

In The
United States Court Of Appeals
For The
First Circuit

Case No. 15-1914

WALTER TUVELL,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES,

Defendant-Appellee.

*Appeal from an Order and Judgment entered in the
United States District Court for the District of Massachusetts*

ORAL ARGUMENT TRANSCRIPTION, ANNOTATED

WALTER E. TUVELL, *PRO SE*
836 Main St.
Reading, Massachusetts 01867
(781) 944-3617 (h); (781) 475-7254 (c)
walt.tuvell@gmail.com

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PREFACE

In the matter of Tuvell v. IBM, this document presents a transcription of the oral argument held on Apr. 5, 2016, together with annotations (in endnotes) thereto, prepared by plaintiff Walter Tuvell.

As reason therefor, plaintiff Tuvell states that mistakes (prejudicial to plaintiff) were made by the participants during oral argument, and he cites interest in clarifying and/or correcting said mistakes. Left uncorrected, the mistakes have the potential of misleading reviewers, to the unfair detriment of plaintiff.

CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically via the First Circuit's CM/ECF system, on Jun 15, 2016. It will be served electronically via CM/ECF to all counsel of record and other registered participants of the Court's CM/ECF system. I hereby certify that paper copies will be sent to all participants not registered in CM/ECF.

Signed: /s/ Walter E. Tuvell

Dated: June 15, 2016

UNFILED

ORAL ARGUMENT TRANSCRIPTION

Participants

*Federal First Circuit Appellate panel: Juan R. **Torruella** del Vallee, Sr.; Sandra L. **Lynch**; Ojetta R. **Thompson**.*

*Appeal from dismissal by summary judgment (Federal District Court, District of Massachusetts, Denise J. **Casper**).*

*Andrew P. **Hanson** for Tuvell.*

*Matthew A. **Porter** and Anne E. **Sellinger** (Jackson Lewis) for IBM.*

Court Clerk (anonymous).

*Transcription and endnotes by Walter E. **Tuvell**.*

1 **Court Clerk** 00:00.2

2 Tuvell versus International Business Machines.

3 **Torruella** 00:22.0

4 Mr. Hanson, good morning.

5 **Hanson** 00:24.5

6 'Morning, your honor.

7 May it please the court. My name is Andrew Hanson. I represent plaintiff/ap-

8 pellant, Mr. Walter Tuvell. And I'd li—, I'd like to request the reservation of three

9 minutes of my time for a rebuttal.

1 **Torruella** 00:56.3

2 You may.

3 **Hanson** 00:57.3

4 Thank you.

5 In our reasons why oral arguments should be heard, we mentioned two.

6 First, whether an employer may reject applications for job transfer from an
7 employee on short-term disability¹ leave, precisely because that employee is on
8 short-term disability leave.

9 And second, the “Catch-22” issue: namely, whether an employer may keep in-
10 sisting that an employee can return to work for his harassing supervisor, but is not
11 a qualified disabled person eligible for a job transfer.

12 I’d like to start today by discussing each of these questions in the context of
13 Mr. Tuvell’s rejected job transfer applications.

14 Turning first to the Catch-22 issue that was created by IBM and endorsed by
15 the District Court, the question is: “Was Mr. Tuvell a qualified disabled person?”

16 Yes, he most certainly was. On January 24th, 2012, while Mr. Tuvell was still
17 employed at IBM, attorney Larry Bliss, counsel for IBM, wrote to Mr. Tuvell’s
18 lawyer, quote: “The ADA does not require IBM to transfer Mr. Tuvell, or change
19 Mr. Feldman as Mr. Tuvell’s manager as a reasonable accommodation, since Mr.

1 Tuvell is capable of performing the job.” This should end the debate. IBM took
2 the position that Mr. Tuvell was a qualified disabled person, who could do his cur-
3 rent job, so of course he cou—, he should be eligible for a job transfer.

4 Now, however, IBM moved for summary judgment arguing there was no gen-
5 uine omi—, issue of material fact, that he was not a qualified disabled person, ca-
6 pable of performing job or any job. An—, and this should not be permitted.

7 Even if this court finds that IBM can change its position 180° like this, IBM
8 never—, nevertheless took the position that Mr. Tuvell could perform his job. And
9 Mr. Tuvell was steadfast that he could return to work with IBM, with a new super-
10 visor or in a new role. And his medical reports supported that he could. And he
11 performed well in his interviews at the time: at the time he was trying to get a
12 transfer, he performed well. So there’s actually no dispute that he was a qualified
13 disabled person.

14 At the very least, if all the parties agree that he was capable of performing his
15 job, or a new job with an accommodation, surely a jury could decide the same
16 thing. If there were any other result, it would be an unlawful Catch-22.

17 Having established that Mr. Tuvell was a qualified disabled person, we can
18 turn now to the second question, of whether IBM’s justification for denying his
19 transfers was unlawful.

20 The first rejection for transfer, to “The 579 Position”, came in writing on Jan-

1 uary 6th, 2012. Specifically, the hiring manager, Chris Kime, wrote to Mr. Tuvell,
2 quote: “I underestimated the difficulty of moving forward with bringing you to the
3 team. We cannot move forward with taking you directly from being on short-term
4 disability leave. This will receive very close scrutiny from the operations people in
5 the organization.” This is direct evidence of discrimination. It’s direct evidence of
6 retaliation for taking a disability leave. And it was an od—, unlawful failure to
7 provide a reasonable accommodation. It thus supports the conclusion that sum-
8 mary judgment was improperly granted on Counts II, IV, V and VI.

9 We cited *Sensing v. Outback Steakhouse* in this context, on page 41 of our first
10 brief. That’s the First Circuit case from 2009 that supports a number of Mr. Tu-
11 vell’s claims and arguments, and is thr—, cited throughout our briefs.

12 Now, in terms of Mr. Kime’s rejection for Mr. Tuvell’s transfer showing un-
13 lawful animus, IBM doesn’t even address this issue in its brief, and neither did the
14 District Court. That’s on pages 20–22 of the Addendum. The District Court
15 avoided that discussion by holding that the rejections for transfer were not adverse
16 actions. I want to address this point.

17 As a result of the two rejections for transfer, Mr. Tuvell’s income went from
18 two-thirds to zero. On page 160 of the *Sensing* ...

1 **Lynch** 05:34.8

2 I'm sorry.² I, I understood the reason for termination of, of his employment to
3 be different. I—, you've not yet talked about that. Would you address that please?

4 **Hanson** 05:48.9

5 Umm. I, I think that's wh—

6 **Lynch** 05:49.8

7 He's on short-term disability ...

8 **Hanson** 05:52.8

9 Right.

10 **Lynch** 05:54.2

11 ... according to the company records. In the meantime, the company sees
12 that, evidence that, he is in fact working someplace else. And at that point they ask
13 him about it. And he refuses to give information. And they essentially ask again.
14 And he refuses to give information. And at that point he is terminated. Is that ba-
15 sically correct?³

16 **Hanson** 06:29.6

17 Th—, th—, that covers some of the fact involved in the termination. Umm ...

1 **Lynch** 06:33.3

2 Yes, I'm asking about the termination.

3 **Hanson** 06:36.8

4 So, um, one of the facts you mentioned is that he was working at another com-
5 pany. And, for starters, that helps support the finding that he's a qualified disabled
6 person, 'cause he was working.

7 **Torruella** 06:47.6

8 That's beside the question that was asked by Judge Lynch.

9 **Hanson** 06:51.6

10 In, in terms of, uh, termination and the communications that were back and
11 forth at that time, um ... Mr. Tuvell, uh, was more than willing to assuage their
12 concern that he was not working for a competitor.⁴ And, he ...

13 **Lynch** 07:11.6

14 What's in the record? I, I hear your characterization of it. He said, "You can
15 go online⁵ and find out just as well, uh, without asking me," essentially.

16 **Hanson** 07:27.9

17 Uh, I, I'm not sure which, which fact you're referring to.⁶ Um ...

1 **Lynch** 07:31.5

2 Answer my question, please.⁷

3 **Hanson** 07:34.3

4 In terms of the animus at, at the, the termination?

5 **Lynch** 07:36.6

6 No. Go back. What were the reasons for his termination?

7 **Hanson** 07:43.1

8 I, IBM's, uh, alleging that he was unwilling to provide the name of his other
9 employer. And he was willing ... A—, and the concern stemmed from, “Was he
10 working for a competitor?” And under the, the company policies,⁸ you only have
11 to disclose other work if it is for a competitor. And he wasn't working for a com-
12 petitor. And he was willing to have a third party, uh ... You know, in ... First of
13 all, he inform—, he was not working for EMC, as they had first alleged. And sec-
14 ond that he was not working in a competitive capacity.

