, it will be easy to return your access"). On December 16, 2011, you reaffirmed that my system access would be severed during the pendency of my medical leave. Third, IBM refused to act on my August 18, 2011 Complaint to the IBM Corporate Open Door process, expressly due to my disability leave. Despite a policy requirement for prompt review, Mr. Mandell asserted, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." See Complaint Addendum I, at 68. He only responded to my complaint (completely and unfairly rejecting it), after receiving multiple demands from me objecting to this lapse. So, my disability leave has been the express basis for repeated adverse actions, including the failed transfer application.

The fact that you would assert your false explanation that my rejection was due to lack of right fit is very distressing to me, given the strength of the evidence to the contrary. Your e-mail of January 16 with respect to my rejection leads me to conclude that you will continue to rely on falsehoods to hurt, victimize and disparage me (as you have in the past), should I go back to work under you. As you know, I suffer from PTSD, a disability, and I have been on leave as a reasonable accommodation. Your behavior in the past, and your false statement of January 16, 2012, places me in an excruciating position. Since you have long had knowledge of my PTSD, I must conclude that you are acting this way, with knowledge of the pain it causes. For this reason, in order to feel safe and preserve my health, I do not see any workable scenario in which I could continue to work under you. 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 you.

I have asked, and continue to ask for transfer or reassignment outside the GOM process, to different supervision, but I have been refused each time. I hereby renew my request.

I have utilized the GOM process, and was rejected under plainly discriminatory circumstances. Did you have any input into the decision? I request that you let me know what input you had, and what information you conveyed to the team.

Since IBM has apparently taken the idea of reassignment or transfer off the table unless it is through the GOM process, 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?

- Walt

Daniel Feldman	Walt: You were not hired for the...	01/16/2012 10:26:53 AM
----------------	-------------------------------------	------------------------

From: Daniel Feldman/Marlbrough/IBM
To: Walter Tuvell/Marlbrough/IBM@IBMUS

TUVELL001027

Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 01/16/2012 10:26 AM
Subject: Re: Transfer problems

Walt:

You were not hired for the position mentioned below because the team did not think you were the right fit for the position. HR reviewed the situation with the hiring manager to ensure that the decision was made for legitimate business reasons.

You can continue to look for jobs on GOM. Diane can work with you on looking for opportunities on GOM, if you need any assistance.

In the meantime, of course, you have a job on my team.

I believe you know that you are expected to return to work on January 25 once your Short Term Disability Benefit concludes, unless you find another position or apply for Long Term Disability.

Further, as you know, many weeks ago we offered you the opportunity to discuss proposed accommodations for you to return to your current position. Apparently you have decided not to explore this possibility with IBM but it does remain available to you. If there are other potential accommodations you would like to discuss (other than changing managers), please let me know.

-Dan.

Daniel J. (Dan) Feldman
Director, Netezza Performance Architecture
Software Group, Information Management

Phone: 508 382 8480
E-mail: dfeldman@us.ibm.com



26 Forest St
Marlborough, MA 01752
United States

Walter Tuvell	Dan, As you know, I have taken s...	01/11/2012 12:58:02 PM
---------------	-------------------------------------	------------------------

From: Walter Tuvell/Marlborough/IBM
To: Daniel Feldman/Marlborough/IBM@IBMUS
Cc: Diane Adams/Fishkill/IBM@IBMUS
Date: 01/11/2012 12:58 PM
Subject: Transfer problems

Dan,

As you know, I have taken short term disability as a reasonable accommodation for my handicap. On November 23, in response to my requests for further accommodation, you wrote an e-mail suggesting that I apply for other positions

TUVELL001028

through the GOM system. I applied and was interviewed for a posting SWG-0436579. However, on January 6, 2012, Mr. Kime informed me that I was rejected for the transfer based on the fact that I am currently serving on STD. I believe this rejection constitutes retaliation based on my requesting or utilizing the reasonable accommodation of medical leave. It is ironic that availing myself of one type of reasonable accommodation is being used to prevent me from utilizing another type of reasonable accommodation.

Moreover, the rejection appears to close off the one avenue you suggested to accommodate my disability, other than continued leave. Is there any other options, any other positions, any other reporting structures, that you can think of that would help me return to IBM as a productive employee?

- Walt

Exhibit 114



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Home > Imprivata Extends OneSign's Identity Management Capabilities with Integration with IBM Tivoli Identity Manager

Imprivata Extends OneSign's Identity Management Capabilities with Integration with IBM Tivoli Identity Manager

Integration Enables Customers to Combine Authentication and Access Management with Popular Provisioning Solution for Holistic Identity-Centric Security

LEXINGTON, MA - January 26, 2009 - Imprivata®, Inc., the converged **authentication and access management** company announced that its appliance-based **OneSign® Platform** has achieved certified integration status with IBM Tivoli Identity Manager. This integration enables customers to benefit from the easy-to-use, easy-to-manage OneSign solution with integrated user provisioning from Tivoli Identity Manager for improved security and efficient management of user credentials from an employee's first day to last day.

"Day-one productivity for new employees is important, especially in today's economic environment, but security must not be compromised in the rush to get team members up and running quickly," said Omar Hussain, president and CEO of Imprivata. "Partnering with IBM and integrating OneSign with the Tivoli Identity Manager provides organizations with a popular provisioning option to manage user credentials while providing secure and efficient access to facilities, networks and applications for employees."

Integrating **single sign-on** (SSO) with user provisioning provides greater network security, improved user and IT administrator productivity and a dramatic reduction in password reset requests to the help desk. The integration between the Imprivata OneSign platform and Tivoli Identity Manager allows:

- Users and their network and application credentials to be automatically provisioned and de-provisioned in OneSign Single Sign-On, eliminating the need to issue passwords to new users
- Instant first day single sign-on to applications and last day lock down of all network and application access

The OneSign-Tivoli Identity Manager integration is the latest in a series of strategic provisioning partnerships enabling Imprivata to realize its vision of delivering enterprise customers with end-to-end user access solutions that are easy-to-use and easy-to-manage. Imprivata OneSign also integrates with provisioning solutions from Courion and Fischer International, and its standards-based Service Provisioning Markup Language (SPML) interface allows for easy integration with other third-party provisioning solutions as well.

About Imprivata

Imprivata is the converged **authentication and access management** company. Its OneSign platform helps organizations safeguard enterprise information assets by enabling secure employee access to networks and applications—improving user productivity and convenience, while reducing the time, risk and cost of complying with data privacy and protection regulations. OneSign has received top ratings in product reviews throughout the industry and has been awarded numerous accolades from leading publications including *Information Security*, *InfoWorld* and *SC Magazine*. Headquartered in Lexington, Mass., Imprivata is one of the fastest growing IAM companies with more than 650 customers and over 200 partners around the world. For more information, visit <http://www.imprivata.com>.

Imprivata is a registered trademark of Imprivata, Inc. in the USA and other countries. All other product or company names mentioned are the property of their respective owners.

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Secure Communications		Webinars	Français	

TUVEU 4537

Exhibit 115



**Employment
Practices Group**

Defining workplace rights

May 30, 2014

Robert S. Mantell
Rodgers, Powers & Schwartz LLP
18 Tremont Street, Suite 500
Boston, MA 02108

*Re: Walt Tuvell v. International Business Machines, Inc.
Docket Number C.A. No. 13-cv-11292-DJC*

Dear Mr. Mantell:

This will serve as the written report of my expert opinions in connection with my retention in the above matter in which your client, Walt Tuvell, alleges various forms of discrimination, harassment and retaliation under state and federal law, as outlined in the 8-count First Amended Complaint and Demand for Jury Trial against International Business Machines, Inc. ("IBM" or the "company") as the Defendant.

Issues addressed here include whether IBM properly responded to Mr. Tuvell's complaints of workplace conflict; whether IBM properly responded to Mr. Tuvell's complaints about inappropriate behavior including but not limited to discrimination and retaliation; whether IBM selected the appropriate investigator to investigate Mr. Tuvell's complaints of illegal behavior; whether IBM took or failed to take appropriate interim measures at the outset of the investigation; whether IBM conducted a prompt, thorough and impartial investigation into his complaints; and otherwise whether the company properly handled aspects of the employer-employee relationship. Opinions will be rendered as to whether the company otherwise acted reasonably in following sound employment practices, consistent with industry standards, in connection with the issues outlined herein. At times, I will also be opining on whether IBM failed to abide by its internal policies and procedures and the importance of an employer complying with the letter and spirit of its written guidelines.

This report is a summary of the expert opinion testimony I am offering in this matter. This report is preliminary in nature as discovery is ongoing and depositions have recently been taken and more are scheduled next month. I have yet to review any deposition transcripts. If additional relevant information becomes available to me, I reserve the right to and expect to supplement this report.

In the field of Human Resources and employment law, certain accepted industry standards are recognized in law or as "reasonable" or "best practices" for the handling of employer-employee issues in all aspects of Human Resources, including maintaining and enforcing policies,

managing employees, handling conflict and disputes between or among employees, responding to complaints of discrimination (which includes harassment) and retaliation, and conducting internal investigations. Sources relied on to form opinions about action employers should take when faced with such issues include the following: guidance and model policies promulgated by governmental agencies such as the Equal Employment Opportunity Commission (“EEOC”) and state fair employment practices agencies such as the Massachusetts Commission Against Discrimination (“MCAD”); court decisions; legal analyses published in legal journals and discussed at continuing legal education courses and programs; books and treatises; and the sharing of practical approaches and strategies at professional conferences and continuing education courses for Human Resources professionals and employment attorneys. Some specific sources are cited herein, but I am not citing to every espoused principle about sound employment practices that is contained in books, papers and articles that I have read, relied on, referenced or even published or delivered myself.

The EEOC's Guidance, including but not limited to its "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," No. 915.002, 6/18/99¹ citing *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and its Enforcement Guidance entitled “Policy Guidance on Current Issues of Sexual Harassment,” No. 915.050, 3/19/90 and last reformatted 6/28/10,² is widely cited and relied on by employers, Human Resources professionals and workplace investigators as a practical guide for both preventing harassment and discrimination in the workplace and for conducting a proper workplace investigation. The MCAD publishes “Sexual Harassment in the Workplace Guidelines,” 10/2/02,³ that, similarly, offer guidance and best practices for preventing, responding to, and investigating sexual harassment complaints. While sexual harassment was not alleged here, sexual harassment is a form of discrimination, to which the same principles apply. There are, of course, many other resources on workplace complaints and investigations with which I am familiar, and all are consistent with these authorities.

Professional organizations, as well, are a source for establishing and communicating the industry standard. For example, the Society for Human Resources Management (“SHRM”), the world’s largest professional association devoted to human resource management and an organization of which I am a member, is a key authority relied upon in articulating industry “best practices” for the handling of employer-employee issues in all aspects of Human Resources as well. Another noted authority relied upon for the articulation of such “best practices” is Business and Legal Resources (“BLR”), an acknowledged authority providing updated coverage of state and federal laws and industry standards on a variety of workplace matters.⁴ BLR’s business and legal resources are prepared by lawyers and industry experts for the business world so that organizations can have access to appropriate tools and resources for compliance. The Association of Workplace Investigators (“AWI”) is a professional organization designed to

¹ Available at <http://www.eeoc.gov/policy/docs/harassment.html>.

² Available at <http://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf>.

³ Available at <http://www.mass.gov/mcad/shtoc.html>.

⁴ I spoke at BLR's National Employment Law Update in November 2010, in Las Vegas, Nevada, and I have been quoted in BLR publications.

promote and enhance workplace investigations, and is a resource for the proper conduct of investigations.⁵

My evaluation of the company's action is based on whether it followed its own policies and industry standards with respect to these practices, as articulated in the sources described above and throughout this report, have been adhered to and followed. Wherever possible, I rely on the company's version of the facts, as I am not making any credibility determinations.

I. SUMMARY OF OPINIONS

(1) THE COMPANY'S REPEATED REFUSAL TO ACT RESPONSIVELY TO THE WORKPLACE DISPUTE OR INSTITUTE INTERIM MEASURES TO PREVENT FURTHER ESCALATION OF THE DISPUTE WHILE MR. TUVELL'S COMPLAINT WAS PENDING WAS CONTRARY TO BEST PRACTICES

- A. The Company Failed to Intervene Early On to Mediate the Conflict Between Walter Tuvell and Fritz Knabe, Contrary to Best Practices
- B. The Company Failed to Implement Interim Measures When Mr. Tuvell Claimed Discriminatory Treatment

(2) THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES OR ITS INTERNAL POLICIES IN SELECTING RUSSELL MANDEL AS INVESTIGATOR

- A. Mr. Mandel Reviewed and Sanctioned Ms. Due's Investigation, Thus Destroying Any Independence
- B. Mr. Mandel Was a Person Accused of Engaging in Wrongdoing
- C. The Company Failed to Comply With Best Practices When It Selected Mr. Mandel as Investigator Because He Lacked Knowledge and Capability to Apply Best Practices and Company Policies That Were in Place to Ensure Neutrality and a Fair Process
 - 1. Not Understanding Third Party Complaints
 - 2. Failing to Interview Mr. Tuvell While He Was on STD
 - 3. Failing to Appreciate the Timeliness Requirement in the Policy

⁵ I am a member of the Board of Directors of AWI, have been a speaker at the AWI annual conference, and have been conference chair of the AWI annual conference in 2012 and 2013 and will continue in this role in 2014. I have published in the AWI Quarterly, which is a peer-reviewed publication.

4. *Chastising Him For Availing Himself of the Corporate Open Door Process*
5. *Denying Mr. Tuvell Access to Company Systems*
6. *IBM Knew or Should Have Known that Mr. Mandel Had a History of Failing to Conduct Prompt or Neutral Investigations, Contrary to Policy*
7. *Failing to Treat the Complaining Party and Accused Equally*

D. *The Company Failed to Comply with Best Practices Because It Insisted on Using Mr. Mandel as an Investigator Notwithstanding Mr. Tuvell's Clear Assertion That He Did Not Have Faith in the Integrity of Any Process Spearheaded by Mr. Mandel*

(3) **THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES AND ITS OWN POLICY BY NEGLECTING TO INVESTIGATE ALL COMPLAINTS OF DISCRIMINATION AND RETALIATION AND, FURTHER, BY FAILING TO THOROUGHLY INVESTIGATE WHEN IT DID**

A. *The Company Failed to Follow Best Practices and Its Internal Policies in that It Did Not Acknowledge and Investigate Mr. Tuvell's Discrimination and Retaliation Claims*

1. *Lisa Due, Investigation #1, and June 29, 2011 Report*
2. *Mr. Mandel, Investigation #2, and September 15, 2011 Report*
3. *Mr. Mandel, Investigation #3, and February 1, 2012 Report*

B. *The Company's Failure to Apply Best Practices With Regard to Mr. Tuvell's Claim of Disability Discrimination and Retaliation Meant that the Complaints Were Not Fully Investigated, the Relevant Evidence Was Not Gathered, and the Conclusions Reached Were Not Based on Credible Evidence Analyzed for Factual and Logical Consistency*

II. FACTS AND DATA CONSIDERED

A. IBM Policies

1. *Discrimination and Harassment Policies*

In the “About Your Job” June 2009 policies, IBM outlines its harassment, EEO, and workplace diversity policies. (TUVELL 5881) The company maintains a policy entitled “Equal Opportunity.” In this policy, the company states that hiring and advancement are based on job-related requirements and an individual’s qualifications to perform a job. All aspects of employment are carried out free of discrimination and harassment based on gender, disability, and other protected characteristics. Anyone who believes he/she has been a victim of any violation of IBM’s equal opportunity policies is strongly urged to talk to a manager or bring the complaint through any of IBM’s communication channels.

IBM also maintains a policy entitled “Harassment and Inappropriate Behavior.” In that policy, IBM states its commitment to providing a work environment free from harassment based on gender, disability, and other protected characteristics. The policy states that IBM employees who engage in harassment or inappropriate behavior are subject to a range of discipline. The relative seriousness of the conduct and any past warnings will be considered. In certain circumstances, it may be appropriate to transfer the offender to another department or location. If the victim requests it, he/she may be transferred to another department or location.

The complaint procedure states that employees are encouraged to report misconduct to management, senior management, or the Human Resources department. Additional other channels are available as well, including websites and outside telephone numbers. Aggrieved employees are advised that complaints will be investigated “promptly and dealt with appropriately.” Retaliation is forbidden.

2. *IBM’s Concerns and Appeals Program (Open Door, Panel Review & Confidentially Speaking)*

The Concerns and Appeals program, dated May 19, 2008, is contained in a 10-page policy and procedure, and it outlines the Open Door policy, eligibility, investigation, Panel Review, and the like. (TUVELL 2557-67)

IBM provides an overview of its program. It is available when an employee has a problem, question, or comment that could affect job satisfaction and work performance. The program consists of three (3) different processes: Open Door, Panel Review, and Confidentially Speaking. The employee may choose any of the processes. Panel Review decisions cannot be appealed through the Open Door process and vice versa. A Confidentially Speaking concern may be converted to a Panel Review or an Open Door before a response is given. When an appeal is requested, the individual responsible for administering the process has sole discretion to determine the scope of the investigation which may be conducted.

The Open Door process reviews an action by management that affects an employee. All issues, except policy decisions and operational business decisions, are eligible for review under this process. The intent is to ensure an *objective and thorough* review of the issues, and ensure the employee was treated fairly.

Under the panel review process, a panel of employees and managers will decide appeals involving the interpretation of company policies or established practices that affect employees.

Confidentially Speaking is a confidential 2-way communication channel for an employee to use to raise concerns, express opinions, or report questionable behavior.

With regard to Open Door, the “trained investigator,” who is usually a senior manager, gathers relevant facts and recommends a solution to the reviewing executive. The investigation and conclusion are designed to take place in a timely fashion, normally thirty (30) to sixty (60) business days. The time period may be extended for various reasons, such as the complexity of issues and availability of parties involved.

All regular and part-time employees, *including employees on a leave of absence*, are eligible to utilize the Open Door process.

Prior to utilizing Open Door, the employee must give management an opportunity to resolve the concern. That is, the employee must first discuss the issue with his first-line manager. If the employee has already done that and is unsatisfied, the employee must contact the next level of management or the first level of management *not involved in the issue*. The employee may pursue Open Door if he disagrees with the response of the second management.

The policy also explicitly states that IBM has Open Doors to the corporate office, a special process known as Corporate Open Door. The corporate office includes senior executives who report directly to the Chairman. Concerns directed to the corporate office will be acknowledged by the Corporate Employee Relations Special Programs staff. The concern will be assigned to the appropriate executive for handling. Where appropriate, appeals sent to the corporate office will have an appropriate senior executive review recommendations and comments prior to a final decision being made.

Employees may request a Corporate Open Door by bringing the matter to the attention of senior management in the Operating Unit or to the local Human Resources Manager. A Corporate Open Door may be requested through the Essential Links on the On Demand Workplace or directly through a particular website address. Alternatively, employees may initiate an Open Door upon writing a letter to the appropriate executive, sending a Lotus Note to “APPEALS/Armonk/IBM” or by calling a particular phone number. Within two (2) days, the employee will normally receive a phone call. At that time, the employee will be advised which executive has been assigned to handle the Open Door.

The investigator is the representative of the executive to whom the appeal is assigned. Usually it will be someone from the local area. The investigator must be objective, as the policy states, *“The investigator...must not have been involved in the issue being investigated and, in IBM’s*

opinion, is sufficiently removed organizationally from the employee to provide objectivity.” (Emphasis supplied) The policy further states, “The investigator’s primary responsibility is to provide an objective and thorough review of the issues. In addition, the investigator is responsible for recommending: any disciplinary action management should take, an action plan to prevent the issue(s) from recurring, and an action plan to ensure an equitable result for the employee making the appeal.”

Under normal circumstances, the investigator should interview the complaining employee and his management. The investigator should consider interviewing others who have relevant knowledge, including individuals suggested by the complaining employee.

At the conclusion of the investigation, the employee will be advised either over the phone or in person. Also, the employee will usually receive a written response from the reviewing executive.

3. *Revised Concerns and Appeals Program*

The Concerns and Appeals Program was revised effective January 11, 2012. I note that the 2012 policy and procedure differs from the 2008 one in several respects. (Bates 2342-52) It states that a trained investigator is assigned to act as the designated reviewer. It omits the language that that investigator is “usually a senior manager.” Further, it states that the process will normally take forty-five (45) to sixty (60) days.

Section 2.4 from the 2008 policy is entirely omitted in the 2012 version. That is, Section 2.4 describing the Corporate Open Door process was stricken from the revised policy. Accordingly, IBM no longer encourages employees to report concerns to the corporate office.

In the revised policy Section 2.5 “The Investigator,” IBM has stronger language regarding the need for objectivity and lack of bias on the investigator’s part. It contains the following new language that was not included in the 2008 version: “The reviewer who is assigned the case must not have had any involvement in the underlying decision being appealed and must be, in IBM’s opinion, sufficiently removed from the management decision being reviewed.”

4. *Leaves of Absence Policy*

IBM’s policy 2.4 “At Work and Away” references attendance, leaves of absence, short-term disability, and FMLA. Employees are advised that they may be granted a personal leave of absence without pay depending on a variety of circumstances. During such absence, employees are still eligible for medical and dental coverage as well as selected other benefit plans that IBM provides.

5. *Business Conduct Guidelines*

IBM maintains a comprehensive set of policies about appropriate workplace behavior in a document entitled Business Conduct Guidelines or “BCG.” (IBM 2353-85) In its Guiding Principles, the company discusses its commitment to integrity, business ethics, and compliance. While many of the issues discussed are unrelated to this case (i.e. gifts and bribes, competitors, immigration, and international trade), several provisions are directly on point.

In the letter from Samuel Palmisano, Chairman, President and Chief Executive Officer, IBM states that it is well established that all employees are expected to comply with laws and ethical practices in all aspects of business. Mr. Palmisano describes the Guidelines as values and includes a statement about “personal responsibility to manifest the highest standards of trust, ethics and responsibilities in all of our actions and relationships.” (IBM 2357)

The Business Conduct Guidelines provide general guidance for resolving a variety of legal and ethical questions. In addition to BCG, employees are told that they are expected to comply with other applicable policies, directives, and guidelines of IBM, some of which are referenced in the BCG. IBM states its commitment to comply with all laws and regulations that apply to its business.

Section 2.0 of the BCG is entitled “Speaking Up.” There, IBM states that it is each employee’s “responsibility to know and follow the Business Conduct Guidelines [which] includes reporting potential violations. IBM will promptly review your report and will not tolerate threats or acts of retaliation against you.”

In Section 2.1, “Raising Concerns and Reporting Violations,” IBM states, “If you know of, or have good reason to suspect, an unlawful or unethical situation or believe you are the victim of prohibited workplace conduct, immediately report the matter through any of IBM’s Communication Channels.” (IBM 2361) IBM goes on to give a bulleted list of seven (7) potential reporting channels, to include but not be limited to a manager, Human Resources, the Concerns and Appeals program, internal audit, and Trust & Compliance. The policy states that the Concerns and Appeals program includes “Open Door” to higher management as well as the “Confidentially Speaking” program. Employees are reminded that these programs allow them to submit concerns online, by email, regular mail, fax or phone. The clear message is that IBM wants employees to speak up when issues arise.

In Section 3.5, “Reporting, Recording and Retaining Information,” IBM emphasizes the importance of honesty and truthfulness by all employees. The company reinforces that employees must be accurate, complete and honest when making any reports. Employees are warned, “Never make misrepresentations or dishonest statements to anyone. If you believe that someone may have misunderstood you, promptly correct the misunderstanding. Reporting inaccurate or incomplete information, or reporting information in a way that is intended to mislead or misinform those who receive it, is strictly prohibited and could lead to serious consequences.” (IBM 2367)

Accurate information in connection with workplace investigations, according to IBM, is particularly important. IBM states that it expects full cooperation from all employees, which includes employees' "promptly, completely, and truthfully" participating in the investigative process.

6. *Leaves of Absence Policy*

IBM's policy 2.4 "At Work and Away" references attendance, leaves of absence, short-term disability, and FMLA. Employees are advised that they may be granted a personal leave of absence without pay depending on a variety of circumstances. During such absence, employees are still eligible for medical and dental coverage as well as selected other benefit plans that IBM provides.

B. *Other Documents*

I reviewed a number of documents that have been produced to date during the course of this litigation for the purpose of reviewing, assessing and commenting upon the company's employment practices and procedures.

In the course of my examination of the facts, the following documents contained facts or data that I considered in forming the opinions expressed in this report:

- All documents referenced within this report
- Tuvell Bates #1-1526
- Select documents produced by IBM in discovery
- First Amended Complaint and Demand for Jury Trial
- Various pleadings filed with the Massachusetts Commission Against Discrimination
- Policies and procedures of IBM, including but not limited to Business Conduct Guidelines, Concerns and Appeals Program, and About Your Job
- Notes, report, and other writings pertaining to Russell Mandel's investigation
- Notes, report, and other writings pertaining to Lisa Due's investigation
- IBM's Supplemental and Further Supplemental Interrogatory Answers
- Select excerpts from Lisa Due's deposition

- Various communications between Walter Tuvell and various IBM representatives
- Various communications among IBM representatives
- Various Open Door Complaints filed by Walter Tuvell and associated documents
- Various documents associated with Mr. Tuvell's application for Software Developer positions and IBM's responses

III. CHRONOLOGY OF RELEVANT FACTS

In this report, I will not be providing a detailed recitation of Walter Tuvell's employment history, as it is unnecessary in my analysis here. In the Complaint, Mr. Tuvell outlines relevant background information. In addition, in Russell Mandel's September 15, 2011 report, he cites background information. (IBM 11148)

May 18 – First Sign of Trouble

The so-called "Excel graphic" incident took place on May 18, 2011, whereby Walter Tuvell, Band 8 Advisory Software Engineer, complained that Fritz Knabe, Distinguished Engineer and a dotted line supervisor to Mr. Tuvell, treated him inappropriately by defaming him. Further, Mr. Tuvell complained that Mr. Knabe falsely accused him of failing to produce assigned work and publicly yelled at him on June 8, 2011. Mr. Tuvell also characterized Mr. Knabe's behavior as bullying and harassment. Thereafter, Mr. Tuvell repeatedly requested a 3-way meeting with Mr. Knabe and his manager, Daniel Feldman, Director, Netezza Performance Architect, Software Group, Information Management, to clear the air and resolve differences.

It is undisputed that Mr. Tuvell made multiple requests for a 3-way meeting. The facts apparently show that, on at least six (6) occasions according to Mr. Tuvell's count, Mr. Tuvell asked Mr. Feldman to call a 3-way meeting with him, Mr. Knabe and Mr. Feldman to clear the air, and Mr. Feldman consistently refused each time. (For example, on May 19, 2011 and May 20, 2011, Mr. Tuvell stated to Mr. Feldman that a 3-way meeting was needed (TUVELL 512); a June 14, 2011 email from Mr. Tuvell to Dan Feldman, Kelli-ann McCabe, Vice President of Human Resources, Netezza, and Diane Adams, Netezza Steady State HR Leader, also states that he had repeatedly requested a 3-way meeting. (TUVELL 265). Mr. Feldman himself admitted refusing to review/discuss the matter with Mr. Tuvell, and admitted refusing 3-way meetings.⁶ (IBM 8997) It was confirmed in the investigative notes of Lisa Due, Human Resources representative, that Mr. Feldman refused to have a 3-way meeting. (IBM 11137)

⁶ Mr. Feldman apparently testified in his deposition that requests had been made and that he refused. I have not reviewed any deposition transcripts.

Also, in a goodbye letter to colleagues from June 14, 2011, Mr. Tuvell stated that he repeatedly asked for a 3-way conversation to clear the air, but that has been refused. (IBM 8825)

In Russell Mandel's September 15, 2011 report, he addresses the reasons why Mr. Feldman rejected the suggestion for a 3-way meeting. He stated as follows:

Mr. Tuvell requested a three-way meeting between Mr. Knabe, Mr. Feldman and Mr. Tuvell to discuss the events of the prior week. Mr. Feldman refused because he "wasn't interested in mediating dispute but in building credibility by delivering results."

(IBM 11152; IBM 8997)

It also appears that the company took no steps to attempt to mediate or otherwise resolve the conflict that existed between these two co-workers. Rather, the company determined that removing Mr. Tuvell from his position was the appropriate action step.

Walt Tuvell Seeking HR's Help to Assist with the Rift Between Him and Fritz Knabe

June 10 – Demotion and Mr. Tuvell Seeking HR Intervention

On June 10, 2011, Mr. Tuvell was removed from his position as Band 8 Advisory Software Engineer and switched to the job held by Sujatha Mizar. Interestingly, I have never seen reference to Ms. Mizar's job title. Mr. Tuvell's Band remained unchanged. In Lisa Due's notes, she acknowledges that Mr. Tuvell's switch with Sujatha Mizar is a demotion. She states, "Walt [Tuvell] is a band 8, one he switched with is a band 7. So think it is going to be a lesser role so manager needs to augment it...according to advice by Diane [Adams]." (IBM 11130)

While the reason for his demotion was not documented at the time, IBM has since stated that Mr. Tuvell was demoted because of his "inability to work effectively with Mr. Knabe." (May 11, 2012 position statement, Page 4)

Also, on June 10, 2011, Mr. Tuvell sent an email to Kelli-ann McCabe with the subject "A request for help." He forwarded her several emails pertaining to the yelling and conflict that had recently taken place involving him and Mr. Knabe. He stated, "I would like to learn how I could have handled things better." Mr. Tuvell had previously requested that his manager, Daniel Feldman, hold a 3-way meeting to include him and Mr. Knabe. (IBM 8855) He also provided her with documentation pertaining to the weekly report that he had sent to Mr. Feldman. (IBM 8852)

It is interesting that, in its position statement, IBM continually refers to Mr. Tuvell's transfer away from Mr. Knabe as "an accommodation." For example, at the top of Page 16, IBM states that the change in assignment "was an accommodation to Complainant and who could not work with Mr. Knabe." Mr. Tuvell never requested this so-called "accommodation" and, indeed, protested it repeatedly in the days and weeks ahead.

More specifically, Mr. Tuvell considered this transfer to be a "demotion," and an adverse job action for a variety of reasons. I start with stating that IBM considers an "undesirable reassignment" to be a tangible adverse employment action, according to its "Harassment and

Inappropriate Behavior” policy. (TUVELL 66) Several reasons support Mr. Tuvell’s contention that this was a demotion. First, he was assuming the role of a less qualified, less educated employee who was in a lower Band than he was. Next, he had been doing highly significant research in an advanced development position that was unique in the industry, and it was creative, inventive programming work; now, he would be taking on more lower-quality work assignments. (TUVELL 583) In his former job, Mr. Tuvell worked on a high-profile new product (Wahoo) as opposed to lower profile work on old products. It was a loss of prestige and opportunity. Mr. Tuvell reports that Mr. Feldman had described his former job as a plum position. Also, the work location changed, and Mr. Tuvell much preferred working in Cambridge where he had been removed from.

As was revealed later in Lisa Due’s interview, In an interview with John Metzger, the questions were framed: ***“Is the move to Michael’s team a demotion? Did he discuss with Walt? Preferred by Walt?”*** (IBM 11133) It was also acknowledged that Sujatha Mizar was ***“not as senior skilled.”*** (IBM 11138-39) (Emphasis supplied)

June 13 – *Mr. Tuvell Describes His Now Former Job as Perfect for Him and a “Plum Position”*

Mr. Tuvell sent a lengthy email to Ms. McCabe on June 13, 2011 with further explanation of the context and situation. (IBM 8847-49) He made reference to the Wahoo project that he was working on as “the best possible position for me.” He also stated that Mr. Feldman told him it was a “plum position for anybody to nab.” Ms. McCabe and Mr. Tuvell met on June 13, 2011. (IBM 8832)

June 13 – *Mr. Feldman Expresses Desire to Have Mr. Tuvell Terminated*

Also on this day, it appeared that Mr. Feldman was advocating for Mr. Tuvell’s termination because of his medical/psychological condition and alleged violent tendencies. More particularly, Mr. Feldman felt strongly about Mr. Tuvell being “irrational and potentially dangerous.” In a June 13, 2011 email that Mr. Feldman sent to John Metzger, his supervisor and the Vice President, Product Strategy, and Kelli-ann McCabe, Mr. Feldman expressed concerns that Mr. Tuvell was a danger, and he referenced Mr. Tuvell’s May 26 disclosure that he suffers from Post Traumatic Stress Disorder (“PTSD”) and Depression. He further stated that Mr. Tuvell raised his voice to him on occasion and rose from his chair in anger when discussing a work issue. (IBM 8689) He also stated that a recent email from Mr. Tuvell was “quite bizarre,” and stated that it contained complaints and threats. He stated that Mr. Tuvell seems to be angry with Fritz Knabe, and he expressed fear that he was perceived the same way. He stated that he believed Mr. Tuvell’s behavior was unpredictable.

Significantly, Mr. Feldman expressed his opinion that Mr. Tuvell should be terminated. He stated that he was involved in a “similar situation” with a prior employer where an employee engaged in threatening behavior. That employee was terminated immediately. He suggested that the company “take a similar action.” I am told that Mr. Feldman admitted at his deposition that, by this language, he was advocating for Mr. Tuvell’s termination.

Mr. Tuvell’s “weekly report” that was submitted in a June 12, 2011 email seemed to prompt Mr. Feldman’s correspondence. (TUVELL 260-262) In that email, Mr. Tuvell stated that, during the week of June 5 to June 12, 2011, Fritz Knabe was bullying, harassing, and yelling at him and told lies which constituted “defamation.” He said that Mr. Feldman told him that Mr. Knabe falsely accused him of being a liar and a bully, and opined that such conduct is illegal.

Dan Feldman responded to Mr. Tuvell’s June 12, 2011 weekly report by stating that all future communications will include Human Resources. (IBM 8864)

In that weekly report, Mr. Tuvell also complained about the June 10th demotion. He said that he suffered “public humiliation” because he was removed from his high-profile position on Wahoo to a “highly symbolic deportation to Siberia.” He said he was unjustly accused. He stated that he had since filed a complaint pursuant to corporate processes.

Further, he criticized Dan Feldman for refusing his multiple requests for a 3-way meeting to include Mr. Knabe.

Also that day, Mr. Tuvell noted that Mr. Feldman was making the process adversarial by, among other things, addressing him as “Dear Dr. Tuvell” in his last communication. He also stated that he felt retaliated against. (IBM 8863-64)

Mr. Tuvell reached out to colleagues after learning of his demotion. For example, he told Huamin Chen that he was “fired” from Wahoo for reasons that he did not understand. Mr. Chen expressed his shock and disappointment, referring to Mr. Tuvell as a “great colleague.” (IBM 8828-29) Similarly, co-worker Jeffrey Keller said that he was completely surprised to learn of Mr. Tuvell’s leaving, and said that he was “sorry to hear it.” (IBM 8829) Other colleagues expressed well wishes to Mr. Tuvell as well, upon learning of his departure.

June 13-14 – Mr. Tuvell Alerts IBM to Upcoming Leave of Absence and Vacation

By email dated June 13, 2011, Mr. Tuvell advised Mr. Feldman that he was undergoing surgery on July 7 and would be away from the office for approximately four (4) weeks. He said that he would be able to work at home on many, but not all, of those days (but unable to work on some days). He also stated that he expected to “double-up on the time-away-from-office and take a week-long vacation.” (IBM 8840)

On June 14, 2011, Mr. Tuvell further clarified and revised his anticipated leave of absence, stating that he would not be working July 7 or 8, he anticipated being able to work July 11-22, he would be on vacation July 25-29, and he would return to the office on August 1. (IBM 8833-34)

June 15 – Complaint of Gender and Age Discrimination

In his June 15, 2011 email to Dan Feldman, Kelli-ann McCabe, and Diane Adams, Walt Tuvell expresses his opinion that his demotion was due to gender and age.⁷ Sujatha Mizar replaced him

⁷ He also referenced “snide harassment/retaliation,” without elaborating, and softly said that “perhaps even race” might be a factor in his position switch.

in his position. More specifically, he said that he was replaced with an employee who lacked the educational degrees and relevant work experience that he had and, thus, had inferior qualifications. He expressly pointed out that Ms. Mizar was someone of a different gender and one who is much younger than him. He explicitly stated that the company could have replaced him “with another person in his group (Ashish Deb), who also has a PhD, is male, and is over 40.” He stated that replacing him with Mr. Ashish would have made more sense from a business standpoint because the work Mr. Ashish was doing was more compatible with Mr. Tuvell’s background. He expressly stated that the adverse job action created a “prima facie case (and even stronger) for discrimination on the grounds of both age and sex...” (TUVELL 265-266)

June 16-30 – *Lisa Due Conducted Investigation*

In an email from Diane Adams in HR to Mr. Tuvell, on June 16, 2011, she stated, “Walt, just wanted to let you know that Lisa Due has been assigned to look into your concerns. She is a very experienced, knowledgeable HR professional. You can expect to hear from her over the next few days as she will want to better understand the situation and get your perspective.” (IBM 4707)

Further, in written discovery, the company was asked to describe the investigation(s) of Mr. Tuvell’s “complaints of discrimination, harassment and/or retaliation” to include all action the company took to investigate. (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14) The company was asked to identify the complaints, identify whether an investigation followed, and identify who acted as investigator, identify witnesses, identify documentation generated, identify documents reviewed, identify conclusions, any corrective or remedial measures, and the like. In its answer, the company advised that it conducted three (3) investigations (one by Ms. Due and two by Mr. Mandel).

With regard to Investigation #1, in June of 2011, the company stated that Human Resources representative Lisa Due acted as the investigator.⁸ In connection with that investigation, the company represented that Ms. Due interviewed the following individuals:⁹

- Walter Tuvell
- Fritz Knabe
- Dan Feldman

⁸ Kelli-ann McCabe stressed that Lisa Due was “the lead” to handle Mr. Tuvell’s issues. (TUVELL 641-642) Inexplicably, I am told that Ms. Due testified at her deposition that she was not investigating Mr. Tuvell’s complaint but, rather was engaged in something called “management consultation.” This contradicts the documents that I reviewed and relied on.

⁹ I was told that, at her deposition, Ms. Due testified that she did not interview Mr. Aggarwal, Mr. Chen, Mr. Keller, or Mr. Title. This contradicts written discovery answers. Her notes, however, offer no evidence that she did interview any of these four (4) individuals who she now says she did not interview. Further, her internal investigation notes indicate that she interviewed Kelli-ann McCabe and Diane Adams, who are not named in the company’s discovery responses.

- Devesh Aggarwal
- Huamin Chen
- Steven Lubars
- Jeffrey Keller
- Gerrold “Richard” Title

It appears the scope consisted of three (3) issues: Whether Mr. Tuvell was “defamed” in connection with the Excel graphics issue, whether he was demoted because of it, and whether he acted inappropriately by taking papers from Dan Feldman and becoming angry about it. Significantly, the scope *did not* include the discrimination or retaliation claims that Mr. Tuvell raised.

Some noteworthy notations in the documentation of Lisa Due include the following:

- According to the interview of Kelli-ann McCabe on June 16, 2011, Ms. McCabe and Diane Adams told Mr. Feldman that the tone in one of his messages (presumably the so-called “Dear Dr. Tuvell” email) “was over the top.”
- Dan Feldman referred to Mr. Tuvell as an “emotional crusty individual.”

It appears that Kelli-ann McCabe referred to Mr. Tuvell as “crusty” as well. Both knew at the time that Mr. Tuvell was suffering reactions from his PTSD.
- John Metzger recognized that Dan Feldman and Walt Tuvell would not work well together and said there may be an opportunity for Mr. Tuvell to work with another manger. (IBM 11133)
- In an interview with John Metzger, the questions were framed: “*Is the move to Michael’s team a demotion? Did he discuss with Walt? Preferred by Walt?*” (IBM 11133) (Emphasis supplied)
- Dan Feldman seems to admit that Fritz Knabe engaged in wrongdoing. Lisa Due’s notes of her interview with Mr. Feldman state, “Fritz is a bully and a liar, dan (sic) said you exhibited some bullying behavior *too*.” (IBM 11138) (Emphasis supplied)
- Mr. Feldman picked Sujatha Mizar to replace Mr. Tuvell, “*Sujatha [Mizar] is not as senior skilled.*” (IBM 11138-39) (Emphasis supplied)

It appears that HR was saying that Dan Feldman was “putting company at risk” by “sending inflammatory emails -- taking the bread crumbs.”¹⁰ It seems he was told “do not respond, have HR check emails.” It seems he was further told “no retaliation/retrib!” (IBM 11137)

Interestingly, in Lisa Due’s notes, she included notes of a meeting or interview that she had with Russ Mandel on June 27, 2011.¹¹ (IBM 11143) While it is unclear the meaning of the notes, they state as follows:

Rules of court of law don’t exactly apply to the business environment.
One of the things that differentiates IBM from others is this organization that investigates appeals.

Manager is treating different than everyone else...making sure you are doing your job.

Think being too nice to the manager, from complex case perspective.
Employee didn’t bring the complaint.

Tell the ee: manager/hr communicated complain (sic) re; weather (sic) mistreated (sic), find no reason to conclude that.

Now up to manager to manage the employee. Then turn it over to HR/manage as performance.