1 And there's plenty of evidence that, uh, the whole approach that they took at
2 this time was in retaliation for all of his complaints.⁹ In fact, on May 11th — that's
3 the date that IBM submitted its Position Statement at the MCAD — that's the very
4 same day it ramped up its questions of Mr. Tuvell, and, you know, trying to find an
5 excuse to be able to terminate him. So ...

6 **Thompson** 08:40.6

7 Doesn't the record say that he ha—, on his LinkedIn, uh, page, that he was
8 working for EMC? As a competitor?

9 **Hanson** 08:47.6

10 It, it, it appears that, that there was, uh, i—, information on his LinkedIn page
11 that indicated that. He had worked for EMC previously. IBM knew about that.
12 He hadn't touched his LinkedIn page for years. So there's evidence in the record
13 that he did not put that in there,¹⁰ and he ...

14 **Thompson** 09:05.5

15 Well, it's his page.

16 **Hanson** 09:07.1

17 ... know how it got there. It is his page, but he hadn't looked at it, or touched
18 it, for years.¹¹

1 **Thompson** 09:11.1

2 But that doesn't make it unreasonable¹² for IBM to ask him about it, or to de-
3 mand information.

4 **Hanson** 09:15.8

5 But th—, their concern was, “Are you working for a competitor?” Why, why
6 wouldn't they be comfortable with a third party neutral? Uh, you know ...

7 **Thompson** 09:24.8

8 He's still listed as — He's still out on leave from employment with them.
9 He's still their em—, employee.

10 **Hanson** 09:32.3

11 Right.

12 **Thompson** 09:32.9

13 Why should they have to go through third parties when th—, they have a
14 right¹³ to get the information directly from an employee?

15 **Hanson** 09:41.6

16 He was, he had valid concerns that they were going to jeopardize his employ-
17 ment there. There was a lot of retaliatory, discriminatory animus behind the
18 scenes, by a lot of different figures at IBM. And I'd like to get into that. Um ...

1 But first I just want to, uh, follow up on the issue of, uh — not the termination
2 as an adverse action — but the rej—, rejected transfers.

3 **Lynch** 10:07.8

4 Yes, we've heard you on that. Uh, umm, I'd like to hear a bit more on the ter-
5 mination. Uh, you've a—, a—, attributed to IBM kn—, knowledge of, uh, your
6 client's reactions, um, wh—, on what basis?

7 **Hanson** 10:26.3

8 Wh—, what reactions are you referring to?

9 **Lynch** 10:29.3

10 To h—, his refusal to reply to a request for information, from his employer.

11 **Hanson** 10:38.8

12 Uh, I'm sorry, could you ask the question again?

13 **Lynch** 10:41.8

14 You've admitted that IBM asked him information, uh, for information about
15 his LinkedIn page. I believe you have admitted that he refused to give them that.¹⁴
16 You then suggested that your client had good reason for doing so.¹⁵ I've said how
17 did, uh, the employer know what those reasons were?¹⁶

1 **Hanson** 11:15.4

2 Um ...

3 **Lynch** 11:15.9

4 Did he communicate them? Did he say, “I’m sorry, I can’t give you that infor-
5 mation”, for some reason?¹⁷

6 **Hanson** 11:25.0

7 He did. He, he indicated that he was fearful they would re—, retaliate against
8 him, and in—, interfere with that plan.

9 **Lynch** 11:31.1

10 All right. And if we find that’s¹⁸ not retaliation — that’s a perfectly legitimate
11 request for information — then what argument do you have?

12 **Hanson** 11:42.2

13 Well, normally, certainly, of course it’s a legitimate request for information.¹⁹

14 But in the circumstances of this case, with the long history that had gone on before
15 it ...

16 **Lynch** 11:50.5

17 Because they knew he said he had PTSD. Is that the answer?²⁰

1 **Hanson** 11:57.5

2 No, it's not solely because he had PTSD.²¹ Because all of the decision-making
3 that *[was]* involved in whether he should get a reasonable accommodation.
4 Whether, uh, um, whether he has legitimate complaints. Uh, all of those decision-
5 makers displayed animus throughout the process.

6 **Lynch** 12:16.2

7 So IBM is, or is his employer, is supposed to attribute to themselves animus,²²
8 and know from that that this request for information was an illegitimate request?

9 **Hanson** 12:34.6

10 Not that it was an illegitimate 'crest, request,²³ but if their main concern was,
11 "Are you working for a competitor?", um, wh—, why isn't it sufficient for some-
12 body to convince them that, that he's not?

13 **Lynch** 12:47.6

14 Uh ...

15 **Thompson** 12:47.7

16 'Cause it's on his LinkedIn page.²⁴

17 **Hanson** 12:50.5

18 But he did ... He, he, he ... First of all,²⁵ they went out and saw his LinkedIn

1 page. They found it. And so he didn't deny what was on there. He didn't try and
2 hide *{timer beep}* anything. He just said: "I didn't put that on there."²⁶ I don't know
3 how it got there.²⁷ I'm not working for EMC.²⁸ I'm not working for a competi-
4 tor."²⁹

5 **Lynch** 13:08.1

6 You've reserved some time. Thank you.

7 **Hanson** 13:10.2

8 Thank you.

9 **Porter** 13:19.2

10 'Morning. May it please the court. My name is Matthew Porter, counsel for
11 defendant/appellee International Business Machines. With me is my colleague,
12 Anne Sellinger.

13 And, we submit that the District Court dismissal of the Amended Complaint
14 was correct in every respect, and should be affirmed.

15 As this Court said about a month ago, in the *Lang*³⁰ case, "Sometimes the sim-
16 plest way to decide a case is the easiest way." Or the "best" way, rather. And I
17 think that's the case here. And the District Court got it right, that Mr. Tuvell was
18 not a qualified handicapped individual. He was not able to perform the essential
19 functions of his job.³¹ And in making that decision, the District Court was looking

1 at three different things.

2 First of all, with the medical treatment reports³² submitted to Mr. Tuvell's own
3 treating professionals.³³ First, the nurse practitioner for the first two³⁴ months, in
4 August and September³⁵ of 2011; followed up by his, uh, social worker, who was
5 his mental health counselor, Stephanie Ross, who p—, prepared MTRs for Septem-
6 ber³⁶ through December, 2011. And in each of those MTRs, he was described as
7 “totally disabled” from working.³⁷ These³⁸ are the basis³⁹ on which he sought and
8 received short-term disability. And, more to the point, because of the questionnaire
9 on the second page in the rec— — and this is in the record — he was described as
10 severely impaired in his ability to manage conflict with others.⁴⁰ His ability to get
11 along with others without behavioral extremes.⁴¹ And so you⁴² interacti—, actively
12 participate in group activities.

13 And we really do see that in the record of this case, over and over and over
14 again.⁴³ Now ...

15 **Thompson**

14:49.6

16 One of his, one of his last reports, though, said that he did ... It was a little bit
17 tentative⁴⁴ I, I uh, submit. But that he could perhaps go back to work if he had a
18 new supervisor and had a, a different work location.

1 **Porter** 15:05.0

2 It, it, it did. Ms. Ross ...

3 **Thompson** 15:05.9

4 And so the, so the question is why wouldn't that be a reasonable accommoda-
5 tion?

6 **Porter** 15:10.4

7 Well, under the circumstances, it, it, it ... she did ... Ms. Ross, the, the mental
8 health specialist, did say that, in that last one.⁴⁵ In which she was ... suppose⁴⁶ she
9 said it was only possible⁴⁷. And she was describing the idea of, of diff—, of possi-
10 bly a different supervisor or a different setting. One or the other of those things.
11 And, if you look at the record of different supervisors.⁴⁸ By that time, we actually
12 had a pretty clear, um, vision of Mr., Mr. Tuvell's idea of what a different supervi-
13 sor might look like.⁴⁹ It wasn't anybody he ever identified. He admits that, he
14 never identified a new supervisor.⁵⁰

15 But at that, by that point, in December, he had a laundry list of individuals,⁵¹
16 who he had described⁵² variously as wrong-doers and evil-doers, who had caused
17 tremendous problems in, in the workplace.⁵³ Including everybody from his direct
18 supervisor, Mr. Feldman, all the way up to the chairman of the company, Sam
19 Palmisano, who ... We're still not quite sure⁵⁴ why he's identified as a problem in

1 this case, other than the fact that he did receive⁵⁵ at one point Mr. Tuvell's unso-
2 licited⁵⁶ complaints about the, uh, about his workplace. It was about 300 pages of
3 documents.⁵⁷ Um, he testified he spent 22 hours a day on these documents, over 2-
4 3 weeks.⁵⁸ I mean, it's listed, item after item after item.⁵⁹

5 But the reality is, when you look at the record, and, and, and, of the case at, by
6 that point, it, it wasn't these came in a vacuum. Because we did have Mr. Tuvell,
7 you know, starting from the very beginning of his time with IBM — about five
8 months into his tenure, so May of 2011 — he has a very, very minor workplace in-
9 teraction.⁶⁰ The kind of thing that under any objective standard — we must apply
10 objective standard here — was benign at most. His boss comes to him — profes-
11 sional to professional, two senior software developers — and they, and they dis-
12 cuss th—, Mr. Feldman's idea — let's talk about the fact that our internal customer,
13 Mr. Knabe, is not satisfied with the deliverables.⁶¹ Now, it wasn't a big issue. It
14 was something about, either the software deliverable being in an Excel spreadsheet
15 or not, and whether it was quite on time or not.⁶² So you had that. And so they sat
16 down⁶³ to talk about it, and Mr. Tuvell's response was really remarkable.⁶⁴ Rather
17 than engaging in a professional conversation, he nearly⁶⁵ accuses Mr. Knabe of be-
18 ing a liar,⁶⁶ and having some sort of ulterior motive⁶⁷ behind it, and not knowing
19 what he's talking about.⁶⁸ So that conversation went nowhere.

20 Now, if we just stop there, you know, we—, we—, maybe we'd be, you know,

1 okay, if things improved from there. But a couple weeks later, Mr. Knabe and Mr.
2 Tuvell are again going over a software issue.⁶⁹ Again, a [*sic*] ordinary workplace
3 interaction. People working together. And what happens? Voices are raised.⁷⁰ Mr.
4 Tuvell leaves the meeting.⁷¹ Comes ba—, and, and then sends a scathing email,
5 again, attacking Mr. Knabe.⁷² Personally,⁷³ with a lot of a—, um, suggestions of,
6 you know, harassment, and, and defamation, and all those kinds of things.

7 So, IBM at that point says, “You know what? These two aren’t working well
8 together. So let’s move⁷⁴ Mr. Tuvell from the Knabe work to another set of work
9 within Mr. Feldman’s purview. And we’ll switch him over with another em-
10 ployee.”⁷⁵ Again, not an unusual situation⁷⁶ to develop⁷⁷ when you, when you’re a
11 —, working with internal clients, within an organization like this.

12 But the response is in—, is interesting. Mr. Tuvell immediately jumps⁷⁸ to the
13 conclusion that this change must be race, age and gender discrimination. Why?
14 Because he’s being replaced, or substituted with, a woman who’s South-Asian and
15 female, and s—, and, and slightly younger than him.⁷⁹ Or, actually, quite bit
16 younger than him.⁸⁰

17 So that’s his immediate default⁸¹ reaction. Not disability discrimination, but
18 these other things.⁸² And then ... Again, we’re not making a lot of progress here
19 in terms of the interpersonal relations between th— Tuvell and Mr. Kna—, and Mr.
20 Feldman. Where F—, Feldman is just trying to manage his group professionally.⁸³

1 But then when Mr., Mr. Feldman comes to Mr. Tuvell and Ms. Mizar — the
2 replac—, person he’s being replaced with — he says, “I just need transition memos
3 from the two of you. About⁸⁴ your hand-off for the work.”⁸⁵ Mizar gives hers,⁸⁶ no
4 problem. Tuvell doesn’t, and when Feldman says, “In case I wasn’t clear, I need
5 one from you too”,⁸⁷ his response is to go to Human Resources,⁸⁸ and say: “I’m
6 done with this guy. I can’t work with him anymore. He’s harassing me. He’s en-
7 gaging in defamation, and {???)⁸⁹ stress, and the whole rest of it.”⁹⁰

8 And it never changes from that time on, in terms of his position on this issue
9 of working with this supervisor.⁹¹ Except, as I mentioned, he expands the group.⁹²
10 And that’s entirely consistent⁹³ with, with, with, with what Ms. Ross said, in her
11 deposition testimony,⁹⁴ as well as in her, in her, long-term disability applica—, uh,
12 appeal.⁹⁵ All the way into September of 2012, after he’s been working for this new
13 company for a few months, and long gone from IBM. And she says, she’s still
14 talking about the fact that he was totally disabled.⁹⁶ Couldn’t work in the work-
15 place.⁹⁷ And when she was asked about this, in her deposition, she described it.
16 She said: “Mr. Tuvell, um, if he just goes near IBM,⁹⁸ within 20 to 50 miles⁹⁹ of the
17 location where he worked, he becomes hysterical. If he talks about the workplace,
18 he becomes upset, and obsessed.” And most disturbingly, she says that, “If he just
19 sees Feldman or Knabe ...” Just sees them — and the District Court noted this ...
20 This idea that, even if he got transferred to a new location, there was no guaran-

1 tee¹⁰⁰ he wouldn't see Feldman, Knabe ... He wouldn—, he wouldn't have to in-
2 teract with all these people he's identified, including Diane Adams, Human Re-
3 sources, uh, Russell Mandel in the Appeals department.¹⁰¹ “If he just sees Feldman
4 or Knabe,¹⁰² it could trigger obsessive thoughts, depression, or other strong reac-
5 tions.”

6 And, we actually have Mr. Tuvell's own testimony. A vivid example of what
7 those other strong reactions might look like. He testified that he drove to the gas
8 station he used to,¹⁰³ he used to patronize when he was commuting back and forth
9 to work. And just being at the gas station that he used to go to ...

10 **Lynch** 21:08.5

11 Counsel, ...

12 **Porter** 21:09.1

13 ... amed¹⁰⁴ ...

14 **Lynch** 21:09.5

15 ... actually we have read the decision. Um, could you meet some of your
16 brother's arguments? One has to do with the, what he calls the change in IBM's
17 position, from ...

1 **Porter** 21:27.2

2 Yes, your honor.

3 **Lynch** 21:27.5

4 ... from “qualified” to “you’re not qualified”.

5 **Porter** 21:30.6

6 Well I think this where the case becomes circular.¹⁰⁵ Is that by the time we, we
7 reference in this email,¹⁰⁶ between Mr. Bliss — who the IBM in-house lawyer —
8 and, uh, Mr. Tuvell’s then-lawyer, Mr. Mantell. And in that email, Mr., Mr. Bliss is
9 actually re-stating the position that Mr. Tuvell has taken in his various emails.
10 Which is, “There’s nothing wrong with me. It’s just ... I can do this job. It’s just
11 the supervisor’s harassing me.” And so, what Mr. Bliss is basically saying is:¹⁰⁷
12 “Look, we’ve done the investigation. We did the investigation originally with Ms.
13 Due. We did the investigation, the follow-on, with Mr. Mantell.” — or Mr. Man-
14 del, excuse me — “And as a result of those investigations, there has been no ha-
15 rassment, by any objective standard. Nothing’s happened to you. So ...”

16 **Lynch** 22:20.5

17 Okay. What about the, de—, denial o—, of the two transfers?

2 Well, there was only ... It was, it was essentially th— It was e— The first
3 time he applied for the position, it wasn't within the context of an accommoda-
4 tion.¹⁰⁸ It was simply Mr. Tuvell reaching out on the GOM, the Global Opportunity
5 Marketplace website, and ask—, applying for a job. He did interview, did inter-
6 view, for the job, and he didn't get the job. And that's because the hiring manager
7 for that position, when he was interviewing him, it was pretty clear during the
8 course of their conversations and some of the emails back and forth, that Mr. Tuve
9 —, Mr. Tuvell was looking for higher-end development work.¹⁰⁹ This was a kind-
10 of a low-level maintenance for a mature product. And Mr. Kime — the gentleman
11 who interviewing for the position was a relatively new manager,¹¹⁰ down in Austin,
12 Texas, managing remotely — um, concluded, based upon his, um, interactions with
13 him, that this was not going to be a good fit for Mr. Tuvell. It was not his, the kind
14 of work he was looking for.¹¹¹ It's evidenced by the fact that he was working on
15 the Wahoo, uh, work for Mr. Knabe, and he said, "That's the kind of work I want,
16 that kind-of high-end significant developer work".¹¹² Now we're way down from
17 that.