No need to place him in another role. Like a tantrum for a 2 yr old, they will learn to do it again if you give in what they need.

I prefer respect but fear is not a bad second choice.

In the conclusion, Lisa Due notes that there was “not really anything for defamation,” and performance management needed to take place. There was no problem, and Mr. Tuvell was free to look for another position if he did not want to be in his existing role. (IBM 11145)

June 16 – *Requests for Interim Measures*

By email dated June 16, 2011, from Mr. Tuvell to Diane Adams and Kelli-ann McCabe, Mr. Tuvell stated that it was not feasible for him to continue to work with Dan Feldman, and he predicted that he would continue to be bombarded with harassment and retaliation and anticipated having to leave the company due to a “hostile environment.” (IBM 8504-05) In

¹⁰ I am told that Ms. Due testified in her deposition that she did not recall further context for these notations.

¹¹ I am told that, at her deposition, Lisa Due testified that she did not “interview” Russell Mandel but, rather, gave him a “briefing.” I am told that she has been an IBM employee since 1997 and had a role as an investigator for many years. I was told that she became a Senior Case Manager in 2008, and she was responsible for conducting investigations. IBM referred to her as a “very experienced, knowledgeable HR professional.” (IBM 4707) Accordingly, it is unknown why she needed to involve him during her investigation to either gather information from him or otherwise inform him of her findings.

response, six (6) minutes later, Diane Adams expressed, “I don’t think we should be making any changes before this matter is looked into. Agreed?” (IBM 8504) Lisa Due agreed, stating that it was “too premature” to make any change. (IBM 8503)

In a second June 16, 2011 email from Walter Tuvell to Kelli-ann McCabe and Diane Adams with a subject line of “Help,” Mr. Tuvell stated that it was “not reasonable for IBM to require [him] to work for a known-abusive boss.” He stated that it may not have yet been “proven” that he was abusive, and he stated that “IBM cannot comfortably support a policy of ‘presumed non-abusive’ in a case like this, because the consequences of being wrong are just too high.” (TUVELL 738-39) He stated that Mr. Feldman was starting to set him up, and he asked them to remove all possibility of letting this happen.

June 23 – Another Request for Interim Measures

In Mr. Tuvell’s June 23, 2011 email to Lisa Due, he made it abundantly clear – once again-- that he sought a separation from Mr. Feldman while Ms. Due/Human Resources was investigating his complaints. He stated that he was having difficulty coping in the “transition” of the new position. He reiterated that he has made it clear to Human Resources that he was nearly incapacitated by a recurrence of his PTSD, could not eat because of stomach problems caused by anxiety, could not sleep because of lack of food, and could not concentrate because of lack of sleep and intrusive thoughts. He advised Ms. Due that he sought psychological help and was taking medication.

He stated, “I have begged HR to release [me] from the grasp of the likes of Dan [Feldman], yet I am still forced to be here, more vulnerable than ever, and tortured beyond my ability to stand it.” He asked if there was an opportunity to allow him not to work with his “tormentor” at that time. (TUVELL 666-67)

Ms. Due rejected his request to remove him or Mr. Feldman from their respective positions, characterizing it as “premature” to make any changes while the investigation was ongoing. (TUVELL 667-68)

June 28 – Another Request for Interim Measures

Further, in a June 28, 2011 email from Mr. Tuvell to Mr. Feldman, Diane Adams, Kelli-ann McCabe, and Lisa Due, he stated that he has “BEGGED HR to get [him] away from [Mr. Feldman], as fast as possible, and I hereby repeat that plea. I do not trust you, and I fear you (i.e. do not feel safe around you), for good/rational reasons correctly/truthfully stated...” (TUVELL 672-73) He reiterated his concern that he is being subjected to a hostile work environment when he works with Dan Feldman. Nevertheless, he stated, “I’ve been forced to continue working for Dan [Feldman] and I despise every moment of it. I CONSIDER IT RETALIATION. My health (both physical and mental) is suffering, as I have duly informed all of you.” (TUVELL 673)

June 29 – *Lisa Due’s Report of Investigative Findings – Investigation #1*¹²

Ms. Due begins her June 29, 2011 email/report by stating, “As you know, I was asked to conduct an investigation into concerns raised regarding your treatment by your manager, Mr. Daniel Feldman. I have completed my investigation and found that there was insufficient factual information to support your allegations.”¹³ (IBM 8283)

With respect to work life going forward, Ms. Due advised Mr. Tuvell that he could proceed with his current assignment. Alternatively, she advised him that he was free to apply for other positions within IBM, and she referenced the Global Opportunity Marketplace (“GOM”) job system and provided him with the website address. She reminded him that he would be required to perform his current job while pursuing the search for a new role.

She also provided him with an appeal mechanism. That is, she stated that he could engage Russell Mandel, HR Program Director of Concerns & Appeals, if he disagreed with her investigative findings. She stated that Mr. Mandel would review whether the investigation was performed properly under IBM’s investigation guidelines.

What the conclusion/ report shows is telling: There was absolutely no mention of Mr. Tuvell’s claims of discrimination or retaliation. No mention also of the Fritz Knabe’s admitted voice raising, which one can also construe as yelling.¹⁴ No mention is made of Mr. Feldman acting inappropriately. There is also no record of what documentation, if any, was reviewed in connection with the investigation. No conclusions were reached about whether Mr. Tuvell was “defamed” or harassed in connection with the Excel graphics issue, whether he was demoted because of it, and whether he acted inappropriately by taking papers from Dan Feldman and becoming angry about it.

I was advised that Ms. Due testified at her deposition that she admittedly failed to investigate Mr. Tuvell’s claims of discrimination and, further, did not seek to determine whether Mr. Feldman had a history of engaging in inappropriate comments based on age or gender or had a history of engaging in age or gender discrimination. This admission confounds me, as Mr. Tuvell very clearly and unequivocally claimed “discrimination” in his many complaints.

June 29 -- *Mr. Tuvell’s Appeal of Lisa Due’s June 29, 2011 Report on Investigation #1*

On June 29, 2011, fifty (50) minutes after receiving Lisa Due’s report that Investigation #1 lacked merit, Mr. Tuvell sent an email to Mr. Mandel, Ms. Due, Ms. Adams, Ms. McCabe, and

¹² As per IBM’s Supplemental Interrogatory Responses, #14, this is the first investigation conducted (one by Ms. Due and two by Mr. Mandel).

¹³ It is my understanding that Lisa Due testified at her deposition that she was conducting a “management consultation investigation,” which, frankly, I do not understand. The documents I reviewed are very clear that the company investigated Mr. Tuvell’s complaints -- and rightly so, though the investigations were seriously flawed.

¹⁴ Ms. Due received the email with Mr. Fritz’s apology to Mr. Tuvell (TUVELL 8532-8537), but apparently ignored it.

Mr. Metzger indicating that he was going to appeal. He stated that Ms. Due’s conclusion was “utterly wrong,” and he criticized it because she never stated the basis upon which she based her finding. (TUVELL 715-16) He expressed his intent to enter the IBM Concerns & Appeals process, effective immediately.¹⁵ (TUVELL 716)

Kelli-ann McCabe, in an email dated June 29, 2011 to Lisa Due and Diane Adams, asked what happens next. (IBM 8475) Ms. Due responded, “Typically, Russ [Mandel] would review what I have done and then get back to the employee. ***In this matter, I already ran the case by Russ. He may have all the information he needs or contact me to fill in gaps.*** Then he will close with the employee.” (IBM 8474) (Emphasis supplied) * See also note below from August 18, 2011.

June 29 – Mr. Tuvell Seeks Alternative Position

In an email dated June 29, 2011 from Mr. Tuvell to John Metzger and others, Mr. Tuvell expressly asked Mr. Metzger for help in finding a job at Netezza outside the influence of Dan Feldman and Fritz Knabe. (IBM 716)

June 30 – Mr. Tuvell Working While on STD Leave

An email exchange from June 30, 2011 demonstrates that the company asked for Mr. Tuvell’s response, and he gave it, while out of work on STD. That is, Mr. Feldman emailed Mr. Tuvell and said that he realized that Mr. Tuvell was out sick and would not be able to write the summary he asked for, but he asked him to focus on writing the summary when he was well enough to return to the office. A half-hour later, Mr. Tuvell responded and provided a summary. Mr. Feldman responded and asked him additional questions that were work-related. He then stated that Mr. Tuvell should not be working if he was recording the day as a sick day. (TUVELL 674-75) Mr. Tuvell explained that he was able to work, but just unable to do certain things such as drive a car. Nevertheless, he was capable of working a full 8-hour day and was doing that on June 30. (TUVELL 675)

July 1 – Mr. Tuvell Re-Lodges Complaint of Gender and Age Discrimination; Adds Complaint of Race Discrimination and Retaliation

On July 1, 2011, Mr. Tuvell sent a lengthy email to Mr. Mandel regarding a number of “topics for discussion.” He provided the factual background for what prompted him to raise concerns. He reiterated his claim for discrimination, saying, “I’m a man, far over 40, Caucasian. Sujatha [Mizar] is a woman, far under 40. Sujatha is also well-known to be very much under-qualified compared to me. (For example, I have a PhD, she doesn’t, not to mention my decades of much more relevant experience). This amounts to a prima facie case for discrimination on the bases of age, sex and race. This is especially so since Dan [Feldman] has refuse to state to me any reason whatsoever (much less cohere/truthful) for the demotion.” (TUVELL 718)

He also stated that Mr. Feldman’s acts after the complaint amount to retaliation, and he cited several examples including Mr. Feldman addressing him as “Dr. Tuvell,” asking for detailed

¹⁵ He stated that he would be on a medical leave for two (2) weeks beginning Thursday, July 7, followed by a pre-scheduled vacation. He stated that he would not be able to participate in the process during that period.

day-by-day plan documents over the ensuing three (3) weeks, and the like. He concluded the letter by saying that he had been the victim of “retaliation” and subjected to a “hostile work environment.” (TUVELL 719)

July 5 – *Additional Request for Interim Measures – to Russell Mandel*

In a July 5, 2011 email from Mr. Mandel, Mr. Tuvell stated that he wanted to reiterate what had been discussed days earlier: “I requested to be removed from my hostile work environment (according to my perception), but you explained to me that it is ‘impossible’ (i.e. not within IBM policy) for that to happen at this time (if ever). I will abide by that decision to the best of my ability, but I reiterate it will be hard for me to do so, and that I continue working under these conditions only under the most strenuous protest.” (TUVELL 719)

Later on July 5, 2011, Mr. Tuvell reiterated his desire to be separated from Dan Feldman in another email to Russell Mandel. He stated that he was doing his best to continue to work with Mr. Feldman “under protest.” (TUVELL 679) He stated that he does not trust Mr. Feldman and he fears him – and stated “(Specifically, retribution and “blackball”).”

Mr. Mandel responded by stating that he had “[n]othing to add, but we have not take[n] any action because we have not concluded that you are indeed working in an inappropriate work environment and I’m still looking into your issues.” (TUVELL 719-20)

July 6 – *The So-Called Lazy Incident*

Mr. Tuvell sent an email to Mr. Feldman and colleague Garth Dickie regarding the word “lazy,” writing, “If you’re lazy you can just click” the link he provided. (IBM 11162) This email was subsequently referred to as the “lazy scandal” or lazy issue. On July 1, 2011, after being criticized for his choice of words, Mr. Tuvell subsequently apologized, prompted by Mr. Feldman, for his use of the word “lazy” stating that it was an “innocent” and “jocular throw-off.” On July 20th, he sent an email apologizing for his apology because “laziness” was not an insult and, therefore, “no apology was necessary.”

August 3 – *Written Warning*

A Formal Warning Letter dated August 3, 2011 was issued to Mr. Tuvell from Dan Feldman. The disciplinary document states that proper workplace behavior is a condition of employment, and Mr. Tuvell violated it by engaging in the following conduct:¹⁶

¹⁶ I note in Further Supplemental Response of Defendant, International Business Machines, Inc. to Plaintiff’s First Set of Interrogatories dated May 13, 2013, Response #9, that the warning was due to Mr. Tuvell’s “escalating inflammatory e-mails and speech aimed at Fritz Knabe, Devesh Agrawal, Sujatha Mizar, and Mr. Feldman, which Plaintiff did not correct even after counseling. Specifically, Plaintiff demonstrated an escalating set of unprofessional and inappropriate comments and behaviors, as well as disregarding management direction from May through July of 2011. This included his confrontation with Mr. Feldman on May 18, 2011, and Mr. Knabe on June 8, 2011, his calling Mr. Knabe a “bully” and a “liar,” his unprofessional comments that Mr. Knabe was “threatened” by Plaintiff and that Mr. Knabe was “going insane,” making “nonsensical” statements and “worthless” comments, and committing “illegal acts” and public humiliation” and denigrating the work of his peers by discussing or referring to their work as “an unbelievable poor solution,” the data provided should be “considered

- Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments, verbally or via notes; specifically, your email of 20 July 2011 addressed to Garth Dickie and me.
- Conduct in the workplace that creates, encourages or permits an inappropriate work environment.

(TUVELL 726)

August 3 to termination date -- *Leave of Absence, STD*

Mr. Tuvell left after a fainting episode in Mr. Feldman’s office during the Formal Warning Letter meeting on August 3, 2011 and never returned to work. He stated that he could not work with Dan Feldman again, and subsequently applied for STD on August 11. He was either on a leave of absence or STD until the cessation of his employment.

August 5 – *Russell Mandel Wrongly Stating that IBM Fails to Accept Third-Party Complaints; States that Mr. Mandel Disqualified from Acting as Investigator*

Mr. Tuvell strongly criticizes Russell Mandel for saying that IBM does not accept third-party complaints. That is, on August 5, 2011, Russell Mandel sent an email to Walter Tuvell stating, “IBM does not accept third-party employee complaints. If [co-worker] Mr. Haldar has a complaint about his treatment, he should complain using the C&A process.”¹⁷ (TUVELL 442)

In response, also on August 5, Mr. Tuvell advised Mr. Mandel that he was incorrect about “that third-party statement.” He pointed to language in the IBM policies that state:

If you know of, or have good reason to suspect, an unlawful or unethical situation...immediately report the matter through any of IBM’s Communication Channels:

suspicious/unreliable until proven innocent,” “a terrible idea,” “stonewalling,” “lazy,” and being a “script monkey.” Notably, however, Mr. Feldman had already indicated at the time of events that none of these were necessarily inappropriate, as no finding had been made that Mr. Tuvell “violated” any employment expectations. (TUVELL 309).

¹⁷ That email was preceded by Mr. Tuvell’s email from the morning of August 5 when he wrote to inform Diane Adams and Russell Mandel of an incident that had happened the day before, in which Mr. Tuvell stated that he believed he was required to report under IBM’s policies and procedures and believed that it would generate a Formal Warning Letter to the perpetrators, Gordon Booman and Dan Feldman. More specifically, Gordon Booman had written in an email, “I think the regression test you describe is Amal’s raison d’être...No?” Mr. Tuvell explained that the phrase “raison d’être” is a French phrase meaning “reason for existence.” Mr. Tuvell pointed out that, given IBM’s demonstrated propensity for taking such language at literal face value as it had with his “lazy” letter, the plain meaning of the sentence was that the reason for existence of Amalendu Haldar is the regression test. Mr. Tuvell expressed that this “devalues all aspects of Amal (such as his human-being-ness, for example) so it is offensive, intimidating, harassment, bullying, etc.”¹⁷ (TUVELL 442-443) Mr. Tuvell pointed out that Amal is not Caucasian, and he expressed the suspicion that this could properly be considered to be discrimination based on race, color, religion, national origin, or other protected category. (TUVELL 444)

- Your manager is usually the best place to start
- IBM Human Resources
- Concerns & Appeals Programs

IBM will promptly review your report of unlawful or unethical conduct, and will not tolerate acts or threats of retaliation against you for making that report.

(Mr. Tuvell was quoting from IBM 2361 of the BCG).

Mr. Tuvell also pointed out other policy language that states that the company will take action if it learns about potential harassment based on any of the protected categories.

If Russell Mandel knew that the company did, in fact, accept third-party complaints and failed to say so, Mr. Tuvell said that he knowingly misrepresented the process and “hence he was corrupt.” If he did not know but should have known, then Mr. Tuvell characterized him as “incompetent.” In either case, it is Mr. Tuvell’s belief that Mr. Mandel has proven himself “unqualified to be the head of C&A.” Given that he was “compromised in this way,” Mr. Tuvell states that he is unqualified to “hear/investigate/adjudicate this very Complaint.”

Mr. Tuvell’s words were crystal clear. He considered Mr. Mandel to be tainted and lacking in objectivity due to his actions toward him. He had no confidence in Mr. Mandel from that point forward. (TUVELL 619)

After pointing out language from IBM policy and explaining that he was asserting the complaint on his own behalf, Mr. Tuvell reasserted his complaint, seeking IBM’s response. Mr. Mandel never responded. Mr. Tuvell stated that HR “went into deep silence mode.” Despite the company’s promise of a “prompt” investigation, neither Diane Adams nor Russell Mandel responded, which Mr. Tuvell characterized as quite uncharacteristic in his experience. (IBM 618)

It appears there was never a response to this email.

August 11 – STD

On August 11, 2011, Mr. Tuvell advised IBM that he came down with a “sudden condition” that would require short-term disability together with a longer-term solution, potentially involving an accommodation. He sought assistance on applying for STD benefits. (TUVELL 453) As of that day, Mr. Tuvell advised Mr. Feldman that he would be taking the next day off, August 12, and that he had spoken to his physician and applied for STD. (TUVELL 454)

The IBM Medical Treatment Report Form from Mr. Tuvell’s personal physician indicates that Mr. Tuvell’s diagnosis was sleep disorder and stress reaction, and he was “unable to get adequate

rest to be able to function at his job responsibilities” and needed to be out of work. (TUVELL 456)

IBM approved Mr. Tuvell’s application for STD, and a medical leave of absence was granted. According to Mr. Tuvell, the leave was necessitated by two factors: (1) mental/psychological damage due to Mr. Feldman’s infliction of emotional distress and bullying upon him, resulting in upset stomach, ability to eat, lack of sleep, and the like; and (2) knowledge that any one-on-one unmonitored communications with Mr. Feldman could result in worsening emotional distress. (TUVELL 622) IBM certified Mr. Tuvell’s STD leave from August 15, 2011 through September 14, 2011. (TUVELL 741) In that documentation, IBM states that managers and employees should communicate weekly during the STD absence.

August 18 -- *Corporate Open Door Filing/Complaint of Age, Sex, and Race Discrimination and Retaliation*

On August 18th, while on a leave of absence, Mr. Tuvell continued to pursue his complaints against the company. Mr. Tuvell filed a Corporate Open Door complaint, which was addressed to Samuel Palmisano, Steve Mills, Randy MacDonald, Robert Weber, and Lynea St. Pier, with a cc to Arvind Krishna, Pratyush Moghe, David Flaxman, and Russell Mandel. In his submission, Mr. Tuvell explained that he sought high level corporate intervention as a result of his belief that the C&A process, with Mr. Mandel at the helm, was corrupt and incompetent. (TUVELL 619)

Mr. Tuvell expressly stated that he was submitting the complaint pursuant to the Corporate Open Door clause of the IBM Concerns and Appeals program as well as the Confidentially Speaking clause. He stated that he submitted a draft complaint two (2) weeks earlier, but this submission was the final version. (TUVELL 460-742) In Part One, Mr. Tuvell details the “acts of Fritz Knabe.” (TUVELL 461) Further, Mr. Tuvell states that the perpetrators of the misconduct include Fritz Knabe, Dan Feldman, “and others (IBM HR and Legal personnel and processes).” (TUVELL 465)

In his “Theory of the Case; Blackballing” Section, Part Two, Mr. Tuvell expressed, “IBM wanted to get rid of me because I am *“too old.”* (TUVELL 466) (emphasis added) He stated that age is a barrier at Netezza. He further stated that somebody learned that he was “the oldest employee at Netezza” and raised it as an issue. He said that IBM, for various reasons, decided to “blackball” Mr. Tuvell, and Fritz Knabe and Dan Feldman “were recruited to ‘do the deed.’” (TUVELL 466-67)

Mr. Tuvell stated that management, HR, and Legal were acting together in a “conspiracy” against Mr. Tuvell. (TUVELL 467)

Mr. Tuvell expressed the seriousness of the stress that he was feeling, and he referenced “intentional infliction of emotional distress” which he also refers to as IIED. He stated that he “literally passed-out at one-on-one meeting with Dan [Feldman], due directly and precisely to the stress induced by his badgering.”¹⁸ (TUVELL 467)

¹⁸ Mr. Tuvell states that this incident occurred after Mr. Feldman gave him the Formal Warning Letter dated August 3, 2011. He said he started to fold the letter, saying, “I’ll look at it later,” but Mr. Feldman told him that it needed to

Mr. Tuvell framed his complaint in another way: “Premeditated conspiracy of defamation, deceit/fraud and IIED (intentional infliction of emotional distress), with the aim of coercing me to resign -- or alternatively to fabricate false ‘evidence against me’ leading to ‘dismissal for cause’ -- all motivated by age discrimination. Said conspiracy against me (and presumably many other employees) has been secretly sponsored/supported by IBM at corporate level for years, in the sense of systemic, widespread coordination involving management/HR/Legal.” (TUVELL 468) Mr. Tuvell summarized the basis of Part One of his complaint as follows:

- On May 18, 2011, Fritz Knabe told Dan Feldman that Mr. Tuvell disobeyed orders and failed to produce certain Excel graphics for him. That was a lie, according to Mr. Tuvell.
- On at least six (6) occasions, Mr. Tuvell asked Mr. Feldman to call a 3-way meeting with those players to clear the air; Mr. Feldman consistently refused each time. (For example, on May 19, 2011, Mr. Tuvell emailed Mr. Feldman to say that a 3-way meeting was needed.) (TUVELL 512)
- On June 8, 2011, Fritz Knabe yelled loudly at Mr. Tuvell in public, and Mr. Tuvell stated that Mr. Knabe was lying about what he was accusing him of.
- On June 10, 2011, Mr. Feldman informed Mr. Tuvell that Mr. Knabe had told him that Mr. Knabe was the “bully” and “liar,” to which Mr. Tuvell disagreed.
- On June 10, 2011, Mr. Feldman “executed an adverse job action,” which was removing Mr. Tuvell from the highest position in the Performance Architecture Group to the lowest.
- Mr. Tuvell pointed out that the demotion constituted a prima facie case of discrimination on the basis of age and possibly sex and race as well. (TUVELL 469) Mr. Feldman “switched” Mr. Tuvell with Sujatha Mizar, who is a non-Caucasian woman under age 40 who was less qualified than Mr. Tuvell. (TUVELL 469)

be turned back in and instructed him not to fold it. Mr. Tuvell laid the letter on the floor next to his chair, and he leaned his head back and closed his eyes for “a moment” or so he thought. When he opened his eyes, he reached to pick up the letter but it was not there. He was confused and dazed. His clothing was drenched in sweat, and his face felt “devoid of blood.” He said that Mr. Feldman was looking at him in a “funny” manner, and he realized later on that he had passed out. (TUVELL 614)

Further articulating on the retaliation claim, Mr. Tuvell asserts that the Formal Warning Letter was bogus and it would not have been issued had he not initiated the C&A process. (TUVELL 615) He stated that the Formal Warning Letter was issued by Mr. Feldman, Diane Adams, HR, and Legal in order to interfere with the C&A process itself. (TUVELL 615-16) Mr. Feldman specifically advised Mr. Tuvell, according to Mr. Tuvell, that all of his actions have been taken with the knowledge and advice of HR, Diane Adams, and Legal. (TUVELL 616)

- Mr. Tuvell noted that he went on medical leave and received short-term disability benefits from July 10 through July 24. He was then on vacation from July 24 to July 31. (TUVELL 506)
- In an email dated June 10, 2011, Fritz Knabe expressed his disappointment with how his working relationship with Mr. Tuvell on the project has come apart and, further, stated, “I’m sorry for the embarrassment and anger I provoked when raising my voice. Clearly we were both frustrated!” (TUVELL 580)

In Part 2 of his complaint, Mr. Tuvell articulates his concerns about the “acts of Dan Feldman, HR, Legal.” (TUVELL 590)

In his particular allegations, Mr. Tuvell expressed his criticism about how Dan Feldman treated him following the Excel graphics/Fritz Knabe incident, which was retaliatory in nature. For instance, Mr. Feldman ordered him to produce a day-by-day plan describing how he intended to spend his next three (3) weeks on various work projects, he addressed him as “Dr. Tuvell,” which was highly unusual, and he initiated a campaign of “impossible planning exercises.” He also reported that Mr. Feldman threatened him on June 30 about comments he made about two (2) colleagues in the course of the C&A process. (TUVELL 593) Further, Mr. Tuvell claims that John Metzger, with whom he met on three (3) occasions (June 13, June 15, and July 1), was involved in the blackballing campaign against him. (TUVELL 594)

Mr. Tuvell criticized Mr. Feldman for threatening him about the “lazy” email (Mr. Tuvell wrote, “Or if you’re lazy you can just click this link”), and then falsely accused him of yelling and threats of dismissal on August 3. (TUVELL 594-95; 723) Mr. Feldman issued a Formal Warning Letter to Mr. Tuvell on August 3 and, two (2) days later, Mr. Tuvell submitted a complaint to Diane Adams and Russell Mandel about the use of the term *raison d’être*, saying that was “worse” than Mr. Tuvell’s use of the word “lazy.” The company refused to investigate the French phrase.

Mr. Tuvell pointed out that moving someone like him with high-level expertise to a low-level project “like Sujatha’s so-called ‘Dev-Emu/FPGA’ is a waste of talent. (TUVELL 601) He explained that he received the “worst assignment” when he was demoted to Sujatha’s level, indicating that it was purposeful for him to “tie my own noose.” (TUVELL 602) Additionally, he was required to provide a detailed and independent day-by-day 3-week schedule on the new project with one day’s notice. (TUVELL 602) He stated that this was an impossible undertaking.

Mr. Tuvell then criticized HR. He stated that his complaint to HR about Mr. Feldman’s behavior prompted the following response: “Your manager has assigned you do (sic) a task, so you must do it.” (TUVELL 605)

Mr. Tuvell then complained of John Metzger’s actions. Mr. Metzger supervises Fritz Knabe and Dan Feldman. Mr. Tuvell explained that he had never before met individually with Mr. Metzger

but,¹⁹ since the incidents occurred, he has had three (3) one-on-one meetings (June 13, June 15, and July 1) with him. (TUVELL 606)

Mr. Tuvell criticized Lisa Due's factual findings. He said that she became the lead on the Open Door process on June 16, she met with him on June 20, and she issued her report on June 29, opining that insufficient factual information existed to support Mr. Tuvell's allegations. (TUVELL 607) He pointed out that her investigation centered on Mr. Tuvell's concerns about Mr. Feldman's treatment of him. To the contrary, he stated that his primary charge (on the June 20 phone call) was the claim of defamation against Fritz Knabe, among other complaints. He pointed out that Mr. Knabe admitted yelling at him, yet this evidence was ignored. (TUVELL 608) He criticizes the fact that she provided no reasons to support her conclusion.

Significantly, Mr. Tuvell asserted, "Thus I claim the whole C&A process in general, and Lisa Due and *Russell Mandel* in particular, knowingly foster[ed] a fraudulent and abusive hostile work environment." (TUVELL 609) (Emphasis added)

Mr. Tuvell states that he filed an appeal with Russell Mandel, the C&A Program Director, immediately upon receiving Ms. Due's June 29 report. He had a twenty-five (25) minute phone call with Mr. Mandel on July 1, and he said that Mr. Mandel identified himself as the "top dog" in the C&A program. He was skeptical of Mr. Mandel, expressing that he "wasn't being quite straight enough with [him]." (TUVELL 609) Mr. Tuvell describes that call as introductory and "perfunctory" in nature; by agreement, it was the catalyst for Mr. Tuvell to write out a detailed complaint outlining his concerns. (TUVELL 609-610; 715-720) There was no interview that followed.

Among other things, Mr. Tuvell accused Dan Feldman of engaging in harassment/retaliation based on his invoking the C&A process. (TUVELL 610) He also expressed that Diane Adams from HR assisted him in this endeavor. (TUVELL 610)

Mr. Tuvell advised that, upon receipt of the August 5 disciplinary notice, he sent an "emergency letter" to Samuel Palmisano, Randy MacDonald, and Robert Weber complaining that the warning was in retaliation for his use of IBM's Concerns and Appeals process and constituted "retaliation/retribution/revenge upon me for taking part in that protected process." (TUVELL 728) He asked them to take immediate action to order Dan Feldman and Diane Adams to stop harassing him and to have the Warning Letter withdrawn.

August 18 – *Ms. Due Again Discusses Mr. Mandel's Involvement in Her Investigation*

In an August 18, 2011 email from Lisa Due to Lynea St. Pier, Ms. Due confirms that Mr. Mandel was involved in her investigation and approved her findings. (IBM 8904) She wrote, "Just a heads up that you may be or have gotten a case in regards to Walter Tuvell (his latest was a 100 page letter to SJP and others).. . . So you know, Mr. Tuvell did not agree with my

¹⁹ Mr. Tuvell did meet Mr. Metzger in his hiring interview.

findings (*approved by Legal and Russ*)²⁰. . . I would be happy, thrilled even, to fill you in on the details. Just ping me!” (Emphasis added)

August 25 -- *Follow Up to Corporate Open Door Filing*

On August 25, 2011, Mr. Tuvell sent an email to Mr. Palmisano, Mr. MacDonald, Mr. Weber, Mr. Mills, and Ms. St. Pier, advising that he filed his complaint filed seven (7) days earlier and it had gone unanswered. That is, he advised them that he had not heard back from anyone to date. He received no acknowledgement of receipt of his filing. (TUVELL 743) He stated this inaction was contrary to the policy, which states that the Corporate Open Door process will ensure contact normally within two (2) business days and the company would assign a case worker within that time frame. He complained that a week was not “prompt” contact with him.

That afternoon, Mr. Mandel responded, stating:

I will begin investigating your issue(s) now that I have returned from vacation. I do not plan on discussing your concerns directly with you until you return from Short Term Disability, so you may concentrate on your health improving.

(TUVELL 745)

The company never responded to the Confidentially Speaking Submission.

August 25 – *Mr. Tuvell Stating that Mr. Mandel Is Disqualified from Acting as Investigator/Appellate Reviewer*

Mr. Tuvell’s response ninety (90) minutes later was quite explicit. He responded to Mr. Mandel, and he also copied Mr. Palmisano, Mr. MacDonald, Mr. Mills, Mr. Weber, and Ms. St. Pier. He began by saying:

This is ABSOLUTELY UNACCEPTABLE. The very REASON I’m on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse (IIED) that is being heaped upon me by Dan Feldman, and yourself, and everybody else who has touched this case to date. And you know it. The ONLY way for me to recover sufficiently to return to work from STD is to settle this case. Properly and correctly.

(TUVELL 744-45)

²⁰ I note that IBM redacted “Russ” from the document that it produced at IBM 8904. One can only presume that IBM did not want Mr. Tuvell to know, for purposes of this litigation, that Mr. Mandel was involved in the Lisa Due investigation and approved her findings before they came to him for the “appeal.” IBM 8906 reveals that Russ Mandel did, in fact, “approve” her findings.

Mr. Tuvell took great offense at Mr. Mandel’s statement that he would not be contacting Mr. Tuvell to investigate his complaints because he was on STD leave. Mr. Tuvell characterized it as “delay.” He stated, “You cannot point to any policy that prevents IBM from working with me on my case NOW.” He states that no policy of IBM states anything relating to “STD disqualification.” To the contrary, he cites IBM’s policies that promise a prompt investigation. He stated, “I hereby INSIST upon being afforded that ‘promptness’ right IMMEDIATELY.” (TUVELL 744)

Mr. Tuvell asked that the investigation be initiated by having the persons accused of wrongdoing contacted. Following that, Mr. Tuvell asked for the opportunity to formally respond to what they had to say in writing. He identified the following as key witnesses: “Fritz Knabe, Dan Feldman, John Metzger, Diane Adams, Lisa Due, Russell Mandel, Arvind Krishna.” (Emphasis added)

Mr. Tuvell made it abundantly clear that Mr. Mandel was not the appropriate choice of an investigator. He stated that Mr. Mandel was “not a ‘competent authority’” to hear his case, as he was specifically a “named party to the wrongdoing.” He referenced that Mr. Mandel still had not responded to the email regarding the issuance of a third-party complaint (which was on August 5). Mr. Tuvell stated that it was “IMPERATIVE” that the investigation be turned over to “an independent body” who would be considered a “trusted higher authority” for further handling. He asked that IBM Board of Directors name an independent investigator free from bias and conflict. If that did not occur, he stated that any conclusions contrary to Mr. Tuvell would be “too-obviously-suspect.”

Furthermore, Mr. Tuvell demanded that an investigation begin by August 29. He asked for regular updates on the progress of his case.

It appears there was no response to this email.

August 28, 2011: Addendum to Corporate Open Door Filing/ Claims Disability Discrimination

On August 28, 2011, Mr. Tuvell submitted an addendum to his Corporate Open Door complaint, in light of recent events. Mr. Tuvell stated that he believed the company’s delay in investigating his complaint, and even responding promptly to its submission, was based on his STD status -- disability.²¹ He claims that such inaction violated IBM’s policy of “prompt” action in response to employee problems, constituted a hostile workplace because of his disability (which was the reason for his STD status), and constituted “illegal (ADA) disability discrimination (because of STD status).” (TUVELL 753) In his submission, Mr. Tuvell elaborated on the reasons he felt he was the victim of disability discrimination on the basis of his mental health. (TUVELL 757-58)

August 30 -- Mr. Tuvell Questioned Status of Corporate Open Door / Stating that Mr. Mandel Is Disqualified from Acting as Investigator/Appellate Reviewer/ Additional Request for Interim Measures

²¹ Mr. Mandel expressly said so in emails to Mr. Tuvell. (TUVELL 745, 823).

By email dated August 30, 2011 to Samuel Palmisano, Randy MacDonald, Steve Mills, Robert Weber, and Lynea St. Pier, with a copy to Russell Mandel, Arvind Krishna, Pratyush Moghe, David Flaxman, and others, with a subject line “Corporate Open Door -- what is going on?” (TUVELL 1519-20) Mr. Tuvell asked for a status update. He stated that he expected Mr. Mandel to contact him after his latest writing on August 25. That did not happen.

In his email, Mr. Tuvell stated that IBM was legally bound to “promptly” investigate his complaint, and he stated that the company’s “delaying tactics just compounds the misconduct.”

In addressing the “corporate officers,” Mr. Mandel quoted the C&A document relating to the “Corporate Open Door” policy that states, “Concerns directed to the corporate office will be acknowledged to the employee by the corporate employee relations staff.” That did not happen. He further quoted policy language which states, “The concern will be assigned to an appropriate executive for handling, such as Division General Managers or other senior executives.” Mr. Tuvell, again, pointed out that that had not happened.

Mr. Tuvell addressed Lynea St. Pier, and stated, “According [to] the ‘Confidentially Speaking’ documentation, you’re supposed to contact me about the Complaint I filed with you. You’ve never done that. Not even a single word. If you’re deferring to others, you need to tell me that (and who it is you are deferring to).” He characterized her inaction as exhibiting “silent treatment,” which he states is contrary to IBM’s values and policy.

In this writing, Mr. Tuvell expressly stated, once again, that Russell Mandel is not the appropriate investigator. He stated as follows:

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email (“no third-part[y] complaints” and “STD/leave disqualification from due process”), Russell Mandel has proven he is not qualified to hear my case, so somebody else needs to be appointed. But there is even an over-riding reason Russell cannot be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in “blackballing me,” and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: “The investigator, however, must not have been involved in the issue being investigated and, in IBM’s opinion, is sufficiently removed organizationally from the employee to provide objectivity.”

(TUVELL 1519)

Also in this writing, Mr. Tuvell, again, asked to be separated from Mr. Feldman. He explained that he was on STD as a result of the “illicit/illegal stress” that Dan Feldman (and others) inflicted on him. He stated that he has “many, many times demanded to be removed from Dan’s ‘leadership’ (if you can call it that), but to date have been blindly/unthinkingly refused (sometimes explicitly, sometimes implicitly).”

At the conclusion of the email, Mr. Tuvell asked, “WHAT IS GOING ON?” He had repeatedly asked that question in the course of the email.

August 30 -- *Mr. Mandel’s Response/ Statement that No Investigation While Mr. Tuvell Out on STD*

An hour after Mr. Tuvell’s email, Mr. Mandel responded that he was investigating Mr. Tuvell’s concerns but, as previously explained, “I am simply not going to discuss with you the concerns you raised while you were out on STD since you are not supposed to be working during this time.” He also advised him that he was working on the investigation, but just would not be speaking directly with Mr. Tuvell while he was out on leave.

Finally, Mr. Mandel chastised Mr. Tuvell for addressing his email to the corporate executives. He told him that he needed to communicate his concerns about the investigative process “through the appropriate IBM channels.” He stated that Mr. Tuvell should be communicating with him “alone” since he is the investigator. He told Mr. Tuvell that he was “disturbing senior IBM executives” who were not involved in the process. He directed him to stop sending any emails, directly or with a cc, to the senior executives. (TUVELL 1518)

August 31 -- *Mr. Tuvell Reiterates His Concern About Mr. Mandel Being Investigator / STD Disqualification*

In his August 31, 2011 email to Mr. Mandel, Mr. Tuvell began by expressing, once again, his belief that Mr. Mandel was the inappropriate choice of investigator. He stated, “Concerning your personal involvement in the investigation: My objection to this has already been stated in multiple places, with reasons (another one of which occurs in this very note of yours, see next paragraph), and I hereby reassert my position.” (TUVELL 821)

Mr. Tuvell points out that he desires to and has the right to participate in the C&A investigation regardless of his status on being on STD leave. He points out that nothing in IBM policy states that he is disqualified from participating because he is on a leave of absence. He reminded Mr. Mandel that he was aware that Mr. Tuvell was “fully capable of conducting ‘C&A business’ while on leave.” He further stated, “By refusing to accord me my rights to a full/proper C&A investigation, you are therefore knowingly preventing me from ‘recovering’ sufficiently to ‘return to work’ -- that is, you yourself are affirmatively ‘coercing me to remain ‘disabled’ (in the sense of my current STD leave).”

September 4, 2011 – *Addendum to Corporate Open Door Filing/ STD Disqualification/ Interim Measures/ Disability Discrimination/Retaliation/Denied Access to Company Systems*

On September 4, 2011, Mr. Tuvell sent another appeal document through the Corporate Open Door process by addressing an email to Samuel Palmisano, Randy MacDonald, Steve Mills, Robert Weber, and Lynea St. Pier, with a cc to Mr. Mandel, Arvind Krishna, Pratyush Moghe, and David Flaxman. (TUVELL 824) Attached to the email was an addendum to his complaint. The addendum focuses on Mr. Mandel’s refusal to handle Mr. Tuvell’s appeal because Mr.

Tuvell was on a leave of absence. Mr. Tuvell emphasized that the Corporate Open Door has been “the main audience for [his] Complaint all along,” and he reiterated his distrust for Human Resources “for very good reasons.” He states that the C&A explicitly states that employees “on leave” are fully eligible to participate in the C&A process.

Among other things, Mr. Tuvell complains about IBM’s refusal to remove him from working with Dan Feldman (interim measures), violation of ADA law, and hostile work environment. (TUVELL 828-29)

Included in Mr. Tuvell’s complaint is the fact that he has been denied access to Netezza systems. A September 7, 2011 email from Mr. Tuvell to the helpdesk states that he cannot access Netezza VPN via Juniper Network Connect, and this does not allow him to track the status of his help ticket. (TUVELL 860-61) In an email to Mr. Mandel, Mr. Tuvell states that he cannot log in to Netezza and asks if he is being blacklisted. (TUVELL 860) Mr. Mandel responds that Mr. Tuvell has no need to access heritage Netezza systems while he is out on STD. (TUVELL 860)

Mr. Tuvell vehemently objected to his lack of access. He had advised Mr. Mandel, via a September 7, 2011 email, that he was an employee in good standing and needed to access Netezza. He stated that he was using Netezza to study and, further, stated that no IBM policy prohibits employees on leave from their normal access rights. He stated the company’s action here run afoul of the ADA. (TUVELL 862)

Mr. Tuvell also complained that his IBM badge would not allow him into IBM buildings, as noted in a September 13, 2011 email to Mr. Mandel. (TUVELL 866) In response, in a September 14, 2011 email, Mr. Mandel stated that Mr. Tuvell did not need access to IBM facilities since he is on STD and not working. (TUVELL 866)

Mr. Tuvell stated that Mr. Mandel was harassing him and retaliating against him by refusing him access to the building. In a September 14, 2011 email, Mr. Tuvell stated that he went to an IBM location to visit a friend, and his badge did not work. (TUVELL 867) He asked for Mr. Mandel to point to the policy document that states the privileges that employees on disability leave lose as a result of the leave.