1 **Thompson** 23:29.6

2 That doesn't explain why there's a statement about him coming back from
3 short-term.¹¹³

4 **Porter** 23:34.7

5 That doesn't explain it.

6 **Thompson** 23:35.7

7 No.

8 **Porter** 23:36.2

9 No, but there, but there, th—, th— ... If you look at the email itself, he, he
10 does ...

11 **Thompson** 23:39.6

12 Do you want to explain that one?

13 **Porter** 23:40.7

14 I, I, I will, your honor. And, and ... I just want to note in that email that he
15 sent, that we're, we're speaking about, from January, that in fact Mr. Kna—, uh,
16 Kime specifically references that, this first, d—, discussion I just had, about the
17 reason why he didn't think he'd be interested in the work.¹¹⁴

18 As far as the short-term disability piece of it, he, wha—, wha—, he says —

1 and what Mr. Kime was deposed on this. And what he testified about, and, and —
2 what is admittedly a clumsy¹¹⁵ email — is that ... is that ... Because Mr. Tuvell
3 was somewhat of a unique situation — although with a company the size of IBM,
4 I'm not sure how unique — he, um ... He'd only been there for less than a year.
5 And so he hadn't received yet a PBC,¹¹⁶ a performance evaluation.¹¹⁷ And so Kime
6 didn't have a piece of paper¹¹⁸ to give to his boss, to say, to say, "This is what, this
7 is the review from the manager."

8 And Kime was not working alone. He was working in conjunction with his
9 upline managers. 'Cause again he's a relatively younger manager.¹¹⁹ And so, he's
10 saying that the, the, the com—, the complicating factor for him is that he can't just
11 give it¹²⁰ to his managers to review and say, "This is how the guy did." Instead, he
12 need to be, he needs to be in—, incorporating additional elements, in terms of get-
13 ting feedback from his current manager, and — verbally — and then transmitting
14 that to his boss. And the feedback he receives from the manager was not 100% fa-
15 vorable, for sure.

16 On the technical side, it was actually very good.¹²¹ That's 'cause no one's ever
17 questioned¹²² Mr., Mr. Tuvell's ability to, to program.

18 Uh, but on the, on the, on the, on the side of interpersonal relations ... Again,
19 the things that we've talked about in the record, things that were talked about in his
20 MTRs,¹²³ he did have difficulty engaging with his coworkers. And that was Mr.

1 Kime — who—, wha—, what Mr. Kime testified to,¹²⁴ when he said there was a
2 difficulty about taking him directly, directly from short-term disability. Not that
3 taking him from short-disability was the, a disqualifier. It was, just made it more
4 of a complicating factor.¹²⁵

5 Um. And also note that Kime, when he, when, when he, when he was first
6 was approached by Mr. Tuvell ...

7 **Thompson** 25:37.0

8 Yeah, but why would that be a complicating factor?

9 **Porter** 25:39.4

10 It just made it more, it, w—, it, it w—, it was just made it more, it was ...

11 **Thompson** 25:41.8

12 It's a difference between, uh, having to get an oral, uh, evaluation,¹²⁶ versus a,
13 a specific mention of disability coming up as an issue for disqualification.¹²⁷

14 **Porter** 25:52.8

15 That's right. An—, and he's not saying that. I don't, I don't think he's saying
16 that it's a, it's a, it's a disqualifier for, for, for him coming off a short-term disabili-
17 ty.¹²⁸

18 And in fact, I note that when he first engaged Mr. Tuvell — when Mr. Tuvell

1 first approached him about the position — Mr. Tuvell mentioned to him specifi-
2 cally that, “I’m coming off of short-term disability”. And yet, even under those
3 circumstances, Mr. Kime, you know, didn’t say, “Okay, we’re done here.”¹²⁹ He
4 when through the interview process with him at that point. And he continued to,
5 and he, and he took him all the way through the process.

6 So it was never a disqualifier from Mr. Kime’s perspective. And as he testi-
7 fied, they never had a conversation¹³⁰ about what this disability might be. Or what
8 the, what, what, what, um, what was happening with Mr. Tuvell.

9 I also note that Mr. Tuvell actually misled i— — not that it’s material, but to
10 the, to, to Mr. Kime’s position — but in his email to Mr. Kime, Mr. Tuvell said, “I
11 have a clean bill of health,” as of early December of 2011. He did not have a clean
12 bill of health at that point.¹³¹ By his, by the admission of his own MTRs.¹³²

13 **Lynch** 26:53.3

14 Um, uh, you heard a rather extend dialog about the circumstances of termina-
15 tion. Could you go through that, please?

16 **Porter** 27:03.2

17 Yes, yes, yes, you honor.

18 Um ... It’s really interesting. You know, IBM is, is in a situation where as of
19 May of 2012, they’re still attempting to engage in the interactive process with this

1 employee. Mr. Tuvell's, um, long-term disability has been denied.¹³³ And IBM
2 said in April: "Okay, you can continue on. A—, appeal the, the long-term disabil-
3 ity denial and we'll, you know, we'll hold your position open. And we're willing
4 to still continue to talk to you about, about reasonable accommodations under the
5 circumstances."¹³⁴ And ... So that's where IBM is.

6 Now, while IBM's having this conversation with Mr. Tuvell, he's already
7 working somewhere else, as of a month earlier. And so, I— — unbeknownst to
8 IBM. So when May comes around, and somehow¹³⁵ they, they find out that there's
9 this LinkedIn page, with the EMC reference on it, saying, you know, from a certain
10 date to "present", meaning to the date.

11 They went to him and said: "Well this is a problem for us, that you'd be work-
12 ing for EMC, a major competitor of IBM. Are you working for EMC?"

13 "No, I'm not working for them.¹³⁶ I'm not tell— ..." And then he said, "I
14 won't tell you where I'm working."

15 IBM said, "Well, we need to know where you're working, in order to make a
16 determination whether it's competitive employment."

17 He says, "I'm not going to tell you that."

18 They said, "Well ..."

19 And he, and then that point — and this is very interesting, because it goes to
20 the issue of his qualified handicapped status¹³⁷ — is that he immediately jumps

1 into, to Diane Adams, “This is defamation and harassment.” Defamation and ha-
2 rassment?¹³⁸ {timer beep} Which is, but the, on, on that basis, there’s, the, that,
3 that the termination decision was rightly made.

4 **Lynch** 28:34.3

5 Thank you.

6 **Porter** 28:35.1

7 Thank you.

8 **Hanson** 28:48.9

9 I’d like to respond to a few of those points.

10 First of all, my brother used the word “wrong-doers”, as if to suggest that it
11 was not reasonable for, uh, Mr. Tuvell to view the a—, uh, conduct that he was a
12 —, uh, uh, exposed to as wrong-doing, and that he wasn’t justified in fearing for
13 the wrong-doing.

14 Um, and then let’s focus on the, the failed transfers, because i—, there was a
15 discussion of, um, you know, who made the decision. It wasn’t Mr. Kime on his
16 own, you know, deciding that Mr. Tuvell shouldn’t get the job. Mr. Feldman, his
17 manager, poisoned it.¹³⁹ There’s, is, is evidence in writing.

18 The live chat on December 13th. Their conversation was over. Mr. Kime
19 thanked Mr. Feldman for time and candor. Mr. Feld—, Mr. Feldman then volun-

1 teers his own question — he asks himself his own question: “Would you hire him
2 again?” And he says, “No.” So he adds this to the end of the conversation — poi-
3 sons the chances that, that Mr. Tuvell’s going to get the transfer.

4 Two days later, in another live chat, Mr. Kime writes to Mr. Feldman, quote:
5 “Based on your feedback, I don’t think we will be able to move forward.”

6 Now, uh, there’s a reference to, you know, “We can’t get a performance rat-
7 ing¹⁴⁰ for Mr. Tuvell.” On March 30th of 2011, he had gotten a performance review,
8 and it was a 3.5 rating. This is on page 749 of the Appendix. And, what a 3.5 rat-
9 ing means is that it’s between acceptable/average/good and above average. So that
10 was his performance rating.¹⁴¹

11 Then two months later he tells Mr. Feldman he has PTSD.¹⁴² Then everything
12 changes. What happens after that are not work—, regular workplace interac-
13 tions.¹⁴³ It was defamation. It was demotion. It was threats of termination, just for
14 making complaints of discrimination. And Mr. Feldman was right involved with it,
15 throughout the process. Some of, some of the comments he made are just direct
16 evidence of, of animus.