September 15, 2011 – ***Report by Russell Mandel – Investigation #2***²²

In this 19-page document, dated September 15, 2011, Russell Mandel purportedly reported his findings of the Open Door complaint of Mr. Tuvell. (IBM 11147-65) (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14) Note that Mr. Tuvell was not notified of these findings until over two months later, in November. Mr. Mandel noted, “This investigator became involved because Mr. Tuvell escalated the finding of Ms. Due’s investigation.” (IBM 11147) The conclusions focus on four issues, including: 1) “Did Mr. Knabe yell at Mr. Tuvell?” 2) “Was Mr. Tuvell unfairly “demoted?” 3) “Was Mr.

²² As per IBM’s Supplemental Interrogatory Responses, #14, this is the second investigation conducted (one by Ms. Due and two by Mr. Mandel).

Tuvell unfairly asked to provide a project plan for his last three weeks prior to his leave of absence?” and 4) “Was Mr. Tuvell unfairly given a Formal Warning Letter?” The answers to these questions seem to be the findings of the investigation.

First, with regard to whether Mr. Knabe yelled at Mr. Tuvell, Mr. Mandel found the answer to be “no.” (This contradicts Knabe’s admission.) Mr. Mandel found that Mr. Tuvell was the only one who believed Mr. Knabe yelled, and Mr. Knabe and Steven Lubars (an Advisory Software Engineer who reported to Mr. Knabe) were also present at the June 8 meeting. Mr. Knabe apparently admits that he raised his voice, but Mr. Lubars denied it.

Second, Mr. Mandel stated that Mr. Tuvell was not unfairly demoted. He explained that Mr. Tuvell was not demoted at all, as he was a Band 8 and he remained a Band 8. He found that it was “completely appropriate” to have Mr. Tuvell and Ms. Mizar exchange work assignments. He stated this was regular procedure at IBM, and also opined that Mr. Tuvell was not providing the support that Mr. Knabe required. He stated that Mr. Tuvell harbored animosity toward Mr. Knabe and, in support of this conclusion, referenced the name calling that Mr. Tuvell purportedly engaged in.

Third, Mr. Mandel concluded that Mr. Tuvell was not unfairly asked to provide a project plan for the three (3) weeks prior to going out on a leave of absence for STD and vacation. He cited Ms. Due’s investigative findings, stating that other team members who worked for Mr. Feldman also had to provide project plans and it was common practice throughout IBM.²³ He said this was especially true with an employee who was resistant to providing status reports.

Fourth, Mr. Mandel concluded that the August 3rd Formal Warning Letter was not inappropriate. He stated that Mr. Tuvell demonstrated an escalating set of unprofessional and inappropriate comments and behaviors and, further, that he disregarded management direction between May and July. He stated this included his May 18 confrontation with Mr. Feldman and his purported name calling of Mr. Knabe on June 8. It included Mr. Tuvell’s comments to Mr. Feldman that Mr. Knabe was engaging in illegal acts, going insane, and the like.

Moreover, he made a special NOTE about the August 3 Warning Letter in which he stated the following:

It is common practice in IBM to provide warning letters when employees exhibit this type of behavior. In more serious cases warning letters include restrictions such as no salary increase, no promotions and no job movement unless in the best interest of the company for a specified period of time, as well as impact on salary, PBC assessments, etc.

(IBM 11163)

The conclusions reference nothing about any discriminatory or retaliatory treatment.

²³ Ms. Mizar apparently was required to do them as well. (IBM 11157)

In connection with this investigation, Mr. Mandel interviewed twelve (12) individuals, including Mr. Tuvell, Mr. Feldman,²⁴ Ms. Due, Mr. Knabe, and others. Note that Mr. Mandel spoke with Mr. Tuvell by phone on July 1, 2011. (IBM 11160) As noted earlier, the call was not substantive in nature, and it lasted perhaps twenty-five (25) minutes, according to Mr. Tuvell. It could not properly be considered an “interview,” and Mr. Mandel acknowledges such when he repeatedly told Mr. Tuvell that he would not “interview” him while he was on STD. Accordingly, the indication that Mr. Mandel interviewed Mr. Tuvell in connection with his investigation is inaccurate.

In his report, Mr. Mandel acknowledges that Mr. Tuvell complained that IBM wanted to terminate him because he was “too old.” He referenced Mr. Tuvell’s claim that he was “the oldest employee at Netezza.” He referenced Mr. Tuvell’s claim that, because of his age, Mr. Knabe and Mr. Feldman treated him unfairly and demoted him. In addition, Mr. Mandel acknowledged that Mr. Tuvell complained that he was retaliated against for complaining about age discrimination and other improper treatment. As examples, he stated that Mr. Feldman unfairly asked him to produce a project plan, made threats to him, and provided him with a warning letter. He further complained that Lisa Due engaged in the cover up of Mr. Feldman’s and Mr. Knabe’s actions by her conclusion that insufficient facts supported Mr. Tuvell’s claims. Yet he fails to address the discrimination or retaliation claims.

I note in Mr. Mandel’s report that he gives a recitation of facts with regard to Mr. Tuvell’s, Mr. Knabe’s, and Mr. Feldman’s actions, yet he does not indicate that a factual dispute exists as to what took place. Clearly, Mr. Tuvell’s version of events is at odds and conflicts with the version offered by Mr. Knabe and Mr. Feldman, at least in several respects. Mr. Mandel does not state that he determined credibility and disbelieved Mr. Tuvell’s version of events and explained why. This is contrary of the role of an investigator, who is responsible for determining credibility, when differing versions are offered, and explained the basis for that.

Mr. Mandel addresses the issue of whether Mr. Knabe yelled at Mr. Tuvell. He states that Mr. Tuvell claimed that Mr. Knabe became “very animated and angrily attacked” him by “yelling loudly” and “shouting” at Mr. Tuvell. (IBM 11153) He further described Mr. Knabe’s “yelling,” and stated that he had to increase the volume of his voice to make himself heard over Mr. Knabe’s yelling. Mr. Mandel reports that Mr. Knabe stated that he felt “they both raised their voices but felt no one was ’yelling.’” Mr. Mandel references Mr. Knabe’s June 10, 2011 email where he apologized for “raising his voice.” (IBM 11155)

Another interesting disparity I noted was the fact that Dan Feldman had the opportunity to review Mr. Mandel’s report of the investigation and make corrections. (IBM 10268-69, 10274-75) Mr. Tuvell had no such opportunity.

Mr. Tuvell is not notified of this report until November.

²⁴ Interestingly, in a September 9, 2011 email from Dan Feldman to Mr. Tuvell, he stated that he had not seen the complaint. Rather, Mr. Mandel was dealing with it. Mr. Feldman explained that his role was limited to providing Mr. Mandel any support he asks for and communicating with Mr. Tuvell about regular work issues involving manager/subordinate. (TUVELL 892)

September 21 – ***Mr. Tuvell Appeals to IBM’s Corporate Trust & Compliance Officer/ Further Appeal to Have Russell Mandel Disqualified as Investigator***

On September 21, 2011, Mr. Tuvell sent an email to Richard Kaplan, Corporate Trust & Compliance Officer, with a subject line “There is a cancer growing on IBM.” He stated that he was filing a formal report/complaint, and he attached the four (4) Complaint documents that he had produced to date. He stated that he already filed this complaint with HR and C&A, and it was “in process” as he understood it. He opined that Russell Mandel was stonewalling the complaint and could not be trusted. He also stated that he filed the complaint with the Corporate Open Door process and confidentially speaking process, but received no response at all. (TUVELL 892)

The next day, Mr. Mandel responded to Mr. Tuvell, stating that the complaint that he directed to Richard Kaplan had been forwarded to him. He stated that the concerns raised with Mr. Kaplan were identical to those that Mr. Mandel was currently investigating. He stated that he would continue to be the individual responsible for investigating Mr. Tuvell’s concerns. He stated that all correspondence regarding concerns should be sent only to him as he is the sole point of contact. (TUVELL 892-93)

September 22, 2011: ***Addendum to Corporate Open Door Filing/ Disability Discrimination/ Retaliation/ STD Delay***

On September 22, 2011, Mr. Tuvell submitted an additional addendum setting forth new claims, including an ADA violation. (TUVELL 880) Mr. Tuvell elaborates on the “anti-ADA behavior” of Mr. Mandel by stating that he revoked his IBM badge physical access to IBM buildings and denied him access to Netezza VPN. (TUVELL 883) He further states that Mr. Mandel has engaged in a “delay-of-justice” by refusing to process his C&A complaint while he is on leave. (TUVELL 883) He states that Mr. Mandel has not communicated with Mr. Knabe or Mr. Feldman in regards to his complaint, contrary to his responsibility to promptly investigate. (TUVELL 884)

October 18, 2011 – ***Mr. Tuvell Reiterating Interest in Being Interviewed in Investigation; Complaint of Discrimination; IBM Encouraging Transfer***

In an October 18, 2011 email from Mr. Tuvell to Mr. Mandel, Mr. Tuvell reiterates his interest in participating in the investigation, advising Mr. Mandel, “You have no legitimate excuse for not discussing/progressing/resolving my C&A with me.” He characterized his situation as perhaps the “worst recorded case of discrimination (retaliation) corruption in American corporate history.” (TUVELL 906-07)

Mr. Mandel, in an October 18, 2011 email to Mr. Tuvell, states that IBM is open to providing Mr. Tuvell with assistance in finding a new position within IBM. (TUVELL 907-908)

October 22, 2011 – *Reiterating Retaliation Claim*

In an October 22, 2011 email from Mr. Tuvell to Mr. Feldman and Mr. Mandel, Mr. Tuvell reiterates his discrimination/retaliation complaints: “All of the retaliation by you/HR/Legal is of course in the context of my original complaint about age/sex/racial discrimination, which you/HR/Legal of course are trained to know about...” (TUVELL 918)

November 3, 2011 -- ***Mr. Tuvell Files an Additional Addendum to Open Door Complaint of Age, Disability, Sex and Race Discrimination and Harassment/ STD Leave***

In this new submission under the Corporate Open Door policy, Mr. Tuvell states that he has been the victim of discrimination and retaliation based on age and disability and, also, perhaps sex and race. (TUVELL 929) He again complains about IBM’s refusal to process his C&A complaint while he is on leave. He also cites Mr. Mandel’s denial of an ADA reasonable accommodation as another basis of his complaint. (TUVELL 930) He outlines some of the bases for his discrimination complaints within the document. (TUVELL 933-34) He also stated that he had been the victim of “unrelenting, unrepentant retaliation” which began “immediately after, and precisely because of, the filing of [his] discrimination-rooted C&A complaint.” (TUVELL 934) He further stated that he “emphatically raised to everyone’s attention the discriminatory nature of [his] complaint, emphasizing front-and-center that discrimination was a foundation centerpiece of [his] Theory of the Case.” (TUVELL 936) He again reiterates that Mr. Mandel’s refusal to process his C&A complaint while he is on leave is discriminatory and retaliatory. (TUVELL 936)

Mr. Tuvell lodges a new allegation, which is that the company, through Dan Feldman, “stole” some of his full pay STD benefits by improperly classifying some of his regular work-at-home days to be STD days, thus shortening his eligibility for benefits. (TUVELL 937-38; 956-58) He characterized this as “pure and simple” harassment and retaliation. (TUVELL 939)

November 7-15, 2011 -- ***Mr. Mandel Finally Invites Mr. Tuvell to Participate in Investigation While on STD***

Mr. Tuvell notes that Mr. Mandel emailed him on Monday, November 7 “totally out of the blue” proposing to complete the appeal investigation. (TUVELL 1237) A phone call was set up for November 17, at which time Mr. Mandel provided his conclusions. Mr. Mandel’s notes on the report, according to Mr. Tuvell, coincide with his own notes of the discussion and confirm that the conversation that day was a report of Mr. Mandel’s conclusions. (IBM 11166-11184)

More particularly, Mr. Mandel sent an email to Mr. Tuvell on November 7, 2011, stating as follows:

In order to meet your request that I complete your investigation while you are still out on Short Term Disability, I would like to give you the opportunity to provide your point of view on the issues I have investigated in case you have anything to add to the various LotusNotes I have

received from you. If not, I would be happy to schedule time to provide you my findings.

(TUVELL 962)

I note that Mr. Mandel had already completed his investigation and drafted a report which was dated September 15, 2011 – and he indicated that Mr. Tuvell had been interviewed in connection with it. This is inaccurate, as he had not interviewed Mr. Tuvell.

Two (2) days later, on November 9, 2011, Mr. Tuvell responded and said that he would be inclined to discuss the issues with him.²⁵ He asked various questions about what conclusions and reasons behind them that he might be given and what opportunity he would have to respond to anything adverse that might be included in his findings. (TUVELL 970) He also asks how he could ensure that all communications during the C&A are “on-the-record.”

Mr. Mandel responded that day by stating that he would arrange for a phone call, during which time Mr. Tuvell would have the opportunity to provide any additional information. (TUVELL 969)

On November 10, 2011, Mr. Tuvell responded to Mr. Mandel by stating that the November 9 letter from his attorney, Rob Mantell, explains Mr. Tuvell’s position. (TUVELL 969) Mr. Mandel responded by stating that he would call Mr. Tuvell on Thursday, November 17, and further stated that IBM does not discuss employee issues with third parties including attorneys. (TUVELL 968)

On November 15, 2011, Mr. Tuvell stated that he was available on that day, and also stated that he could not think of anything he would like to add that had not already been stated in writing. Nevertheless, he said that he would be happy to provide any additional information that Mr. Mandel might need. (TUVELL 968)

November 17, 2011 – *Mr. Tuvell’s “Interview” in Connection with the Investigation*

Mr. Tuvell describes the phone call that he had with Russell Mandel on November 17, 2011. (TUVELL 1238) He states that Mr. Mandel advised him that he had read the entire 400+-page complaint, and he reviewed the issues that were under investigation. He asked Mr. Tuvell if he had anything to add, to which Mr. Tuvell advised that he had additional complaints such as discrimination, retaliation, defamation, and the like. He claims that Mr. Mandel responded that he refused to investigate anything else because “nothing else was eligible for investigation by IBM.” (TUVELL 1238)

²⁵ In a November 9, 2011 letter from you, as Mr. Tuvell’s attorney, to IBM, you specifically requested that IBM complete its investigation of the appeal. The letter states, “Mr. Tuvell is committed to cooperating with the investigation, and providing any necessary information. IBM should complete its investigation of its Appeal...” (TUVELL 967)

Mr. Mandel then discussed the findings on the issues he investigated.

November 21 – *Mr. Tuvell Seeks Mr. Feldman’s Help in Facilitating a Transfer*

In what appears to be an email from Mr. Tuvell to Mr. Feldman, in connection with STD check-in, Mr. Tuvell advised him of the extremely high levels of anxiety and fear he had in his prior position. For this reason, he states that he has pressed for a transfer as “some sort [of] reasonable accommodation.” He said that he appreciated Mr. Feldman’s suggestion to seek other opportunities on GOM, and he advised him that he found a position that he believed was appropriate and for which he applied. He stated, “I would appreciate it if you could be of assistance in helping my application succeed.” (TUVELL 1522)

November 25 – *Russell Mandel’s Report of Investigative Findings*

As noted above in regards to the September 15, 2011 report, after Mr. Tuvell appealed the finding of Ms. Due’s investigation, Russell Mandel conducted a follow up investigation. (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14) Russell Mandel reviewed Ms. Due’s findings. Following his review and additional investigation, he reached the same conclusion. He determined that Mr. Tuvell was treated fairly, and he advised Mr. Tuvell of his finding via a phone call on November 17, 2011 and a brief report, via email, on November 25, 2011. (TUVELL 1292)

His one-sentence finding was as follows:

As we discussed, I have investigated your concerns, and determined that management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you. While I know this is not the answer you had hoped, please accept my best wishes for the future.

November 28 – *Mr. Tuvell Applies for Software Developer Position*

On November 28, 2011, IBM acknowledged receiving Mr. Tuvell’s application for the position Software Developer SWG-0436579. (TUVELL 1521)

December 1 -- *Chris Kime Remarks About Mr. Tuvell’s Qualifications and Desires
Phone Interview*

On December 1, 2011, Chris Kime emailed Mr. Tuvell indicating he wanted to talk on the phone about the open job requisition. He stated that he had reviewed Mr. Tuvell’s resume and has “little doubt that [he has] technical skills that we could use on the project. Of course, we need to make sure that you have an interest in the position and it seems like it would be a good fit.” (TUVELL 990)

That day, Mr. Tuvell responded that he was returning from STD and was ready, willing, and able to return to work. He stated that he had contemplated what he likes to do best, and he expressed

a desire to “get back into more of a development role. Scanning GOM turned up your opening, hence this inquiry.” He went on to explain why he had an interest in developing as opposed to performance. (TUVELL 991)

December 6 – *Badge Access*

On behalf of Mr. Tuvell, you emailed IBM on December 6, 2011, asking that IBM’s restriction on Mr. Tuvell accessing the workplace be released in general and also, in particular, in anticipation of Mr. Tuvell’s December 8, 2011 job interview. Counsel for IBM responded the same day by stating that Mr. Tuvell had badge access that should allow him to enter the main entrance of the Littleton site for his interview, and that it was never turned off. He described “some confusion” in this regard. (TUVELL 1000-01)

December 8 -- *Mr. Tuvell Interviewed for the Job*

Mr. Tuvell interviewed at the IBM Littleton facility with Harvey Harrison and Brian Doherty in connection with the job opening, and he reiterated his interest in the job. He wrote them an email thanking them for their time and 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. I feel comfortable with both of you, and I think I’d fit into the team well. I’m also pretty sure I could start adding value early -- I seem to have all the basics covered...” (TUVELL 1002)

December 12 -- *Chris Kime Responds Positively*

In an email dated December 12, 2011, Chris Kime thanked Mr. Tuvell for speaking with Harvey Harrison and Brian Doherty, and described the interview as “very positive.” He said that he would be following up with his management chain and keeping Mr. Tuvell posted with developments. (TUVELL 1003)

December 13 -- *Mr. Feldman Tells Mr. Kime that He Would Not Re-Hire Mr. Tuvell*

In an electronic communication, Mr. Kime sought information from Mr. Feldman about Mr. Tuvell. Mr. Feldman stated that his Personal Business Commitments “PBC” was delayed “because of the disability issue,” but Mr. Feldman said that he would rate Mr. Tuvell a “3” based on experience to date. He also volunteered, “If someone had (sic) were to ask me the question I always ask – ‘Would you hire him again?’ – the answer would be no.” (IBM 10412)

December 16 -- *Mr. Tuvell Updates Mr. Kime about Accomplishments*

On December 16, 2011, Mr. Tuvell emailed Mr. Kime, Mr. Harrison, and Mr. Doherty to advise that one of his pending patents was just awarded. (TUVELL 1006)

In a December 16, 2011 email from Mr. Feldman to Mr. Tuvell, he stated that there was no business need for him to have access to Netezza-specific systems while he was on STD and not working. He stated that his systems access would be restored if Mr. Tuvell returned to work in his prior role where systems access was warranted. (TUVELL 1523)

January 3 -- Mr. Tuvell Updates Mr. Kime

In a January 3, 2012 email to Mr. Kime, Mr. Harrison, and Mr. Doherty, Mr. Tuvell updated them on the QR Code Wikipedia project which he had mentioned to them. He stated that he looked forward to returning to work and anticipated that “the paperwork for transfer to your group can be signed-off and completed.” (TUVELL 1010)

January 6 -- Walt Tuvell Rejected for Position

In a January 6, 2012 email to Walter Tuvell, Chris Kime advised him that he was not selected for the transfer for which he applied. (TUVELL 1018) He praised Mr. Tuvell’s “impressive explanation of the [QRCode information] technology,” and stated this was “another demonstration of [his] deep technical skills and ability to produce solid documentation.”

With regard to the transfer, however, Mr. Kime stated that he discussed Mr. Tuvell’s situation with his up-line management and said that he could not move forward with taking Mr. Tuvell directly from being on short-term disability, as it would receive “very close scrutiny from the Operations people” in the organization. He further stated that there was a second concern about hiring him -- “about the work being to your liking and keeping you as a productive and satisfied member of the team.”

It is clear that Mr. Kime articulated two (2) reasons for rejecting Mr. Tuvell’s application for transfer. First, he said it would create problems from Operations people to take Mr. Tuvell from short-term disability. Second, he said there was concern about whether Mr. Tuvell would truly enjoy the work in the new position.

January 10 -- Tuvell’s Attorney Questions Mr. Tuvell’s Rejection for Job Transfer

In a January 10, 2012 email, you expressed “alarm and disappointment” at the fact that Mr. Tuvell’s application for the internal job posting was rejected due to his status of being on STD, and such medical leave was a reasonable accommodation for his handicap. (TUVELL 1016) You pointed out that IBM’s policies regard employees on STD as employees in good standing. You described IBM’s failure to hire as “plain retaliation” in violation of state and federal disability discrimination laws.

January 11 -- Mr. Tuvell Claims Retaliation Again

On January 11, 2012, Mr. Tuvell emailed Mr. Feldman and Diane Adams, advising that Mr. Kime’s rejection of his application for transfer based on the fact that he was on STD constitutes retaliation based on his requesting or utilizing the reasonable accommodation of medical leave. He asked for their help and options as to how he could return to work as a productive IBM employee. (TUVELL 1021)

January 16 -- *Mr. Feldman Offers Contradictory Reasons for Failure to Hire Mr. Tuvell*

On January 16, 2012, Mr. Feldman provided different and contradictory reasons as to why Mr. Tuvell was not hired for the position. He stated that he was not hired “because the team did not think [he was] the right fit for the position. HR reviewed the situation with the hiring manager to ensure that the decision was made for legitimate business reasons.” (TUVELL 1022) Mr. Feldman advised that he could continue to look for jobs on GOM, and HR could assist him.

January 18 -- *Mr. Tuvell Reiterates Discrimination and Retaliation Claim*

Mr. Tuvell, in a January 18, 2012 email to Mr. Feldman and Diane Adams, stated that the new reason of not being the “right fit” is vague and subjective. He also pointed out the reasons Chris Kime offered on January 6, which were contradictory. (TUVELL 1026) Mr. Tuvell questioned, “If I was not the right fit, at least from the perspective of the team, why was my situation elevated to up-line management?” Mr. Tuvell expressed that his status as a disabled person on medical leave is the true reason for the rejection. (TUVELL 1026) In his 2-page email, Mr. Tuvell asserted various examples of discriminatory and retaliatory treatment to which he had been subjected. (TUVELL 1026-27)

January 22 -- *Mr. Tuvell Files New Corporate Open Door Complaint/ Disability Discrimination*

In his Complaint, Mr. Tuvell explained that he is a person who had been on STD, and was seeking a transfer via the GOM process. This Complaint is the final one, as one was also submitted on January 20 (and prior Complaints were submitted prior to that as well). (TUVELL 1043) He stated that he applied for SWG-0436579, which had been posted since September 26 - - two (2) months prior to Mr. Tuvell applying for it. (TUVELL 1051) He explained the interview process. He explained that his first interview was with Mr. Kime and, after that went well, he interviewed with two (2) other people, Harvey Harrison and Brian Doherty. (TUVELL 1052) He described the discussions during the interview process.

Mr. Tuvell explicitly stated that the reason for his rejection -- that he availed himself of STD benefits -- constitutes discrimination based on his disability. (TUVELL 1057)

Mr. Tuvell also references Mr. Feldman’s second reason for his rejection, and characterized his reason as “incompatible” and “irreconcilable” with Mr. Kime’s reason.

January 24 -- *IBM States that Mr. Tuvell’s Latest Appeal is Under Review*

In a January 24, 2012 letter from IBM counsel Larry Bliss to you, with regard to Mr. Tuvell’s rejection from the internal position, Mr. Bliss acknowledges the following: “It is my understanding his latest appeal is under review.” (TUVELL 1188) Presumably this is in reference to the IBM internal complaint that Mr. Tuvell filed regarding the failure to transfer, which you provided to Mr. Bliss on January 23. (TUVELL 1189-90)

January 25 -- *IBM Acknowledges Mr. Tuvell's Application for the Position Software Developer*

IBM sent Mr. Tuvell an email indicating that it received his application for the Position Software Developer SWG-0456125. (TUVELL 1194)

February 1 – ***Russell Mandel's Investigative Report – Investigation #3***²⁶

Mr. Mandel conducted an investigation regarding the company's decision not to select Mr. Tuvell for a position with Chris Kime's group in January of 2012. He concluded that the complaint lacked merit. By email dated February 14, 2012, he advised Mr. Tuvell of his finding and advised him that the hiring decision "was not because of a disability." (TUVELL 1211)

He prepared a report of investigative findings. (IBM 11026-27) In his February 1, 2012 report, Mr. Mandel framed the issue as a complaint by Mr. Tuvell that he was "unfairly denied an opportunity as a result of his being disabled." Significantly, no mention is made of Mr. Tuvell's claim of retaliation. No mention is made of any other issue about which Mr. Tuvell complained.

In connection with his investigation, Mr. Mandel interviewed Dan Feldman and Christopher Kime. Mr. Kime is the Application Development Manager out of Austin, Texas and the hiring manager for the GOM position. The question, as Mr. Mandel framed it, is as follows: "Was Mr. Tuvell rejected for a position because he was on Shortterm (sic) Disability?" Mr. Mandel found that Mr. Tuvell was not rejected because he was on short-term disability. He wrote that Mr. Kime states that he rejected Mr. Tuvell for the Software Developer position "because of feedback from Mr. Feldman that stated that Mr. Tuvell did not take management direction well and had trouble teaming with others." Parenthetically Mr. Mandel noted, "Mr. Feldman confirms that this is the feedback he provided Mr. Kime and is consistent with the findings of a previous investigation into Mr. Tuvell's performance done by the current investigator."

The company stated that Mr. Tuvell was not selected for the transfer position due to performance problems. Mr. Mandel explained that a decision to hire him for another position could not be made without a PBC (which is a Personal Business Commitment/Performance Evaluation). Mr. Mandel referenced "performance issues" that would "present a problem to [his] success" in the absence of a PBC.

Mr. Mandel further elaborated on alleged performance deficiencies of Mr. Tuvell in an email dated February 17, 2012. (TUVELL 1217) Mr. Mandel stated, "An essential component of any performance assessment includes the ability of the individual to work well with others." Mr. Mandel stated that Mr. Tuvell was unable to work cohesively with other team members. He referenced "unprofessional conduct" that Mr. Tuvell was cited for on July 5, 2011 as being an obstacle for him.

Mr. Mandel noted that Mr. Kime was not truthful or forthright in his rejection letter to Mr. Tuvell. In that letter, Mr. Kime stated that he could not hire Mr. Tuvell while on short-term

²⁶ As per IBM's Supplemental Interrogatory Responses, #14, this is the third investigation conducted (one by Ms. Due and two by Mr. Mandel).

disability because it would “receive very close scrutiny from his organization’s operations people.” Mr. Tuvell noted that Mr. Kime should have been more direct with Mr. Tuvell on his reasons for not hiring him, and he stated that Mr. Kime “should be counseled on his error by his management.”

During litigation of this matter, I note that IBM now offers additional reasons why it failed to select Mr. Tuvell for the transfer. It stated as follows:

...[I]t was determined that he lacked the qualifications necessary for the role. The position was appropriate for someone who could work in a small team environment. That required working well with team members, working cooperatively in a subordinate role and taking direction as necessary from the leadership of the team. Interest in the job was believed to be a component of working successfully in a small team. Plaintiff emphasized that his interest was in a development role but the work to be done in the open position was more weighted towards supporting activities or test QA activities related to the support activities. That work did not appear to be in line with Plaintiff’s expressed preferences. Plaintiff also created the impression that he had a tendency to work well on his own and generate work product in an individual effort, which was not the skill set needed by our small team. Additionally, Plaintiff did not have experience in working directly with customers in a support role and he did not have specifically applicable technical skills regarding the actual product, the MQ product or the platform on which they were working.

(Further Supplemental Response of Defendant, International Business Machines, Inc. to Plaintiff’s First Set of Interrogatories dated May 13, 2014, Response #11)

Moreover, IBM stated, in Further Supplemental Answer to Interrogatory #11(c), that it relied upon Chris Kime’s interview of Mr. Tuvell, Mr. Kime’s discussions with his subordinates Harvey Harrison and Brian Doherty based upon their interviews with Mr. Tuvell, Mr. Kime’s discussions with Dan Feldman about Mr. Tuvell’s performance when he worked with Mr. Feldman, and Mr. Kime’s discussions with his up-line manager’s Arnand Mathieu and Gerry Reilly.

IBM further states that Russell Mandel is one of several people who has knowledge about the facts giving rise to the decision not to hire Mr. Tuvell for the position. (Further Supplemental Answer to Interrogatory #11(d))

February 7 -- *Mr. Tuvell Files LTD Application*

(TUVELL 1406)

This application was denied.

February 9 – *Mr. Tuvell Emails Mr. Mandel about the Open Position*

In an email to Mr. Mandel, Mr. Tuvell stated that he reapplied for the position to work under Chris Kime, and noted that the position is identical to the former opening (but with a new GOM number) that he was rejected for, but that Larry Bliss confirmed the position was still open. (TUVELL 1206) Further, he noted that, as of January 25, he was on unpaid leave and not STD (which was the reason he was rejected the first time). (TUVELL 1206)

No response was ever given.

February 14 -- *Mr. Mandel Rejects Mr. Tuvell's Complaint About Discriminatory Denial of Transfer*

In a two-paragraph email, Mr. Mandel advised Mr. Tuvell of the following:

I have looked into the complaint you made that you were denied an opportunity as a result of being disabled. Having done so, I can advise that the decision was not because of a disability.

(TUVELL 1213) He makes no mention of the February 1, 2012 written report.

He further stated that there was not a PBC for Mr. Tuvell to date. Without that, “it would be difficult to approve the decision to hire if that was the decision made. Since there was no PBC, there was a need to make an assessment of performance and based on that assessment, the conclusion was that the performance issues we discussed previously would present a problem to your success in the role to be filled.” (TUVELL 1213)

February 16 -- *Mr. Tuvell's Response*

Mr. Tuvell advised Mr. Mandel, in a February 16, 2012 email, that he had never been through the PBC process. He also stated that he did not understand what “performance issues” Mr. Mandel was referring to, and he referenced the only formal evaluation he received, which was dated February 22, 2011, and apparently showed no performance problems. (TUVELL 1212) Mr. Tuvell also referenced Dan Feldman’s June 30, 2011 statement, “You are not on a performance plan.”

February 17 -- *Mr. Mandel Offers Another Reason for Denial of Transfer*

In a February 17, 2012 email to Mr. Tuvell, Mr. Mandel responded to his inquiry about performance issues. Mr. Mandel wrote, “An essential component of any performance assessment includes the ability of the individual to work well with others. The performance issue you and I discussed previously is the inability to work cohesively with other members of a team. In addition to unprofessional conduct, for which you were cited on July 5, 2011, this issue was considered to be a potential obstacle to being successful in the role to be filled.” (TUVELL 1219-20)

Mr. Mandel mentions nothing about the “common practice” at IBM, which is to include certain language in warning letters of a serious nature that the employee is restricted in job movement for a specified period of time. (IBM 11163)

February 22 -- Mr. Tuvell Asks Mr. Mandel for Status Update

Mr. Tuvell sent an email on February 22, 2012 in follow up to the discrimination and retaliation complaints as well as reasonable accommodation issues raised in his internal Corporate Open Door submissions. He noted that he received no response to his email of the week prior, and asked if he would be receiving a decision on his latest C&A complaint, if he would get a decision on his application for the recent GOM that he applied for in Littleton, and asked about reasonable accommodation transfer. (TUVELL 1218)

March 2 -- New Corporate Open Door Filing

In his cover letter, Mr. Tuvell reiterates that Russell Mandel is conflicted out of responding to this complaint. He states, “[T]he investigation into this matter must be handled by someone other than you, since you are personally involved in serious wrongdoing, contrary to the interests of IBM.” (TUVELL 1230)

In this lengthy submission, Mr. Tuvell complains of many concerns. He characterizes Russell Mandel’s “investigation” as a “sham.” (TUVELL 1235) He reiterates his other concerns of defamation, discrimination, retaliation, failure to reasonably accommodate and the wrongful acts associated with the rejection of his transfer application to Chris Kime. (TUVELL 1235-36)

March 2 -- Mr. Tuvell Files Addendum to Corporate Open Door Process

In this submission, Mr. Tuvell provides details about his application for SWG-0456125. He states that he reapplied for the job on January 25 under a new ID number. (TUVELL 1388) Mr. Tuvell states that he was rejected from the old SWG on January 6 and on January 12, Chris Kime re-registered the position in GOM using the identical description but a new GOM ID number.

March 6 – Mr. Tuvell Inquires about a Number of Issues, Such as System Access

On March 6, 2012, Mr. Tuvell emailed Mr. Mandel about a number of issues. Mr. Tuvell references his third Open Door being about Mr. Mandel’s “own misdeeds.”

Mr. Tuvell denied misusing any IBM systems. He stated that he accessed IBM’s system to communicate his opposition to IBM’s illicit/illegal/discriminatory behavior/acts, which are legally protected. He stated that Mr. Mandel’s act of rescinding his LotusNotes access is retaliation.

Mr. Tuvell takes umbrage with Mr. Mandel’s statement that Mr. Tuvell lacks business necessity for using IBM systems. Mr. Tuvell states that he needs to communicate with Mr. Mandel about the ongoing investigation and with the company about reasonable accommodations for his

disability. He stated that he needed to communicate with company officials via email, as a record is needed, and Mr. Mandel's actions prohibited him from such communications.

Mr. Tuvell essentially asked Mr. Mandel to provide him with a copy of any IBM policy that states that systems access is rescinded when an employee is on an unpaid leave of absence. Mr. Tuvell stated that he is aware of no such policy.

Mr. Tuvell states that he submitted his third Open Door complaint on March 2 and looks forward to an investigation and resolution. He states that he would like to add Mr. Mandel's rescission of his systems access as an additional example of illegal discrimination/retaliation.

Mr. Tuvell stated that he would have to resort to using Internet email and not Notes email, due to Mr. Mandel's action. He provided a personal email address for continued communication with company officials. (TUVELL 1524-25)

March 9 -- *Mr. Tuvell Submits Addendum to Corporate Open Door*

Mr. Tuvell cites new facts, namely a new charge of discrimination and retaliation against Russell Mandel because of his "rescission of [his] electronic access to Notes and w3..." (TUVELL 1431)

March 13 – *Mr. Mandel's Explanation of Restricted Access*

On March 13, 2012, Mr. Mandel emailed Mr. Tuvell and stated the following:

On March 6, 2012, IBM restricted your access to IBM systems because you were causing disruption by failing to utilize the proper mechanism for raising concerns about HR related issues. It has come to our attention that you are now using a personal email address to engage in the same conduct. We have discussed on multiple occasions the need for you to direct your issues with IBM and IBM personnel to a limited distribution list, more specifically, to me.

As my previous notes to you stated, the concerns and appeals program is the clearly defined mechanism which allows you raise your concerns in an orderly way. I am your point of contact for the concerns and appeals process. IBM considers your continuous emailing of copies of your complaint and numerous addenda -- to dozens of people unrelated in any way to the concerns and appeal process -- disruptive to IBM's business.

If this conduct continues, you will be subject to discipline, up to and including termination.

(TUVELL 1526)

April 17 -- MetLife Denies LTD Application

May 8 – *Mr. Tuvell Submits Corporate Open Door Complaint*

In an email to Diane Adams, Mr. Tuvell states that he is submitting his “FOURTH Open Door C&A complaint,” in connection with the accusation that he breached IBM business conduct guidelines by working at EMC while, simultaneously, working for IBM and IBM’s repeated demands for information about outside employment. (TUVELL 1464-65)

IV. THE COMPANY’S REPEATED REFUSAL TO ACT RESPONSIVELY TO THE WORKPLACE DISPUTE OR INSTITUTE INTERIM MEASURES TO PREVENT FURTHER ESCALATION OF THE DISPUTE WHILE MR. TUVELL’S COMPLAINT WAS PENDING WAS CONTRARY TO BEST PRACTICES

The company failed to comply with best practices related to the handling Mr. Tuvell’s complaints as early as May 19, 2011, when the conflict with supervisor Fritz Knabe arose, and it escalated when it repeatedly failed to separate Mr. Tuvell from Dan Feldman, the person originally accused of discrimination and retaliatory conduct.

A. The Company Failed to Intervene Early On to Mediate the Conflict Between Walter Tuvell and Fritz Knabe, Contrary to Best Practices

As I reviewed the chronology of escalating hostility between Mr. Tuvell and IBM, I saw one resounding theme, again and again -- missed opportunity. I saw a talented employee, an employer with the resources to resolve the dispute, and a situation that spun out of control.

It didn’t have to happen that way. If IBM had applied best practices early on to prevent escalation, there is a distinct possibility that a stable working relationship between workers could have been restored. Even if that were not possible, the company’s early involvement would likely have stanch the increase in hostility and helped to ameliorate a tense situation.

Initially, the friction was limited to Mr. Tuvell, supervisor Fritz Knabe and manager Dan Feldman. Words were exchanged and tempers flared. The accusations seemingly went in several directions. Mr. Tuvell, at least, wanted to get back to work. Yet, as his repeated requests for resolution were ignored by the company, the dispute widened and the complaints grew in number.

In the early days of this dispute, when it pertained to a disagreement between Mr. Tuvell and Mr. Knabe, Mr. Tuvell wanted to clear the air. He made that desire known. On May 19, just one day after the precipitating event now known as the “Excel incident,” Mr. Tuvell reached out to his manager, Mr. Feldman, and asked for a 3-way meeting that would include Mr. Feldman, Mr. Tuvell and Mr. Knabe. Mr. Feldman refused.

Essentially, Mr. Tuvell asked Mr. Feldman to act as a mediator, and he shirked that duty.

Still hopeful, Mr. Tuvell asked again the next day; but, again, he received the same answer. According to Mr. Tuvell, he made a total of six (6) requests for a 3-way meeting. Mr. Feldman admits he refused to review or discuss the matter with Mr. Tuvell, and admits refusing 3-way meetings.²⁷ (IBM 8997) According to the September 15, 2011 report by investigator Russell Mandel, Mr. Feldman refused these requests for the following reason:

because he “wasn’t interested in mediating disputes but in building credibility by delivering results.”

(IBM 11152; IBM 8997) Mr. Tuvell reports that Mr. Feldman said that he was “only interested in the success of Wahoo.”

Next, Mr. Tuvell involved Human Resources. That is, Mr. Tuvell emailed HR representatives to advise them of his desire to participate in a 3-way meeting to resolve the recent dispute. He got the same response. HR thus refused Mr. Tuvell’s attempts to have this workplace conflict mediated by Mr. Feldman, HR or other appropriate person.

What Mr. Tuvell sought is commonplace in the workplace. In its “Introduction to Mediation Concepts” (2010), SHRM emphasizes a manager’s pivotal role in helping resolve workplace conflicts, adding that managers often act as mediators when informal workplace disputes arise between two or more employees. Likewise, in another recent article, “Conflict Resolution: Mediation: How Do We Mediate a “Cease Fire” Between Two Employees?” (August 2013), SHRM highlights mediation’s effectiveness as a conflict resolution process for many, if not all, workplace conflicts. SHRM notes that both parties must be ready to voluntarily participate in the mediation for it to be effective.

The purpose of mediation is to restore the workers to the status quo, prior the conflict. In “We Need to Talk: Ten Scenarios to Practice Handling Needed Conversations” (2008), SHRM states that a manager’s or supervisor’s role is to establish and maintain performance norms in the workplace. Best practices thus call for managers to quickly address issues as they occur rather than ignore them. Similarly, in “Conflict Resolution Training for Supervisors” (2008), SHRM emphasizes how supervisors can assist in resolving employee conflicts, stating:

Why should we get involved? It’s their problem, right? WRONG! Managers must learn to manage conflicts amongst their team members so that the business continues to run effectively and objectives are met.

²⁷ Mr. Feldman apparently testified in his deposition that requests had been made and that he refused. I have not reviewed his deposition transcript.

Also, in a goodbye letter to colleagues from June 14, 2011, Mr. Tuvell stated that he repeatedly asked for a 3-way conversation to clear the air, but that had been refused. (IBM 8825)

The consequences are real. According to SHRM, unresolved conflict can lead to low morale, productivity and, in extreme cases, workplace violence. Even those employees not directly involved in an employee conflict may take sides or withdraw from the conflict, diverting focus from or leading to disengagement from work.

SHRM describes the first phase of mediation as “storytelling.” It calls this phase the “heart of mediation” and states it should not be rushed. The manager/mediator should, therefore, at a “3-way”, or “all-party” meeting:

Allow each party to tell his or her story of how and why the conflict started and persists. Be vigilant in enforcing the ground rule that when each employee tells the story, the other listens and does not interrupt, try to present conflicting information or attack on the other employee. Remember to stay the course in your neutral, impartial role.... Once storytelling has been successfully navigated, the soul of mediation can now shine: acknowledgement, collaborative brainstorming, problem-solving and resolution.

See SHRM “Conflict Resolution: Mediation: How do we mediate a ‘cease fire’ between two employees?” (August 2013).

In its article “Discipline: Conflict Resolution Rules and Steps” (April 2014), SHRM outlines similar ground rules to those articulated above, calling for managers to obtain agreement from all parties that they will:

- Work to resolve the conflict.
- Treat each other with respect.
- Be clear and truthful about what is really bothering them and what they want to change.
- Listen to other participants and make an effort to understand the views of others.
- Be willing to take responsibility for their behavior.
- Be willing to compromise.

The process is relatively straightforward, and the SHRM article outlines nine (9) key steps for a manager to follow in the conflict resolution process:

- 1) Arrange for all parties to confront the problem.
 - Select a time as soon as all parties have cooled down.
 - Meet at a place that is neutral for all parties.
- 2) Have all participants describe the conflict in clear terms and describe behaviors, feelings and desired changes.
 - Direct participants to use I, not you, and to focus on specific behaviors and problems, not on people.
- 3) Ask participants to restate what the others have said.

- 4) Summarize the conflict based on what you have heard and obtain agreement from participants.
- 5) Start brainstorming to find solutions.
 - Ask each participant to offer a solution.
 - List all of the options presented (either verbally or on flip chart).
 - Discuss all of the options in a positive manner.
 - Rule out any options that participants agree are unworkable.
- 6) Summarize all possible options for a solution.
- 7) Assign further analysis of each option to a participant.
- 8) Obtain agreement from all parties on next steps.
- 9) Close meeting by having participants shake hands, apologize and thank each other for working to resolve [the] conflict.

In this case, Mr. Tuvell made repeated requests for someone to step in and mediate. He acted responsibly. He acted purposefully. One email is particularly telling of Mr. Tuvell's sincerity. He sent an email to Kelli-ann McCabe in Human Resources with the subject "A request for help." The request was humble: "I would like to learn how I could have handled things better." (IBM 8832)

Despite his good intentions, and the fact that each request by Mr. Tuvell was an opportunity to resolve the dispute before it escalated, the company failed to accept his suggestion or offer a viable alternate suggestion. Each time his supervisor, and the company, refused to take part, that declined opportunity became a missed chance. And, with each missed chance at resolution, the hostility grew.

The company's failure to step in and encourage the 3-way meeting, or ensure that it or a similar mediation-type of meeting took place, was contrary to best practices. It is also somewhat hard to understand, given that this choice was also so evidently contrary to the best interests of everyone involved. The reality of workplace disputes is that employees are not productive if they are fighting rather than working. There were many moments in this chronology when action could have been taken pursuant to best practices to de-escalate the conflict, and there is no question that Mr. Feldman's position resulted in lost ground.

What happened here was relatively predictable. Rather than mediate the conflict, on June 10, 2011, the company made a decision that was quite decisive and harsh. That is, it determined that Mr. Tuvell should be involuntarily removed from his position. Mr. Tuvell was not simply removed from his job, he was demoted. He lost opportunity and prestige, and he explicitly characterized it as an adverse job action. He assumed the role that had been filled with someone with significantly less education and experience than him. While the reason for his demotion was not documented at the time, IBM has since stated that Mr. Tuvell was demoted because of his "inability to work effectively with Mr. Knabe." (May 11, 2012 position statement, Page 4)

In short, he was punished for his involvement in the conflict, and IBM's only way of "fixing the problem" was to hope it would go away.

Mr. Tuvell was demoted, but he worked minimally and sporadically in the position. He became ill and then took a medical leave and received STD benefits. He never returned to work.²⁸

B. *The Company Failed to Implement Interim Measures When Mr. Tuvell Claimed Discriminatory Treatment*

On June 15, 2011, Mr. Tuvell lodged his first email complaint during the period of formal HR involvement. In an email to Mr. Feldman and HR, Mr. Tuvell complained about the demotion, and asserted that it was due to his age, with tinges of gender and race discrimination and retaliation also mentioned. Mr. Tuvell made his first request to be separated from Mr. Feldman one day after filing his complaint. In an email to Diane Adams in HR, he described the environment as "hostile". (IBM 8504-05) In an email to her colleague Ms. Due, Mr. Adams asked: "I don't think we should be making any changes before this matter is looked into. Agreed?" (IBM 8504) Lisa Due agreed, stating that it was "too premature" to make any change. (IBM 8503) The company was wrong in thinking that it was "too premature" to make a change that would have allowed Mr. Tuvell to be separated from Mr. Feldman while an investigation of Mr. Tuvell's complaint took place.

As a matter of best practices, interim measures are one of the first considerations for an employer preparing to investigate discrimination or other similar type of misconduct complaint. Interim measures are steps taken right away, before an investigation is fully underway. These measures are intended "stop the alleged conflict, protect those involved and begin investigations." See SHRM "Investigations: How to Conduct an Investigation" (April 2013). The purpose is to build momentum in the direction of resolution, rather than propelling the parties into a cycle of escalation.

In "Conducting Workplace Investigations" (November 2011), SHRM underscores that a key tenet of a proper investigation is engaging in appropriate measures at the outset of the process to ensure the complainant does not experience any further harm:

As a general rule, any time an employee makes an informal or formal complaint to management, the employer should take immediate steps to begin an investigation, protect those involved from further disruption and ultimately attempt to resolve the alleged conflict.

In "Investigations: How to Conduct an Investigation" (April 2013), SHRM similarly emphasizes:

When an employee makes an informal or formal complaint, the employer should take immediate steps to stop the alleged conflict, protect those involved and begin investigations.

²⁸ Just days after the demotion, on June 13, Mr. Feldman was actively trying to have Mr. Tuvell terminated. (IBM 8689) I am told that Mr. Feldman admitted at his deposition this was his state of mind and intention.

The SHRM article outlines the steps that “should be taken as soon as the employer receives a verbal or written complaint.” The second step articulated by SHRM pertains to interim measures:

Step 2: Provide interim protection

One of the first considerations may be the need to take immediate measures for the protection of the accuser or the alleged victim. Separating the alleged victim from the accused may be necessary to guard against continued harassment or retaliation. Actions such as a schedule change, transfer or leave of absence may be necessary; however, *employees should not be involuntarily transferred* or burdened. These types of actions could appear to be *retaliatory* and result in a retaliation claim. The employer and the accuser must work together to arrive at an amenable solution. Employers may wish to seek legal advice prior to making any decisions. (Emphasis added.)

SHRM’s article entitled “Investigations: THE ABC’s to Investigations” (July 2010) offers similar guidance on best practices, with a list of steps “designed to provide a guideline for conducting a fair and thorough investigation.” Here again, SHRM stresses interim measures as primary consideration once a complaint has been made:

Put out the fire first. No decision has to be made now on discipline. Stabilize the workplace. The more severe the claim or emotions, the more care may be needed to keep employees separate and/or safe from any further threats, retaliation or harassment while you investigate.

Case by case decision to suspend employee during investigation. Warn about contact with other employees & consequences.

The Massachusetts Commission Against Discrimination (“MCAD”) emphasizes the vital role of interim measures pending an investigation to safeguard against continued harassment. MCAD’s Sexual Harassment in the Workplace Guidelines, which are equally applicable to other kinds of harassment and discrimination, explain that interim measures should “be carefully crafted to minimize the chance that the alleged harasser will either continue to harass the complainant or will retaliate against her.” The MCAD lists some factors that may be relevant when developing appropriate interim measures:

- the expressed wishes of the complainant;
- the nature and extent of the allegations;
- the personal safety of the complainant;
- the number of complainants;

- whether the alleged harassment is of an ongoing nature;
- the behavior of the alleged harasser; and
- whether the alleged harasser has an alleged or actual history of engaging in harassment.

Of course, “[t]he employer must also ensure that the measures themselves do not amount to retaliation against the complainant.” MCAD’s Sexual Harassment in the Workplace Guidelines. Further, interim measures should be monitored to ensure their efficacy and fairness.

* * *

During the investigation, the employer has a duty to take the necessary steps to eliminate from the workplace the harassment about which the complainant has complained. The fact that it may be burdensome for the employer to take such action does not diminish this duty. The employer should monitor any interim measures that it takes throughout the investigation. Monitoring may include assessing whether the interim measures meet the goals of preventing ongoing harassment, protecting the safety of the parties and preventing retaliatory conduct.

So too, the EEOC makes clear, in its Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, 6/18/99, that interim measures are an important part of an effective investigative process:

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. . . .

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

Separating the complainant and the accused is an obvious and often the most effective step the employer can take. SHRM emphasizes that “[i]t may be necessary to separate the alleged victim from the accused to guard against continued harassment or retaliation.” *See* SHRM “How to Conduct an Investigation” (2010).

A separation can be accomplished in several different ways. This can be done by physically separating employees from working with each other or having any contact with each other. It can include temporary reassignment of one or both affected parties. The employer can place the accused employee on paid or unpaid suspension or leave of absence, pending the outcome of the investigation. If the complaining party leaves the workplace on his/her own volition and expresses a desire to stay away from the site until the situation can be resolved, then he/she should be placed on paid leave of absence pending the outcome of the investigation. Requiring the employee to use his/her vacation or accrued time off solely to escape his/her harasser is, however, never a valid response.

Interim measures should be neutral. As SHRM explains: “If the parties have to be separated, then the separation should not burden the employee who has complained of harassment; doing so puts the employer at risk of a claim of unlawful retaliation.” SHRM “Conducting Workplace Investigations” (November 2011). Neutral interim measures could include making scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

The goal of interim measures is simply to prevent any further inappropriate conduct from occurring. Significantly, the final determination of whether inappropriate conduct did occur is irrelevant to the employer’s duty to put in place interim measures upon receiving a complaint. IBM confounded the concepts of interim measures at the outset of the investigation, with remedial measures at the conclusion of the investigation.

In this case, Mr. Tuvell made multiple requests for interim measures, all to no avail. Mr. Tuvell reached out to the company for protection. He explained that he suffered from a disability which exacerbated his reaction to the workplace conflict. The company acknowledged that Mr. Tuvell’s manager was making matters worse by “sending inflammatory emails – taking the bread crumbs.”²⁹ (IBM 11137) In response, HR intervened to monitor his email communications with Mr. Tuvell. That certainly signals that HR sees the manager as engaging in problematic behaviors that are or have a tendency to exacerbate the already volatile situation.

No doubt it would have been best practice at this juncture to take action to separate Mr. Tuvell and Mr. Feldman, especially in view of the obvious and recognized hostility Mr. Feldman harbored. As noted above, “The more severe the claim or emotions, the more care may be needed to keep employees separate and/or safe from any further threats, retaliation or harassment while you investigate.” See SHRM “Investigations: The ABC’s to Investigations” (July 2010). A permanent demotion was not the answer.

I was particularly dismayed by the exchange between Ms. Adams and Ms. Due, determining that it was too soon to protect Mr. Tuvell from his perceived harasser. Interim measures are not “*premature*” at the initial stages of a dispute. In fact, it is at the initial states of a dispute that interim measures are *effective and necessary*.

²⁹ In another document, HR again referred to Mr. Feldman’s engaging in inflammatory communications, where Diane Adams apparently stated, “Manager starts off with inflammatory statements.” (IBM 11041)

Mr. Tuvell's response shows an understanding of interim measures that seemed lost on the Human Resources professionals who were charged with putting them in place. He responded to the company's refusal to separate him from Mr. Feldman as follows: "IBM cannot comfortably support a policy of 'presumed non-abusive' in a case like this, because the consequences of being wrong are just too high." (TUVELL 738-39) He stated that Mr. Feldman was starting to set him up, and he asked them to remove all possibility of letting this happen.

Perhaps the company refused to take interim measures to punish Mr. Tuvell – forcing him to work in an untenable situation in the hopes that he would leave. Mr. Mandel's words of June 27, 2011 -- "No need to place him in another role. Like a tantrum for a 2 yr old, they will learn to do it again if you give in what they need. I prefer respect but fear is not a bad second choice" -- ring loudly. (IBM11143)

Assuming that the company was not intentionally seeking to deny Mr. Tuvell the protections of both its internal policies and employment laws relating to workplace conduct, the only explanation for the company's failure to consider interim measures was that it was confused about the difference between interim measures and remedial/corrective action and their proper use. It is surprising to me that a knowledgeable Human Resources professional could harbor such confusion.

The most salient difference between interim measures and remedial action relates to timing, *i.e.* when the employer implements them. Interim measures are taken once a complaint is made in order to protect the complainant pending the outcome of the investigation, while appropriate remedial action is reserved for the conclusion of a thorough investigation. Thus, interim measures are implemented *while* the investigation is ongoing, in order to stop any further harassment and to prevent retaliation pending the outcome of the investigation. Interim measures are put in place for a finite period of time while the investigation takes place and the investigator can determine if the complaint has merit.

Remedial measures, in contrast, take place *after* the investigation is complete and only when the investigator finds there was merit to the complaint and wrongdoing occurred. For example, the employer may decide to implement remedial measures focused on education, such as one-on-one sensitivity training, redistribution of the policy, and the like. Following an investigation that has revealed misconduct, employers may also consider corrective action such as discipline or termination. A reassignment or transfer of the accused might also be considered a corrective measure.

Interim and remedial measures both have the intended purpose of stopping further misconduct such as discriminatory treatment and retaliation, in order to effectuate policies and laws designed to maintain a workplace free from all forms of discrimination. Remedial measures, however, have the additional purpose of correcting the effects of misconduct revealed by the investigation, with the goal of putting the employee in the position he or she would have been in had the misconduct not occurred.³⁰ It is, therefore, remedial measures (not interim measures) that are

³⁰ The EEOC gives examples of some types of remedial measures that can be taken to correct the effects of harassment:

properly reserved for implementation only after an investigation is complete and has uncovered wrongdoing.

The facts reveal that Mr. Tuvell continued to request, very pointedly, that the company take interim measures. A week after he lodged his first complaint and, simultaneously, sought interim measures, he asked again, on June 23, to be separated from Mr. Feldman. By this time Lisa Due had been assigned to investigate his complaint. Mr. Tuvell wrote to her, “I have *begged* HR to release [me] from the grasp of the likes of Dan [Feldman], yet I am still forced to be here, more vulnerable than ever, and tortured beyond my ability to stand it.” He asked if there was an opportunity to allow him not to work with his “tormentor” at that time. (TUVELL 666-67) (Emphasis supplied)

In considering the purpose of best practices, I think it is significant to note the change in Mr. Tuvell’s tone over time. In May and early June, Mr. Tuvell was reaching out to Mr. Feldman asking to talk. When Mr. Feldman refused, he turned to Ms. Adams and asked for “help.” He asked what he could do better next time. Now, he “begged” for help.

But as things ramped up, so did Mr. Tuvell’s rhetoric. This comes as no surprise - one of the primary purposes of interim measures is to prevent emotions from heightening. This was another opportunity for the company to stop the escalation. Once again, failing to appropriately apply the best practice of interim measures to a situation where something was so obviously called for, Ms. Due responded that to do anything would be “premature.” (TUVELL 667-68)

It was more than predictable that events would escalate. It was preordained.

Mr. Tuvell’s next request for interim measures came on June 28, 2011. The language he used once again illustrates why interim measures are a best practice. He was becoming increasingly frustrated and frightened by the company’s failure to step in to protect him from Mr. Feldman while the investigation was ongoing. In an email that day, he wrote that he has:

“***BEGGED*** HR to get [him] away from [Mr. Feldman], as fast as possible, and I hereby repeat that plea. I do not trust you, and I fear you (i.e. do not

-
- restoration of leave taken because of the harassment;
 - expungement of negative evaluation(s) in employee’s personnel file that arose from the harassment;
 - reinstatement;
 - apology by the harasser;
 - monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
 - correction of any other harm caused by the harassment (*e.g.*, compensation for losses).

See EEOC: Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, 6/18/99.

feel safe around you), for good/rational reasons correctly/truthfully stated...” (TUVELL 672-73) (Emphasis supplied)

“I’ve been forced to continue working for Dan [Feldman] and I despise every moment of it. I CONSIDER IT RETALIATION. My health (both physical and mental) is suffering, as I have duly informed all of you.” (TUVELL 673)

I note, too, that Mr. Tuvell was not imagining things: Dan Feldman admittedly was trying to have him fired.

The company’s refusal, again, to provide Mr. Tuvell relief is particularly surprising, in view of Mr. Tuvell’s assertion that failure to protect him was retaliation. Ms. Due, as the investigator reviewing his complaint, hearing his charges that his demotion was discriminatory, should have been on high alert for signs of retaliation. Her failure to recognize the possible ramifications of ignoring Mr. Tuvell suggests that she may not have been sufficiently trained or experienced, though I offer no opinion on that matter at this time.

On June 29, 2011, Ms. Due found that Mr. Tuvell’s claims were not supported by sufficient evidence. Mr. Tuvell immediately appealed. With the dispute ongoing, the company was still under a duty to protect Mr. Tuvell from harassment, discrimination and retaliation.

At every stage, I submit that the company had a duty to consider whether interim measures were necessary, and it failed to discharge its duty every time.

On July 1, 2011, Mr. Tuvell had a conversation with Russell Mandel, who had been assigned to review Ms. Due’s investigation. Mr. Tuvell expressed his belief that he was being subject to retaliation by Mr. Feldman. In a July 5, 2011 email to Mr. Mandel, Mr. Tuvell stated that he wanted to reiterate what had been discussed days earlier: “I requested to be removed from my hostile work environment (according to my perception), but you explained to me that it is ‘impossible’ (i.e. not within IBM policy) for that to happen at this time (if ever). I will abide by that decision to the best of my ability, but I reiterate it will be hard for me to do so, and that I continue working under these conditions only under the most strenuous protest.” (TUVELL 719) Later that day, Mr. Tuvell reiterated his request. (TUVELL 679)

This was another opportunity for a trained and seasoned HR professional to make the right call and implement interim measures. Unfortunately, that did not happen. Mr. Mandel responded much in the same way Lisa Due did, by stating: “[W]e have not concluded that you are indeed working in an inappropriate work environment and I’m still looking into your issues.” (TUVELL 719-20) Like Ms. Due, Mr. Mandel was under the mistaken impression that nothing could or should be done until the company made a definitive finding that wrongdoing had occurred. Again, this demonstrates a clear lack of knowledge of the meaning and application of best practices as they relate to workplace investigations and interim measures.

It is true that the company’s Harassment and Inappropriate Behavior policy contemplates the “transfer [of] the offender to another department or location. [And, if] requested by the victim,

he or she may be transferred to another department or location.” (TUVELL 66) However, IBM confuses the timing. These are remedial measures to be considered after the completion of the investigation and a determination of wrongdoing. Mr. Mandel, like Ms. Due, failed to grasp this important concept.

In his August 18, 2011 Corporate Open Door complaint, Mr. Tuvell made another request for interim measures. At this point, the company – at the highest levels -- was clearly on notice that Mr. Tuvell was raising claims of discrimination and retaliation. It is beyond dispute that an employer should take steps to protect an employee who has complained of discrimination from further illegal conduct – *before it happens*. But the company continued to miss opportunities to do this, and the hostility continued to escalate.

On August 30, 2011, Mr. Tuvell made another request for interim relief. In an email inquiring about the status of his Corporate Open Door complaint, he wrote that he had “many, many times demanded to be removed from Dan [Feldman]’s ‘leadership’ (if you can call it that), but to date have been blindly/unthinkingly refused (sometimes explicitly, sometimes implicitly).” (TUVELL 1519) He reiterated his request in September.

The record is abundantly clear – Mr. Tuvell made repeated requests to his manager, HR professionals and corporate executives to implement remedial measures. The response, when there was one, was that it was premature as the investigation was not complete. As exhaustively stated above, that is an incorrect response, and the company thus failed to follow best practices for considering and implementing interim measures.

The company’s failure to apply best practices in its initial response to the first dispute plays a central role in this saga. In the employer-employee relationship, the parties do not have equal power. The employer is the party with the power. That power can be used to build positive relationships and resolve disputes when they occur. IBM did not do that here. Instead, IBM used its power to deny Mr. Tuvell interim relief when he was begging for help, believing in good faith to be the victim of discrimination and retaliation. This was diametrically opposed to best practices.

V. THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES OF ITS INTERNAL POLICIES IN SELECTING RUSSELL MANDEL AS INVESTIGATOR

The goal of an investigation is to find the facts and reach a reasoned and fair resolution to the complaint. An investigation is a means of eradicating any complained-of harassment, discrimination, and/or retaliation so that the employer can maintain (or re-build) a productive work environment free of illegal conduct. A meaningful investigation is one that is transparent, impartial and even-handed.

The investigator spearheads the investigative process. The investigator must gather and be aware of all applicable policies and procedures so that they can be applied consistently and impartially. Additionally at the outset, all involved parties must have faith in the integrity of the investigative process. Drawing from the complaint, the investigator will define the scope of the investigation,

which may expand as the investigation proceeds. The investigator will determine what documents are relevant to the investigation, including policies, procedures, personnel documents, and documents containing potential evidence. The investigator will identify witnesses to be interviewed and will define the lines of inquiry. The investigator will also be the primary person communicating with the complainant and the accused. The investigator will maintain confidentiality and should know what information may be shared with whom. The investigator will conduct the interviews, weigh the evidence and draw the conclusions. In short, the investigator is both judge and jury.

Accordingly, the employer must choose the investigator with great care. Like an effective judge, the investigator must know which policies and practices to apply and must have the ability to apply them fairly. To accomplish this, the investigator must be trained, experienced and knowledgeable. Like an effective jury, the investigator must weigh all relevant evidence in a principled and unemotional manner. To carry out this responsibility, the investigator must be impartial and neutral.

In SHRM's How-To Guide entitled "Investigations: How to Conduct an Investigation" (April 2013), SHRM emphasizes the importance of selecting an appropriate investigator. SHRM outlines the key qualities an investigator should possess:

- An ability to investigate objectively.
- To have no stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.
- To be in a position to maintain confidentiality, be respected within the organization (because his or her conclusions will be used to make a determination), have the ability to act as a credible witness and, if internal, have the likelihood of continued employment with the company.

Selecting an investigator with the appropriate training and knowledge means selecting an investigator who knows the rules that apply during the course of the investigation – those "rules" include company policies, investigative best practices, and relevant laws defining the types of conduct that are unlawful. In "How to Avoid Botched Investigations" (August 2012), SHRM emphasizes the risk of choosing an investigator who lacks the necessary training, experience, and

impartiality to handle the matter under investigation, such as an investigator who lacks the skills, training or ability to perform the task well or otherwise be unable to follow appropriate federal and state laws as well as best practices and internal guidelines.

What is more, the employer must select an investigator with the ability and skill to accurately assess the scope of the complaint. Understanding the scope of the complaint is a necessary first step that must be taken so that the investigator may then identify the relevant evidence. In turn, reviewing all of the relevant evidence is a prerequisite for reaching a reasoned and fair decision.

Not only must the investigator have the skills to identify the relevant evidence but, further, the investigator must have the ability to weigh that relevant evidence in a principled, unbiased and unemotional manner. In “Guiding Principles for Conducting Workplace Investigations,” (1st revision, July 2013), the Association of Workplace Investigators (“AWI”) states that the “investigator should be impartial, objective, and possess the necessary skills and time to conduct the investigation.” (Principle No. 2) The Guiding Principles articulate numerous factors that should be considered when selecting an investigator, including, “... the investigator should be someone who is in fact, and *who is perceived by the participants to be*, impartial[.]” (Emphasis supplied) Perception is as important as reality in investigator selection.

Accordingly, it is axiomatic that the investigator cannot be a party to the complaint or a witness in the investigation. “Obviously, someone who has a vested interest in the outcome of the investigation is a poor choice.” See SHRM “Proper Workplace Investigations” (May 2011). “Some investigators are simply too close to the situation and can’t be objective. If they’re friends with—or have coached or worked closely with—the person being investigated, they might have a personal stake in the outcome.” See SHRM “How to Avoid Botched Investigations” (August 2012).

It is critical that the “employer . . . ensure that both the accused and the accuser(s) have no credible reason to believe that the investigator cannot carry out his or her responsibilities in a fair and objective manner.” See “Legal Risks Associated with Conducting Improper Investigations” (AWI Quarterly, Vol. 3, No. 1, Jan. 2012) (Julie A. Moore) (citing *McLaughlin v. National Grid USA*, 2010 WL 137814 (D. Mass. 2010)). If the process is actually unfair or one-sided, or if one party perceives the process as biased, the decision will carry no weight and the goal of finality will not be achieved. Therefore, it is essential that the investigator be free of “preconceived notions as to who was at fault, and that he or she treats all parties involved -- the complainant, alleged wrongdoer and all witnesses -- fairly and with respect.” See SHRM “Proper Workplace Investigations” (May 2011).

In some situations, an outside investigator may be a more appropriate choice than an internal or in-house investigator. In the “Legal Risks Associated with Conducting Improper Investigations” article cited above, I highlight the *McLaughlin* case to illustrate the legal consequences that can occur when an employer fails to investigate or fails to *properly* investigate a discrimination complaint using the right investigator. The article states, “We see from the case law that investigations can be attacked in myriad ways. Though the courts do not expect investigations to be perfect, they must be reasonable and unbiased or they can form the basis for liability.”

Even IBM's Human Resource professional Lisa Due, the initial investigator, recognized that neutrality and lack of bias are important. In her interview notes, she stated that John Metzger was told to "stay neutral, he is the 'go to guy' as dan (sic) is embedded in the fray." (IBM 11134)

IBM maintains policies about investigations that underscore its commitment to responding to complaints properly, and this begins with its commitment to objectivity – inextricably tied to the choice of investigator. In its Concerns and Appeals Program, IBM explains its Open Door policy:

The Open Door process reviews actions or inactions by management which [are] directly related to and affect an employee. All issues, except policy decisions and operational business issues, are eligible for review under this process. . . .The intent of the process is to ensure an objective and thorough review of the issues. The process will not make legal determinations. It will, however, determine whether the employee was treated fairly.

(TUVELL 2560)

The investigator assigned to investigate the Open Door has one "primary responsibility," which is "to provide an objective and through review of the issues." The investigator's job is to ensure "an equitable result for the employee making the appeal."

The company failed to comply with best practices when it selected Russ Mandel to review Ms. Due's investigation, and to investigate each Open Door complaint that followed, because he was not impartial. Four reasons support this conclusion: (1) he reviewed and sanctioned the initial investigation and, thus, was not independent; (2) he was a person accused of engaging in wrongdoing; (3) he lacked the knowledge or capability to apply best practices and company polices to ensure a fair and neutral process; and (4) Mr. Tuvell expressed his lack of confidence in Mr. Mandel's ability to act free of bias and repeatedly protested Mr. Mandel's role as investigator.

A. *Mr. Mandel Reviewed and Sanctioned Ms. Due's Investigation, Thus Destroying Any Independence*

In Lisa Due's notes, she indicated that she met with or interviewed Mr. Mandel on June 27, 2011. (IBM 11143) Her notes state as follows:

Rules of court of law don't exactly apply to the business environment.
One of the things that differentiates IBM from others is this organization that investigates appeals.

Manager is treating different than everyone else...making sure you are doing your job.

Think being too nice to the manager, from complex case perspective.
Employee didn't bring the complaint.

Tell the ee: manager/hr communicated complain re; weather [SIC]
tmistreated, [SIC] find no reason to conclude that.

Now up to manager to manage the employee. Then turn it over to
HR/manage as [SIC] performance.

No need to place him in another role. Like a tantrum for a 2 yr old, they
will learn to do it again if you give in what they need.

I prefer respect but fear is not a bad second choice.

For whatever reason, Ms. Due and Mr. Mandel met, and Ms. Due took notes of the information that Mr. Mandel provided. Consequently, Mr. Mandel had a hand in the outcome of Ms. Due's investigation. Indeed, as an email from Lisa Due and Kelli-ann McCabe on June 29 makes clear, Mr. Mandel was familiar with the evidence Ms. Due considered and the conclusions reached: "Typically, Russ [Mandel] would review what I have done and then get back to the employee. ***In this matter, I already ran the case by Russ. He may have all the information he needs or contact me to fill in gaps.*** Then he will close with the employee." (Emphasis added) (IBM 8474)

Subsequently, in an August 18, 2011 email to a corporate executive, Lynea St. Pier, Ms. Due confirms that Mr. Mandel was involved in her investigation and approved her findings. (IBM 8904) She wrote, "Just a heads up that you may be or have gotten a case in regards to Walter Tuvell (his latest was a 100 page letter to SJP and others)... So you know, Mr. Tuvell did not agree with my findings (***approved by Legal and Russ***)... I would be happy, thrilled even, to fill you in on the details. Just ping me!" (Emphasis added)

I note that, in his September 15, 2011 report, Mr. Mandel states: "This investigator became involved because Mr. Tuvell escalated the finding of Ms. Due's investigation." (IBM 11147) This is not true, as Mr. Mandel was clearly involved before Ms. Due made her findings. The company's failure to ascertain Mr. Mandel's involvement in Ms. Due's deliberative process indicates that the company failed to comply with best practices when it selected him to review her findings.

Mr. Mandel was assigned to be the investigator and take a fresh look at Ms. Due's findings. The Open Door policy is an appeal process that is designed for an aggrieved employee to have a member of management review a finding that he/she wants independently reviewed – not rubber stamped. To be "objective," as the policy states, the person involved in the appeal naturally cannot have been involved in the underlying decision.

As explained above, it is my opinion that IBM did not follow best practices to ensure that the investigation was independent and valid, because Mr. Mandel was assigned as the investigator

after having been directly involved in Lisa Due's finding that Mr. Tuvell subsequently challenged, on appeal, as being incorrect.

B. Mr. Mandel Was a Person Accused of Engaging in Wrongdoing

The company also failed to comply with best practices when it appointed Mr. Mandel to investigate Mr. Tuvell's Open Door complaints because Mr. Mandel was one of the persons whom Mr. Tuvell accused of wrongdoing.

The Open Door policy, under which Mr. Tuvell's August 18, 2011 and subsequent appeals and complaints were expressly filed (specifically, he invoked the Corporate Open Door option), requires that such complaint will be reviewed by someone who was not involved in the dispute at issue. However, as Mr. Tuvell's communications made clear, Mr. Mandel was a central figure named in his Open Door complaints, including each and every addendum. This disqualified him from acting as the impartial investigator, in both reality and perception.

Mr. Tuvell framed his initial Open Door filing as a complaint about a "Premeditated conspiracy of defamation, deceit/fraud and IIED (intentional infliction of emotional distress), with the aim of coercing me to resign -- or alternatively to fabricate false 'evidence against me' leading to 'dismissal for cause' -- all motivated by age discrimination. Said conspiracy against me (and presumably many other employees) has been secretly sponsored/supported by IBM at corporate level for years, in the sense of systemic, widespread coordination involving management/HR/Legal." (TUVELL 468) This is the first reference to Mr. Mandel as a person accused – he is part of HR.

More directly, on August 18, 2011, Mr. Tuvell asserted, "Thus I claim the whole C&A process in general, and Lisa Due and *Russell Mandel* in particular, knowingly foster[ed] a fraudulent and abusive hostile work environment." (TUVELL 609) (Emphasis added) Given these allegations, however speculative (though specifics were adduced too, and were the very reason I'm told that Mr. Tuvell chose the Corporate Open Door option), it was completely inappropriate to assign Mr. Mandel to spearhead an investigation which necessarily required an investigation of his *own conduct*.

On August 28, 2011, in an email to corporate executives, Mr. Tuvell again pointed out that Mr. Mandel was a party complained-of, and, therefore, could not investigate it. (TUVELL 744) Mr. Tuvell made it abundantly clear that Mr. Mandel was not an appropriate choice of an investigator, as he was specifically a "named party to the wrongdoing." He asked for an "independent body" to step in to investigate.

In an addendum to his complaint filed on August 28, in connection with the Corporate Open Door process, Mr. Tuvell added another claim involving Mr. Mandel. That is, Mr. Tuvell asserted that the company's delay in investigating his complaint, and even responding promptly to its submission, was based on his STD status – disability. (TUVELL 753) Indeed, *it was Mr. Mandel* himself who informed Mr. Tuvell that he would not be contacting Mr. Tuvell to investigate his complaints because he was on STD leave. Again, Mr. Mandel was the alleged wrongdoer and, yet, the company failed to appoint another investigator to the matter.

Shortly thereafter, Mr. Tuvell again pointed out that Mr. Mandel was involved in the complained-of conduct and, therefore, could not impartially investigate it. He stated as follows:

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email (“no third-part[y] complaints” and “STD/leave disqualification from due process”), Russell Mandel has proven he is not qualified to hear my case, so somebody else needs to be appointed. But there is even an over-riding reason Russell cannot be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in “blackballing me,” and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: “The investigator, however, *must not* have been involved in the issue being investigated and, in IBM’s opinion, is sufficiently removed organizationally from the employee to provide objectivity.” (Emphasis added)

(TUVELL 1519)

Mr. Tuvell’s September 4, 2011 addendum to the Corporate Open Door also names Mr. Mandel, focusing on Mr. Mandel’s refusal to handle Mr. Tuvell’s appeal because Mr. Tuvell was on a leave of absence.

In addition, Mr. Tuvell complains about the company’s failure to take interim measures to separate him from his supervisor, Dan Feldman, who Mr. Tuvell complained about, while the investigation was ongoing. Mr. Mandel was involved in or was the sole decision maker in this regard. (TUVELL 719-20)

Additionally, following Mr. Mandel’s decision to cut off Mr. Tuvell’s access to the Netezza systems and company buildings, Mr. Tuvell complained that this was harassing and retaliatory. (TUVELL 867)

On September 21, 2011 Mr. Tuvell again attempted to use the Corporate Open Door process to seek a neutral review of the process and, specifically, evade Mr. Mandel’s involvement. (TUVELL 892) On that day, Mr. Tuvell sent an email to Richard Kaplan, Corporate Trust & Compliance Officer, with a subject line “There is a cancer growing on IBM.” He provided some background and relevant documentation, and explained that Mr. Mandel was the investigator but he was not handling the matter properly and was not to be trusted. (TUVELL 892) Again, the company failed to take appropriate action and, instead, it was Mr. Mandel who responded to Mr. Tuvell, stating that the complaint that he directed to Mr. Kaplan had been forwarded to him for handling. (TUVELL 892-93)

More allegations against Mr. Mandel followed. Mr. Tuvell named Mr. Mandel as a party in his September 22, 2011 addendum, citing Mr. Mandel’s actions in revoking his IBM badge, physical access to IBM buildings, denying him access to Netezza VPN and delaying the process. (TUVELL 883) Once again, in an October 22, 2011 email, Mr. Tuvell reiterated his

discrimination/retaliation complaints involving Mr. Mandel: “All of the retaliation by you/HR/Legal is of course in the context of my original complaint about age/sex/racial discrimination, which you/HR/Legal of course are trained to know about...” (TUVELL 918) The November 3, 2011 addendum also names Mr. Mandel as a party to the harassment, retaliation and discrimination by which he claimed he was victimized. (TUVELL 929, 930, 933-34, 936)

Mr. Tuvell made it abundantly clear in his complaints that Mr. Mandel’s conduct was directly in question and should have been investigated.³¹ He directly alleged that Mr. Mandel was a wrongdoer. Thus the company’s appointment of Mr. Mandel to investigate these complaints – and keep him in that position as time went on -- was contrary to best practices and its own policies. It defies reason to think that Mr. Mandel could impartially review grievances that were lodged against him. What is even more surprising is that the company had ample opportunity to reassign Mr. Tuvell’s complaints to another investigator, as the allegations continued to mount and it was known that Mr. Mandel’s actions were the source of many of Mr. Tuvell’s complaints.

I was struck by the similarity between this situation and *McLaughlin v. National Grid USA*, which illustrates the legal risks when an employer fails to investigate or fails to *properly* investigate a discrimination complaint using the right investigator. See “Legal Risks Associated with Conducting Improper Investigations.” (AWI Quarterly, Vol. 3, No. 1, Jan. 2012) (Julie A. Moore) In *McLaughlin v. National Grid USA*, the Court reasoned:

A jury might reasonably infer that an investigation was not independent or valid if it were conducted by a person who participated in one of the challenged decisions.

As I noted in my analysis of that case in the AWI peer-reviewed publication, the plaintiff argued that the investigation was “fraudulent,” that the investigator was “incompetent,” and that the investigator’s role in the investigation was “the equivalent of demanding that [he] find himself guilty of discriminatory activities.” Calling it a “ruse,” the plaintiff criticized National Grid for failing to expend the “time, manpower, or risk of an adverse finding that a legitimate investigation would have entailed.”

As explained above, it is my opinion that IBM did not follow best practices or its own policy to ensure that the investigation was independent and valid because Mr. Mandel was accused of wrongdoing and, thus, was one of the subjects of his own investigation.

³¹ In his January 22, 2012 “New Complaint,” Mr. Tuvell claims that the failure to provide him the transfer was a failure to reasonably accommodate him under the ADA. Mr. Mandel was charged with investigating that complaint. I am told that Kathleen Dean, IBM’s Health Services Advisor, testified at her deposition that Mr. Mandel was involved in the reasonable accommodation discussions, including at least one meeting that occurred on September 8, 2011. (IBM 3464-3465) Once again, this is an example of Mr. Mandel charged with investigating his own misconduct.

C. *The Company Failed To Comply With Best Practices When It Selected Mr. Mandel as Investigator Because He Lacked Knowledge and Capability to Apply Best Practices and Company Policies That Were in Place to Ensure Neutrality and a Fair Process*

Throughout the investigation, Mr. Mandel repeatedly failed to comply with best practices and misapplied or misinterpreted company policy in a way that was prejudicial to Mr. Tuvell. His failure to understand the policies at issue, or his unwillingness to apply them fairly to Mr. Tuvell, adds support to my conclusion that he was not a thoroughly trained, skilled and competent investigator – and, therefore, an inappropriate choice for handling Mr. Tuvell’s complaints. It is my opinion that the company failed to comply with best practices when it assigned him to investigate Mr. Tuvell’s complaints.

1. *Not Understanding Third Party Complaints*

One example of Mr. Mandel’s failure to understand, or failure to evenly apply, company policies is his instruction to Mr. Tuvell that the company does not accept “third party” complaints. This came in response to Mr. Tuvell’s report of what he believed to be a potentially discriminatory statement in an email written by a colleague, Gordon Booman: “I think the regression test you describe is Amal’s raison d’être...No?” Mr. Tuvell reported this statement to Mr. Mandel pursuant to the company’s policy, which instructs employees to “immediately report” any “unlawful or unethical situation.” Mr. Tuvell believed that Mr. Booman’s statement might constitute discrimination based on race, color, religion, national origin, or other protected category, based upon the company’s demonstrated propensity in this case to interpret language in a literal manner . (TUVELL 444) Mr. Mandel responded,

IBM does not accept third-party employee complaints. If [co-worker] Mr. Haldar has a complaint about his treatment, he should complain using the C&A process.

(TUVELL 442)

It is well settled that an employer *is* legally obligated to take all reported harassment and discrimination seriously, and to investigate such complaints. As SHRM notes in “Expert Provides Guidance on Investigation Dilemmas” (March 2010), “‘Courts give us some guidance on what needs to be investigated,’ ...such as allegations of harassment, discrimination, theft, substance abuse, violence, Internet/e-mail usage, insubordination, ethics and financial issues.” The reporter of the discrimination is irrelevant – the employer is on notice and must respond.

In its own policies, IBM expresses its commitment to investigate complaints of discrimination (to include harassment and retaliation) regardless of the source. For example, in its Business Conduct Guidelines, under section 2.1 “Raising Concerns and Reporting Violations,” IBM states, “If you know of, or have good reason to suspect, an unlawful or unethical situation or believe you are the victim of prohibited workplace conduct, immediately report the matter through any of IBM’s Communication Channels.” (IBM 2361) The company refers to the Open

Door policy contained in its Concerns & Appeals programs. Workplace discrimination and harassment are specifically included in describing the types of misconduct that should be reported. (IBM 2363)

As a high-ranking HR official, Mr. Mandel knew or should have known that an employer's acceptance of third-party complaints is completely consistent with best practices, state and federal authorities, and IBM's own policy, as quoted above. The MCAD, for example, states in its Sexual Harassment in the Workplace Guidelines: "Any employee who receives a complaint of sexual harassment or is made aware of any sexually harassing behavior, should immediately report it to the designated person(s) and/or the designated department." Employers need to be aware of any type of discrimination in the workplace, and it should take all reports seriously regardless of the source.

I note that, in the Business Conduct Guidelines, under section 3.5, IBM states, "Never make misrepresentations or dishonest statements to anyone. . . . Reporting inaccurate or incomplete information, or reporting information in a way that is intended to mislead or misinform those who receive it, is strictly prohibited and could lead to serious consequences." (IBM 2367). Thus, to the extent that Mr. Mandel's representation to Mr. Tuvell that IBM does not accept third-party employee was inaccurate or incomplete, or reported in a way intended to mislead or misinform Mr. Tuvell, Mr. Mandel acted contrary to IBM's policies.

I am told that Lisa Due, who apparently has received training from Mr. Mandel, testified in her deposition that IBM accepts and investigates third party complaints of possible discrimination.

2. *Failing to Interview Mr. Tuvell While He Was on STD*

Another example of Mr. Mandel's failure to properly apply company policy is his response to Mr. Tuvell's August 18th Open Door complaint. On August 25,³² Mr. Mandel responded to Mr. Tuvell's Open Door filing on behalf of the company. He wrote: "I do not plan on discussing your concerns directly with you until you return from Short Term Disability, so you may concentrate on your health improving." (TUVELL 745) Mr. Mandel's decision in this regard indicates that he was not fully apprised of the company's Open Door policy, which is expressly available to all employees, including those who are on short-term disability.