17 On June 12th, two days after he demoted Mr., Mr. Tuvell, he says — he quotes
18 his “history of suing when you feel you’ve been wronged in the office.”¹⁴⁴

19 Two, t—, two weeks later, after the first¹⁴⁵ in—, investigation closed, with the
20 denial of Mr. Tuvell’s complaints, Mr. Feldman puts in writing, quote: “Assertions

1 of bad faith ... are inconsistent with success.”¹⁴⁶

2 Three weeks later, while Mr. Tuvell is now on short-term disability leave, he,
3 he communicates to his boss in HR,¹⁴⁷ he says, “Let’s suspend all of Mr. Tuvell’s
4 access,” because, quote: “My concern is, he’s establishing the *prima facie* basis for
5 a claim of accommodation.” So, this is a manager actually saying, “I’m concerned
6 that he’s establishing *prima facie* base—, basis for an accommodation.”¹⁴⁸

7 Uh, there was a reference to Mr. Mandel, and, and, and the investigations. Mr.
8 Mandel was the head of the Concerns & Appeals program. He was handling all the
9 Open Door complaints. What did he say to Ms. Due, the first investigator? As he
10 was telling her {timer beep} to, to deny the, deny his complaint,¹⁴⁹ he said, quote:
11 “No need to place him in another role. Like a tantrum for a two-year-old, they will
12 learn to do it again if you give in to¹⁵⁰ what they need.”¹⁵¹ So before he even begins
13 his inves—, investigation, he realizes that Mr. Tuvell needs an accommodation, but
14 he won’t do it.

15 **Torruella** 32:10.0

16 Your time is up.

17 **Hanson** 32:11.0

18 Thank you.

ENDNOTES

- 1 Often abbreviated “STD”.
- 2 Here begins a long line of questioning (05:34.8–13:08.1) about the termination, which is muddled because the questions from the panel evinced a mistaken view of the underlying facts, namely, confusion concerning: (i) EMC and Imprivata; (ii) IBM policy; (iii) “online” (whatever that was supposed to mean, see en. 5); and (iv) the interplay of the hacked LinkedIn page, trusted third party, PTSD, and fear of retaliation). This confusion threw Hanson off-guard trying to sort it all out in real-time.
- 3 No, that isn’t correct. IBM started badgering Tuvell about “working someplace else”, *before* they revealed to him they had LinkedIn/EMC in mind, so he didn’t have any idea what they were talking about. Once IBM pointed out the LinkedIn page indicated (incorrectly) Tuvell was still working at EMC, he promptly corrected the mistake by telling them he was not working at EMC, and the LinkedIn page was out-of-date (and had even been hacked by persons unknown with respect to its IBM entry).
- 4 Because of Lynch’s mistake (en. 3), Hanson is thrown off-guard and focuses on the “refuses to give information” (Imprivata) part of her question, instead of the LinkedIn (EMC) part of her question.
- 5 At the time of the oral hearing, it was very *unclear* what “online” here was supposed to mean — there is nothing about anything “online” (much less “you can go online”) anywhere in the *record* of the case. Upon later investigation, however, it was discovered that Judge Casper had written the word “online” in one place in her *opinion* (op., p. 23): “Tuvell does not dispute ... that he posted online that he was working for an IBM competitor ...” Thus, to Lynch, “online” apparently means, approximately, “LinkedIn” (though Tuvell never said anything like, “you can go to

LinkedIn”). However, Casper was dead wrong (as she was throughout, because she refused to read/cite/credit Plaintiff’s Statement of Facts [PSOF]). Tuvell *indisputably did “dispute”* the LinkedIn/EMC contention, on the record, namely: (i) the LinkedIn posting was written years before he worked for IBM, and had simply become orphaned/out-of-date (he’d forgotten all about it); (ii) when IBM pointed out the LinkedIn/EMC entry to Tuvell, he explicitly told them about its out-of-dateness, and that he certainly never worked for EMC and for IBM at the same time.

6 That’s because it’s a misspeak (non-existent, nowhere in the record; see en. 5).

7 The question can’t be answered, because it’s a misspeak (non-existent, nowhere in the record; see en. 6).

8 Right. IBM policy for employees on medical leave only required assurances that they weren’t working for a competitor. Only employees on PLOA (Personal Leave of Absence) were required to reveal the names of other companies they were working for.

90 ~~Right is the best argument, and updates his LinkedIn profile to IBM at the time he checked the~~
“present”-box as the latest date of employment at EMC, thinking that meant “the date at which he checked the box”. But instead, LinkedIn automatically updated that date, unbeknownst to Tuvell, to “the date at which a reader read that LinkedIn page” — contrary to LinkedIn’s own published policies to the effect that “you [and not LinkedIn] own your data.”

11 Correct. And that’s in the record.

12 It was not “unreasonable to ask” from IBM’s point of view; but neither was it “unreasonable to deny” from Tuvell’s point of view, because it was beyond IBM published policy, and Tuvell had “reasonable fear of retaliation” (heightened as a symptom of PTSD).

13 IBM doesn’t have “a right”, because company policy says otherwise (see en. 8).

14 Wrong. Tuvell did give IBM information about the LinkedIn page, as soon as he knew they were actually asking about the LinkedIn page.

15 Wrong. Tuvell had good reasons for refusing information about Imprivata (not

about LinkedIn/EMC).

- 16 Whatever Lynch is asking, Tuvell told IBM at the time exactly what all his reasons were for everything.
- 17 Yes, Tuvell surely did, for Imprivata. (But maybe Lynch has LinkedIn in mind?)
- 18 At this point, due to the confused line of questioning (see en. 2), we have no idea what Lynch means by “that”: Imprivata or LinkedIn/EMC?
- 19 Hanson assumes Lynch is asking about Imprivata, but because of the confused line of questioning (see en. 2) it seems more likely she’s asking about Linked/EMC.
- 20 The answer to what: Imprivata or LinkedIn/EMC?
- 21 Correct answer (equivalent, preferable wording would have been, “Yes, though it’s not solely because he had PTSD”) — but still referring to Imprivata, not LinkedIn/EMC.
- 22 IBM didn’t have to “attribute it to themselves,” because Tuvell had already attributed it to them explicitly in email.
- 23 Right. See en. 12 again.
- 24 Again, they’re talking past one another. Thompson is talking about LinkedIn/EMC, while Hanson is talking about Imprivata.
- 25 Hanson finally figures out the confusion about LinkedIn/EMC vs. Imprivata, but it’s too late for him to really clarify things.
- 26 Referring to the IBM entry on the LinkedIn page, not the EMC entry.
- 27 Referring to the IBM entry on the LinkedIn page, not the EMC entry.
- 28 Referring to the EMC entry on the LinkedIn page.
- 29 Referring to the EMC entry on the LinkedIn page (but also applicable to Imprivata,

apart from anything on the LinkedIn page).

- 30 *Lang v. Wal-Mart* (March 2, 2016; same panel as *Tuvell*). A reading of *Lang* shows it is an ADA case containing approximately the quoted passage (““The simplest way to decide a case is often the best,’ ... [a]nd that is true here.”), but it exhibits no point of fact or law illuminating *Tuvell* (to the contrary, the plaintiff in *Lang* admittedly could not perform an admitted essential job function, namely, lifting heavy packages).
- 31 Yes, Tuvell was “able to perform essential job functions”, because it is *never* a legitimate “essential job function” to “work in an abusive/harassing environment”!
- 32 Usually abbreviated “MTRs”.
- 33 Note that IBM’s “strongest” (really, “only”) arguments involve indirect quotes from third-party individuals (external health-care providers) in out-of-context, hearsay snippets, as opposed to quoting direct first-party (IBM-generated) complaints against Tuvell filed internally at the time of events! That’s because there were no such complaints/filings at the time of events, of course. IBM is grasping at straws.
- 34 Actually, three.
- 35 Actually, October.
- 36 Actually, October.
- 37 No, not “described”; rather, a simple “totally disabled” check-box was checked (see en. 38). Ross’s reason for checking that check-box was later well-“described” in detail by IBM itself at Ross’s deposition (p. 80, emphasis added; and this was Tuvell’s understanding as well, see Tuvell deposition, vol. I, pp. 194–195), as *based on the whole (temporary) context* involving Tuvell’s return to the specific Netezza workplace under Knabe & Feldman, and not some amorphous/false “can’t-ever-do-any-work-of-any-kind”, as IBM now pretends:

Q. So your belief that Mr. Tuvell could not return to the work situation was that his [e]motions were so intense that it was going to retrigger *all of the things that you are talking about*, his not sleeping, his obsessive thoughts, his depression, *all of that*? Just going into that building and seeing Dan Feldman and Fritz Knabe might trigger those strong reactions?