The Open Door policy specifically states, under its Employee Eligibility section (2.1), that "All regular full-time and part-time employees, supplemental employees, employees on a leave of absence... are eligible to use the Open Door process." (TUVELL 2561)

Mr. Tuvell protested this decision, to no avail. On August 30, Mr. Mandel reiterated his position in another email, stating: "I am simply not going to discuss with you the concerns you raised while you were out on STD since you are not supposed to be working during this time." He also advised Mr. Tuvell that he was working on the investigation, but just would not be speaking directly with Mr. Tuvell while he was out on leave.

³² The policy states that the company will normally respond within two (2) days. Mr. Mandel claims that the delay in responding to Mr. Tuvell was due to Mr. Mandel's vacation. Ordinarily, it is best practice to assign someone to handle complaints when the assigned individual is on vacation.

Mr. Tuvell continued to object to Mr. Mandel's misapplication of the Open Door policy. On September 4, he filed an addendum to his Open Door complaint, focusing on this issue. In it, Mr. Tuvell emphasized that the Corporate Open Door has been "the main audience for [his] Complaint all along," and he reiterated his distrust for Human Resources "for very good reasons." He states that the C&A policy explicitly states that employees "on leave" are fully eligible to participate in the C&A process.

Mr. Tuvell wrote to Mr. Mandel about this issue again on October 18, but it was not until November 7, 2011 that Mr. Mandel finally reached out to Mr. Tuvell with an offer to interview him. Mr. Mandel only then indicated that he would like Mr. Tuvell's input so that he could complete his investigation. (TUVELL 962) It is to be noted that Mr. Mandel had already completed all his other interviews, and even formulated the conclusions of his investigations, by September 15.

3. *Failing to Appreciate the Timeliness Requirement in the Policy*

Mr. Mandel's nearly three-month refusal to work with Mr. Tuvell to resolve the complaint was contrary to the Open Door policy itself, which pledges that complaints will be handled "in a timely fashion," which usually means "30-60 business days." (TUVELL 2561) Mr. Tuvell made his desire to resolve the matter expeditiously quite plain, explaining in an email to Mr. Mandel that his disability was related to the unresolved complaint. Mr. Tuvell vociferously repeated that he was ready, willing and able to do his part to reach a prompt resolution. The fact that he was on STD did not bar him from doing this, as he was well enough to communicate with the company during his absence and, in fact, made great efforts to do so.

One of the hallmarks of an effective investigation is promptness, and the delay Mr. Mandel caused flies in the face of this premise. As well-trained and knowledgeable investigators know, "an employer should be able to demonstrate that it took reasonable steps to begin and complete an investigation as quickly as practicable after learning of a complaint." See *Workplace Investigations: Understanding Standard Practice*, by Michael A. Robbins and Julie B. Yanow,³³ CA Labor & Employment Bulletin (June 2010). To be sure, "promptness" is determined on a case-by-case basis, as warranted by the facts. But here, the fact is that Mr. Mandel's justification for the delay was not warranted by the policies or circumstances at issue.

4. *Chastising Him For Availing Himself of the Corporate Open Door Process*

Another example of Mr. Mandel's failure to apply company policies fairly and properly is apparent in an August 30, 2011 email, in which Mr. Mandel instructs Mr. Tuvell to communicate his concerns about the investigative process "through the appropriate IBM channels." He did not mean the various avenues available in IBM's C&A process. Rather, he stated that Mr. Tuvell should be communicating with him "alone" since he was the investigator. In fact, he told Mr. Tuvell that he was "disturbing senior IBM executives" who were not involved in the process. He

³³ Mr. Robbins is President of AWI, and Ms. Yanow is a member of the Board of Directors.

directed him to stop sending any emails, directly or with a “cc,” to the senior executives. (TUVELL 1518)

It is important to note that Mr. Mandel’s email was written in response to Mr. Tuvell’s August 30, 2011 communication to the company’s corporate office, regarding the company’s response to his Corporate Open Door complaint. Mr. Tuvell was eligible to use this process because it is open to all regular and part-time employees, *including employees on a leave of absence*. In accordance with the policy, Mr. Tuvell had given management an opportunity to resolve his concern. His correspondence on August 30 was pursuant to the policy direction that, if the employee has given management an opportunity to resolve the complaint and is unsatisfied, the employee must contact the next level of management or the first level of management *not involved in the issue*.

Obviously, Mr. Mandel *was* involved in the issue. Consequently, under the Open Door policy, Mr. Mandel should not have been the person assigned to handle the matter. Additionally, the policy *explicitly* states that IBM has Open Doors to the corporate office. The corporate office includes senior executives. The policy says that concerns directed to the corporate office will be acknowledged by the Corporate Employee Relations Special Programs staff.

In short, Mr. Tuvell was doing exactly what the policy instructed. He was communicating “through the appropriate IBM channels,” as set forth in the company policy. Mr. Mandel’s response, that Mr. Tuvell should not be contacting the corporate office, is directly contrary to the policy.³⁴

A trained investigator is well aware of the risks associated with limiting an individual’s ability to use complaint mechanisms that are available pursuant to policy. Inconsistent application of policies can easily be seen as retaliatory, especially where the employee is complaining about discrimination (including retaliation), as Mr. Tuvell was doing. Mr. Mandel’s failure to understand this elementary principle is a sure sign that he was a poor choice of investigator.

In fact, in “Don’t Let Dormant Policies Lie” (July 2007), SHRM notes, “Inconsistent enforcement of company policies is practically an invitation for claims of discrimination under state and federal anti-bias laws.” Discussing this principle, SHRM cites *EEOC v. Kohler Co.*, 335 F.3d 766 (8th Cir. 2003), where evidence that the employer inconsistently enforced its policies to the detriment of the employee supported the jury’s finding that the employer retaliated against the employee for filing a claim of discrimination.

5. *Denying Mr. Tuvell Access to Company Systems*

What is more, this was not the only action Mr. Mandel took to restrict Mr. Tuvell’s access to the company’s official complaint mechanisms. In September, Mr. Tuvell’s access to the company’s Netezza VPN via Juniper Network Connect system in Marlboro was cut off. (TUVELL 860-61) In an email to Mr. Mandel, Mr. Tuvell stated that he could not log in to Netezza and asked if he was being blacklisted. (TUVELL 860) Mr. Mandel responded that Mr. Tuvell had no need to

³⁴ I note that the company changed this policy in 2012, limiting the ability of employees to reach out to the corporate office. But this exchange took place in 2011. The policy language quoted above, therefore, was applicable.

access heritage Netezza systems while he was out on STD. (TUVELL 860) Thereafter, Mr. Mandel further cut off Mr. Tuvell's electronic access by eliminating his access to LotusNotes and w3, which affected Mr. Tuvell's access to IBM worldwide. (TUVELL 1432-1433) This was one of the many complaints that Mr. Tuvell lodged through the Open Door and that was not investigated, as discussed elsewhere in the report.

The point here is that Mr. Mandel exhibited yet another failure to correctly apply company policy to Mr. Tuvell. Mr. Tuvell expressly *did* have a need – and a right – to use the company's official channels of communication. In fact, the company's policy dealing with discrimination issues expressly state that the Corporate Door is open and that one channel of communication available to all employees is "Lotus Notes" – the same program Mr. Tuvell was no longer able to use.

In addition, Mr. Mandel had a hand in disallowing Mr. Tuvell's IBM badge to allow him access to IBM buildings. (TUVELL 883)

My opinion is further buttressed by IBM's own policy language:

Threats or acts of retaliation or retribution by any manager or other supervisory personnel against employees *for use of IBM's communications channels* or appeals process will not be tolerated by the company; such conduct, when determined to have occurred, will result in discipline.

One of the most important tasks for a trained investigator is to communicate that retaliation is absolutely prohibited. Mr. Mandel, in direct contradiction of company policy and the prohibition on retaliation, prohibited Mr. Tuvell from using IBM's communication channels – including restricting his ability to walk in the front door of the company buildings. This is a plain violation of company policy and further indication that he should not have acted as investigator in this case.

6. *IBM Knew or Should Have Known that Mr. Mandel Had a History of Failing to Conduct Prompt or Neutral Investigations, Contrary to Policy*

There may be circumstances where an employer unwittingly engages an apparently well-credentialed investigator,³⁵ who turns out to be a sham. This is not one of those cases. Mr. Mandel apparently had a history of conducting investigations that were not prompt and that were one-sided investigations. In 2011 and 2012, when the Tuvell investigation was underway, IBM knew or should have known about this history.

Indeed, when Mr. Tuvell filed his complaint, the company had all the information necessary to be aware that Mr. Mandel was not an investigator who conducted prompt or neutral investigations. On or around June 13, 2008, IBM assigned Mr. Mandel to investigate a

³⁵ I have no knowledge of Mr. Mandel's training, education or experience in HR or conducting investigations and, therefore, cannot comment on his qualifications at this time.

complaint by then IBM employee James Castelluccio of age discrimination. Mr. Mandel did not conclude that investigation and inform Mr. Castelluccio of the finding until August 11, 2009 -- *over one year later*. This could hardly be considered prompt.

With regard to neutrality, an investigation that fails to include an in-person or telephonic interview with the complaining party (irrespective of the documentation provided by him/her) defies what can properly be considered as neutral. The Tuvell investigation was concluded prior to December 23, 2013, which is the date that the United States District Court for the District of Connecticut issued an order precluding the admission of Mr. Mandel's Open Door investigation report in Mr. Castelluccio's case. Even without the direct benefit of that order, IBM had all the information it needed to be reach the same conclusion the Court reached:

Although the open door investigation purports to have determined whether Mr. Castelluccio was treated fairly, it represents only the findings and conclusions of IBM, as opposed to Mr. Castelluccio's account of the circumstances surrounding his termination. This was not an investigation conducted by a neutral party; rather, one conducted by Mr. Mandel, who selected whom to interview and what evidence to consider.

Castelluccio v. Int'l Bus. Machines Corp., 3:09CV1145 TPS, 2013 WL 6842895 (D. Conn. Dec. 23, 2013)

Apparently, it was Mr. Mandel's practice to conduct investigations without ascertaining the complainant's side of the story, which is contrary to best practices and policy. In Section 2.7 of the Open Door policy, entitled "The Investigation," the policy states that "the investigator should interview both the employee initiating the Open Door and his/her management." (TUVELL 2562) A review of the Castelluccio investigative file would have illustrated that Mr. Mandel made his decision in that case without the benefit of Mr. Castelluccio's input. So, it should have come as no surprise to IBM when the same thing happened to Mr. Tuvell. And indeed, the same thing did happen. Time and again, Mr. Mandel interfered with Mr. Tuvell's right to communicate with the company and to participate in the investigation. This right was provided to Mr. Tuvell and other IBM employees by the company's own policies. Mr. Mandel had an obligation to uphold those policies, and to apply them fairly, in the course of his investigation.

Here, the documentation speaks volumes -- Mr. Mandel's report was final long before he even offered to open a dialogue with Mr. Tuvell. Moreover, although Mr. Mandel's September 15, 2011 report indicates that Mr. Tuvell had been interviewed in connection with it, he did not in fact invite Mr. Tuvell for an interview until November 7, 2011. In an email that day to Mr. Tuvell, Mr. Mandel extended the opportunity to meet, "in case you have anything to add to the various Lotus Notes I have received from you."

Here, the obvious warrants special emphasis: Mr. Mandel did not extend this "opportunity" until *after* he had finalized his written report on September 15, a report in which he states that he "had" interviewed Mr. Tuvell. Mr. Mandel's only verbal interaction with Mr. Tuvell at that point was on July 1, wherein I am told that Mr. Mandel began to appreciate the complexity of it.

At that point, according to Mr. Tuvell, the two agreed that Mr. Tuvell would provide a “long-form” complaint before the two met again.

It appears that in this case, as in the *Castelluccio* matter, Mr. Mandel failed to take seriously his obligation to consider the complainant’s side of the story and otherwise give the complainant a voice.

7. *Failing to Treat the Complaining Party and Accused Equally*

I also note another instance where Mr. Mandel failed to abide by policy and give Mr. Tuvell a fair opportunity to participate in the investigation – and to treat all persons involved in that process in a uniform manner. It is evident that Mr. Mandel provided Dan Feldman with the opportunity to review his September 15, 2011 report of the investigation and make corrections. (IBM 10268-69, 10274-75) Mr. Tuvell had no such opportunity.

In concluding that the company failed to follow best practices in selecting Mr. Mandel as an investigator, I considered AWI’s “Guiding Principles for Conducting Workplace Investigations,” (1st revision, July 2013), which states:

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer’s policies, standards, ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent and to reach reasoned conclusions based on the information gathered.

It is my opinion that the company failed to comply with best practices when it selected Mr. Mandel as investigator. Mr. Mandel had a history of failing to comply with best practices and policies when conducting investigations. It is in large part due to Mr. Mandel’s role in this investigation that Mr. Tuvell was not afforded a fair and impartial process.

D. The Company Failed to Comply with Best Practices Because it Insisted on Using Mr. Mandel as an Investigator Notwithstanding Mr. Tuvell’s Clear Assertion That He Did Not Have Faith in the Integrity of Any Process Spearheaded by Mr. Mandel

Not only must an investigator have the actual ability to be impartial but, in addition, the investigator must be perceived by the parties as impartial and unbiased for the investigation process to be considered fair and impartial.

In its prefatory statement to its “Guiding Principles for Conducting Workplace Investigations,” (1st revision, July 2013), the Association of Workplace Investigators (“AWI”) states:

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer’s policies, standards,

ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent and to reach reasoned conclusions based on the information gathered.

This best practice is drawn from one of the fundamental premises of due process. That is, an adjudicatory process, formal or informal, is only effective if the parties who are subject to that process believe it is fair.

Mr. Mandel's involvement in the complained-of events, and his failure to fairly apply policies and best practices during his investigation, was not lost on Mr. Tuvell. In fact, Mr. Tuvell vehemently petitioned for a different investigator, over and over. Mr. Tuvell clearly stated that he did not believe that the processes offered to him were fair. In turn, the company should have responded.

In fact, the *reason* Mr. Tuvell initiated the Corporate Open Door complaint, as opposed to a "regular" Open Door, was that he did not believe Mr. Mandel could provide a fair and impartial review of Ms. Due's decision. It appears that one event that contributed to Mr. Tuvell's conclusion early on was Mr. Mandel's refusal to accept his third party complaint related to Gordon Booman's email. Mr. Tuvell asserted Mr. Mandel's refusal to accept that complaint meant one of two things: either he did not know that he was required to do so under the applicable policy, or, he was not applying that policy fairly to Mr. Tuvell. In either case, Mr. Tuvell pointed out to the company that Mr. Mandel was "corrupt," "incompetent," and "unqualified to be the head of C&A."

Mr. Tuvell's words were clear and unambiguous. He considered Mr. Mandel to be tainted and lacking in objectivity due to the various words and actions that he personally heard and to which he was otherwise privy. He had no confidence in Mr. Mandel from that point forward. (TUVELL 619) It is difficult to reconcile the company's decision to direct Mr. Tuvell's Corporate Open Door complaints to Mr. Mandel with the fact that these complaints were so clearly triggered by Mr. Tuvell's lack of faith in Mr. Mandel. Mr. Tuvell reiterated his vote of no confidence in Mr. Mandel's neutrality as a decision maker again and again yet, with each new complaint, IBM continued to maintain Mr. Mandel's assignment as the investigator.

For example, on August 25 when Mr. Tuvell first learned that his request for a neutral review through the Open Door procedure led right back to Mr. Mandel, he responded as follows:

This is ABSOLUTELY UNACCEPTABLE. The very REASON I'm on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse (IIED) that is being heaped upon me by Dan Feldman, and yourself, and everybody else who has touched this case to date. And you know it. The ONLY way for me to recover sufficiently to return to work from STD is to settle this case. Properly and correctly.

(TUVELL 744-45)

Again, on August 18, Mr. Tuvell made it known that he did not believe the Mr. Mandel was an appropriate person to provide him with a fair and impartial process:

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email (“no third-part[y] complaints” and “STD/leave disqualification from due process”), Russell Mandel has proven he is not qualified to hear my case, so somebody else needs to be appointed. But there is even an over-riding reason Russell cannot be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in “blackballing me,” and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: “The investigator, however, must not have been involved in the issue being investigated and, in IBM’s opinion, is sufficiently removed organizationally from the employee to provide objectivity.”

(TUVELL 1519)

To be sure, the company’s failure to follow best practices clearly resulted in escalation of the dispute. Mr. Tuvell perceived the company’s decision to hand over his Open Door complaint to Mr. Mandel as a further act of hostility. Further, Mr. Tuvell communicated this perception to the company. His communication should have triggered, at a minimum, a re-evaluation of Mr. Mandel’s role as investigator. It did not.

Mr. Tuvell went down many different roads looking for a process that he perceived as fair. Unfortunately, each road led to Mr. Mandel, the perceived source of unfairness. Indeed, with each decision Mr. Mandel made that impacted the investigation, Mr. Tuvell communicated to the company his perception that the decision was tainted by Mr. Mandel’s role in the complaint and, therefore, constituted retaliation. Tracking the history of Mr. Tuvell’s complaint reveals a pattern: action by Mr. Mandel, followed by Mr. Tuvell’s objection to Mr. Mandel’s role as investigator, leading to an escalation of the dispute.

For example:

- On August 25, 2011, Mr. Mandel advised Mr. Tuvell: “I do not plan on discussing your concerns directly with you until you return from Short Term Disability[.]” (TUVELL 745)

This led to an escalation of the dispute:

- On August 28, 2011, Mr. Tuvell communicated to the company his belief that the delay in investigating his complaint was based on his STD status - - disability. He alerted the company to his perception that this inaction violated IBM’s policy of “prompt” action in response to employee problems, constituted a hostile workplace because of his disability (which

was the reason for his STD status), and constituted “illegal (ADA) disability discrimination (because of STD status).” (TUVELL 753)

Here again, Mr. Tuvell’s communication should have triggered, at a minimum, a re-evaluation of Mr. Mandel’s appropriateness as investigator. It did not. And, within days, the pattern repeated again:

- On August 30, Mr. Mandel advised Mr. Tuvell: “I am simply not going to discuss with you the concerns you raised while you were out on STD since you are not supposed to be working during this time.” Mr. Mandel also instructed Mr. Tuvell not to contact the corporate offices, notwithstanding the Open Door policy language upon which Mr. Tuvell relied.

In response,

- On August 31, Mr. Tuvell objected to Mr. Mandel’s position as investigator: “Concerning your personal involvement in the investigation: My objection to this has already been stated in multiple places, with reasons (another one of which occurs in this very note of yours, see next paragraph), and I hereby reassert my position.” (TUVELL 821)

Mr. Tuvell’s communication should have triggered, at a minimum, a re-evaluation of Mr. Mandel’s role. But the company failed to comply with best practices and, as a result, the dispute escalated further:

- On September 4, 2011, Mr. Tuvell sent another appeal through the Corporate Open Door process, objecting to Mr. Mandel’s refusal to handle his appeal because he was on a leave of absence.

It is best practice for an employer to respond when the accused or the accuser indicates a belief that the process is unfair. The goal of this best practice is not to appease employees or to give them control over the process. Rather, the underlying rationale is that providing employees with a grievance process that they perceive to be fair is essential to the effectiveness of that process. When the parties know they have been heard, the decision will have weight: “Information gathered in response to an even-handed and impartial investigation will not only yield the best information and evidence, but it will also enhance both the investigator’s and the employer’s credibility.” *See* SHRM “Conducting Workplace Investigations” (November 2011).

By failing at every turn to listen to Mr. Tuvell’s complaint, conduct an impartial investigation, and take appropriate action, the company fueled Mr. Tuvell’s growing concerns that he was being subjected to retaliatory treatment for having lodged his complaint. In PretiFlaherty’s Employment Law Update “Retaliation in Discrimination Matters: A View From the MCAD” (November 13, 2013), Former MCAD Commissioner Walter Sullivan writes:

Having spent seven years as Commissioner of the Massachusetts Commission Against Discrimination, I have come to the realization that the charge of

retaliation can lead to big and perceived problems for an employer. I am only going to discuss two of [the] ways that retaliation can impact an employer. The first relates to an employee who brings a sincere claim of discrimination, harassment or failure to accommodate to the employer's attention... An employer who is confronted with a claim of discrimination, harassment or failure to provide a reasonable accommodation by an employee **should listen to the employee's complaint, conduct a prompt impartial investigation, and take appropriate action.** Following these three steps should reduce the chance of a claim of discrimination and retaliation being filed, and, if filed, increases the chances the charge of retaliation will also be dismissed.

(Emphasis supplied) See <http://pretiemployment.blogspot.com/2013/11/retaliation-in-discrimination-matters.html>.

Here, the company was well aware that the only process it afforded Mr. Tuvell was a process he deemed to be unfair. Yet IBM failed to even acknowledge this point. This flies in the face of best practices.

The selection of Mr. Mandel to investigate Mr. Tuvell's complaints created a stalemate. It was an impasse that could have been broken if the company had appropriately responded to Mr. Tuvell's expressed concerns that the deck was stacked against him. But the company missed opportunity after opportunity to respond to Mr. Tuvell's perception of unfairness. With each missed opportunity, the dispute escalated. The company's selection of Mr. Mandel as investigator was contrary to best practices and IBM's own policies – completely unreasonable in the context of work place investigations.

VI. THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES AND ITS OWN POLICY BY NEGLECTING TO INVESTIGATE ALL COMPLAINTS OF DISCRIMINATION AND RETALIATION AND, FURTHER, BY FAILING TO THOROUGHLY INVESTIGATE WHEN IT DID

Best practices and IBM's policies called for the company to conduct a prompt, thorough and impartial investigation of each and every one of Mr. Tuvell's claims of employment discrimination— both those involving allegations of discrimination and those alleging other types of discriminatory conduct such as retaliation. In this case, *no investigation whatsoever* was conducted into the vast majority of Mr. Tuvell's claims. In other instances, only wholly inadequate, perfunctory steps were done to investigate. As explained below, IBM's "investigations" were flawed in virtually every respect, contrary to its policies and best practices.

Immediately upon receiving a complaint, an employer should assess whether the complaint alleges a violation of law or policy. Obviously, this requires the employer to identify the legal or policy issues in question. Identifying the relevant legal and policy principles is essential because these principles provide the framework for the investigation that will follow. See AWI's Guiding Principle No. 1.

A related consideration is whether the complainant is in a protected category. *See* AWI’s Guiding Principle No. 1. If the complainant is in a protected category, the employer is on notice that the investigation may require it to consider whether the complained-of conduct was motivated by the complainant’s protected status. To that end, it is best practice to select an investigator who has the knowledge and skill to recognize when a complaint includes claims of discrimination. It is axiomatic that an employer’s obligation to investigate alleged workplace misconduct properly extends to all forms of employment discrimination, which may include alleged harassment and/or other forms of discriminatory conduct that may violate company policy and/or the law.³⁶

The EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (1999), underscores that harassment claims are a type of discrimination claim, where the alleged harassing conduct is based on a category protected by law under anti-discrimination statutes (“Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes.”) *See* <http://www.eeoc.gov/policy/docs/race-color.html#VA2>.

The EEOC goes on to state, in its “Questions and Answers About Race and Color Discrimination in Employment” (May 2006):

COMPLAINTS OF DISCRIMINATION

What should an employer do when someone has complained about race/color discrimination?

Employers should investigate and seek to resolve any complaint of discrimination by an applicant or employee. Employers should remember that, in all cases, it is unlawful to retaliate against a worker who complains of discrimination or participates in an investigation of discrimination.

(Emphasis in original) *See* http://www.eeoc.gov/policy/docs/qanda_race_color.html

Likewise, the EEOC emphasizes an employer’s duty to investigate complaints of discrimination in its “Questions and Answers About National Origin Discrimination” (December 2002):

What should an employer do when someone has complained about national origin discrimination?

³⁶ This is because sexual and other forms of harassment are a form of employment discrimination actionable under anti-discrimination laws, as made clear by the United States Supreme Court in cases such as *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex;” “courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”)

Employers should investigate and seek to resolve any complaint of discrimination by a worker. Employers should remember that in all cases, it is unlawful to retaliate against a worker who makes a complaint of discrimination in the workplace.

(Emphasis in original)

See <http://www.eeoc.gov/policy/docs/qanda-nationalorigin.htm>

As applied to this case, I am told that Lisa Due testified in her deposition that she is fully aware of IBM's duty to fully investigate and remediate all complaints of discrimination, which is consistent with IBM's policies.

In the "About Your Job" June 2009 policies, IBM outlines its harassment, EEO, and workplace diversity policies. (TUVELL 5881) The company maintains a policy entitled "Equal Opportunity." In this policy, the company states that discrimination and harassment based on gender, disability, age, race, and other protected characteristics are not allowed in all terms and conditions of employment, which includes transfers, promotions, hiring, firing, etc. Any employee who believes he/she has been a victim of any violation of IBM's equal opportunity policies is advised to talk to a manager or bring the complaint through any of IBM's communication channels. The investigation that IBM is committed to undertaking is outlined in its "Harassment and Inappropriate Behavior" policy. Communication channels include the C&A process.

Given the potential legal ramifications of failing to address complaints that include discrimination, harassment or retaliation, the importance of correctly defining the scope of the investigation cannot be over-emphasized. As explained further below:

One of the investigator's key jobs will be to make sure that he or she understands the scope of the investigation. This can be done in several ways. Generally, a conversation with the person requesting the investigation will give the investigator an idea of the matters to be included. Additionally, at the outset of the investigation the investigator should review any relevant threshold documents. Generally, this can include a written complaint, if there is one, relevant company policies and documents from personnel files, among other things.

See Workplace Investigations: Understanding Standard Practice, by Michael A. Robbins and Julie B. Yanow, CA Labor & Employment Bulletin (June 2010).

With a solid understanding of the issues to be investigated, the employer should engage in taking appropriate steps in furtherance of an effective investigation and preparing a strategy. *See AWI Guiding Principle No. 4.* This requires the employer to consider what documents should be obtained, including emails, policies and procedures. Another important initial determination is who will be interviewed, in what order and for what purpose. General lines of inquiry should also be outlined in advance before interviews begin, as it is crucial to ensure that all the

important questions are asked and that information critical to the resolution of the dispute is obtained.

Following best practices in planning the investigation will prepare the investigator to gather the relevant evidence. Failure to do this planning will impact the investigation itself. Indeed AWI's Guiding Principle No. 7 explains the seemingly obvious principle that, "[t]he investigator should gather relevant evidence;" however, if the scope of the investigation has not been properly determined, or if effective lines of questioning were not developed, the investigator could easily overlook relevant evidence.

Documenting the investigation is another crucial step. *See* AWI Guiding Principle No. 9. The purpose of documenting each step of an investigation is to "create a reliable record of the evidence the investigator relied upon in reaching findings."

Once interviews have been conducted and relevant evidence obtained, the investigator must make credibility determinations as necessary. When there are conflicting versions of the same event, or shifting explanations for a manager's decision, the investigator will have to weigh each party's credibility.³⁷

Turning to investigative findings, it is well settled that "[a]n investigator's findings should be consistent with the scope of the investigation as defined by the employer." This best practice harkens back to the investigation planning, where the investigator must identify and define the scope of the investigation. As AWI explains, "In many workplace investigations, the appropriate standard of evidence will be 'the preponderance of the evidence' standard; namely, whether after weighing all of the evidence, it is more likely than not that the alleged conduct occurred." *See* AWI Guiding Principle No. 10.

Finally, AWI's Guiding Principle No. 11 addresses the elements of a written report. A report should include a statement of the scope and issues. The investigative process should be explained, and the evidence relied upon by the investigator should be discussed. The report should identify the policies at issue, the evidentiary standard used, and a statement of the findings and conclusions.

³⁷ Some guidelines for credibility assessments include:

1. Inherent plausibility: Is the testimony believable on its face? Does it make sense?
2. Demeanor: Did the person seem to be telling the truth or lying?
3. Motive to falsify: Did the person have a reason to lie?
4. Corroboration: is there witness testimony (such as testimony by eye-witnesses, people who saw the person after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
5. Past record: did the alleged [wrongdoer] have a history of similar behavior in the past?

"Workplace Investigations: Understanding Standard Practice," by Michael A. Robbins and Julie B. Yanow,³⁷ CA Labor & Employment Bulletin (June 2010).

I reviewed the steps taken to address Mr. Tuvell's many complaints. First, the company failed to properly address and investigate Mr. Tuvell's claims of discriminatory and retaliatory treatment in each and every instance. Further, I found that the company did not follow best practices for thorough investigations with regard to the areas it did investigate, particularly on drawing and reporting conclusions.

C. *The Company Failed to Follow Best Practices and Its Internal Policies in that It Did Not Acknowledge and Investigate Mr. Tuvell's Discrimination and Retaliation Claims*

I analyzed the three investigations the company undertook: (1) Lisa Due's investigation and June 30, 2011 report ("Due investigation"); (2) Mr. Mandel's review and Open Door investigation, and September 15, 2011 report (Mandel Investigation #1); and (3) Mr. Mandel's investigation of Mr. Tuvell's failure to hire claim, and February 1, 2012 report (Mandel Investigation #2). The complaints leading to each of these investigations unequivocally raised claims of discrimination and retaliation. Further, the company identified the three foregoing investigations as investigations they conducted, specifically, into discrimination and retaliation. (Supplemental Responses of the Company to Plaintiff's First Set of Interrogatories, dated November 13, 2013, #14)

My analysis of the complaints and conclusions indicate quite clearly that IBM failed to investigate (or thoroughly investigate), document or report Mr. Tuvell's discrimination and harassment claims. Throughout his submissions, he raised discrimination based on age, gender, race, and disability. Indeed, with regard to the June 10, 2011 demotion, he even used the word "adverse action," clearly invoking the employer's duty to investigate, analyze and make a determination as to whether this adverse action was taken on the basis of any articulated protected category. It did not.

He also claimed retaliation many times, in many ways. As a few examples, he alleged that the company retaliated by refusing to remove him from Dan Feldman's direct supervision, by cutting off his access to company systems, and by cutting off his badge access so he could not even enter the buildings. But the company never investigated, documented or reported on these claims.

The investigations did not reach even the minimal standards of thoroughness. The proper questions were not asked and the relevant evidence was not gathered. The company's reports are incomplete, at best, as they fail to take into account conflicting evidence and contain no conclusions on the issues clearly raised.

4. *Lisa Due, Investigation #1, and June 29, 2011 Report*

Mr. Tuvell undeniably raised discrimination in his first complaint to the company and, undeniably, the company failed to address it. This failure meant that relevant evidence went ignored. It also meant that potentially discriminatory conduct went unabated and unremediated.

Mr. Tuvell made his claim of discrimination explicitly in his June 15, 2011 email to Dan Feldman, Kelli-ann McCabe, and Diane Adams. In that writing, he expresses his opinion that his

demotion was due to gender and age, with tentative hints of race discrimination and retaliation. He states that Sujatha Mizar, who replaced him, lacked the educational degrees and relevant work experience that he had, and thus had inferior qualifications. He expressly pointed out that Ms. Mizar was someone of a different gender and one who is much younger than him. He stated that the adverse job action created a “prima facie case (and even stronger) for discrimination on the grounds of both age and sex...” (TUVELL 265-266)

It appears the scope of Ms. Due’s investigation consisted of three (3) issues: Whether Mr. Tuvell was “defamed” in connection with the Excel graphics issue, whether he was demoted because of it, and whether he acted inappropriately by taking papers from Dan Feldman and becoming angry about it. Significantly, the scope *did not* include the discrimination or retaliation claims that Mr. Tuvell raised – and it should have.

Failure to investigate Mr. Tuvell’s claim that the demotion was discriminatory undermines the validity of this investigation, especially where he inarguably identified it as such as early as June 10, 2011. This triggered the company’s legal duty to assess the conduct in light of the law. Not only that, but Mr. Tuvell directly pointed the company to its own policy identifying actions like this as potentially discriminatory acts. In his June 10 email, he wrote that he considered the transfer a “demotion” specifically because IBM considers an “undesirable reassignment” to be a tangible adverse employment action, according to its “Harassment and Inappropriate Behavior” policy. (TUVELL 66)

With this information, best practices for conducting investigations required Ms. Due to refer to that policy, carefully examining it. *See* AWI’s Guiding Principle No. 1. I see no evidence in her notes that she did examine the policy but, if she did, she entirely failed to collect the evidence necessary to make a determination under the applicable standards.

Mr. Tuvell identified the kinds of evidence that would be relevant, in his June 15, 2011 email describing why he believed the demotion to be discriminatory. He explained that he was replaced with an employee who lacked the educational degrees and relevant work experience that he had and, thus, had inferior qualifications. He expressly pointed out that Ms. Mizar was someone of a different gender and one who is much younger than him. He explicitly stated that the company could have replaced him “with another person in his group (Ashish Deb), who also has a PhD, is male, and is over 40.” He stated that replacing him with Mr. Deb would have made more sense from a business standpoint because the work Mr. Deb was doing was more compatible with Mr. Tuvell’s background. He expressly stated that the adverse job action created a “prima facie case (and even stronger) for discrimination on the grounds of both age and sex...”

To the extent Ms. Due did collect evidence about the adverse action, though undocumented, she apparently did not analyze, and certainly did not report, that evidence. Her notes leave the question of discrimination hanging. I learned that when Ms. Due interviewed John Metzger, Mr. Feldman’s supervisors, the questions were framed: “*Is the move to Michael’s team a demotion? Did he discuss with Walt? Preferred by Walt?*” (IBM 11133) It was also acknowledged that Sujatha Mizar was “*not as senior skilled.*” (IBM 11138-39) (Emphasis added)

Although she noted this evidence, Ms. Due seemingly never ascertained its relevance and never applied the evidence to the question at hand. Moreover, she failed entirely to take the next step, that is, to ask and answer whether the reasons for the adverse action were discriminatory reasons.

Further, Ms. Due did not use the evidence she did gather to reach reliable and consistent conclusions. For example, Ms. Due apparently testified in her deposition that she reviewed Mr. Knabe’s email in which he acknowledged raising his voice to Tuvell. Instead, she also apparently acknowledged that she relied on a report from another witness, Mr. Lubars, to conclude that Mr. Knabe did *not* raise his voice. This is quite difficult to reconcile with her further deposition testimony, when she apparently admitted that, when she interviewed Mr. Knabe, he confirmed that he raised his voice corroborating his own previous email. Finally, while it appears that Ms. Due may have also admitted at her deposition that, in the end, she did conclude that Mr. Knabe raised his voice, she also testified that she does not recall reporting this conclusion to anyone.

Ms. Due begins her June 29, 2011 email/ report by stating, “As you know, I was asked to conduct an investigation into concerns raised regarding your treatment by your manager, Mr. Daniel Feldman. I have completed my investigation and found that there was insufficient factual information to support your allegations.” (IBM 8283) In the conclusion, Ms. Due indicates that there was “not really anything for defamation,” and performance management needed to take place, there was no problem, and Mr. Tuvell was free to look for another position if he did not want to be in his existing role. (IBM 11145)

I was advised that Ms. Due testified at her deposition that she admitted recognizing, but failing to investigate, Mr. Tuvell’s claims of discrimination and, further, did not seek to determine whether Mr. Feldman had a history of engaging in inappropriate comments based on age or gender or had a history of engaging in age or gender discrimination. This admission confounds me, as Mr. Tuvell very clearly and unequivocally claimed “discrimination” in his many complaints.

Accordingly, it is clear that Ms. Due acted in violation of company policy and best practices by failing to investigate the discrimination complaints.

5. *Mr. Mandel, Investigation #2, and September 15, 2011 Report*

Mr. Tuvell appealed Ms. Due’s findings pursuant to the Open Door policy in the Concerns & Appeals process, by approaching Russell Mandel, the presumed independent investigator who would review the first investigation that was undertaken to determine if the right result was reached. As Mr. Tuvell expressed, he believed her conclusion was “utterly wrong,” and he looked forward to an appellate review. As explained below, that did not happen.

Early on, on July 1, 2011, an approximately twenty-five (25) minute telephone call took place between Mr. Mandel and Mr. Tuvell. This was Mr. Tuvell’s first opportunity to tell his story directly to Mr. Mandel. Had there been any question whatsoever as to whether discrimination was on the table – and there should have been no question -- Mr. Tuvell made it clear to Mr. Mandel what was at issue. In a follow up email of the same date, he stated:

I'm a man, far over 40, Caucasian. Sujatha [Mizar] is a woman, far under 40. Sujatha is also well-known to be very much under-qualified compared to me. (For example, I have a PhD, she doesn't, not to mention my decades of much more relevant experience). This amounts to a prima facie case for discrimination on the bases of age, sex and race. This is especially so since Dan [Feldman] has refused to state to me any reason whatsoever (much less coherent/truthful) for the demotion.

(TUVELL 718) What is more, as early as July 1, Mr. Tuvell explicitly told Mr. Mandel that he perceived Dan Feldman's conduct to be retaliatory.

Mr. Mandel did not pursue the claims of discrimination or retaliation in any of his investigations and, worse, he took no steps to prevent the complaint from escalating – and it did. Indeed, Mr. Mandel played a central role in the evolution of the complaint to include additional claims of retaliation and discrimination. For example, the July 6 so-called “Lazy” email, (IBM 11162), which resulted in a counseling email from Mr. Feldman to Mr. Tuvell, should have made it absolutely clear to Mr. Mandel that continued interaction between Mr. Tuvell and Mr. Feldman would be the source of further complaints. Mr. Tuvell advised Mr. Mandel that he perceived Dan Feldman's conduct in that incident to be continued retaliation. But Mr. Mandel did nothing. And again, when Mr. Tuvell was disciplined on August 3, 2011, he advised Mr. Mandel that he perceived this as further retaliation by Mr. Feldman. But Mr. Mandel, again, did nothing; and again, the complaints from Mr. Tuvell grew.

Indeed, Mr. Mandel not only failed to fulfill his investigative charter, but his unresponsiveness predictably had a snowballing effect on the original complaint, causing it to grow exponentially. After the July 6 and August 3, 2011 interactions between Mr. Tuvell and Feldman, and Mr. Tuvell's repeated but unheeded requests to be removed from Mr. Feldman's direct line of command, Mr. Tuvell's health deteriorated. On August 15, 2011, IBM approved his request for STD leave.

And so there began a new chapter in the complaints of discrimination and retaliation; this time, to include disability. Like the last chapter, this one also went unheeded by the company officials charged with investigating it.

Having no faith in Mr. Mandel, on August 18, 2011, Mr. Tuvell attempted to escalate his complaints, from the company's regular Open Door process to its Corporate Open Door process, which policy specifically allowed for. In this new complaint, Mr. Tuvell explicitly repeated his claims of discrimination and retaliation, and expressed that Russell Mandel could not neutrally review his concerns of age, gender, and possibly race discrimination and retaliation. Although the policy allowed for the removal of a complaint to be reviewed by the corporate office, Mr. Tuvell was not allowed to invoke this process -- his August 18 complaint *about* Mr. Mandel was referred to Mr. Mandel for processing.

In conjunction with the August 18 Corporate Open Door complaint, Mr. Tuvell also sought review of his claims at that time via the company's Confidentially Speaking process. Contrary to that policy, too, no one connected with that program responded. Indeed, at no time did the company even acknowledge the filing of the Confidentially Speaking complaint, which no doubt was received. (IBM 8905).

Mr. Mandel's response to the escalation of the original complaint, once again, had a snowballing effect. Mr. Mandel advised Mr. Tuvell that he would not be working with him to resolve the complaints until Mr. Tuvell returned from STD. Mr. Tuvell perceived this as a failure to "promptly" address his complaints as required by the policy, as well as an adverse action based on his disability and retaliation. In short, he considered it to be further discrimination and further retaliation.

Mr. Mandel's ensuing "investigation" caused the complaint to grow further still. Mr. Mandel cut off Mr. Tuvell's access to part of the company's computer system;³⁸ Mr. Tuvell perceived this as retaliation and he informed the company of it in a September 4 addendum to his complaint. Mr. Mandel apparently also had a hand in the decision to cut off Mr. Tuvell's badge access to the IBM physical properties; Mr. Tuvell perceived this as additional retaliation, and so advised the company and Mr. Mandel on September 14.

Mr. Mandel responded to the Corporate Open Door complaints in a report, seemingly distributed to no one else, dated September 15, 2011. In it, he implicitly acknowledged that age discrimination and retaliation were issues. He acknowledged that Mr. Tuvell complained that IBM wanted to terminate him because he was "too old." He referenced Mr. Tuvell's claim that he was "the oldest employee at Netezza." He referenced Mr. Tuvell's claim that, because of his age, Mr. Knabe and Mr. Feldman treated him unfairly and demoted him.

Although he apparently recognized the claims of discrimination, Mr. Mandel failed to consider or analyze them. For example, it appears that he failed to consider Mr. Tuvell's qualifications in comparison to those of Sujatha Mizar, who replaced him, or their relative age and gender. Nor did he determine whether Mr. Feldman had a history of engaging in inappropriate comments based on age or gender or had a history of engaging in age or gender discrimination. Thus while acknowledging the claim of age discrimination, clearly, Mr. Mandel did not investigate it or offer a conclusion as to its merits.

In addition, Mr. Mandel acknowledged that Mr. Tuvell complained that he was retaliated against for complaining about age discrimination and other improper treatment. His report addressed the question of whether Mr. Tuvell was unfairly asked to provide a project plan for his last three weeks prior to his leave, and unfairly given a warning letter. He acknowledged that Mr. Tuvell claimed Mr. Feldman threatened him and improperly disciplined him with a warning letter. He acknowledged that Mr. Tuvell complained that Lisa Due engaged in the cover up of Mr. Feldman's and Mr. Knabe's actions by her conclusion that insufficient facts supported Mr. Tuvell's claims.

³⁸ I am told that others may have been involved as well.

Once again, Mr. Mandel saw some of the facts that should have triggered an analysis of the retaliation claims, but he failed to conduct that analysis. That is, when he examined the questions of unfairness, Mr. Mandel did not collect evidence necessary to determine whether the alleged unfair decisions were in response to Mr. Tuvell's earlier complaints of discrimination. Without investigating this question, he could not properly assess whether the decisions were unfair in a *discriminatory* or *retaliatory* manner. Therefore, Mr. Mandel's September 15 conclusion that no unfairness occurred failed to satisfy the company's obligation to investigate.

Further, the September 15, 2011 report did not even contemplate the additional claims of discrimination and retaliation that Mr. Tuvell added on during Mr. Mandel's own investigation. Mr. Mandel did not assess *his own decision* to wait until Mr. Tuvell returned from STD to investigate was retaliatory. He did not assess whether *he violated* any of the company's policies relative to STD or FMLA or the ADA/M.G.L. ch. 151B (on disability accommodation and leave of absence). He did not gather evidence pertaining to whether *his own decision* was based on Mr. Tuvell's disability, perceived disability or STD or FMLA status.

Mr. Mandel's September 15, 2011 conclusions were drawn without interviewing Mr. Tuvell, as required under the company's C&A policy. He also did not convey his findings to Mr. Tuvell at that time, presumably waiting for Mr. Tuvell to return from STD. As a result, the complaints continued to compound. On September 22, for example, Mr. Tuvell dubbed the interference with his ability to access company buildings as "anti-ADA" behavior, emphasizing once again his claims of retaliation and discrimination.

In a further complaint on November 3, 2011, Mr. Tuvell could not have more clearly asserted his claim that he was being subjected to age, gender, sex, race and disability discrimination and harassment while he was on STD leave. He called it "unrelenting, unrepentant retaliation" which began "immediately after, and precisely because of, the filing of [his] discrimination-rooted C&A complaint." (TUVELL 934) He further stated that he "emphatically raised to everyone's attention the discriminatory nature of [his] complaint, emphasizing front-and-center that discrimination was a foundation centerpiece of [his] Theory of the Case." (TUVELL 936) He again reiterated that Mr. Mandel's refusal to process his C&A complaint while he was on leave amounts to discriminatory and retaliatory treatment. (TUVELL 936)

Despite the fact that his lengthy report was already written and finalized – and dated September 15, 2011 -- Mr. Mandel didn't offer to interview Mr. Tuvell until November 7, and in a November 17, 2011 telephone call purported to do that. At that time, Mr. Mandel reviewed the issues under investigation and asked Mr. Tuvell if he had anything to add. Mr. Tuvell did have something to add – "dozens and dozens," I am told he said, particularly his additional complaints of discrimination and retaliation. According to Mr. Tuvell, Mr. Mandel responded that he refused to investigate anything else because "nothing else was eligible for investigation by IBM." (TUVELL 1238) This refusal was contrary to best practice and company policy, which both mandate investigating any and all claims of discrimination and retaliation.

The findings Mr. Mandel shared with Mr. Tuvell were unchanged by the events occurring between September 15 and November 17, 2011. The report was already inadequate to address the complaints that had been raised as of September 15, as discussed above. And it did not even

attempt to address the additional claims that were raised between that date and the time when the decision was conveyed to Mr. Tuvell.

Turning to Mr. Mandel's November 25, 2011 one-sentence finding of his review of Ms. Due's investigation, that report was similarly non-responsive. It in no way addressed Mr. Tuvell's claims of retaliation and discrimination. In fact, this investigation led to nothing more than a blanket adoption of Mr. Due's factual findings, which indisputably did not include any examination or analysis of discrimination or retaliation:

As we discussed, I have investigated your concerns, and determined that management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you. While I know this is not the answer you had hoped, please accept my best wishes for the future.

(TUVELL 1292) Mr. Mandel apparently did not consider, because Ms. Due did not consider, whether the June 10 adverse action was discrimination based on age, gender or possibly race.

In sum, Mr. Mandel's investigations were insufficient to satisfy the company's obligation to investigate discrimination and retaliation. He rubber-stamped Ms. Due's findings, which failed to address discrimination or retaliation. His September 15, 2011 report on his Open Door investigation revealed that he did not investigate discrimination based on age, gender, sex, disability or race, in any way. Nor did he investigate or make any findings on any of Mr. Tuvell's claims of retaliation. Specifically with regard to his failure to address retaliation, I am again struck by the impact the company's choice of Mr. Mandel to investigate the Corporate Open Door complaints had on the overall investigation. In fact, the evolution of the Open Door complaints to include additional claims of retaliation and discrimination can be directly attributed to Mr. Mandel's role as the investigator.

6. *Mr. Mandel, Investigation #3, and February 1, 2012 Report*

On January 22, 2012, Mr. Tuvell filed another Open Door complaint, alleging that he was subjected to disability discrimination, including a denial of reasonable accommodation, and retaliation when the company failed to hire him for the Software Engineer position he applied for, posted as SWG-0436579. (TUVELL 1051) Mr. Tuvell explicitly claimed that the stated reason for his rejection -- that he availed himself of STD benefits -- constituted discrimination based on his disability and was retaliatory. (TUVELL 1057) The email from Mr. Kime stating this as the primary reason was clear evidence that should have been examined.

Further, Mr. Tuvell alleged that the company ran afoul of the ADA, citing that “reassignment to a vacant position” is a form of accommodation specifically contemplated under that statute. (IBM 1103-1105) He goes on to state that he is “qualified” for the position. He even points out language from the EEOC’s Enforcement Guidance on the ADA that it is the employer’s – not the employee’s– responsibility to notify an employee with a disability about vacant positions that may be appropriate.

Mr. Mandel’s February 1, 2012 report framed the issue as a complaint by Mr. Tuvell that he was “unfairly denied an opportunity as a result of his being disabled.” Significantly, no mention is made of Mr. Tuvell’s claim of retaliation. No mention is made of any other issue about which Mr. Tuvell complained, such as the denial of reasonable accommodation.³⁹ (IBM 11026-27)

On February 9, 2012, Mr. Tuvell contacted Mr. Mandel, stating that he had reapplied for the position to work under Chris Kime, hiring manager for the position, and noted that the position had been reposted and was identical to the former opening for which he was rejected. (TUVELL 1206) Further, he noted that, as of January 25, he was on unpaid leave and not STD (which was the reason he was rejected the first time). (TUVELL 1206) Mr. Mandel did not respond.

Mr. Tuvell received feedback in the form of a 2-paragraph email on February 14, 2012, wherein Mr. Mandel advised Mr. Tuvell of the following:

I have looked into the complaint you made that you were denied an opportunity as a result of being disabled. Having done so, I can advise that the decision was not because of a disability.

(TUVELL 1213) He makes no mention of the February 1, 2012 written report. It is unknown if Mr. Mandel looked into Mr. Tuvell’s rejection for the first or second posting or both.

D. The Company’s Failure to Apply Best Practices With Regard to Mr. Tuvell’s Claim of Disability Discrimination and Retaliation Meant that the Complaints Were Not Fully Investigated, the Relevant Evidence Was Not Gathered, and the Conclusions Reached Were Not Based on Credible Evidence Analyzed for Factual and Logical Consistency

In my opinion, the company’s failure to comply with best practices and its own policy was egregious with regard to the third investigation – the only one that did purport to investigate discriminatory treatment. This investigation, conducted by Mr. Mandel, addressed Mr. Tuvell’s assertion that the company discriminated against him on the basis of disability/STD and failed to accommodate him when it denied his application for a transfer to be a Software Engineer for Chris Kime’s team.

³⁹ See also FN 31 regarding Mr. Mandel’s involvement in the reasonable accommodation discussions, which also should have disqualified Mr. Mandel from investigating this decision, as he participated in its making.

Analyzing each step taken, it is clear that IBM ran afoul of expectations in the following ways:

- Mr. Mandel failed to accurately define the scope of the investigation;
- Mr. Mandel was an inappropriate investigator;
- Mr. Mandel did not consider all of the relevant evidence;
- Mr. Mandel did not adequately weight the evidence, assess credibility and reconcile inconsistencies; and
- Mr. Mandel’s conclusion was factually and logically untenable.

I started by defining the scope of the investigation (AWI Guiding Principle No. 3), with reference to Mr. Tuvell’s January 22, 2012 Corporate Open Door complaint. In it, he states that he is a person who had been on STD, and was seeking a transfer via the GOM process. He stated that he applied for SWG-0436579, which had already been posted for two months, since September 26. (TUVELL 1051) He explained the process, saying that his first interview was with Mr. Kime and, after that went well, he interviewed with two (2) other people, Harvey Harrison and Brian Doherty. (TUVELL 1052) He described the discussions during the interview process. He concluded by explicitly stating that the reason for his rejection -- that he availed himself of STD benefits -- constitutes discrimination based on his disability. (TUVELL 1057) Further, he advised that he received additional feedback from Dan Feldman as to why he was rejected, and he characterized this reason as “incompatible” and “irreconcilable” with the first reason, given Mr. Kime. He also stated that the denial was a failure to reasonably accommodate him.

Therefore, the scope of the complaint should have consisted of four parts: (1) did Mr. Kime deny Mr. Tuvell’s application for the transfer due to his disability/STD? (2) was Mr. Feldman’s second reason “incompatible” and “irreconcilable” with Mr. Kime’s reason for the denial?(3) was this disability discrimination because of a failure to accommodate? and (4) if Mr. Tuvell was denied based on disability, was this retaliation for availing himself of STD?

I compared this to the scope of Mr. Mandel’s investigation. The question, as Mr. Mandel framed it, was as follows: “Was Mr. Tuvell rejected for a position because he was on Shortterm (sic) Disability?” There was no mention of retaliation or failure to accommodate. Here, Mr. Mandel failed to comply with best practices because he failed to enter into the investigation with as solid understanding of the issues to be investigated. *See* AWI Guiding Principle No. 3.

Next, I assessed what documents, pursuant to best practices, might be relevant to the questions of whether the denial was related to disability, whether Mr. Feldman’s reason was inconsistent with Mr. Kime’s, and whether the decision was retaliatory. *See* AWI Guiding Principle No. 4. To define what evidence would be relevant, it is best practice to consider what is actually in dispute. Here, the dispute related to the reason Mr. Tuvell was denied transfer. Thus, the investigator should have considered who, within the organization, would be a possible witness regarding

whether the denial was based on disability, the compatibility of Mr. Feldman's and Mr. Kime's reasons, and the issue of retaliation.

Mr. Mandel did not apply best practices here, it appears, since the evidence he considered was limited to interviews with Mr. Feldman and Mr. Kime. Query whether Mr. Mandel explored whether Mr. Feldman had an ulterior motive for giving Mr. Kime a negative reference on Mr. Tuvell, as he indisputably was aware of his PTSD and was gunning for his termination shortly after learning it. (IBM 8689) What is clear is that Mr. Mandel certainly did not apply company policy, which required him to interview Mr. Tuvell. The Concerns & Appeals Process, section 2.7, states "the investigator should interview both the employee initiating the Open Door and his /her management." (TUVELL 2557-67) Nor did he did not interview anyone else "who may have relevant first-hand knowledge of the facts and circumstances...." as required by the policy.

Mr. Mandel also apparently failed to consider the nature of the allegations; it is best practice to consider this to properly identify the relevant evidence. Applying that best practice, Mr. Mandel should have reviewed policies and practices relating to job transfers, as well as any policies and practices which might restrict an employee's ability to transfer. And, he should have reviewed all information relating specifically to Mr. Tuvell's eligibility to transfer. Moreover, he should have reviewed policies relating to employees with disabilities and reasonable accommodation.

I looked at the voluminous trail of documents to ascertain what might be relevant and, therefore, what a neutral investigator should have considered. In doing so, I found evidence that is critical to understanding the company's practices relative to when employee misconduct reaches the level where the ability to transfer is limited. This evidence was relevant to the reason Mr. Tuvell was denied transfer, as well as to the validity of Mr. Feldman's statements in this regard and, in turn, Mr. Mandel's conclusions. Evidence relating to these issues existed but Mr. Mandel failed to consider it.⁴⁰

IBM's position is most interesting -- while alleging that the transfer did not happen because Mr. Tuvell's interactions with others made him unqualified, Mr. Tuvell was nonetheless invited back to continue to work with Dan Feldman. Either IBM somehow thought Mr. Tuvell was qualified to continue working under Mr. Feldman, despite his alleged misconduct and irrespective of Mr. Tuvell's PTSD being continuing triggered under Mr. Feldman, or it was keeping him under Mr. Feldman to punish him or force him to leave. (IBM 11143) The important thing is that IBM avoided an obvious possible accommodation -- the transfer.

Turning to the evidence that Mr. Mandel should have considered begins with IBM's policy on restrictions on employees' ability to transfer. Mr. Mandel failed to consider the company's

⁴⁰ Once again, the reason Mr. Mandel failed to consider the relevant evidence can be traced to the company's faulty decision to appoint him to investigate this claim in the first place. Much of the relevant evidence was in the possession of Ms. Due and Mr. Mandel. Indeed, a great deal of it is actually contained within Mr. Mandel's own September 15, 2011 report from the second investigation. It is quite significant that, here again, Mr. Mandel had critical information and, as such, he was a witness. Obviously, he did not interview himself. The company's failure to comply with best practices regarding selection of the investigator meant that, here again, the investigation was far from complete, thorough or impartial.

practice for limiting transfers, which was *contained in his own report*. In the September 15, 2011 report, Mr. Mandel explains:

It is common practice in IBM to provide warning letters when employees exhibit this type of behavior. In more serious cases warning letters include restrictions such as no salary increase, no promotions and no job movement unless in the best interest of the company for a specified period of time, as well as impact on salary, PBC assessments, etc.

(IBM 11163) Accordingly, in “more serious cases” of employee misconduct, the company can issue “warning letters [to] *include restrictions* such as . . . *no job movement* unless in the best interest of the company for a specified period of time[.]” (Emphasis supplied) Mr. Mandel neglected to consider this evidence.

Additionally, Mr. Mandel overlooked relevant evidence pertaining to how this practice was applied to Mr. Tuvell. There were several sources of evidence on this issue.

First, there is email correspondence between Mr. Feldman and Mr. Tuvell on July 6, 2011 establishing that, as of that date, there were no conditions on Mr. Tuvell’s ability to transfer to a different job. Mr. Feldman referred to three “behavior issues” he had discussed with Mr. Tuvell, in particular:

Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes)

Conduct in the workplace that creates, encourages or permits and inappropriate work environment;

Failure to follow management direction (for example refusing to develop a plan for how you would spend your time prior to your medical leave).

(TUVELL 000310)

Mr. Tuvell responded with follow up questions about this conduct. Mr. Feldman then explained that the purpose of the communication was “*in no way*” to discipline Mr. Tuvell but, rather, to clarify expectations so that discipline would not later be necessary:

The point of bringing these expectations to your attention verbally was to ensure that you are aware that they are fundamental conditions of employment for all IBM employees. I sent them to you in writing at your request. Doing so is in no way an accusation that you have violated them. As I understand it, this is the process that we would follow with an employee who appeared to need education about these issues. If you are unsure about what

any of them mean, I am happy to discuss this with you and, I believe, our HR professional would be happy to do so, too.

(TUVELL 000309)

Therefore, to the extent Mr. Mandel relied on Mr. Tuvell's conduct through July 6, 2011 to reach the conclusion that the transfer was properly denied, this reliance was misplaced. The record is clear -- as of July 6, 2011, no conditions whatsoever were placed on Mr. Tuvell's ability to transfer.

The second piece of relevant evidence pertaining to any prior conditions limiting Mr. Tuvell's ability to transfer within the company is the August 3, 2011 formal warning letter. That letter states that Mr. Tuvell has violated the requirement of "[p]roper workplace behavior;" specifically,

- Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes); specifically, your email of 20 July 2011 addressed to Garth Dickie and me
- Conduct in the workplace that creates, encourages or permits and inappropriate work environment;

The letter goes on to state:

The following applies to you as a condition of your continued employment at IBM:

Immediately cease engaging in the behavior outlined above and any behavior or actions which are, or could be interpreted as, inappropriate, unprofessional or otherwise violating company policy, such as the Business Conduct Guidelines;

Read the IBM Business Conduct Guidelines and certify that you understand these guidelines and agree to abide by them. You must confirm this to me in a LotusNote within five business days of the date of this letter; approved time off for medical leave and vacation will not be counted as business days for the purposes of such confirmation.

Provide status updates and work deliverables as requested by your management.

The letter closes by explaining that future violations of any condition of employment may lead to immediate dismissal without benefit of a further warning. (TUVELL 000315)

Therefore, to the extent Mr. Mandel's conclusion that the transfer was properly denied relied on Mr. Tuvell's conduct through August 3, 2011, this reliance was misplaced. As of August 3, 2011, the company had placed explicit conditions on Mr. Tuvell's continued employment, but it had not limited or conditioned his ability to transfer to a different job.

The third piece of relevant evidence pertaining to conditions limiting Mr. Tuvell's ability to transfer within the company is Mr. Mandel's own September 15, 2011 report. In this report, Mr. Mandel refers to the August 3, 2011 letter cited above and, specifically, calls it a formal "Warning Letter *Without Restrictions*."⁴¹ (IBM 11163) (Emphasis supplied)

Reading this evidence together, as Mr. Mandel should have but failed not do, three (3) facts are crystal clear:

1. Mr. Tuvell was not disciplined as a result of the July 6, 2011 email.
2. The company's practice pertaining to warning letters, "[i]n more serious cases," is to explicitly include restrictions. Those restrictions may include limits on salary increase, promotions and "*job movement unless in the best interest of the company for a specified period of time.*" The restrictions may also impact on salary, PBC assessments or other things.
3. Mr. Tuvell's August 3 warning was a "Warning Letter *Without Restrictions.*" As such, although the company has a practice of placing such restrictions on employees in more serious cases, it chose not to place any restrictions on Mr. Tuvell.

These facts can lead to only one conclusion: as of August 3, 2011, Mr. Tuvell was free to transfer to another position within IBM.

Mr. Mandel also overlooked additional relevant evidence pertaining to the company's stated position on Mr. Tuvell's ability to transfer within the company. This evidence was contained in Ms. Due's investigation and Mr. Mandel's review of that investigation, as well as various emails.

First, at the end of her investigation, Lisa Due advised Mr. Tuvell that he was free to apply for other positions within IBM, and she referenced the Global Opportunity Marketplace ("GOM") job system and provided him with the website address. (IBM 8283)

Second, manager John Metzger recognized that Dan Feldman and Walt Tuvell did not work well together and said there may be an opportunity for Mr. Tuvell to work with another manager. (IBM 11133) In fact, in email dated June 29, 2011 from Mr. Tuvell to John Metzger and others,

⁴¹ I am told that Mr. Feldman testified in his deposition that, at IBM, there are two kinds of warning letters, and that the one he gave Mr. Tuvell on August 3, 2011 did not have the effect of precluding a transfer. I am told that he testified that this is the type of letter that HR suggested, and that he did not advocate for the restrictive type at the time.

Mr. Tuvell expressly asked Mr. Metzger for help in finding a job at Netezza. Mr. Metzger never responded that Mr. Tuvell was ineligible.

Third, Dan Feldman apparently suggested, in November 2011 and again in January 2012, that Mr. Tuvell explore opportunities on GOM. (TUVELL 1522, 1022)

Fourth, on November 25, 2011, Mr. Mandel himself indicated his approval of Ms. Due’s suggestion that Mr. Tuvell should consider transferring when he fully endorsed Ms. Due’s findings and conclusions. (TUVELL 1292)

At no time did Lisa Due, John Metzger, Dan Feldman or Russell Mandel retract the encouragement given to Mr. Tuvell about transferring. At no time did anyone inform Mr. Tuvell that his ability to transfer had been limited or restricted in any way. The company consistently took the position that a transfer was desirable.

This evidence was absolutely critical to a reliable consideration of the reasons the company later advanced for denying Mr. Tuvell’s transfer. Mr. Tuvell’s complaint, alleging that denial of the transfer was discriminatory and retaliatory, explicitly required Mr. Mandel to weigh the company’s shifting reasons for denial. Mr. Tuvell’s complaint was based on the very first reason he was given; this related to Chris Kime’s statement that he discussed Mr. Tuvell’s situation with his up-line management and said that he could not move forward with taking Mr. Tuvell directly from being on short-term disability, as it would receive “very close scrutiny from the Operations people” in the organization. Chris Kime further stated that there was a second concern about hiring him -- “about the work being to your liking and keeping you as a productive and satisfied member of the team.” (TUVELL 1018)

This decision came on January 6, 2012. After Mr. Tuvell challenged this decision and asserted that an adverse job action based on his STD status was discriminatory, potentially on the basis of disability, perceived disability, STD status, FMLA status, among other things, the company gave other reasons:

Date	Witness	Explanation
Jan. 16, 2012	Dan Feldman	He stated that he was not hired “because the team did not think [he was] the right fit for the position. HR reviewed the situation with the hiring manager to ensure that the decision was made for legitimate business reasons.” (TUVELL 1022)
Feb. 1, 2012	Russell Mandel	Mr. Mandel found that Mr. Tuvell was not rejected because he was on short-term disability. He wrote that Mr. Kime stated that he rejected Mr. Tuvell for the Software Developer position “because of feedback from Mr. Feldman that stated that Mr. Tuvell did not take management direction well and had trouble teaming with others.” Parenthetically Mr. Mandel noted, “Mr. Feldman confirms that this is the feedback he provided Mr. Kime and is consistent with the findings of a previous investigation into Mr. Tuvell’s performance done by

		the current investigator.” (IBM 11026-27) Further, Mr. Mandel noted “unprofessional conduct” that Mr. Tuvell was cited for on July 5, 2011 was an obstacle for him.
Feb. 1, 2012	Russell Mandel	Mr. Mandel explained that a decision to hire Mr. Tuvell for another position could not be made without a PBC (Personal Business Commitment, an element of Performance Evaluation management). (IBM 11026-27)
Feb. 17, 2012	Russell Mandel	“The performance issue you and I discussed previously is the inability to work cohesively with other members of a team. In addition to unprofessional conduct, for which you were cited on July 5, 2011, this issue was considered to be a potential obstacle to being successful in the role to be filled.” (TUVELL 1217; 1219-20)

Ultimately, Mr. Mandel concluded that the denial was not discriminatory because it was actually due to the performance issues, including “...unprofessional conduct, for which [he was] cited on July 5, 2011[.]”

Mr. Mandel made this decision without the benefit of, or in defiance, the relevant available evidence. In particular, he apparently did not consider Mr. Feldman’s July 6, 2011 communications with Mr. Tuvell, relating to the July 5 event. The email record from that day, discussed in detail above, clearly shows that none of the behavior at issue violated the company’s policies relating to:

Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes)

Conduct in the workplace that creates, encourages or permits and inappropriate work environment;

Failure to follow management direction (for example refusing to develop a plan for how you would spend your time prior to your medical leave).

(TUVELL 000310) Indeed, Mr. Feldman explained explicitly that Mr. Tuvell’s behavior on July 5 *did not* violate the company’s policies.

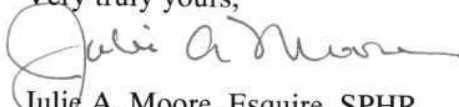
Consequently, Mr. Mandel’s decision on February 17, 2012 was not thorough, because he did not account for this first-hand evidence that made his own conclusion unsupported by the evidence. It also appears that Mr. Mandel failed to consider that Mr. Tuvell’s ability to transfer was not limited by the company at any time. Finally, it appears that Mr. Mandel entirely overlooked the fact that the company consistently encouraged Mr. Tuvell to transfer, through

Ms. Due, Mr. Feldman, Mr. Metzger and even Mr. Mandel himself. It is my understanding that, even in her deposition, Mr. Due described the desire to have Mr. Tuvell transferred as "genuine."

Mr. Mandel did not accurately define the scope of the investigation; did not consider all of the relevant evidence; did not adequately weigh the evidence; and did not assess credibility and reconcile inconsistencies. As a result, it is my opinion that Mr. Mandel's conclusion was factually and logically untenable, running afoul of best practices and IBM's policy. My conclusion that Mr. Mandel did not conduct a thorough investigation is intertwined with my earlier finding that the company failed to apply best practices when it selected Mr. Mandel to investigate these complaints.

Please let me know if I can provide additional information to you.

Very truly yours,



Julie A. Moore, Esquire, SPHR

Exhibit 116



**Employment
Practices Group**

Defining workplace rights

By Electronic and U.S. Mail

October 6, 2014

Robert S. Mantell
Rodgers, Powers & Schwartz LLP
111 Devonshire Street, 4th Floor
Boston, MA 02109

Re: *Walt Tuvell v. International Business Machines, Inc.*
Docket Number C.A. No. 13-cv-11292-DJC

Dear Mr. Mantell:

This report supplements the May 30, 2014 expert opinion report (“Report”) submitted in the above matter.

Since May 30th, I received additional documents that should be included in the listing contained on Pages 9-10 of the Report to include the following: Lisa Due deposition with exhibits, Russell Mandel deposition with exhibits, various documents produced by IBM relating to training (IBM 011375-011459).

Opinion (1) A. Failure to Mediate the Conflict with a Three-Way Meeting (Report pp. 46- 50)

At his deposition, Mr. Mandel opined that Mr. Tuvell’s request for a 3-way meeting with Mr. Knabe and Mr. Feldman was not an unreasonable request. (Mandel Depo., p. 33) Indeed, the facts reveal that Mr. Tuvell, Mr. Feldman and Mr. Knabe had a three-way meeting just a short time before the June 2011 incident. (Tuvell Depo. Vol. II, p 156; TUVELL000512 (“We need to have another 3-way talk”); TUVELL000475 n. 26¹) Accordingly, precedent exists for such meetings. These facts further buttress my opinion in this section.

No IBM policy exists to forbid three-way meetings. (Due Depo., p. 49)

Opinion (1) B. Failure to Implement Interim Measures (Report pp. 50-57)

At his deposition, Mr. Mandel offered a different reason as to why no interim measures were taken after Mr. Tuvell’s first complaint. He testified: “Because it’s standard procedure in IBM

¹Mr. Tuvell wrote, “It was the success of this three-way meeting that gave me some confidence that subsequent three-way meetings could be instrumental in resolving issues between myself and Fritz.”

that you're not supposed to retaliate or discriminate." (Mandel Depo., pp. 175-77) This explanation defies the reason for interim measures – to protect the complaining party so that no further harm can befall him or her. Employees are not supposed to discriminate or retaliate but, unfortunately, it happens. Employees must still be reminded of it and trained on it, among other things, and employers are obligated to appropriately respond to it. Among the responses to consider is the implementation of interim measures, which IBM failed to consider in this case.

Opinion (2) Mr. Mandel as Investigator (Report pp. 57-60)

I explained in the Report that an employer should carefully select the investigator in a particular case. I learned from Mr. Mandel's deposition testimony that *he* made the unilateral decision to be the investigator with no input from anyone else at the company. That is, he testified that he assigned himself the investigation into Mr. Tuvell's complaints. (Mandel Depo., p. 145) He was the decision-maker as to whether the appeal should or should not go to him. (Mandel Depo., p. 61) This is problematic where, as here, he is someone accused of lacking independence and, further, he is named as one of the wrongdoers.

Mr. Mandel testified that he told Mr. Tuvell that he is the "final escalation point within IBM regarding complaints." (Mandel Depo., p. 64) On its face, this is problematic – and it's incorrect. If a complaint involves Mr. Mandel or if otherwise there exists a conflict of interest or reason why Mr. Mandel should not be involved in the investigation, he clearly should not be the final escalation point. Further, he was wrong. The Corporate office was above him, and that is precisely where Mr. Tuvell directed his appeal, only to have it bounced back to Mr. Mandel for handling, much to his dismay.

Another issue relating to bias of Mr. Mandel is important to point out. Ms. Due testified that the company was aware, as of June 2011, that Mr. Feldman was "very concerned about being sued" and it was discussed that Mr. Tuvell had sued an employer previously. (Due Depo., pp. 122-25) Indeed, Ms. Adams in HR was the source of the information about Mr. Tuvell's alleged prior litigation. (Due Depo., p. 122) As the documents indicate, Ms. Due and Mr. Mandel clearly communicated at length about Mr. Tuvell's situation, and Mr. Mandel testified that he had read *all* of Mr. Mandel's complaint submissions.² (Mandel Depo., pp. 58, 73) For these reasons, Mr. Mandel surely was aware of Mr. Tuvell's alleged history and Mr. Feldman's concern. Consequently, Mr. Mandel, as a present, long-term (since 1977) IBM employee, had every reason to protect the company and find that no unlawful conduct took place, thus exonerating IBM rather than determining that Mr. Tuvell was treated fairly. In other words, if Mr. Tuvell

² Included in those submissions were two documents where Mr. Tuvell referenced prior litigation in which he was involved. The first document is TUVELL625 ("I did mention to you once that I'd been involved in a case of workplace harassment/defamation once before, through absolutely no fault of my own, extremely similar to the one that has now been inflicted upon me. . . . [This was mentioned] as a point of information that 'I know what I'm talking about', or as you said to me, 'you've seen this movie before' . . . "you asked if it happened in court (it didn't, it was an arbitration in a hotel room), if it was against an individual or a company (it was the company), and whether I won redress or not (yes I did). . . . And at the same time you told me about your experience of suing somebody. . .). A second document is TUVELL663 ("you pretended I had done something wrong by having mentioned to you, 3 weeks earlier. . . that I'd been involved in a lawsuit (at the arbitration level) involving defamation. . .).

might sue IBM at the conclusion of the investigation, then Mr. Mandel had a motive to conclude that Mr. Tuvell's complaints were unfounded.

Opinion (2) A. Mr. Mandel's Involvement in Ms. Due's Investigation (Report pp. 60-62)

Ms. Due's testimony at her deposition is relevant to this section.

Ms. Due testified that, in her investigation, she did not "interview" Mr. Mandel. Rather, she had a "briefing" with him. (Due Depo., p. 143) They had a discussion. (Due Depo., p. 143) During that briefing, Ms. Due and Mr. Mandel discussed that there was no need to place Mr. Tuvell in another role. (Due Depo., p. 146) Another time, Ms. Due was asked about Mr. Mandel's review of the case, and she responded, "I -- he should -- he had -- I briefed him on it. So not a full, you know, discussion. A briefing." (Due Depo., p. 172)

Despite her testimony that she and Mr. Mandel failed to have a "full" discussion about it, Ms. Due nevertheless had written, "Mr. Mandel may have all the information he needs," in the context of avoiding a full investigation upon appeal, and she referenced information provided in the discussion that they had (referencing Exhibit 13; IBM008474). (Due Depo., p. 172)

As noted in the Report at p. 61, in Ms. Due's August 18, 2011 note to Lynea St. Pier, Program Manager, Ms. Due wrote, "So you know, Mr. Tuvell did not agree with my findings approved by legal and Russ, then went out on STD." (Due Depo., p. 181; Due Exhibit 15) In her deposition testimony, however, Ms. Due backed away from that writing by saying, instead, that her findings were "approved by legal. I had briefed Russ..." (Due Depo., p. 182)

Significantly, Ms. Due testified that, on June 27, Mr. Mandel instructed her to contact Mr. Tuvell and tell him that, based on her investigation, she had no reason to conclude that he had been mistreated. (Due Depo., p. 145) Presumably this is an explanation of Ms. Due's note of her "briefing" with Mr. Mandel, which reads, "Tell the ee: manager/hr communicated complain (sic) re; (sic) weather (sic) tmistreated (sic), find no reason to conclude that."³ (IBM011054)

My conclusion that Mr. Mandel failed to be independent and unbiased as the appeal investigator is further buttressed by this additional testimony. His role as appeal investigator was tainted, thus rendering him a patently inappropriate choice to take a fresh look at the complaints. His involvement was contrary to best practices, IBM policies, and IBM's training materials (as described below).

³ Another example of the accuracy of those notes relates to Mr. Mandel's comments about fear. At his deposition, Mr. Mandel, when reviewing Lisa Due's notes of her meeting with him on June 27, 2011, admitted that it is possible that he said, "I prefer respect but fear is not a bad second choice." (Mandel Depo., p. 37; IBM 011054; Due Depo., Exhibit 21) He further testified that his mother used to say that expression to him. (Mandel Depo., p. 37)

Opinion (2) B. Mr. Mandel Was Disqualified From Investigating Because He Was Accused of Wrongdoing (Report pp. 62-65)

Mr. Mandel acknowledged in his deposition that it is not standard practice for a person to investigate allegations of impropriety lodged against him or her. (Mandel Depo., p. 64) He said that it was “unclear” whether an IBM policy exists suggesting that a third-party should investigate when the assigned/contemplated investigator is also the person accused of improper conduct. (Mandel Depo., pp. 64-65)

Indeed, Mr. Mandel testified that he had no discussions with anyone as to whether it would be appropriate for him to investigate Mr. Tuvell’s Corporate Open Door filing. (Mandel Depo., pp. 69-70) He took no action at any point to determine whether someone else should investigate Mr. Tuvell’s complaint. (Mandel Depo., p. 70)

This testimony further buttresses my opinions in this section. Additionally, Mr. Mandel’s obvious conflicts run afoul of IBM’s training materials, explained fully below. That is, the training documents state that one of the “key responsibilities” is the company’s obligation to “determine the most appropriate Concerns and Appeals channel to resolve the appeal request.” (IBM 011380) IBM is acknowledging that there must be the right person and process in place for the proper handling of critical issues such as allegations of discrimination. If no proper investigator could be found in-house, it was incumbent upon the company, consistent with its Corporate Open Door process, to bring in the proper outside investigator. In Mr. Tuvell’s case, the retention of an independent investigator was the only reasonable choice under the circumstances for the company to discharge its obligation to fully and fairly investigate the complaints of discrimination and retaliation.

Opinion (2) C.1 IBM Accepting Third Party Complaints (Report pp. 65-66)

In my Report, I cited Mr. Mandel’s statement that IBM does not accept third party reports. At his deposition, Mr. Mandel reiterated this blanket statement, and further stated that such policy is not in writing. (Mandel Depo., p. 55) Rather, he explained that it is a “fairly standard process” within IBM. (Mandel Depo., p. 55)

Yet when you offered an example about an employee complaining about a racist comment that was made by Employee A to Employee B, Mr. Mandel testified that the company *would* look into it. (Mandel Depo., p. 56) I find this perplexing, as he seemed to clearly understand the meaning of “third party complaint”, and admitted that third party complaints would be investigated.

Lisa Due testified that IBM does, indeed, accept and process third party complaints. (Due Depo., pp. 187-88) In fact, they could be escalated to her level depending on the situation. (Due Depo., pp. 187-88) The matter would go into the Integrated Services Team (“IST”), and a Case Manager would be assigned to do the investigation. (Due Depo., p. 189)

Moreover, IBM’s training materials encourage investigators to ascertain information from complaining parties about whether others may also be victims of unlawful conduct. In one of the

training documents, IBM states that the investigator should ask the complaining party if he or she believes that others have also been victimized by discrimination or retaliation and, if yes, the details of when and where. (IBM 011394) If the complaining party identified other victims, that would be considered a third-party complaint, triggering the company's duty to respond.

Regardless of whether a complaint is initiated by a first party or a third party, the fact remains that IBM's policies prohibit illegal discrimination and harassment. To the extent IBM is aware of illegal discrimination and harassment, it is required to remediate it. Therefore, whether a complaint is labeled a first-party or third-party complaint is immaterial.

Opinion (2) C.3 Mr. Mandel's Failure to Appreciate the Timeliness Requirements of IBM's Policies (p. 67)

To add to this section regarding time limits, I note that Mr. Mandel failed to appreciate IBM's policy that it will acknowledge complaints within two (2) business days. (Report, p. 6) Mr. Mandel testified at his deposition that no policy existed about acknowledging a complaint. (Mandel Depo., p. 57) Rather, he said it was only IBM's "practice" to try to get back to the employee within two (2) business days to advise that the company was aware of the complaint. (Mandel Depo., p. 57)

This testimony further buttresses my earlier opinion that Mr. Mandel lacks an appreciation for an employer's duty to be prompt and, further, to know and abide by internal policies that set forth specific deadlines.

Opinion (2) C.5 Mr. Mandel's Denial of Mr. Tuvell's Access to Company Systems (Report pp. 68-69)

I add in this section testimony from Mr. Mandel that IBM maintains no policy requiring access to IBM computer systems to be curtailed while someone is out of short-term disability leave. (Mandel Depo., p. 76) This fact further buttresses my opinion in this section.

Opinion (2) C.6 Mr. Mandel's History of Failing to Conduct Prompt or Neutral Investigations (Report pp. 69-71)

In the Report, I referenced litigation involving James Castelluccio and Mr. Mandel's improper handling of that investigation, as per the presiding federal court judge. One issue that I emphasized was that Mr. Mandel's investigation commenced on June 13, 2008, and Mr. Mandel failed to complete his investigative report until August 11, 2009 – about fourteen (14) months later. I opined that the Castelluccio investigation was not prompt, and that lack of adherence to policy and best practices should have alerted IBM that Mr. Mandel was not an appropriate investigator given his history.

Though the court decision said the date of the investigative report was August 11, 2009, I have since reviewed the Complaint filed in the United States District Court for the District of Connecticut. I learned that the report was dated August 11, 2008 – not 2009. According to the Complaint, the two-month investigation was concluded about five (5) weeks after Mr.

Castelluccio had left IBM and the finding was relayed in a two-sentence letter addressed to Mr. Castelluccio.

I note that IBM was on notice early on that Mr. Castelluccio challenged the termination decision, claiming it to be discriminatory. He filed a Charge of Discrimination with the New York State Division of Human Rights on November 17, 2008. His Complaint in federal court was filed on July 21, 2009. In paragraph 45 of the Complaint, Mr. Castelluccio criticized the Open Door Investigation and the determination that he had been treated “fairly” with respect to his termination.

While Mr. Mandel testified that he could not recall whether he was deposed in that case or what it was about, (Mandel Depo., pp. 8, 10-11), he was on the witness list and was expected to testify at trial, according to the Parties’ Joint Trial Memorandum.

Given that this matter was pending in litigation for close to three (3) years before Mr. Tuvell filed his internal complaint, IBM should have carefully scrutinized its Open Door practices, Mr. Mandel as an investigator particularly, and its termination decisions in light of complaints of discrimination.

Opinion (2) C.7 Mr. Mandel’s Failure to Treat the Parties Equally (Report pp. 71-75)

In my Report, I cited an instance where Mr. Mandel failed to abide by policy by not giving Mr. Tuvell a fair opportunity to participate in the investigation – and did not treat all persons involved in that process in a uniform manner. More specifically, I noted that Mr. Mandel provided Dan Feldman with the opportunity to review his September 15, 2011 report of the investigation and make corrections to it, if necessary. (IBM 10268-69, 10274-75) Mr. Tuvell had no such opportunity.

In his deposition, Mr. Mandel testified that, similarly, he provided Fritz Knabe with a draft of the chronology that was contained in the report to review. (Mandel Depo., p. 87) Mr. Mandel did not extend the same opportunity to Mr. Tuvell. (Mandel Depo., p. 91)

This is another important example of Mr. Mandel failing to afford similar treatment to all parties involved, contrary to best practices.

Opinion (3) A. 1 Ms. Due’s Role and Her June 2011 Investigation (Report pp. 79-81)

I learned from Ms. Due’s testimony that she spoke to Mr. Tuvell by phone (not in person) in June of 2011. (Due Depo., p. 45) Conducting telephonic interviews is contrary to best practices when investigating a complainant in a harassment, discrimination or retaliation investigation, absent rare circumstances. Whenever feasible, interviews should be conducted in person, which greatly helps credibility determinations in the often “word on word” situations. While I understand that Ms. Due’s office was in New York, it would be a relatively easy trip to Massachusetts to meet with the relevant parties, particularly given that the case was “complex” and involved allegations of illegal conduct.

An issue of bias came to my attention when reviewing Ms. Due's testimony. That is, Ms. Due testified that she was aware, as of June 2011, that Mr. Feldman was "very concerned about being sued." (Due Depo., pp. 123-25) Additionally, she learned from Ms. Adams that Mr. Tuvell had threatened a lawsuit before. (Due Depo., p. 122) Given Ms. Due's knowledge at the time, Ms. Due, an IBM employee since 1997 who has moved up the ranks over the years, had every reason to protect the company and find that no unlawful conduct took place, thus exonerating IBM rather than determining that Mr. Tuvell was treated fairly. In other words, if Mr. Tuvell might sue IBM at the conclusion of the investigation, then Ms. Due had a motive to conclude that Mr. Tuvell's complaints were unfounded.