A. Yes.

Q. And so *that's the reason* that you indicated that for *some period of time* he was *totally impaired* from work?

A. *I did*, and I was concerned for his mental stability *at the time*.

38 Referring to the MTRs. The MTR form is very limited, affording little/no scope for creativity or detailed/narrative descriptions; even the few comments Ross wrote on the MTRs were beyond the formal scope of the MTRs (because of the MTR's structure, "Fill out either 'A' or 'B' below as appropriate, but not both", regarding the checking of the "totally disabled" check-box). And it is indeed true that Tuvell was "totally disabled" from doing his job-as-assigned-under-abusive-management (namely, he could do 0% of his job under those conditions). MTRs *can be* used for either STD or ADA, but are *not required* for either (e.g., a few-day STD for an illness doesn't require an MTR, and ADA accommodations can be obtained without an MTR [apparently, because once Tuvell started asking for ADA accommodations he was never asked to fill out an ADA-oriented MTR]). IBM is here trying to falsely conflate these two uses for MTRs, but *very significantly* the MTRs Tuvell submitted were explicitly for the *sole purpose of STD, never for ADA* (as all emails surrounding the events prove, including the fact that Tuvell sought ADA accommodation by other permitted means [via HR, not IHS, Integrated Health Services] and he was never advised to submit an MTR for that purpose). See en. 39. And, the IBM employee handbook ("About Your Benefits, Income & Asset Protection", p. 15) explicitly explains that STD is targeted to the *job-as-assigned*, with reference to *neither* of the ADA's two key touchstones for "qualified disabled persons" ("essential job func-

tions” and “reasonable accommodation”):

“If you are unable to work because you are sick or have an accident, your salary will be provided by the IBM Short-Term Disability Income Plan which covers regular employees starting on the first day of employment. ‘Unable to work’ means unable to perform the duties of the job you held at the time of your sickness or accident, or the duties of any other job that IBM determines that you are capable of performing.”

- 39 This admission by IBM *proves* the assertion in en. 37, to the effect that Tuvell’s MTRs were submitted for the purpose of STD, *not* ADA. And in fact, it also shows that IHS (and hence IBM as a whole) *believed* Tuvell had PTSD, because IHS granted him STD leave on the basis of the MTRs. Once IBM *believed* Tuvell had PTSD at the time of events, it was thereafter bound by the “*regarded-as disabled*” prong and “*broad coverage*” clause of the ADA[AA] (i.e., IBM cannot now legitimately argue, in hindsight, “but now we believe Tuvell didn’t ‘really’ have PTSD”).
- 40 Yes — certain *specific* “others” (Knabe, Feldman, and their cohorts), but not generally *all* “others”! Namely, Tuvell never had *any* “issues/problems” with *anybody* concerned with “essential job functions”, that is, outside IBM’s Complaint & Appeal process; and, *all* such “issues/problems” (*wholly* emails, for which we have the *complete* record) with those specific “others” were due solely to those “others”, not to Tuvell himself (albeit, his reaction was of course informed by his PTSD).
- 41 Namely, extreme PTSD-informed reactions to abuse.
- 42 (*Semi-unintelligible.*)
- 43 All of which were *protected communications* (mostly emails).
- 44 What, specifically, was supposedly “tentative”? *All* of Ross’s statements (3 MTRs; phone call to IBM HR [transcribed by IBM]; written report to MetLife; deposition) are *uniformly* supportive of his ability to return to work, given an appropriate (non-

abusive/harassing) accommodation.

45 And everywhere else!

46 *(Semi-unintelligible.)*

47 False/misleading. The December MTR did say “only ... possible”, but the context was completely different from what Porter pretends: “Only modification that would be possible is a change of supervisor & setting. ... Unable to return to previous setting w/ current supervisor & setting — PTSD symptoms exacerbate immediately.” See also en. 95, where Ross’s “only possible” construct is re-phrased even more explicitly.

48 Presumably this means Knabe and Feldman (nobody else could possibly be considered a “supervisor” of Tuvell).

49 And what “idea of a different supervisor” would that be? Answer: non-abusive/harassing/discriminatory/retaliatory, and nothing else.

50 Porter is here trying to bolster IBM’s argument about “can’t do any job”, by insinuating Tuvell “couldn’t work for anybody”. That’s asinine. The question asked Tuvell at his deposition wasn’t about “who Tuvell could work for”, but rather “who could manage the Performance Architecture Group”. And Tuvell had no answer for that, because, as he instantaneously thought at the deposition, there were many contingent questions involved that he had no answers for — it involved questions about: (i) what the requirements were for being a manager at IBM; (ii) who was available to move in that managerial position; (iii) who desired to make the move; (iv) who had the requisite background and qualifications; (v) etc. Here’s the relevant passage (Tuvell deposition, vol. II, p. 98):

Q. Well, you did work for Dan Feldman’s group?

A. Yeah.

Q. Did you identify somebody there you thought could manage you? [*Where the*

second “you” refers to its immediate referent, Dan’s group, or so Tuvell thought as his next answer shows.]

A. No. It was certainly nobody in that group that I felt was qualified to be a manager of that group. Including me, of course.

51 Right, all specifically named and well-documented (nothing amorphous/conclusory here).

52 All these “descriptions” occurred in protected communications, namely, emails complaining about discrimination and retaliation.

53 And recall that Ross testified that Tuvell was, by nature, “not a complainer” (Ross deposition, p. 49): “Mr. Tuvell rarely saw himself as — I don’t know how put it. He minimized his troubles and his pain and his suffering, as a matter of fact”.

54 It was because Russell Mandel was himself accused of discrimination and retaliation, and hence IBM’s Business Conduct Guidelines (BCG) and the Corporate Open Door Concerns & Appeals (C&A) policies solicited the escalation of complaints directly to the CEO/President and his direct reports. And, of course, the EEOC says employees who suspect discrimination/retaliation can complain to *anybody* about it (citing the example of an employee complaining directly to the company’s president).

55 This may be the first time IBM has admitted Palmisano (and later, Virginia Romety, his successor CEO) actually *received* Tuvell’s complaint(s) (up to now, it may have only admitted Tuvell *sent* them).

56 No. The complaints were “solicited”, by the terms of the Corporate Open Door Concerns & Appeals (C&A) Policy.

57 All very well written, true and comprehensive, intended to aid IBM in its investigations.

58 “Hypomania” (meaning “less than mania”; specifically, “mania minus such symptoms as psychosis and grandiosity”), as such, isn’t a “disorder” in itself, but is instead a “mood disturbance” symptom, which can be associated with certain *bona fide* disorders. For example, if the hypomania is recurring (but Tuvell’s was singularly caused by abuse/retraumatization, not periodically recurring), the associated disorder can be bipolar disorder (as IBM has falsely tried to insinuate many times; see Ross’s deposition). But in Tuvell’s case, the hypomania was associated, in a well-known way, to a combination of two other phenomena: (i) “PTSD-induced hypomanic episode caused by the trauma itself” (just like the trauma causes PTSD itself); (ii) hyper-focused goal-directed activity, with racing thoughts and diminished sleep (in Tuvell’s case, reviewing/documenting all events to the best of his ability, in a rush to finish/submit his initial Open Door Complaint by the deadline agreed with Russell Mandel). Such “narrative therapy” or “writing exposure therapy” is not at all uncommon in PTSD patients.

59 In other words, it’s very well documented.

60 No. Knabe’s fabricating from whole cloth his lie about Excel graphics, and communicating it to Feldman, was clear *defamation* (injury to reputation in respect of vocation, an act for which there is no “qualified immunity”), which is not “minor”.

61 This is an entirely false depiction: (i) Feldman never said “Let’s talk about” anything, instead he came flat-out and forcefully (in pre-judged agreement) said Knabe was “ripping mad” about Tuvell’s not doing Excel graphics as ordered; (ii) Tuvell had no “deliverables” as IBM accused (though he did have other, unrelated ongoing work), because Knabe never mentioned Excel graphics to him (then or ever). And of course Knabe and Feldman both *knew* Tuvell didn’t use Excel (thought he could have done so if they had asked, given the time [a day or two] to acquire and configure copies of Windows and its Office programs).

62 That *is* a “big issue” for IBM: incompatible/contradictory “multi-reasons” about

what was supposed to be wrong about the Excel graphics incident.

63 They were already sitting down.

64 Not “remarkable”, given that it was a mistake (possibly) or a lie (actually)!

65 It ultimately did turn out that Knabe was lying, but at the time Tuvell just thought there must have been a miscommunication/misunderstanding somewhere along the line (by Feldman and/or Knabe, not by Tuvell). So giving both Knabe and Feldman the benefit of the doubt at the time, Tuvell gave the most mild response he could think of under the circumstances, namely, that Knabe must have thought Tuvell was a “mind-reader” (note Tuvell didn’t accuse Feldman of anything, until Feldman started harassing Tuvell, later).

66 Tuvell didn’t utter the word “liar” then. He only uttered that after he’d been stonewalled too many times (esp. refusals of three-way meetings) to make any other conclusion tenable.

67 Tuvell didn’t mention any “ulterior motive” at the time of that meeting (because he thought it as just a miscommunication that could be cleared up), but later he did (namely, he claimed defamation and age discrimination, which later blossomed into retaliation, ADA, etc.).