On a separate issue, Ms. Due testified that an investigation can be initiated by means of a "consultation[] for complex cases on behalf of HR and line management..." (Due Depo., p. 62) She denies that the investigation she conducted into Mr. Tuvell's complaint was an Open Door investigation. (Due Depo., pp. 72-74) Interestingly, Mr. Mandel wrote "?" when she characterized in a writing that her investigation was a "consult to the HR and line management team" as opposed to "an employee appeal." (Due Depo. Exhibit 22) This signals to me that Mr. Mandel disagreed with her characterization or, at least, questioned it and sought an explanation.

To the contrary, the documents produced in discovery seem to indicate that Ms. Due understood herself to be acting within the rubric of the Open Door process. In this particular case, a note was sent in to IST. (Due Depo., p. 62) She testified that Dan Feldman was the first Line Manager, and John Metzger was the second Line Manager. (Due Depo., p. 62) Involving both the first and second Line Managers is consistent with the Open Door process. (Report, p. 6)

Ms. Due testified that Mr. Tuvell filed complaints initiating the June 2011 investigation. (Due Depo., p. 61) Additionally, she testified that Mr. Feldman's complaints prompted Diane Adams in HR to initiate the investigation. (Due Depo., pp. 63-64, 71) Included in Due Deposition Exhibit 2, IBM 006621, is an email from IST to Ms. Due on June 19, 2011 that states, "Hi Lisa. I created a space holder and CMO for this case." (Due Depo., p. 66) A "CMO," Ms. Due explained, is the Case Management Organizer, which is a database. (Due Depo., p. 67) Ms. Due explained that she is a Case Manager, and is assigned cases. Each case has a number. Becky Torres opened up a case number as a placeholder, and Ms. Due put her notes, using that number, into the database. (Due Depo., p. 67) Ms. Due subsequently sent an email on June 20, 2011 to IST Case Management. (Due Depo., p. 68) Diane Adams completed a standard form and sent it to IST Case Management ID (referring to Pages 8831-8832 of Exhibit 2). (Due Depo., p. 71) This is the form that was placed in the CMO initiating the investigation. (Due Depo., p. 71) Again, this process and terminology is consistent with the Open Door process.⁴

⁴ Ms. Due testified, however, that Mr. Tuvell's June 2011 complaint was *not* an Open Door investigation. (Due Depo., p. 73) An Open Door is when an employee has a concern, and factual evidence exists to launch a full investigation where interviews are conducted, a report is written, and a verbal closeout is provided to the employee. (Due Depo., p. 76) Mr. Tuvell's case was different, she said, because it came into the Integrated Services Team ID from Ms. Adams in HR and not from Mr. Tuvell. (Due Depo., p. 76) This contradicts her deposition testimony where she testified Mr. Tuvell filed complaints which initiated the June 2011 investigation. (Due Depo., p. 61)

Ms. Due testified that a report at the end of an Open Door investigation would have been more substantive than what she prepared in this case. (Due Depo., p. 169)

It is also significant to point out that Ms. Due tries to distance herself from saying that the Tuvell investigation that she conducted was pursuant to the company's Open Door policy because a manager, and not Mr. Tuvell (though her testimony is inconsistent here), brought Mr. Tuvell's concerns to her attention. I reiterate what was cited elsewhere in this report, which is that Ms. Due acknowledges company policy and best practices about the duty to respond to third-party complaints. It is irrelevant whether Mr. Tuvell or a manager, in this case allegedly Mr. Feldman, raised concerns. The fact remains that the company became aware that Mr. Tuvell felt that he was the victim of discriminatory behavior, thus triggering its duty to investigate pursuant to policy and best practices.

In her June 2011 investigation, Ms. Due testified that she understood that Mr. Tuvell was complaining of age and gender discrimination (as well as harassment and retaliation). (Due Depo. pp. 35, 40, 42) Moreover, as of June 23, 2011, Ms. Due testified that she understood that Mr. Tuvell was claiming to be the victim of discrimination on the basis of disability (referencing Mr. Tuvell's June 23 email, Exhibit 3) as well. (Due Depo., p. 86) Further, she admittedly understood that employers have a legal obligation to fully and fairly investigate all claims of discrimination. (Due Depo., p. 29)

Nevertheless, Ms. Due failed to include the discrimination issues in the scope of her investigation and failed to make any findings whatsoever related to the discrimination claims.⁵ (See Report, pp. 14-16, 18, 79-81) She did make findings relating to Mr. Tuvell's claim that he was demoted. (Due Depo., p. 169) The findings, however, are silent as to whether the demotion was discriminatory, as Mr. Tuvell had alleged.

Significantly, Mr. Tuvell alleged that his former supervisor, Mr. Feldman, was a discriminator and the person responsible for the demotion. During her investigation of Mr. Tuvell in June 2011, Ms. Due testified that she did not recall that Mr. Feldman had been advocating for Mr. Tuvell's termination. (Due Depo., pp. 175-76) In reviewing Exhibit 9, which is an email from Mr. Feldman expressing that Mr. Tuvell should be terminated, Ms. Due stated, "I would think it's important" to the investigation. (Due Depo., p. 174) More explicitly, Ms. Due testified, "It would be important to review this as part of an investigation." (Due Depo., p. 175) Moreover, Ms. Due testified that she also did not know that, during the investigation, Mr. Feldman had advocated for rescinding Mr. Tuvell's access to IBM buildings. (Due Depo., p. 176)

⁵ While she testified that she considered the age and gender discrimination claims as part of her investigation, (Due Depo., pp. 42-43), it appears that she took no action *to actually investigate* those claims. That is, she failed to examine the qualifications of the woman who replaced Mr. Tuvell, nor did she explore whether Mr. Feldman made any age- or gender-related comments, had a history of engaging in sexist behavior, or had a history of discriminating against others on the basis of age. (Due Depo., pp. 43-44)

Similarly, Ms. Due did not speak to Mr. Feldman about Mr. Tuvell's PTSD nor did she make any inquiry regarding the PTSD. (Due Depo., p. 87) She initiated no inquiries with any medical person concerning Mr. Tuvell's medical condition. (Due Depo., p. 87) Rather, she asked Ms. Adams to get the Nurse Case Manager's contact information to provide to Mr. Tuvell. (Due Depo., pp. 86-87)

Another flaw in the investigation relates to findings with regard to Mr. Tuvell and his interaction with Fritz Knabe. (Report, p. 81)⁶ Ms. Due's deposition testimony further underscores the deficiencies in her report findings regarding whether Mr. Knabe raised his voice when speaking to Mr. Tuvell one day. She testified that she knew that Mr. Knabe apologized to Mr. Tuvell for raising his voice, stating, "I'm sorry for the embarrassment and anger I provoked when raising my voice." (Due Depo., pp. 108-09) Nevertheless, despite this admission, Ms. Due testified that she *did not* conclude that Mr. Knabe raised his voice because another witness to the conversation, Mr. Lubars, stated that he did not. (Due Depo., p. 111)

After she read her own notes, however, Ms. Due later testified that Mr. Knabe stated in his interview, "Both raised voices and not considered yelling." (Due Depo., pp. 140-41) Mr. Knabe reported that neither he nor Mr. Tuvell was "yelling." (Due Depo., p. 141) She then testified that she *did* conclude that Mr. Knabe raised his voice to Mr. Tuvell. (Due Depo., p. 141)

It should be noted that Mr. Knabe was not disciplined, and Ms. Due does not recall reporting to anyone that Mr. Knabe raised his voice. (Due Depo., p. 142)

Training Materials

In addition to violating best practices and company policy, as I opined in the Report, Ms. Due's actions and inaction also run afoul of the company's training materials. In 2008, Ms. Due became a Senior Case Manager responsible for conducting investigations, "disciplinary actions as a result of internal audits, investigations of Concerns and Appeals." (Due Depo., p. 22) Among other things, she was responsible for handling complaints of discrimination and harassment. (Due Depo., p. 23) In that capacity, she received training on an annual basis on equal opportunity diversity through an online tutorial from IBM. (Due Depo., pp. 14-15, 23-24) She also received internal training from subject matter experts on conducting investigations. (Due Depo., pp. 14-15, 24) Carolyn Austin, Cathy Travers and Russell Mandel provided such training. (Due Depo., pp. 24-25) She received written materials related to conducting investigations, and they are contained on the internal database.⁷ (Due Depo., p. 25)

The company produced training materials subsequent to Ms. Due's deposition which, I understand, constitute the training documents that Ms. Due referenced. The materials produced appear to apply both to Open Door, or first level investigations, and appeals, which are called Concerns and Appeals. I lack clarity as to precisely what the training documents apply to, and no IBM representative has been deposed to date with respect to their meaning. For this reason, if

⁶ I found another document where Ms. Due improperly characterized what she heard from the witness interviews. In a July 5, 2011 email to Mr. Mandel, Ms. Due incorrectly described the alleged yelling/voice raising incident between Mr. Tuvell and Mr. Knabe. While she states that a co-worker denied that Mr. Knabe yelled or even raised his voice, she makes no mention whatsoever of Mr. Knabe's *admission* that he raised his voice and acted inappropriately. (Due Deposition Exhibit 23; IBM 011193)

⁷ Ms. Due had no formal education in Human Resources. She graduated from Fordham University in 1987 with a Bachelor of Arts degree in Theater Arts and Psychology. (Due Depo., p. 10) Her first position at IBM in 1997 was that of as a Human Resources Generalist. (Due Depo., p. 13)

additional information becomes available to me on this topic, I reserve the right to supplement or revise, as needed, my opinions here.

Training Materials: the Investigative Process

Among the training materials is a January 2011 PowerPoint training is entitled, “Concerns and Appeals Re-Engineering and Transformation.” In addition to covering the appeals process, the training documents also address Open Door investigations. (See, for example, IBM011380) Some aspects of the investigative process were changing while others were not. A number of changes were explained, including a single point of entry for all appeal requests, a new tiered approach in documenting an investigation based on risk level, and new templates to use for expanded investigations on issues to include harassment, discrimination and retaliation, among others. What remains unchanged was the integrity of the Open Door process; “thorough, complete and impartial investigations; Confidentially Speaking investigations, the review of investigative findings prior to communicating the outcome; and case manager judgment and decision making.” (IBM 011378)

The materials detail the Open Door process, stating that it should be an “objective and thorough review of the issues.” (IBM 011444)

The materials specifically state that employees on a leave of absence are eligible to use the Open Door process, consistent with policies. (IBM 011444)

In considering an appeal, the case managers are directed to reach out to the complaining party within two (2) business days to acknowledge receipt. That can be accomplished either by a phone call or an email. (IBM 011431) Questionnaires should be sent when the claim involves a PBC appeal. (IBM 011431-432)

In the training, IBM includes an investigative process flow chart and reiterates IBM’s commitment to conducting a “complete, thorough, impartial investigation.” (IBM 011389) IBM outlines criteria for vetting issues and determining next steps. Among the “key responsibilities” are the company’s obligation to “determine the most appropriate Concerns and Appeals channel to resolve the appeal request.” (IBM 011380) Further, IBM cautions that its policies and practices must be applied in a consistent manner. All decisions must be appropriate and executed in a way “that is fair for IBM and its employees.” (IBM 011380)

IBM explained that it was shifting from a “one size fits all” approach for investigations and moving toward an approach “that assess the level of risk to IBM.” (IBM 011382)

Simultaneously, IBM emphasized that the quality and thoroughness of the investigation must not be impacted. (IBM 011382) IBM recognizes that “complex investigations” must be “consistently documented to further reduce IBM legal exposure.” (IBM 011382)

IBM defines the following types of misconduct as “moderate/high risk” investigations: inappropriate behavior, discrimination, bullying, and harassment. (IBM 011384)

Significantly, IBM states that investigations will be classified as either “Standard” or “Expanded.” (IBM 011384) In investigations of harassment, discrimination, or retaliation, the investigator must document the investigation utilized in the Expanded report form and follow the review/approval matrix. (IBM 011389) All of the steps from start to finish are articulated. (IBM 011389) I have seen no evidence in the case that Mr. Tuvell’s investigation was classified one way or the other. I saw evidence that Mr. Mandel (as well as Ms. Due) referred to it as “complex,” (IBM011054; Due Depo., p. 62) but I’m unsure how that terminology relates to the training materials. If the investigators failed to characterize the investigations as “Standard” or “Expanded,” it demonstrates that IBM failed to follow its articulated procedure here.

I also reviewed written materials entitled “Global Open Door Transformation Project Work stream (sic) #2 -- Recommended Templates for Complex Investigations.” (IBM 011392) This 7-page document relates to allegations of discrimination or retaliation. (IBM 011392-98) Investigators are cautioned that, before beginning an investigation, they must familiarize themselves with the Open Door policy, legislation, and the employer-employee relationships at issue. The investigators are advised to “promptly” establish and maintain contact with the complaining party.⁸ (IBM 011392) Investigators are told to maintain objectivity by focusing only on the facts. (IBM 011392)

The suggestions on conducting interviews are consistent, generally, with best practices. For example, investigators are directed to prepare a core set of questions in advance of the investigation. (IBM 011393) It is unknown if Ms. Due (or Mr. Mandel) prepared questions; I have not seen any. Significantly, investigators are directed to advise all interviewees that retaliation is not tolerated and any possible retaliatory acts should be reported immediately. (IBM 011393)

Guidance is given pertaining to the questioning of the complaining party about alleged discrimination or retaliation. Investigators are told to probe and “press for details and specifics,” such as where and when did the discrimination or retaliation occur, and the investigator is told to get a description of each alleged activity and the identity of who was present. (IBM 011394) Investigators are encouraged to ask, “What exactly was said? Who said it? To whom was it said? Is there any documentation available related to the alleged act?” (IBM 011394) The investigator should ask if the complaining party believes that others have also been victimized by discrimination or retaliation and, if yes, the details of when and where. (IBM 011394)

The person alleged to have engaged in the discriminatory behavior should be questioned extensively as well. (IBM 011395)

Analyzing information gathered is crucial. The investigator is directed to gather all pertinent data and conduct all interviews, and then analyze the data to assess the facts and reach an appropriate conclusion. (IBM 011396) The investigator should consider whether the alleged incident was unfair or unreasonable and, further, should conclude whether a breach of IBM’s discrimination policy occurred. (IBM 011397) The investigator should assess “if a breach of any of the strands of discrimination law has occurred.” (IBM 011397)

⁸ As stated in the Report, Mr. Mandel failed to maintain contact with Mr. Tuvell when Mr. Tuvell was out on STD.

In the section regarding retaliation, IBM makes clear that “denial of promotions or job assignments” and “less favorable job or territory assignments” are examples of adverse actions that could be considered retaliatory. (IBM 011398) Further, “negative references” is also considered to be an adverse action.

Training Materials: Reports

A new report format was rolled out using Excel. (IBM 011378) New templates were included for claims involving harassment, discrimination, and retaliation. (IBM 011378) Using an example of an employee in a protected category (sexual orientation) where it was found that comments in a performance appraisal were retaliatory, IBM explained that an IBM investigator should utilize the Expanded report format and the “Aligning Review/Approval Requirement.” (IBM 011385) The reports I have reviewed do not appear to be in this format.

The training references a “PBC Questionnaire” model that was introduced in 2010. (IBM 011386) I have not seen this Questionnaire produced and, therefore, cannot comment on it.

For the “Expanded” investigation, which indisputably applies to claims involving harassment, discrimination, and retaliation, IBM directs investigators to utilize a “Global Template Design.” (IBM 011386) The following must be included:

- Global guidance on techniques for general interviewing
- Topic-specific recommended questions to ask the complaining party, person accused, and witnesses
- Topic-specific recommended questions and directions on analyzing the information collected
- Review and approval steps
- Topic-specific resources and references

(IBM 011386)

Training Materials: Audit and Oversight

The new process seemingly implements quality assurance and oversight to the process. I note that “CM&A⁹ Quality Insurance (sic) Review & Approvals” is listed as a step. (IBM 011388) I see no evidence that such review was done in Mr. Tuvell’s case. I saw reference in Ms. Due’s notes that “typically” Mr. Mandel would review her findings or report. (IBM 0110544) However, in this case, she felt there was no need as, “In this matter, I already ran the case by Russ [Mandel]. (IBM 0110544)

⁹ Case Management & Appeals

IBM also contemplates “audit readiness.” (IBM 011388) I see no evidence that the investigation in Mr. Tuvell’s case was audited by anyone.

Opinion (3) A.2 Mr. Mandel’s Investigation #2 (Report pp. 81-85)

In this section, I refer to and incorporate the materials outlined above in “Opinion (3) A. 1 Ms. Due’s Role and Her June 2011 Investigation (Report pp. 79-81)” as it relates to the training materials and Mr. Mandel’s failure to comply with them.

In the Report, I relayed that Mr. Mandel’s September 15, 2011 conclusions were drawn without interviewing Mr. Tuvell, as required under the company’s C&A policy. I also noted that Mr. Mandel offered to interview Mr. Tuvell on November 7th, after the report was written on September 15th.

In his deposition, Mr. Mandel was asked about the November 17th phone conversation that he had with Mr. Tuvell prior to releasing his report. (Mandel Depo., pp. 88-89) He did not advocate for characterizing the call as an “interview,” which would have been consistent with IBM policy. Instead, he testified, “So you could either count it as an interview or not count it as an interview depending on your point of view.” (Mandel Depo., p. 89)

Additionally, Mr. Mandel provided further testimony relating to this investigation that buttresses the opinions expressed in the Report. In his deposition, Mr. Mandel admitted that Mr. Tuvell claimed to have been the victim of discrimination and retaliation. (Mandel Depo., p. 97) Despite knowing this, Mr. Mandel failed to investigate Mr. Tuvell’s transfer to Ms. Mizer’s job function, and never made a determination as to whether that switch was appropriate. (Mandel Depo., p. 26) Also, he failed to inquire of Mr. Feldman as to whether he made any comments based on age or gender in the workplace. (Mandel Depo., p. 97) He also never inquired as to whether Mr. Feldman made any comments that might indicate handicap discrimination. (Mandel Depo., pp. 97-98) He never inquired as to whether Mr. Feldman engaged in any retaliatory behavior. (Mandel Depo., p. 98) He does not recall specifically coaching Mr. Feldman about avoiding retaliatory action against Mr. Tuvell. (Mandel Depo., p. 149) Failure to protect against retaliation runs contrary to IBM’s training materials. (IBM 011393)

Opinion (3) A.3 Mr. Mandel’s Investigation #3 (Report pp. 85-86)

In this section, I refer to and incorporate the materials outlined above in “Opinion (3) A. 1 Ms. Due’s Role and Her June 2011 Investigation (Report pp. 79-81)” as it relates to the training materials and Mr. Mandel’s failure to comply with them.

Mr. Mandel’s deposition testimony further corroborated the opinions expressed in the Report. That is, Mr. Mandel testified that he did not investigate whether Mr. Tuvell was rejected for the position based on retaliation. (Mandel Depo., p. 147) Similarly, he did not investigate whether Mr. Tuvell was rejected in violation of IBM’s obligation to provide reasonable accommodation. (Mandel Depo., p. 147)

(4) **THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES OR ITS OWN POLICY WHEN IT ALLOWED MS. DUE TO REVIEW MR. MANDEL'S DRAFT APPEAL FINDINGS BEFORE HE FINALIZED THEM**

When I submitted my Report, I opined that Mr. Mandel's involvement in Ms. Due's investigation was wholly inappropriate. At the time, I had no idea that *Ms. Due* was subsequently involved in *Mr. Mandel's investigation*. Again, that is totally inappropriate and violates best practices, IBM policies, and IBM training materials.

In her deposition, Ms. Due testified that Mr. Mandel forwarded her a draft of his report for her review prior to finalizing it. (Due Depo., pp. 189-90) She further testified that it was "usual" for her to give input into the appeal of her own decision. (Due Depo., p. 190) She said that she was to review the draft decision only to ensure that the facts were accurate. (Due Depo., p. 190)

A review of the email at issue, (Due Depo. Exhibit 22, IBM011116), reveals that Ms. Due did not merely review the draft report for factual accuracy. Rather, she offered additional points "for [his] consideration." (IBM011116) It appears that she offered about fourteen (14) additions, changes or clarifications to his draft report. For example, she encouraged him to add that Mr. Tuvell was the "performance lead" on the Knabe project, and she thought it important to show that it was Mr. Tuvell's "responsibility to be proactive and not reactive." (IBM011116) She also encouraged him to retain language in the draft report, implying that Mr. Mandel embedded thoughts or questions into the draft report to which Ms. Due responded. For example, she wrote, "May 17-18, on this entry, I do think it is important to keep the part in about the non-standard environment b/c that is why Tuvell had" (IBM011116) In that same paragraph, she also wrote, "Also, important tis to keep in the part about how a lower banded ee was able to create things" (IBM011116)

Ms. Due suggested that Mr. Mandel add to the report that the difference between a band 7 and band 8 is "only a 1 band difference." (IBM011116)

Ms. Due suggested that Mr. Mandel point out and "include a note that it is not 'illegal' for a client to give feedback to a manager in the IBM workplace[.]" (IBM011116)

She also suggested that Mr. Mandel "add a note that a manager can reassign any employee at any time without it having to be adverse job impact[.]" (IBM011116)

She suggested that Mr. Mandel add, in his June 27 entry, that Mr. Tuvell said that Mr. Feldman singled him out by asking him to do a project plan, and she also suggested that Mr. Mandel move his entry on the topic from July 6 to June 27. (IBM011116)

The above are just a few examples of the detailed feedback that Ms. Due provided. It was more than just a review for factual accuracy. Rather, she provided substantive input on the report.

I would welcome the opportunity to see the draft that was attached to Mr. Mandel's September 6, 2011 email. (Due Depo. Exhibit 22; IBM011117). I note that the email says that "attachment

“Tuvell Report.doc” deleted by Lisa Due/Somers/IBM.” I reserve the right to supplement this report if that document is produced.

Ms. Due’s involvement in Mr. Mandel’s appeal destroys the independence and objectivity of it. I liken this to the First Circuit reviewing a lower court summary judgment order and sending for review its draft decision to the Federal Court judge who authored the original summary judgment order on appeal. It’s patently wrong and against IBM policies and training as well as best practices.

Thank you, and please let me know if you obtain additional information that may be relevant.

Very truly yours,



Julie A. Moore, Esquire, SPHR

Exhibit 117-118

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant

Civil Action No. 13-11292-DJC

SUPPLEMENTAL AFFIDAVIT OF JOAN ACKERSTEIN

I, Joan Ackerstein, on oath, depose and say as follows:

1. I am a Shareholder in the law firm of Jackson Lewis P.C., with an office located at 75 Park Plaza, Boston, Massachusetts 02116. I am one of the attorneys representing Defendant International Business Machines, Inc. in the matter.

2. Attached as Exhibit 117 is a true and accurate copy of excerpts from what was marked as Exhibit 28 to the May 16, 2014 deposition of Plaintiff Walter Tuvell and identified as IBM's Business Conduct Guidelines.

3. Attached as Exhibit 118 is a true and accurate copy of what was marked as Exhibit 6 to the June 4, 2014 deposition of Russell Mandell, and identified as Mr. Mandell's investigative report.

Signed under the pains and penalties of perjury this 2nd day of March, 2015.

/s/ Joan Ackerstein

Joan Ackerstein

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.

Exhibit 117

EXHIBIT 117

CONFIDENTIAL



IBM002353

EXHIBIT
28 June

CONFIDENTIAL

Letter from the Chairman	1.0 Guiding Principles	2.0 Speaking Up	3.0 In the Workplace	4.0 In the Marketplace	5.0 On Your Own Time	6.0 Further Guidance	
4.1 Working with Organizations Outside of IBM	4.2 Compacting Fairly	4.3 Acquiring and Using Information	4.4 Gifts, Arrangements and Ribbons	4.5 Other Public Sector Matters	4.6 Information Trace Occurrence	4.7 Immigration	4.8 The Environment

Integrity Tip

It is essential that suppliers competing for IBM or a client's business have confidence in the integrity of IBM's selection process. That confidence could be jeopardized if former employees of IBM or close personal friends or relatives of current IBM employees, competing as suppliers, are perceived to have an unfair advantage. If your work involves the use or selection of a supplier with which you are connected, (e.g. a supplier owned by a family member, you should disclose your relationship with that supplier to your manager and the IBM Global Procurement Ombudsman Office, prior to any involvement in IBM's consideration of that supplier.

4.1 Working with Organizations Outside of IBM

Other organizations have multiple relationships with IBM. An IBM Business Partner may be both a client and a competitor. Another organization may be an IBM supplier and client at the same time. A few organizations may even be suppliers, competitors, Business Partners and clients. No matter what the context, you need to understand each relationship involved in your dealings, and act in accordance with our guidelines.

Working with Suppliers

In deciding among competing suppliers, we weigh the facts impartially to determine the best supplier. You should do so whether you are in a procurement job or any other part of the business—and regardless of whether it is a large or small purchase.

You must not exert or attempt to exert influence to obtain special treatment for a particular supplier. Even appearing to do so can undermine the integrity of our established procedures.

Seeking reciprocity is contrary to IBM policy and may also be unlawful. You should not tell a prospective supplier that your decision to buy its goods or services is conditioned on the supplier's agreement to buy IBM products or services. This does not mean that an IBM client cannot be an IBM supplier or that IBM can never consider its other relationships with the supplier when it is evaluating the supplier. It simply means that IBM's decision to buy goods and services from a supplier must be made independently and apart from that supplier's decision to buy IBM products and services.

Working with Resellers and Other Complementary Third Parties

IBM has relationships with complementary third parties, such as IBM Business Partners, Independent Software Vendors, and systems integrators, to help IBM market and install IBM solutions. If you work with these third parties, you must follow the applicable sales, marketing and services guidelines for dealing with them, including the Guidelines for Working with IBM Business Partners. In addition to their complementary offerings, some of these third parties market products or services that compete with IBM. When such a situation arises, you must exercise caution and follow established guidelines for dealing with competitors.

Working with Competitors

In the marketplace it is often clear when you are directly competing with another company. However, a company with which you are dealing in another context—such as a client, a supplier, or even an IBM Business Partner—may also be a competitor. Such situations require extra care. For example, it is likely that you and competitors will, from time to time, meet, talk and attend the same industry or association meetings. Many of these contacts are acceptable as long as established procedures are followed.

IBM002370

CONFIDENTIAL

Letter from the Chairman	1.0 Building Principles	2.0 Speaking Up	3.0 In the Workplace	4.0 In the Marketplace	5.0 On Your Own Time	6.0 Further Guidance	
					5.1 Conflicts of Interest	5.2 Inside Information and Insider Trading	5.3 Public Service and Political Activity
							5.4 Speaking Publicly and Social Media

Integrity Tip

Even non-commercial projects — such as some Open Source projects — can have an impact on IBM's current or future business. Management should be consulted both before and during any such project, to regularly assess the project's impact on IBM's interests.

5.1 Conflicts of Interest

A conflict of interest occurs when you advance a personal interest at the expense of IBM's interests. Some conflicts of interest can be avoided through careful foresight and planning. Others are unavoidable. In some cases, the mere potential for or perception of a conflict can be problematic. It is up to you to avoid situations in which your loyalty may become divided. Some common conflicts are addressed below.

Assisting a Competitor

An obvious conflict of interest is providing assistance to an organization that markets products and services in competition with IBM's current or potential product or service offerings. You may not, without IBM's consent, work for such an organization in any capacity, such as an employee, a consultant or as a member of its board of directors.

Competing against IBM

Also prohibited are individual pursuits that could conflict with IBM's current or future business interests. Outside the office, many IBM employees engage in activities that generally relate to technology, business advice or other products or services IBM offers its clients. Often, such activities are in sufficient conflict with IBM's current or future business interests that they are prohibited. Because IBM is rapidly expanding into new lines of business and areas of interest, the company will constantly redraw lines of acceptable activity. It is therefore your responsibility to consult, in advance and on a periodic basis, with your management or IBM Counsel to determine whether your planned activity will compete with any of IBM's actual or potential businesses.

Supplying IBM

Unless approved in advance by senior management and IBM Counsel, you may not be a supplier to IBM, represent a supplier to IBM, work for a supplier to IBM or be a member of its board of directors while you are an employee of IBM. In addition, you may not accept money or benefits of any kind for any advice or services you may provide to a supplier in connection with its business with IBM.

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You may not have a financial interest in any organization if that interest would create or give the appearance of a conflict of interest with IBM. Such organizations include suppliers, clients, competitors, IBM Business Partners, alliance companies and others with which IBM does business. In all cases, a financial interest is improper if your job, the amount of your investment, or the particular organization in which you invested could — when viewed objectively by another person — influence your actions as an IBM employee.

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Exhibit 118

EXHIBIT 118

① READ ALL YOUR DOCUMENTATION

② WHAT I AGREED TO INVESTIGATE

③ MY ROLE - ESCALATED LISA DUE / FINAL REVIEW
 Personal & IBM Confidential IN IBM

→ 3 - ANY ADD'L INPUT

? ④ - MY CONCLUSIONS

1 - ANYONE ELSE OR RECORDING

Date: September 15, 2011
 Memorandum To: File
 Subject: Open Door - Mr. Walter Tuvell

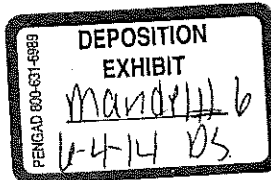
I. FACT SUMMARY

Mr. Walter Tuvell, a Band 8 Advisory Software Engineer with less than one year of service with IBM, complained that IBM wanted to "get rid" of him because he is "too old." He states that this is a result of someone in "IBM HR" learning" he was "the "oldest employee at Netezza," but since IBM could not handle the negative publicity associated with his eventual termination, "IBM decided" he "needed to be blackballed" by creating a "pretended excuse for dismissal." Based on this need, his management, Mr. Frederick C. Knabe and Mr. Daniel J. Feldman, "were recruited." Mr. Knabe conducted "an escalating campaign of not-so-subtly-false claims...hoping ...to cause" him to resign, "pretending" that he had not performed his job, and "yelling" at him in front of his peers. Mr. Feldman's part of this activity was to demote Mr. Tuvell because he could not get along with Mr. Knabe. Mr. Tuvell states that all of this was "intended to have the emotional effect of embarrassing/depressing/scaring/coercing" Mr. Tuvell "into resigning," because he "would 'obviously' fear" for his "psychological safety." Mr. Tuvell goes on to state that "the tactic was to intentionally instill sufficient emotional distress in me to cause me to resign: the tort of IED (Intentional Infliction of Emotional Distress)." In addition, Mr. Tuvell complained that in retaliation for his complaining about his above issues, Mr. Feldman unfairly asked to produce a project plan, and "threatened" him by falsely stating that he made inappropriate comments/behaviors in the workplace and providing him with a "Warning Letter." Finally, he complained that Ms. Lisa Due (who investigated the initial set of issues) covered up Mr. Feldman's and Mr. Knabe's actions by concluding that there were "insufficient facts" to support his claims and her action constitutes a "hostile work environment." [NOTE: This investigator became involved because Mr. Tuvell escalated the finding Ms. Due's investigation.]

II. PERSONS INTERVIEWED

1/2 - Duron (Feldman, Knabe, Mead, etc)

Name	Title	Div	Location
Mr. Walter Tuvell	Advisory SW Engineer (Originator)	SWG	Marlborough, MA
Mr. Devesh Agrawal	Staff Software Engineer	SWG	Cambridge, MA
Mr. Huamin Chen	Advisory SW Engineer	SWG	Marlborough, MA
Mr. Daniel J. Feldman	SW Product Manager (Originator's Manager)	SWG	Marlborough, MA
Ms. Lisa Due	Senior HR Partner/Case Manager	CHQ	Hawthorne, NY
Mr. Jeffrey Keller	Advisory SW Engineer	SWG	Cambridge, MA



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Mr. Frederick C. Knabe	Distinguished Engineer (Originator's Project Manager)	SWG	Cambridge, MA
Mr. Steven L. Lubars	Advisory SW Engineer	SWG	Marlborough, MA
Mr. Jerrold R. (Richard) Title	Advisory SW Engineer	SWG	Cambridge, MA

III. CHRONOLGY

November – December, 2010 – Mr. Feldman hired Mr. Tuvell into his Netezza product performance team on November 10, 2010. Mr. Tuvell's responsibilities include measuring product performance and developing mathematical models for predicting the performance of new products. Mr. Tuvell was assigned to support Mr. Knabe and his team as the performance lead, who were working on a new product with the code name "Wahoo." Therefore, Mr. Tuvell was responsible for performance measurement and analysis in order to develop success criteria to aid Mr. Knabe's team to achieve its performance objectives. During this time frame IBM was in the process of acquiring Netezza.

December, 2010 – Mid-February, 2011 – Mr. Tuvell began working on the Wahoo performance model/commensurability project. The intent of this project was to build a valid model that would be able to predict that the Software associated with Wahoo would be fast enough to run on Wahoo. There are a series of notes from Mr. Tuvell to Mr. Feldman from December 31, 2010 – January 26, 2011 stating that he while he continues to work on the project, he has not made significant headway (e.g., "need to understand it better," "...the necessity for a commensurability proof isn't needed in the next couple of days," it is a "a major goal of mine for upcoming week," "plan to make serious progress this week," etc.). On January 17, Mr. Feldman sent Mr. Tuvell a draft of the model, he had developed on his own. On January 26, Mr. Feldman sent Mr. Tuvell a "final" draft of the model and February 14, Mr. Tuvell stopped working on the model since it was developed already by Mr. Feldman.

January 1, 2011 – Netezza was acquired by IBM.

Mid-March, 2011 – Mr. Feldman removed Mr. Tuvell from working on other projects in order to allow him to focus only on Mr. Knabe's project.

May 6 – 17, 2011 – Mr Tuvell provided his Wahoo performance data via a variety of performance reports called "PerfReport" and "Waltbar," which included ASCII art graphics. Mr. Knabe states that while reports contained much useful data, it difficult to analyze the information because there were over 20 reports, each in a separate file corresponding to a different test, making it was difficult to recognize trends or patterns across tests. In addition, the choice of ASCII art made it difficult to understand any particular test's results because three separate quantities were represented in three separate graphs, making it difficult to see at a glance how the different quantities were

*PERF
 REPORTS
 AN ISSUE
 DIFFICULT
 TO
 INTERPRET*

KNABE + AGRAWAL

varying relative to each other over time and impossible to view the entire graph at once, as many extended for pages and pages.

Mr. Knabe states that he suggested that Mr. Tuvell use Excel charts, because the data could be displayed far more concisely. Mr. Knabe indicates that when Mr. Tuvell did not appear to grasp his explanation, Mr. Knabe made a quick sketch showing a series of strip charts, each with all three quantities plotted. Mr. Knabe continues that when it appeared that Mr. Tuvell still did not appear to comprehend what he wanted, he told Mr. Tuvell he would do the work himself.

Since the data was not formatted in a readily available format to allow the data to be imported easily into Excel, Mr. Knabe chose to manipulate the data himself in "Emacs," Mr. Tuvell offered to generate the data into the usable format (i.e., "comma separated values [CSV]"), but Mr. Knabe elected to do this by himself, since he wanted to generate the charts as quickly as possible. Mr. Knabe presented the charts at the Wahoo status meeting based on the data that Mr. Tuvell had collected, but had not assembled into a format that could be easily assessed and reviewed.

In Mr. Tuvell's recollection of these events, on May 16, 2011, after reviewing some Wahoo performance statistics in an ASCII report format called either "PerfReport" or "Waltbar," Mr. Knabe asked Mr. Tuvell to include in his performance reports an indication of resource capacity-usage (i.e., where demand on Wahoo resources started nearing their limits or becoming over-subscribed). Mr. Tuvell states that he suggested that an improvement would be to construct an ASCII-art graph so that the reader of a "WaltBar" report could visually detect an over subscription scenario. Mr. Knabe agreed.

Mr. Tuvell further recalls that on May 17, 2011, Mr. Knabe and Mr. Tuvell further discussed "WaltBar" and Mr. Tuvell's ASCII-art graphic results. Mr. Tuvell states that Mr. Knabe's discussion were "wide-ranging, exploratory and vague." An example provided by Mr. Tuvell was that Mr. Knabe showed him how he could use Emacs to reformat some of the WaltBar reporting tables (from "plain ASCII" to "comma-separated values [CSV]"). As indicated earlier, Mr. Knabe states that it appeared to him that Mr. Tuvell did not appear to comprehend that he wanted a more concise representation via Excel, he told Mr. Tuvell he would do the work himself. At this point, Mr. Tuvell's and Mr. Knabe's accounts of the issue converge -- Mr. Tuvell offered to reformat some of the reports, but Mr. Knabe said that he would do the work himself.

May 18, 2011 -- Mr. Knabe presented at the regular Wahoo project status meeting, the Excel graphics discussed above. Mr. Tuvell sees this as depicting the same data as Mr. Tuvell's ASCII-art graphics did, while Mr. Knabe sees this as depicting the data in a more usable format to analyze the data.

INVESTIGATOR'S NOTE: Mr. Knabe states that Mr. Tuvell spent a significant amount of time configuring his workstation with a nonstandard choice of operating system. This led to many delays and problems that he had to solve in order to work with Netezza's software, as well as making it impossible to run Microsoft Office tools such as Excel

which was widely used by other members of the performance group nor did Mr. Tuvell seem to have access to or familiarity with a suitable Excel substitute. In addition, a more junior member of Mr. Knabe's team Mr. Devesh Agrawal (i.e., a band 7 employee), was able to build various performance measurement tools on several occasions in a matter of hours that were highly valuable in gathering useful data. Mr. Agrawal states that he got these tools done over a weekend. However, he does agree that Mr. Tuvell's performance graphs were difficult to interpret because you had to go through 50 pages of data as opposed to a single graph which Mr. Tuvell did not develop. He also states that Mr. Tuvell had a tendency to do things his own way rather than following direction; and that things are working "much smoother" since Ms. Sujatha Mizar, a Band 7, has replaced Mr. Tuvell. Mr. Agrawal states that this is because Ms. Mizar is easier to "dialogue" with, is "more communicative," and shows "greater insight" than Mr. Tuvell. *Agrawal*

Mr. Knabe also states that Mr. Tuvell identified and wrote a tool to synchronize the time between two systems, but then got stuck when the tool did not have sufficient granularity. Mr. Knabe recalls that Mr. Tuvell claimed it would be a complex project to resolve this problem. Mr. Knabe questioned this analysis, and chose to try solving it himself. Mr. Knabe states that it took him less than 30 minutes once he was able to access the machines in question. This experience contributed to Mr. Knabe's impression that Mr. Tuvell was not familiar or confident with some of the basic knowledge required of the performance team lead.

May 18, 2011 -- Mr. Knabe told Mr. Feldman that he was frustrated with his inability to get Mr. Tuvell to do work he believed he had asked for including moving too slowly and getting the tooling and tests done in a timely manner and even having to do the above work himself. Mr. Feldman said that he would discuss the issue with Mr. Tuvell.

Later that day, Mr. Feldman met with Mr. Tuvell. Mr. Tuvell had some papers that he wanted to show Mr. Feldman. Before reviewing them, Mr. Feldman said that he wanted to discuss an issue that Mr. Knabe had raised (i.e., that Mr. Knabe was frustrated with getting graphs that succinctly summarize Wahoo resource utilization across a number of test cases) and they needed to figure out how to make it so that Mr. Knabe wouldn't be frustrated. Mr. Tuvell states that Mr. Feldman told him that Mr. Knabe was "ripping mad" at Mr. Tuvell for "disobeying his orders" and "not producing the Excel graphics for him" that he asked for. Though Mr. Tuvell also states that the above is a "paraphrase" but "an accurate portrayal of the impact" Mr. Feldman's words had on him at the time and the actual words "may have been somewhat different" because he was "so shocked" that he "cannot now recall" the precise wording. However, he denies that Mr. Feldman said that he told Mr. Tuvell that Mr. Knabe was "frustrated" that he had not "picked up" on Mr. Knabe's suggestion that he create an Excel graphic depiction of his work. *Feldman's CONFIRMATION*

Mr. Feldman states that Mr. Tuvell became visibly agitated and argued that what Mr. Knabe wanted was inferior to what he was already providing and then complained "quite loudly" that Mr. Knabe was "going behind his back." Mr. Feldman continues that Mr. Tuvell stated that he was "pissed, Mr. Feldman attempted to move the conversation back to a discussion of what was necessary to improve Mr. Knabe's satisfaction, and Mr.

Tuvell continued arguing in a raised voice that this was all because Mr. Knabe expected Mr. Tuvell to read Mr. Knabe's mind. Mr. Tuvell states that he tried to explain to Mr. Feldman that Mr. Knabe had never asked him to do anything and certainly not produce Excel graphics, but Mr. Feldman "seemed to be deaf" to Mr. Tuvell's story. He goes on to state that he "became more and more frustrated/upset."

Mr. Feldman states that at this point Mr. Tuvell rose from his seat, threw the papers in his hand onto Mr. Feldman's desk and said "I'm leaving." Mr. Feldman responded by asking him if he was leaving the meeting or leaving the office. Mr. Tuvell responded that he was leaving the office. Mr. Feldman then asked Mr. Tuvell if he needed to do anything with Mr. Tuvell's papers. Mr. Tuvell responded that he took the papers from Mr. Feldman's hand, leaned over Mr. Feldman and threw the papers into the recycle basket and said "Here, let me make this easy for you!"

Mr. Tuvell states that at some point, he decided that he was getting "nowhere," became "really rather angry (incensed, defamed, 'mad as hell')" and stood up to leave. Then realizing this would be "unprofessional," he asked Mr. Feldman if he could leave. To which Mr. Feldman responded in the affirmative. At that point, Mr. Feldman asked what should he do with the papers Mr. Tuvell had brought into the office, "extending them... with both his hands," Mr. Tuvell responded "Here, I'll help you;" took the papers "gently" from Mr. Feldman's hands and "threw them (silently and emphatically)", but not violently or threateningly" into the paper recycling bin. Mr. Feldman then asked him where was he going and Mr. Tuvell responded home. Mr. Feldman enquired if he was coming back and Mr. Tuvell responded "not today." However, Mr. Tuvell does remember stating that he thought Mr. Knabe was a "workplace bully."

INVESTIGATOR'S NOTE: Mr. Tuvell refers to this issue in his May 16-22 weekly progress report as "Oh yes, there was a new kerfuffle about Fritz, who apparently claims I now need to have an expertise in mind-reading. Have escalated the issue to DanF. I won't be surprised if Fritz succeeds in getting it swept under the rug as a 'mere communication issue'. I speak/understand English, I don't know what language he's using. Call me a cynic."

May 19, 2011 – There are a series of e-mails between Mr. Tuvell, Mr. Feldman and Mr. Knabe, while Mr. Tuvell worked from home because he was "still quite mad" about what occurred on May 18. In the emails he states he has some doctor's visits and does not feel well enough to come into work and may miss a meeting that Mr. Knabe may have discussed but had not scheduled. Mr. Tuvell's states to Mr. Feldman this is "more mind reading." Mr. Feldman responds that he is not concerned if Mr. Knabe was imprecise in his scheduling and he was thinking of ways to get this on a "sustainable, professional footing" and he is open to any serious suggestions. Mr. Tuvell responds that we need a three-way conversation and "A bully can't be ignored, else they'll keep on bullying."

May 23-24, 2011 – Mr. Feldman states that he met with Mr. Tuvell and reiterated that Mr. Knabe is both Mr. Tuvell's and Mr. Feldman's customer, and it is incumbent on them to figure out how to meet Mr. Knabe's needs. Mr. Feldman goes on to state that Mr. Tuvell

continued to complain that Mr. Knabe was expecting him to read his mind and began to reiterate the substance of the conversations he had with Mr. Knabe about the graphing deliverable. Mr. Feldman stated he saw no point in rehashing these conversations and that the point was to make things work moving forward. Mr. Feldman states that he then asked Mr. Tuvell to clearly specify the next iteration of the work to be done including a schedule to be used as a mechanism for ensuring that there was agreement among the three of them about what Mr. Tuvell's deliverables would be. Mr. Tuvell remembers this as a request to keep a "day-by-day written journal (emails) of work and communications" between Mr. Tuvell and Mr. Knabe, so Mr. Feldman could keep "closer tabs" on the situation. However, Mr. Tuvell did provide an e mail with a plan on May 23. In addition, Mr. Tuvell states that he had conversations with both Mr. Knabe alone, and with Mr. Knabe and Mr. Feldman in which they agreed that Mr. Knabe should have more direct control over Mr. Tuvell's time or have Mr. Tuvell work directly for Mr. Knabe. Both Mr. Knabe and Mr. Tuvell deny ever agreeing to have Mr. Tuvell work directly for Mr. Knabe. In fact, Mr. Feldman states that he never remembers the issue ever being discussed.

Example of Direction

Mr. Tuvell requested a three-way meeting between Mr. Knabe, Mr. Feldman and Mr. Tuvell to discuss the events of the prior week. Mr. Feldman refused because he wasn't interested in mediating a dispute but in building credibility by delivering results. [NOTE: Mr. Tuvell states that he believes that Mr. Feldman's refusal to have a three-way conversation was a "way to intentionally construct a hostile work environment" around Mr. Tuvell.]

May 26, 2011 – Mr. Feldman states that he met with Mr. Tuvell for a "one-on-one" status check and Mr. Tuvell responded to several of his questions with sarcasm about Mr. Knabe and the work product of other members of the team. Mr. Feldman goes on to state that Mr. Tuvell stated that Mr. Feldman had placed him "on a performance plan." Mr. Feldman responded that he was not on a performance plan and that the kind of detailed supervision he was using was designed to ensure that the tasks that needed to be done got done and that Mr. Knabe would not have the opportunity to change an agreement without Mr. Feldman being aware of it promptly.

Mr. Feldman also states that Mr. Tuvell said "quite loudly" that what Mr. Feldman perceived as sarcasm was really Post Traumatic Stress Disorder (PTSD) and depression. He then told Mr. Feldman that he suffered from depression, was being medicated for it, and that his current situation with Mr. Knabe reminded him of a prior job where another employee had spread falsehoods about him and that he had successfully sued that co-worker for defamation. Mr. Feldman responded that if he had the help he needed with his medical issues that IBM has resources that he could take advantage of. Mr. Tuvell responded that he had all the help he needs.

June 8, 2010 – Mr. Tuvell overheard Mr. Knabe asking Mr. Steven L. Lubars, an Advisory Software Engineer who reports to Mr. Knabe, when Mr. Lubars would be supplying Mr. Lubars would be providing him with the "Fudge Factor Model" graphics and numerics. Mr. Lubars told Mr. Knabe that Mr. Tuvell had not yet supplied him

with the required performance results (i.e., WaltBar/PerfReport) yet, Mr. Tuvell states that he joined the discussion, reminding Mr. Knabe that Mr. Lubars and he had already reported earlier that morning that they would be delivering the information to Mr. Knabe by close-of-business that day. Mr. Tuvell goes on to state that Mr. Knabe became "very animated and angrily attacked" Mr. Tuvell by "loudly yelling" or "shouting" at Mr. Tuvell that he already expected Mr. Tuvell to have supplied Mr. Lubars with the WaltBar/PerfReport results he needed in front of Mr. Lubars, and others in the office (i.e., Mr. Jerold R. [Richard] Title, Mr. Jeffrey Keller, and Mr. Huamin Chen).

Mr. Tuvell also states that it was impossible to report these results and Mr. Knabe "knew it," because he had already reported "four times" earlier that morning that the results he had run overnight were "PerfBar," "debug" and "no-stats" versus "WaltBar/PerfReport," "turbo, and "stats," which were the reports Mr. Lubars would have needed to complete his work. In addition, Mr. Tuvell also states that he could not have completed the necessary reports in the time allotted, because it took approximately 7½ hours to run the proper reports.

Mr. Tuvell also states that at some point during Mr. Knabe's "yelling," he said something to effect that he knew Mr. Tuvell was not weren't running "stats," but he thought Mr. Tuvell meant he wasn't running "Perf-Bar/PerfScore stats," but was running "WaltBar/PerfReport'-stats." Mr. Tuvell admits at this point he responded to Mr. Knabe "Fritz, get off my back" in a voice "louder" than his "usual volume" because he had to make himself heard over Mr. Knabe's "yelling" though it was no louder than Mr. Knabe's "normal non-yelling volume." Mr. Tuvell goes on to state that this was his "only in-anger" contribution to the incident and it was "entirely defensive."

However, Mr. Lubars states that it is easy to get confused as Mr. Knabe did about which performance data was being run and his remembrance of the incident was that Mr. Knabe asked him (Mr. Lubars) for the results and some clarification on the findings, Mr. Lubars stated that Mr. Tuvell and he did not have the results. Mr. Tuvell overheard the conversation, made some clarifying remarks and Mr. Knabe realized that he had "misunderstood" when the results would be ready and he would get his answers in "a future run," but Mr. Tuvell seemed "defensive." Mr. Lubars goes on to state that Mr. Knabe then said why are we "thrashing yet again about what we are supposed to be doing" and Mr. Tuvell said "get off my back." Mr. Lubars states that Mr. Knabe never raised his voice, but it was Mr. Tuvell who yelled "God damn it I am sick of this shit, you understood and acknowledged and get off my back..." [NOTE: Mr. Lubars states that this was no way to talk at work no matter how frustrated one is; and that it was clear Mr. Knabe was confused and Mr. Tuvell "ascribed intent" on Mr. Knabe's part.] While Mr. Keller did not hear anyone raise their voice, both Mr. Chen and Mr. Title also state that it was Mr. Tuvell, not Mr. Knabe who raised his voice. Mr. Chen remembers that Mr. Tuvell said "don't treat me like shit" and Mr. Title remembers Mr. Tuvell "shouted get off my back."

Mr. Knabe states that he felt they both raised their voices but felt no one was "yelling."

June 8, 2010 – Mr. Tuvell sent a lengthy e mail to Mr. Knabe, carbon copying Mr. Feldman, that was titled "Comments on some miscommunications" which discussed the Mr. Tuvell's efforts to run performance tests. In it, Mr. Tuvell states that Mr. Knabe made an "absurd statement" by stating that "since you haven't finished the host CPU gathering work yet (i.e., nzmon), it seems the bad Wahoo software isn't slowing you down." The e mail also states that Mr. Lubars "labored in essential isolation" from Mr. Tuvell on a model until Mr. Lubars finally asked Mr. Tuvell about the work and then Mr. Tuvell told Mr. Knabe that Mr. Tuvell had already done "95%" of what was needed and later "97.5%" of what was needed;" or in other words, there was a clear miscommunication Mr. Lubars and Mr. Knabe. He also states in this note that "Does it seem there may be a pattern of miscommunication here?" Mr. Lubars had seen this note and commented that this is an example of Mr. Tuvell's "insulting" e mails (i.e., this was nothing more than Mr. Tuvell ensuring that his output matched Mr. Lubars' input and Mr. Tuvell made it sound as if Mr. Tuvell was doing Mr. Lubars' work for him when all Mr. Tuvell did was to "change the sign" of a value), Mr. Lubars also states that there were no "miscommunication" between Mr. Knabe and himself, nor was there any Mismanagment on Mr. Knabe's aprt as Mr. Tuvell implies in his note.

June 9, 2011 – Mr. Tuvell states that Mr. Feldman asked him if he could think of why Mr. Knabe would "yell" at him. Mr. Tuvell responded it could be either that Mr. Knabe was "under a lot of stress," "threatened" by Mr. Tuvell or "was going insane." To which Mr. Feldman responded that Mr. Tuvell needed to try thinking of to "patch over" his difficulties with Mr. Knabe. At this point, Mr. Tuvell asked for another "three-way" meeting, which Mr. Feldman refused.

June 10, 2010 – Mr. Tuvell states that Mr. Feldman told him that he had met with Mr. Knabe the previous day and Mr. Feldman had decided that Mr. Knabe and Mr. Tuvell could no longer work together. Therefore, he would have Mr. Tuvell and Ms. Sujatha Mizar, another member of Mr. Feldman's team switch job assignments. Mr. Tuvell considers this a "demotion" because Ms. Mizar is "very junior" to Mr. Tuvell. [NOTE: Mr. Tuvell is a Band 8 and Ms. Mizar is a Band 7. In addition, when this was investigated by Ms. Lisa Due, Mr. Tuvell stated that he saw no issue with ensuring that the work Ms. Mizar was doing could be developed into Band 8 work (see June 20 entry).]

Mr. Tuvell states that he told Mr. Feldman he wished to lodge a complaint. Mr. Feldman referred Mr. Tuvell to Ms. Kelli-ann McCabe, the "legacy Netezza" HR representative or Ms. Diane Adams, HR Partner. He also told Mr. Feldman that not only is Mr. Knabe a "bully," but that he hesitated to call him a "liar" because the word implies an "intent to deceive, but he believes since the "yelling incident" that Mr. Knabe is "consciously promulgating falsehoods with an intent to deceive." Mr. Tuvell states that Mr. Feldman told him that Mr. Knabe said the same things" about Mr. Tuvell." Both Mr. Feldman and Mr. Knabe deny ever stating that Mr. Knabe called Mr. Tuvell a "liar" or a "bully."

June 10, 2011 – Mr. Tuvell sent an e mail to Mr. Knabe about miscommunication, carbon copying Mr. Feldman, stating that when he told Mr. Knabe to get off his back was a result of Mr. Knabe making a statement that "was so nonsensical" that he could not even logically "parse it in the instant given" and the "illogic was so off-the-wall" that he "was

unable to analyze it in-the-moment," his only response to Mr. Knabe raising his voice was to raise his own voice. He goes on to offer his "apologies for raising" his "voice enough to make himself heard" and wanted to wish Mr. Knabe and his team the "best possible success going forward."

Mr. Knabe responded, carbon copying Mr. Feldman, that he appreciated the "words of encouragement" and "support for the ongoing performance work," and he was disappointed in how their "working relationship on this project" had "come apart," and was sorry for any "embarrassment and anger" he may have provoked "when raising his voice."

June 10, 2011 – Mr. Feldman asked Mr. Tuvell and Ms. Mizar to provide a "brief e mail at the end of every business day detailing the transition tasks" completed and alerting Mr. Feldman "to any problems or issues" they might encounter. Ms. Mizar responded with a report that day, requesting Mr. Tuvell to add anything she might have forgotten. Mr. Tuvell states that since her report seemed to be "perfectly adequate" he did not "bother adding anything."

June 10-13, 2011 – Mr. Tuvell sent several e mails to Ms. McCabe, who responded that she would be happy to discuss his issues. Essentially, he was complaining that Mr. Knabe was a "bully" who yelled at him, and Mr. Feldman unfairly removed him from the Wahoo project.

INVESTIGATOR'S NOTE – Mr. Tuvell included his June 5-12 weekly progress report to Mr. Feldman was attached to his note. Below are some of the excerpts from that progress report are included below:

"Late on Wed afternoon (before my error, above, was known), Fritz [*sic* Mr. Knabe] published to me and Steve [*sic* Mr. Lubars] a list of 5 "upcoming performance tests", which I completed by Fri (and I assume Steve completed his part too). Actually some of the things Fritz suggested were worthless, as 'must' have been obvious to Fritz, but it's his manner to arbitrarily assign scut work to me (seemingly due to neuroses of his own, as has become increasingly clear to me)."

"BTW, have you noticed that all the above were 5 days of work packed into only 3 days? I did this voluntarily, of course, as I always step up where above-and-beyond-the-call-of-duty is required. Nevertheless, that good deed didn't go unpunished, because Fritz shat upon me in public (Camb office) with lies, bullying/harassment and yelling, and surreptitiously (behind my back, refusing to talk to me face-to-face) causing me to be 'fired' from the Wahoo project on Fri. This was an 'illegal' adverse job action (in the IBM sense, perhaps even in the civil law sense), because it was a consummated false defamation of me (IBM policy calls it "harassment"), totally without due process."

"The very act of Fritz's having gone to Dan behind my back, and falsely accusing me of being a liar and bully (as Dan told me he did), already amounts to such an 'illegal' act. Additionally compounding that defamation is the further public humiliation of unilateral

removal from the most excellent high-profile position on Wahoo, to what seems (to me and others, just ask a disinterested third-party observer) to be a highly symbolic deportation to Siberia. I felt unjustly accused and unjustly acted upon. Nevertheless, Dan [sic Feldman] reiterated his many-times repeated mantra that his ONLY [his word] interest is in helping the Wahoo project succeed (thereby excluding interests in such minor niceties as justice to me, if it came at the expense of Wahoo/Fritz)."

Good
Bye
LARRY

June 11, 2011 – Mr. Tuvell wrote a separate "goodbye" to each member of the Wahoo team (i.e., Mr. Title, Mr. Keller, Mr. Chen, Mr. Lubars, Mr. Devesh Agrawal, Mr. Daniel J. Dieterich) stating that "It seems I have been reported to be a liar and a bully...I've of course asked for a 3-way (or more) conversation to clear the air, multiple times, but that's been adamantly refused. So I have absolutely no idea who I've offended, or how. It is for that reason I am forced to write this note in ignorance. If you're not one of the people I've offended, please ignore this note. But in case you're among the offended, please know I did not intend to do whatever it is I'm being accused of, nor was I even aware of it. Nevertheless I do profoundly apologize to you, quite sincerely. The irony is, I've always valued my interactions with you, as clear, honest and of high quality in all ways, and I've never detected any friction between us. If I've offended you, I really hope we can iron out our difficulties...For what it's worth, I'm including below a transcript of an event that happened on Wednesday afternoon, which seems to have precipitated this turn of events."

Mr. Tuvell included the two e mails sent by him and Mr. Knabe in the June 8 and June 10 entries above. [NOTE: Mr. Lubars found this note to be an example of Mr. Tuvell's "aggressive" e mail style. Finally, Mr. Lubars stated that he does not want Mr. Tuvell to know what he said about Mr. Tuvell, in part, because Mr. Tuvell's note was trying to assess in this note who "reported him."]

June 12, 2010 – Mr. Feldman responded to Mr. Tuvell's June 5-12 weekly progress report he "...not believe that you have correctly reported our conversations and I deny that you are being punished in any way." He also made comment that since Mr. Tuvell had previously made it clear that he had sued a former employer, he wanted future conversations be in the presence of a Human Resources representative and that all written communications copy a Human Resources representative. Mr. Tuvell's interpretation of this note is that Mr. Feldman went "adversarial." Ms. McCabe and Mr. Feldman's manager, Mr. John Metzger were on copy of the note.

June 13, 2011 – Mr. Tuvell responded to Mr. Feldman's note, in part to make the following clarification – he did not say Mr. Feldman was "actively punishing" Mr. Tuvell, but that this constituted an "adverse job action," because when somebody "disappears from a project in the middle of the night, only to show up on limbo, it speaks silent volumes to the organization." And this additional clarification as well – while Mr. Tuvell did mention once that he had been involved in a case of "workplace harassment/defamation once before,...extremely similar to the one that has now been "inflicted," he stated this not as a "threat" or "warning," "as your note seems to subliminally imply ("protecting ... interests"), but as a point of information that 'I know

what I'm talking about'...." [NOTE: Managers reassign employees to different projects all the time.]

June 15, 2011 – Mr. Feldman sent an e mail to Mr. Tuvell stating that while he received a report from Ms. Mizar, he did not receive one from Mr. Tuvell. He goes on to state that perhaps he “was not sufficiently clear,” that he required from both of them in their own words and to do until notified otherwise. Mr. Tuvell interprets this as firing off a “nasty-gram,” “dunning” Mr. Tuvell for not providing him with a report. Mr. Tuvell goes on to state that this was a “total absurdity” and an example of “consummated harassment” because of all the of e mails Mr. Tuvell had received from Mr. Feldman in the past “none had carried anywhere near this level of seething animosity.” Mr. Tuvell further states that the “smarmy tone” of Mr. Feldman’s e mail “was undisguised, blatant, stiff, hostile, demeaning, snide and condescending” and Mr. Tuvell “recognized this as the opening salvo of overt warfare.”

June 15, 2011 – Mr. Tuvell responded to Mr. Feldman in a e mail stating “Oh Come On. OK, you want a status report, I'll give you a status report. It is identical to Sujatha's. As if you didn't know that was obviously going to be the case, and which is the reason I didn't bother sending you this redundant, useless information... Dan, I'm very sorry to observe you now showing your true colors in this way. As long as you insist on interacting with me in this sort of blatant (not even an attempt at subtlety) snide harassment/retaliation.... But you and Fritz now appear to be on a campaign of actively persecuting me (this email of yours is a sample piece of evidence)....”

June 16, 2011 – Ms. Lisa Due, was asked to help line management with with Mr. Tuvell’s issues. She was introduced to Mr. Tuvell via a note from Ms. Adams.

June 16, 2010 – Mr. Feldman sent Mr. Tuvell an e mail at 10:25 AM asking Mr. Tuvell to provide him a first draft for a detailed (one-day granularity) schedule for his work on his assigned projects between now and the beginning of Mr. Tuvell’s medical leave by the end of the following day. Mr. Feldman states that he could use the outline they had developed on the whiteboard and that Ms. Mizar had subsequently documented as the beginning of such a schedule. [NOTE: Mr. Tuvell was scheduled to be out on Short Term Disability from July 10-24 and to be on vacation from July 24-31.]

June 17, 2011 – Mr. Tuvell responded to Mr. Feldman that the manner and tone of the note is “consistent with an industry badgering/harassment technique, known in some circles as ‘blackballing’ (portrayed falsely by the unscrupulous as a ‘performance plan’ that just happens to come out of the blue, without need and without warning).” This is done by a manager giving an employee some kind of onerous task to perform, then no matter how well the employee performs it, the manager claims it wasn’t good enough.” Mr. Tuvell goes on to state that he has no idea what Mr. Feldman wants, because nobody had ever requested him to provide a 3-week day-by-day schedule; and therefore “it’s an impossible-to-succeed blackballing task.”

June 20, 2011 – Mr. Tuvell met with Ms. Due. Ms. Due agreed to investigate the "grabbing papers" incident between Mr. Feldman and Mr. Tuvell, the "yelling" incident between Mr. Knabe and Mr. Tuvell. In addition, Ms. Due looked into the following additional claims made by Mr. Tuvell: Mr. Knabe stated that Mr. Tuvell was to work directly for Mr. Knabe in front of Mr. Feldman, Mr. Knabe "defamed" Mr. Tuvell calling him a bully and a liar, and Mr. Tuvell was being "singled out" by Mr. Feldman by asking Mr. Tuvell to create a work plan. She did not look into Mr. Tuvell's complaint about being demoted, because when she spoke with Mr. Tuvell he indicated that he could see Ms. Mizar's role as easily expandable to a band 8 role.

June 20, 2011 – Mr. Tuvell sent Ms. Due an e mail with an outline of Mr. Feldman's request and commenting to her that he believed the above request to be an example of "harassment/bullying/blackballing, because it is clearly intended to be an impossible-to-succeed task.

June 23, 2011 – Ms. Due responded that it looked like "a very small project plan" to her that would help map out the activities under each bullet; and have seen/done many of these herself in the past. However, if he wished to he could always ask Mr. Feldman for a time extension.

June 27, 2011 – Based on Mr. Tuvell complaining to Ms. Due that he was being "singled out" by asking him to do a project plan, Ms. Due sent Mr. Tuvell two examples of simpler project plans done by others on Mr. Feldman's team that he could use as a guide. Mr. Tuvell found these inadequate to help him; and that Mr. Feldman should have just told him to do the work because Mr. Feldman knows he would do it "better than anyone else" and the "assignment to write up a DETAILED DAY-BY-DAY 3-WEEK SCHEDULE, INVOLVING FOUR UNKNOWN/NEW TECHNOLOGY PROJECTS, UPON ONE-DAY'S NOTICE, is UNHEARD OF and IMPOSSIBLE. IT IS DISPARATE TREATMENT, PUNISHMENT, HARASSMENT, HOSTILE WORK ENVIRONMENT, PICK YOUR EUPHEMISM HERE."

Ms Due responded that "your manager has asked you to do a project. You are correct, it is not exactly the same nor is it the same level as others, since you are asked to do a higher level which is appropriate given your band and experience."

Mr. Tuvell responded with comments such "are you (and/or Dan) implying that 'I am not doing the project'...." and Mr. Feldman is "giving me that kind of abusive assignment just to lay a trap for me."

June 27, 2011 – Mr. Tuvell sent an e mail to Ms. Due, Ms. Adams and Ms. McCabe, carbon copying Mr. Feldman. In it he forwards a note from Ms. Mizar and states that he stumbled upon another note that should be forwarded as relevant to the transition status and comments "Incidentally, if anyone thinks I'm being "smart-aleck" about this onerous/picayune crap, you'd be wrong. Instead, what I'm doing is "pointing out the obvious....Dan, is in my opinion embarked upon a campaign, in plain sight of HR, of blackballing me with onerous/picayune tasks. And I most certainly DO know what I'm

talking about, because I'VE BEEN SUBJECTED TO THIS KIND OF HARASSMENT BEFORE,.... I know if I don't at least pretend Dan is being serious/reasonable, he'll find a way to use it against me. It's happened to me before, and it's now happening again, exactly the same way."

Ms. McCabe responded "Wait, while the status updates are part of what has been asked of you, please keep your content to only the tasks at hand. Additional commentary regarding your manager or other co-workers isn't appropriate and should be sent just to Lisa if you wish to express further.

June 29, 2011 – Ms. Due sent an e mail to Mr. Tuvell stating that she had completed her investigation and found that "there was insufficient factual information to support" his allegations. [NOTE: Ms. Due had previously explained to Mr. Tuvell that she was consulting with M. Tuvell's management and would brief his management on her findings.] Ms. Due concluded this based on her interviews that if anything supported that Mr. Tuvell was more likely to have been the one who raised his voice than Mr. Knabe (Mr. Lubars was concerned to have his name mentioned because he found Mr. Tuvell to be overly confrontational) and she saw no issue with removing Mr. Tuvell from supporting Mr. Knabe's work -- this was just a reassignment of work within Mr. Feldman's team.

Ms. Due included in her e mail that Mr. Tuvell could contact me if he disagreed with the findings of her investigation.

Later that day, Mr. Tuvell sent me an e mail stating that he wished to escalate his issue(s) to me, but that he was scheduled to be out for pre-scheduled medical leave starting July 7 followed by pre-scheduled vacation, and returning August 1, 2011. Therefore, he stated that he would not be able to participate in the process until he returned.

In response, I set up a meeting with Mr. Tuvell for July 1.

June 30, 2011 – Mr. Tuvell's transition status note included the following:

"Sujatha [*sic* Mizar] had previously been using an unbelievably poor solution...It's actually hard to believe she herself invented this, did she or did somebody else put her up to it? In other words, now that I've seen what she's doing..., the data she's collected heretofore should now be considered suspicious/unreliable until proven innocent.

I've also heard Devesh [*sic* Agrawal] complain about the inability to capture virtual tables....But again all he's done is complain, and suggest increasing the size of the ring buffer beyond 16 MB, by modifying the source code and recompiling (a terrible idea, an arbitrarily large size is needed, in every build, not oneoffs)! But in his case, that's certainly his idea, nobody else planted that idea into his head, because he's a fully capable developer. Why didn't he just go fix it?

As you know, this effort is far above-and-beyond the call of duty (a constant refrain with my work, as had always been recognized up until June 10). The job as Sujatha 'transitioned' it to me was merely to run her scripts, then give the results to Garth so he can 'post-process' this data in any way he sees fit to derive more useful statistics and 'pretty graphs' (as she herself defined the task in email to me). In other words, my new job was to be a 'script monkey', as you've so colorfully described this kind of work many, many times. Fully consistent with the harassing demotion you've subjected me to...."

June 30, 2011 – Mr. Feldman responded "I appreciate your initiative in solving the ring buffer wrap around problem...However, I didn't assign you this task and you didn't communicate with me about your intention to undertake it. While I agree that it is important and useful, it may not have been the best use of the limited time available prior to your medical leave and by pursuing it without communicating with me you have undermined my ability to make the best decision about how a scarce resource (your time and talent) are allocated. I believe that more effective communication will avoid this kind of thing in the future. Those are precisely the kinds of decisions I'm expected to make.

I have to caution you once more against the unprofessional tone of certain parts of your email. In particular, you appear to be engaged in ad hominem [sic "at the person"] attacks against both Sujatha and Devesh and this is inappropriate and unnecessary; you can take credit for work you've done without casting aspersions on your colleagues."

June 30, 2011 -- Mr. Tuvell states in an e mail to Mr. Feldman that he was doing just the opposite of making an "ad hominem insinuation," in that he "praised" Ms. Mizar "as someone" whom he did not believe "designed the scripts she was running" and he "took special care to call Mr. Agrawa a "fully capable developer."

Mr. Tuvell also comments that he was capable of making any "arbitrary off-the-wall *ad hominem* attacks against anybody and anything with impunity if I had wanted to," because this discussion was under the aegis of both manager-employee communication and the HR Concerns and Appeals processes.

July 1, 2011 – Mr. Tuvell and I met via telephone. Prior to that call he sent me an e mail outlining his complaint.

July 5, 2011 – Mr. Tuvell sent me an e mail stating that he would write up a "long-form" complaint when he returned from STD and vacation.

W/M July 5, 2011 – Mr. Feldman warned Mr. Tuvell that in order to continue to maintain his employment with IBM, he would have to behave in a professional non-disruptive manner and follow management direction. Mr. Tuvell states that he could not keep up with Mr. Feldman and asked Mr. Feldman to e mail him a copy of the behaviors he needed to avoid. Mr. Feldman sent an e mail as requested:

-
- Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes);
-

- Conduct in the workplace that creates, encourages, or permits an inappropriate work environment;
 - Failure to follow management direction (for example, refusing to develop a plan for how you would spend your time prior to your medical leave)."
-

July 6, 2011 -- Mr. Tuvell responded to the above e mail. He asked for examples of when he exhibited the behaviors or made comments outlined in the first bullet above that had happened prior to June 8, because all statements made after that date were "under the protected aegis of HR processes" which therefore enjoys "absolute privilege." [NOTE: While an employee is entitled to complain about inappropriate actions on the part their management and/or there peers, there is nothing in the IBM HR processes that gives an employee free range to demonstrate any of the behaviors or comments listed in the first bullet above.]

As to the next two bullets, Mr. Tuvell stated all he did was to defend himself in through his "conduct" and never "refused" to follow management direction. He just was supplied with insufficient guidance to create the project plan required; and he has never seen anyone outside of a project manager asked to provide such a plan. [NOTE: In the investigator's experience, employees from all skills are routinely asked to provide project plans.]

Mr. Feldman responded that the point of bringing these expectations to Mr. Tuvell's attention was to ensure that Mr. Tuvell was aware that they are fundamental conditions of employment for all IBM employees, doing so was in no way an accusation, and this is the process that IBM management would follow with any employee who appeared to need the education. Mr. Feldman offered for either himself or an IBM professional to discuss anything of which Mr. Tuvell was unsure.

July 6, 2011 -- Mr. Tuvell responded in a email that he could think of one example in which a Mr. Brian Maly wrote an email discussing the security of single-overpass wiping of hard disks and Mr. Tuvell responded that this was based on information that was at least a decade out of date. Mr. Maly "stonewalled, claiming he had 'personal experience' (unspecified) that what he wrote was correct. That was cool if true (as I thought both then and now): maybe he's worked at the CIA or in academia, where that kind of work is really done?" Mr. Tuvell goes on by stating he sent a relevant paper to the e mail group, and if this was the kind of thing where people were "talking behind my back at how nasty I am, then he wanted to know what's a better way of handling things.

Mr. Feldman responded that he would alert Mr. Tuvell when he saw any behavior that seemed to be inappropriate and he hoped this would help Mr. Tuvell to "re-calibrate" his "discourse." However, Mr. Tuvell needed to be careful not to exceed the bounds of tolerable behavior/comments and advised him not to push the "send" button until he had re-read what he wrote. He also stated that it was "perfectly fine and even necessary" to disagree with colleagues when a mistake was made, but it was necessary to do so in a

way that cannot be construed as an attack on individuals "motives, intentions or competence. Mr. Feldman offered to provide an "independent review" of Mr. Tuvell's communication.

July 6, 2011 – Mr. Tuvell sent an e mail to Mr. Feldman and Mr. Garth Dickie stating that he had update the "wiki" and that they could easily find the information by searching the wiki for "blktrace" or "if you're lazy you can just click" the link he provided in the note.

July 11, 2011 -- Mr. Feldman responded thanking Mr. Tuvell for getting this taken care of the above before starting his time off and under the heading of helping with Mr. Tuvell's communication style, using the term "lazy" was the sort of thing Mr. Tuvell wanted to avoid.

Mr. Tuvell refers to this incident as the "lazy scandal" in his complaint. He states "Of all the gaping, pus-filled wounds festering IBM's one-hundred-year history, not many can be more characteristic/emblematic of rot at the corporate core than the 'lazy' scandal.... After a period of five days (during which time God-knows-how-many IBM/Netezza managers, HR staff and Legal must be poring over the world's literature trying to figure out how they can twist/pervert my innocent remark into The Work Of The Devil), Dan responded with an email on Monday, July 11 attacking what I'd written as offensive. Of course, Dan was careful to time his attack to coincide with my pending two-week STD (Short-Term Disability) due to surgery, thus guaranteeing I'd be in a weakened state (no doubt hoping for another slip-up by me), and maximally enhancing the attack's IIED (*sic* Intentional Infliction of Emotional Stress) effect."

July 10-24, 2011 -- Mr. Tuvell was out on Short Term Disability (STD).

July 11, 2011 – Mr. Tuvell sent a note to Mr. Feldman and Mr. Dickie apologizing for his use the word "lazy," stating that he intended it to be "innocent" and a "jocular throw-off."

July 20, 2011 – Mr. Tuvell sent a note to Mr. Feldman and Mr. Dickie withdrawing the above apology because he now remembers that he has read before that "laziness is lauded as a prime virtue of programmers." Therefore, "no apology was necessary."

July 24-31, 2011 – Mr. Tuvell was out on vacation.

August 3, 2011 – Mr. Feldman asked Mr. Tuvell what were his work plans (got me nice and relaxed in order for his upcoming attack to have maximum effect) for the rest of the week. Mr. Tuvell responded that he had accomplished most of his work "Blktrace" while he was recuperating after surgery. Therefore, he planned to spend the rest of the week (i.e., the next two days) to work on his Appeal as was previously agreed as we had three times in writing. Mr. Tuvell provides as proof of this agreement three e mails: 1) his June 26 – July 3 weekly progress report states that he started the IBM Concerns and Appeals process and that it will "take a non-trivial amount" of his time therefore he "will properly

charge the time to the company; 2) in a July 5, 2011 e mail to Mr. Feldman, Mr. Tuvell stated that he spent part of his July 1st working on his appeal; 3) in an August 3, 2011 e mail to Mr. Feldman, Mr. Tuvell states that he worked on "blktrace" during his time off because he was going to need some time to write his appeal. [NOTE: This was to appeal Ms. Due's investigation of his issues.]

Mr. Feldman responded that he could not spend the full two days just working on his Appeal. Quoting Mr. Tuvell, "Dismayed and provoked by Dan's statement, I react instinctively, leaning forward, and letting my voice get a little louder than normal (he had after all provoked me, and my guard is down from the preceding semi-cordial forty-five minutes), saying: 'Now wait a minute, Dan.' The pounce complete, now Dan sinks his fangs. He says: 'If you yell at me one more time I'll fire you! I ordered you not to work during your STD and you disobeyed orders. I need to have a full workday from you every scheduled workday. You must continue your work on Blktrace full-time for the rest of the week.' I hesitantly (out of fear) tried to explain that I only mildly raised my voice out of provocation, I hadn't "really yelled", certainly not in the sense that Fritz certainly had, but Dan said 'I don't care, you can't do that [i.e., pseudo-yell, or whatever-you-did] in here'." Mr. Feldman states that never ordered Mr. Tuvell not to work while on STD and all he said to Mr. Tuvell was that he was not asked to work while on STD and while Mr. Tuvell was free to work on his Appeal, he could spend two full work days just working on his appeal.

August 3, 2011 – Mr. Feldman giving Mr. Tuvell a formal "Warning Letter Without Restrictions." The warning letter in part states he had violated the "proper workplace behavior" condition of employment by exhibiting:

- "Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments verbally or via notes; specifically, your email of 20 July 2011 addressed to Garth Dickie and me;
- Conduct in the workplace that creates, encourages, or permits an inappropriate work environment.

Mr. Feldman states that he decided to place Mr. Tuvell on notice because of Mr. Tuvell's escalating inflammatory e mails and speech aimed at Mr. Knabe, Mr. Mr. Agrawa, Ms. Mizar and himself which did not respond to counseling. [NOTE: It is common practice in IBM to provide warning letters when employees exhibit this type of behavior. In more serious cases warning letters include restrictions such as no salary increase, no promotions and no job movement unless in the best interests of the company for a specified period of time, as well as impact on salary, PBC assessments, etc.]

August 3, 2011 – Mr. Feldman asked Mr. Tuvell what he was planning on working on for the rest of the week. Mr. Tuvell responded that most of the work on "Blktrace" was done over a five-day period during Mr. Tuvell's recuperation from surgery and the rest was completed over the first three days of the current week. He therefore planned on working on his "Appeal" for the next two days. Mr. Tuvell states that this was agreed to by Mr. Feldman in writing three times. He references his weekly report for June 26 - July 3 and

two e mails to Mr. Feldman dated July 5 and August 3. However, all that appears in the weekly report is that the IBM Concerns and Appeals process "will take a non-trivial amount of" time and he would "charge the time to the company. As to the two e mails they both refer to working on his complaint, but neither specifies an amount of time, nor a request for any specific amount of time.

Mr. Tuvell states that at that point Mr. Feldman said that he could not work on his complaint and Mr. Tuvell reacted "instinctively, leaning forward, and letting my voice get a little louder than normal" said "Now wait a minute, Dan." To which Mr. Feldman responded "If you yell at me one more time I'll fire you! I ordered you not to work during your STD, and you disobeyed orders. I need to have a full workday from you every scheduled workday." However, Mr. Feldman states that he just simply told Mr. Tuvell that he could not work on his "Appeal" continuously for a full two days and Mr. Tuvell did "yell" at him.

INVESTIGATOR'S NOTE: Mr. Tuvell refers to this incident as "The Day That Will Live In Infamy for IBM."

August 17, 2011 - Mr. Tuvell was approved for STD from August 15 - September 14, 2011.

August 18, 2011 - Mr. Tuvell sent in the "long-form" complaint he committed to provide to me on July 5.

September 9, 2011 -- Mr. Tuvell's STD was extended until October 18, 2011.

IV. ISSUES

Did Mr. Knabe yell at Mr. Tuvell? *JUNE 8*

MORE THAN JUST YOU & KNABE

No. Though there were three individuals present at the June 8th meeting, Mr. Tuvell, Mr. Knabe and Mr. Lubars, the only one who heard Mr. Knabe yelling is Mr. Tuvell. Mr. Knabe remembers that both he and Mr. Tuvell raised their voices; and Mr. Lubars states that it was only Mr. Tuvell who "yelled" as well as using profanity (i.e. "god damn it" and "shit").

Was Mr. Tuvell unfairly "demoted?"

No. Mr. Tuvell was ~~never demoted~~ at all - he was a Band 8 and he remains a Band 8. In addition, it was completely appropriate to exchange work assignments between Mr. Tuvell and Ms. Mizar. Not only are work assignments regularly shifted among employees at IBM, it was clear that Mr. Tuvell was not providing the support that Mr. Knabe required. Further, Mr. Tuvell refused to let go of the animosity he exhibited towards Mr. Knabe by calling Mr. Knabe a "liar" and a "bully," getting so "agitated" with Mr. Feldman because Mr. Knabe expressed concern about getting the work he needed done in their May 18th meeting, putting himself in the middle of the original discussion between

*CHARTS
COMPARISON
MIZAR'S
BETTER*

Mr. Knabe and Mr. Lubars, continuously complaining that Mr. Knabe expected him to be a "mind reader," making comments that Mr. Knabe is either "threatened" by Mr. Tuvell or going "insane," and even in his apology note to Mr. Knabe accusing Mr. Knabe of making a "nonsensical" statement.

Was Mr. Tuvell unfairly asked to provide a project plan for his last three weeks before going out on Short Term Disability and vacation?

*Mizar June 10
0446 15*

No. As Ms. Due's investigation demonstrated, other members of Mr. Feldman's team have been asked to provide project plans; and it is a common practice within IBM to require project plans. This is especially true in the face of an employee such as Mr. Tuvell who is resistant to providing status reports.

Was Mr. Tuvell unfairly given a formal "warning letter?"

No. Mr. Tuvell demonstrated an escalating set of unprofessional and inappropriate comments and behaviors and disregarding management direction from May through July. This included everything from his confrontation with Mr. Feldman on May 13 and Mr. Knabe on June 8 to his calling Mr. Knabe a "bully" and a "liar." It also included Mr. Tuvell's unprofessional comments that Mr. Knabe was "threatened" by Mr. Tuvell, and that Mr. Knabe was "going insane," making "nonsensical" statements and "worthless" comments, and committing "illegal acts" and "public humiliation" to denigrating the work of his peers (i.e., Ms. Mizar, Mr. Agrawal and Mr. Maly) by discussing or referring to their work as "an unbelievable poor solution," the data provided should be "considered suspicious/unreliable until proven innocent," "a terrible idea," "stonewalling," "lazy," and being a "script monkey."

*July 5th
warned
By Feldman*

Reminders!

- ① WARN YOU THAT YOU SHOULD NOT TRY TO FIND OUT WHICH PEER SAID WHAT OR INTIMIDATING BEHAVIOR OR MANIPULATE THE INVESTIGATION [GOODBYE LETTER]
- ② I AM THE FINAL IBM ESCALATION POINT = LETTERS TO ME
- ③ FINALLY WE WILL GET BACK TO YOU TO CONTINUE ACCOMMODATION DIALOGUE GOING FORWARD