68 Tuvell didn’t say Knabe “didn’t know what he was talking about” at that time. (He did so at one later point, but in connection with something entirely different; namely, Knabe wanted to run a “debug” version of the Wahoo performance tests, but that was wholly superfluous, because at that point Wahoo was capable of running the tests in “turbo/non-debug” mode.)

69 This isn’t what happened. Knabe wasn’t talking to Tuvell, he was talking to Steve Lubars (in the seat next to Tuvell), when Tuvell heard his name mentioned, and asked what they were talking about.

- 70 More specifically, Knabe yelled directly at Tuvell. Tuvell was shocked but calm at first, but the yelling continued, which prompted Tuvell to say, “Fritz, get off my back,” in a raised (but not yelling as Knabe was) voice.
- 71 This is false. Instead, it was Knabe who “left the meeting”. This is documented in Tuvell’s original Open Door Complaint (TUVELL484).
- 72 Presumably this refers to the email (sent that night, some 5 hours later), entitled “Comments on some ‘miscommunications’”, and its follow-up a couple days later. These were sent to both Knabe and Feldman, and were not “scathing”, but were rather a cool-headed, accurate assessment of the “yelling” event.
- 73 “Personally”, yes (because it was Knabe personally who committed the infractions), but *not “ad hominem”* (because directed at Knabe’s acts, not at his personality).
- 74 Why blindly move Tuvell, instead of Knabe (given that Knabe was the instigator of all the problems)? Or, why not at least have a three-way meeting to work things out?
- 75 This may be the first time (apart from contemporary internal emails found at discovery time) IBM has admitted they actually *switched* Tuvell and Mizar (which is indeed what happened). Previously, they’ve falsely pretended they *moved* Tuvell away from Knabe (to “accommodate” him, they now say, but nobody believes that), and then *separately moved* Mizar into the vacancy he’d left.
- 76 Yes, it *is* an “unusual situation”, almost unheard-of, to make such a switch on the spur-of-the-moment (not to mention the unusualness of the lying/defamation situation).
- 77 (*Semi-unintelligible.*)
- 78 This wasn’t an “immediate jump”. It was solidly based on the so-called “pretext-only” rule in discrimination/retaliation cases (which in itself derives from the

generic rules of evidence, “impeachment of witness by contradiction or prior inconsistent statement” and “statement against self-interest”), that a fact-finder (such as a jury, or, here, a victim of wrong-doing) is *justified* (though *not required*) to attribute wrong/worst/illegal motives to a party/witness who is lying (as Knabe and Feldman were doing [by now, *obviously* lying and stonewalling], about the Excel and yelling incidents): “[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation” (*Reeves v. Sanderson Plumbing Products, Inc.*). Here, the worst (and most likely) motive Tuvell could think of for Knabe/Feldman’s lying/stonewalling was illegal behavior, namely discrimination (and then later retaliation, after Tuvell discovered that was illegal too). For Massachusetts law, see *Bulwer v. Mt. Auburn Hospital*.

79 In other words, standard/legitimate *prima facie* discrimination reasons (given the pretextual nature of Knabe/Feldman’s “reasons” for the replacement/substitution)!

80 About 25 years younger. (This is an educated guess; Tuvell doesn’t know Mizar’s exact age, though she did once tell him she was “about 10 years out of school” and thinking about having children.)

81 “Immediate” yes, but not “default” (that was Tuvell’s requests for three-way meetings).

82 Right. At this point, Tuvell had no inkling that disability discrimination was anywhere on the horizon.

83 No. The professional way to manage would have been to hold three-way meetings.

84 (*Semi-uningelligible.*)

85 No. Feldman didn’t ask for “memos on the status of the *work*” (for, he was already getting Weekly Reports on the status of all “*work*” for everybody in the group). He merely requested daily memos on the “*transition status*”, meaning the interactions Mizar and Tuvell had regarding actual transitioning activities themselves (i.e., face-

to-face discussions and emails, which on most days didn't occur). And, by Feldman's making his request in a *joint* email to Mizar and Tuvell, it was obvious that a single *joint* status memo would suffice (Feldman did *not* ask for individual memos from the two, as he later pretended), because all he needed for legitimate management purposes was to be apprised of the status of the transition (not what Mizar and Tuvell independently thought about the status). All this is in email, hence verifiable. Tuvell satisfied all Feldman's memo requests (which were, of course, unnecessary/redundant, having no precedent in Tuvell's career), including the request for individual memos after Feldman made his post-invented "clarification".

86 It wasn't merely "hers" (Mizar's). Mizar submitted the memo, intended as joint, requesting Tuvell to "please feel free to add anything I might have forgotten." She forgot nothing, so Tuvell added nothing.

87 That's not what Feldman said. He said, writing to Tuvell solely (and CC'ing HR, but not Mizar), "I do not have the status report I asked you to provide to me ... [i]n your own words", which was false (he had asked *neither* for an individual report from Tuvell separately from Mizar, *nor* for Tuvell's own [independent] words). This was pure harassment, unprecedented in Tuvell's career.

88 Actually, Tuvell was only CC'ing HR because Feldman had done so, and because Feldman had previously instructed Tuvell to CC HR on all emails to Feldman.

89 *(Semi-unintelligible; garbled by some background noise, perhaps someone coughing or adjusting a microphone.)*

90 Protected communication (because complaining about discrimination, harassment and retaliation), paraphrased, but essentially/materially accurate.

91 Or (as the record clearly shows) any other abusive/harassing supervisor.

92 Presumably this refers to the filing of formal Open Door complaints, ultimately to many individuals, incrementally, as IBM kept stone-walling them.

- 93 Huh? How is “expansion of the group” “consistent” with Ross’s testimony/writings?
- 94 Does Porter have a specific pinpoint reference he’s talking about here? (No, of course not, just more generalized, amorphous, unjustified hand-waving.)
- 95 Ross’s statement to MetLife (dated Jan. 31, 2012, emphasis added):
“Mr. Tuvell suffers from PTSD and due to his recent re-traumatization at his work place has suffered an exacerbation of many of his symptoms. He suffers sleep disturbance, eating disturbance, anxiety, depression, hypersensitivity and reactivity in social interaction. [*As always, this just refers to ‘social interaction with certain specified individuals.’*] I recommended his medical leave from this work place as necessary for his recovery and re-stabilization. It was my recommendation that the *only course to recovery for Mr. Tuvell required a reassignment by the company.* This recommendation has not been heeded. In my opinion a return to this triggering work place would be detrimental to Mr. Tuvell and would inhibit his recovery.”
- 96 Right: due to PTSD, totally disabled from returning to an *abusive workplace*.
- 97 Couldn’t work in the *abusive/harassing* workplace.
- 98 In context, it’s not “near IBM”, it’s “near any abusive/harassing environment”.
- 99 False. What Ross said was (Ross deposition, p. 143): “Mr. Tuvell was unable to drive within a 50 mile radius — 20 mile radius of where he worked for a period of time without becoming hysterical. That creates avoidance.” In other words, the incorrect “50” was a mere tongue-stumble, immediately caught and changed to the correct “20”. (Ross probably had in mind the distance Tuvell lived from the Netezza workplace [45 miles].)
- 100 This is absurd. The problem was that Tuvell was being subjected to mistreatment by *his managers* (and similar higher-ups). If they didn’t control him, then an occasional/casual glimpse (which would be exceeding rare, as people from

Netezza/Marlboro had no reason to visit Littleton on any kind of regular basis; and people from Tuvell's workgroup in Marlboro and the workgroup in Littleton would have no reason at all to ever visit) certainly wouldn't be a major problem at all.

101 Interacting with the people involved in Concerns & Appeals (C&A) wouldn't happen unless there was another serious occasion to do so. And in that case, if those people had just handled Tuvell's complaints properly, he'd have been happy to interact with them again.

102 This meant if/when/while Knabe and Feldman still had *managerial control* over him, of course.

103 In the early Fall of 2011, while events were still very fresh and unresolved.

104 (*Semi-unintelligible.*)

105 (*Semi-unintelligible.*)

106 Bliss's letter to Mantell, dated Jan. 24, 2012.

107 Actually, Bliss's letter says none of these things. See TUVELL1188.

108 That's a *total falsity*. Who does Porter think he's kidding? It was most certainly, and solely, "within the context of an accommodation". Tuvell was absolutely seeking a transfer for the one-and-only purpose of removing himself from the grasp of Feldman & Co., and IBM knew this. Without the harassment/abuse of those people, and their suggestion/offer to seek transfer if he didn't like it, Tuvell of course would never have thought of seeking transfer.

109 That's a *total falsity*. The position as explicitly advertised and explicitly discussed was for a "development position with other duties", to which Tuvell explicitly wrote: "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." The position was known by all to be a maintenance position for a mature product (first introduced into the market in 1976,

and Tuvell had known about it from the mid-1980's), but that's certainly a "development position". Nothing like "high-end" development (i.e., leading-edge development on a new product) for that position was ever discussed or anticipated by anyone.

110 Which Tuvell didn't know until now, though he knew Kime was a "lifer" at IBM (> 20 years at the time).

111 That's a *total falsity*, as the most casual perusal of the record shows.

112 That's a *total falsity*, because it's totally out of context. Porter is here referring to an email Tuvell sent to Kelli-Ann McCabe on Jun. 13, 2011, where he referred to Wahoo as the "best possible position for me", and he was trying to salvage it. TUVELL583. But: (i) the Wahoo position was for a performance engineer, not a developer; (ii) it was during "happier times", before all the craziness started; (iii) Kime didn't know about this email, so he couldn't have relied upon it; (iv) change and flexibility are available/assumed/valuable for everybody in the industry (engineers and managers alike); (v) times change (specifically, the Wahoo poison); (vi) etc.

113 This refers to Kime's email of Jan. 6, 2012: "We cannot move forward with taking you directly from being on short term disability [*recalling that IBM claims they awarded Tuvell STD specifically as a reasonable ADA accommodation*] — this will receive very close scrutiny from the operations people [*presumably meaning HR & Legal, who are knowledgeable about the law, if competent*] in our organization."

114 Kime wrote: "Given the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." But that was a clear (even at the time) falsehood: it flies in the face of what Tuvell wrote to Kime (en. 109), *after* his wildly successful face-to-face interviews (so by that time Tuvell knew about all aspects of the job).

115 "Nice" admission (deftly avoiding the proper designation, "stupidly truthful").

- 116 Personal Business Commitments, an IBM-style yearly performance review.
- 117 But Tuvell had received a (positive) Netezza-style performance evaluation from Feldman, before all the craziness started, and that was surely sufficient for a transfer.
- 118 Hmm, let's see here: Kime (i) needed a "piece of PBC paper", so he told Tuvell that he (ii)(a) couldn't take Tuvell "directly from being on STD", and that he (ii)(b) was worried about keeping Tuvell "productive and satisfied"? These "multi-reasons" are in no way related to one another (hence not "easily confusable", by Kime or anyone else). Not to mention the half-dozen other intervening "multi-reasons", all mutually conflicting, IBM has proffered for denying the transfer.
- 119 No. Kime may be relatively new as a manager, but he's certainly not "younger" as a person (mid-40's cannot be considered "younger").
- 120 The PBC.
- 121 This may be the first time IBM has acknowledged this in a binding forum that Tuvell was "actually very good".
- 122 If "no one's ever questioned it", then what was Knabe doing when he tried to slime Tuvell, during the Excel and yelling episodes, and in some of his emails and/or interviews during the "investigations"? And what were Mandel/Feldman/Kime doing with all their "multi-reasons" for denial of transfer? And why did Mandel say "[T]urn it over to HR/ manage as performance" [IBM11054] (noting that in the industry, "performance" refers to technical ability [such as "performance review"], while "behavior" refers to interpersonal interactions). Answers: IBM was continually lying, cobbling together a "cover-up".
- 123 Again relying on the indirect/hearsay MTRs, not on direct/first-party reports (because none exist).
- 124 So now IBM is claiming Kime saw the MTRs before rejecting Tuvell? That's *yet*

another new multi-reason for rejection of transfer we've never heard before!

125 It certainly *is* “complicated”, given how far Porter had to wend his way through convolutions to produce this “simplification”.

126 This is hard to parse, but it's presumably referring to the PBC (which, though, was a written document, not an “oral evaluation”).

127 Hmm, it's not clear exactly what Thompson is getting at here, though she does seem generally skeptical of IBM's story. (As she should be: see the title of Judge Judy Sheindlin's book, *Don't Pee on My Leg and Tell Me It's Raining*.)

128 Yet, that's exactly what Kime wrote.

129 Porter is here arguing contrary to IBM's better interests. For, he's admitting Kime didn't come up with the “can't take from STD” excuse until *after he talked to Feldman, when he found out about the PTSD nature of Tuvell's STD, and his Complaints to IBM*. Pure admission of pure “cat's paw” retaliation.

130 No, Kime didn't have such a conversation with Tuvell, but he did have such a conversation with Feldman (at least inferentially: they talked about lawyers being involved, etc., but the content of those discussions are shielded by attorney/client privilege).

131 As always, IBM tries to hoist snippets *out of context*. The context was “transferring to Kime” (or really, “away from Feldman & Co.”), and in that context Tuvell certainly *did* have a “clean bill of health”, as many-times asserted by Tuvell himself, and as Ross wrote in her MTRs.

132 Wrong. Again, IBM wants to *ignore context*, and look only at the “totally disabled” check-boxes on the MTRs, but ignore Ross's MTR pleas for IBM to separate Tuvell from Feldman & Co.

133 Yes, MetLife denied LTD (long-term disability), on the basis that Tuvell was *not* to-

tally disabled from doing work, according to their definition (namely, they agreed that Tuvell could do work with the non-harassment accommodation he sought). Yet here is IBM, still trying to argue that Tuvell was totally disabled from doing any kind of work at all (accommodation or not)!

134 False. Ross was already quite clear, on the record, about her recommendation. See especially, in the context of MetLife (which IBM knew about), en. 95.

135 No doubt, IBM's lawyers (internal or external) put them up to it.

136 Porter here skips the fact that Tuvell's attorney (not Tuvell himself) inadvertently tipped off IBM that Tuvell was working at another job somewhere.

137 No, this sequence has *nothing whatsoever* to do with "qualified handicapped status", because it has nothing to do with "essential job functions, with or without reasonable accommodation". Instead, it has to do with retaliation, hence is *protected communication*. IBM seems utterly incapable of grasping that distinction.

138 Yes (though Porter is mixing up the timing a bit): (i) defamation, because IBM/Adams directly and known-falsely (or in wanton disregard for the truth) accused Tuvell of dereliction of duty by working for EMC, hence "impugning Tuvell's reputation in respect of vocation" (just like Knabe and Feldman did), which is one of the universally agreed types of "defamation *per se*" (requires no proof of "special damages"); and (ii) harassment, by continually pestering Tuvell about all this, and such things as falsely accusing Tuvell of being on Personal Leave of Absence (which did require identifying other companies worked for), as opposed to the freely-given extended medical leave he was actually afforded (which only required affirmation that he wasn't working for a competitor, with no requirement to actually identify the other company).

139 Right, though a more accurate characterization is "cat's-paw sabotage".

140 The PBC.

- 141 And Feldman told Tuvell at the time he deserved a higher rating, but Feldman couldn't comfortably (for managerial/political reasons) give it to Tuvell because he hadn't been with the company long enough.
- 142 Though Feldman already knew there was "something 'wrong' with Tuvell" (inordinate shyness/wariness about "tooting his own horn" or "upstaging others", without explicitly mentioning "PTSD") long before that.
- 143 Which is what the District Court "decided", based upon IBM's hammering away at the out-of-context one-liners[†] in the MTRs (see en. 37), and ignoring Tuvell's claims. [[†] "*If you give me six lines written by the hand of the most honest of men, I will find something in them which will hang him.*" — Cardinal Richelieu.]
- 144 Whereas availing oneself of one's legal rights, in the context of discrimination/retaliation (or otherwise), is protected.
- 145 Due's investigation.
- 146 Whereas, of course, good-faith assertions of bad-faith by others, in the context of discrimination/retaliation, are protected.
- 147 Not literally "boss in HR", because Feldman didn't belong to the HR organization, but we get the idea.
- 148 It's hard to imagine more direct evidence of discrimination/retaliation than this!
- 149 Mandel said (according to Due's notes of their conversation [IBM11054]; so even if Due's notes weren't perfectly accurate, this was her take-away): "Tell the ee [*employee*]: manager/hr communicated complain re; [*sic*] weather [*sic*] tmistreated [*sic*], find no reason to conclude that." But note, the first part of this quote is false: it was obviously *Tuvell* who initiated all complaints, *not* "manager/hr". For, in Due's Jun 29 note to Tuvell: (i) she wrote, "[T]here was insufficient factual information to support your allegations" (emphasis added); and, (ii) she pointed Tuvell to

Russell Mandel for further/appeal action (an “appeal” can only be taken by a party/plaintiff/complainer, not by a neutral bystander [“lack of standing”]).

150 The literal quote omitted the word “to” [IBM11054]: “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.”

151 Seizing upon Mandel’s/Due’s exact word-choice, “*need*”, in contrast to the normal “*want*” (a significant Freudian slip).