NO. 15-1914

United States Court of Appeals for the First Circuit

WALTER TUVELL

Plaintiff/Appellant

v.

INTERNATIONAL BUSINESS MACHINES, INC.

Defendant/Appellee

ON APPEAL FROM THE DISTRICT COURT OF MASSACHUSETTS, BOSTON

BRIEF FOR THE DEFENDANT-APPELLEE
INTERNATIONAL BUSINESS MACHINES, INC.

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Dated: January 21, 2016

CORPORATE DISCLOSURE STATEMENT

NOW COMES Appellee International Business Machines, Inc., by and through counsel, and submits the following Corporate Disclosure Statement pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure. IBM has no parent corporation. IBM is a publicly traded corporation (NYSE: IBM), and no publicly held entity owns more than 10% of IBM's stock.

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STATEMENT OF THE ISSUES

1. Did the District Court properly determine that Tuvell was not a qualified disabled person because he could not perform the essential functions of his job with or without a reasonable accommodation based on evidence which included at least Tuvell's testimony and writings and medical forms completed by Tuvell's health care providers that certified him as "totally disabled" and not "able to function at his job responsibilities?"

2. Did the District Court properly determine that, notwithstanding the fact that Tuvell was not a qualified handicapped person, IBM reasonably accommodated Tuvell?

3. Did the District Court properly determine that Tuvell's failure to be hired for or transferred to another position is not actionable?

4. Did the District Court properly determine that Tuvell was not subjected to a hostile work environment?

5. Did the District Court properly determine that the other "tangible acts" cited by Tuvell were not adverse employment actions as they did not alter the material terms or conditions of his employment?

6. Did the District Court properly determine that Tuvell's termination from employment was not discriminatory and/or retaliatory where IBM proffered a legitimate reason for the termination –Tuvell's refusal to

disclose the name of the employer for whom he began working while on leave – and Tuvell offered no evidence of pretext?

7. Did the District Court properly determine that Tuvell could not prevail on his failure to investigate claim where he could not establish that IBM failed to conduct a reasonable investigation into his complaints and where no independent claim of failure to investigate exists absent underlying proof of discrimination?

STATEMENT OF THE CASE

Walter Tuvell filed his First Amended Complaint ("FAC") on June 6, 2013, alleging against International Business Machines, Inc. ("IBM"), his then employer, claims under the Americans with Disabilities Act, 42 U.S.C. §12101, and Mass. Gen. Laws c. 151B of race, gender, age and disability discrimination and retaliation. The eight counts in the FAC, as characterized by Tuvell, are as follows: (I) Failure to Engage in the Interactive Process- ADA and Chapter 151B; (II) Failure to Reasonably Accommodate Plaintiff – ADA and Chapter 151B; (III) Failure to Assist In Helping Mr. Tuvell Obtain the Reasonable Accommodation of Reassignment to a Vacant Position for Which He Was Qualified – ADA and Chapter 151B; (IV) Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 – ADA and Chapter 151B; (V) Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 On the Basis of Handicap Discrimination, Retaliation for Availing Himself of the Reasonable Accommodation of Medical Leave, Retaliation for Engaging in Other Protected Conduct, Race, Gender, Age, and/or Any Combination Thereof – ADA and Chapter 151B; (VI) Tangible Job Actions on Account of Handicap, Retaliation, Race, Age, and/or Any Combination Thereof – ADA and Chapter 151B; (VII) Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – ADA and Chapter 151B;

and (VIII) Failure to Investigate and Remediate Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – Chapter 151B and the ADA. (R.A. 10-39).

Tuvell's claims of discrimination and retaliation all stem from two interactions with two supervisors in May and June 2011, after six months of uneventful employment. Tuvell claims these two benign interactions triggered his Post Traumatic Stress Disorder ("PTSD"), which was caused by the withdrawal of a job offer in 1997. (R.A. 100-01, 241-42).[1] As a result of those interactions, Tuvell within days complained of gender, race, age, and disability discrimination and subsequently requested a medical leave of absence. An IBM Senior Case Manager who investigated Tuvell's concerns in June 2011, shortly after the events in question, concluded his claims could not be substantiated. (R.A. 107-09, 117).

IBM filed its Motion for Summary Judgment on December 12, 2014, with a supporting Memorandum, Statement of Material Facts Not in Dispute, and the Affidavit of Joan Ackerstein. (Doc. Nos. 73-76). Tuvell filed a Memorandum in Opposition to IBM's Motion for Summary Judgment on February 12, 2015, with Plaintiff's Responses to Defendant's Statement of Facts and a separate Statement

[1] Tuvell's Response to IBM's Statement of Material Facts appears at pp. 98-149 of the Record Appendix. The majority of IBM's supporting citations are to both the Statement of Material Facts and the record evidence on which each fact is based.

of Material Facts and Exhibits Submitted in Opposition to Defendant's Motion for Summary Judgment. (Doc. Nos. 81-85).

IBM filed its Reply to Tuvell's Opposition to Summary Judgement on March 2, 2015, with a Response to Tuvell's Statement of Material Facts and a Supplemental Affidavit of Joan Ackerstein. (Doc. Nos. 86-88). In its Reply, IBM noted that Tuvell admitted 32 of IBM's 81 Material Facts Not in Dispute, and virtually admitted another 46 facts, denying them only by claiming a witness would not be believed, setting forth his own opinion without citing to evidence or disputing a statement in a non-material way. (Doc. No. 86, IBM Reply at 2). In sum, IBM demonstrated that Tuvell disputed only three of IBM's Material Facts, and that even those disputes were inconsequential. (*Id.* at 2, n. 1).[2]

On July 7, 2014, the District Court awarded summary judgment to IBM on the FAC in its entirety. In its Memorandum and Order, the Court awarded summary judgment on Tuvell's reasonable accommodation claims (Counts I-V) because Tuvell "failed to demonstrate that he was capable of performing the

[2] In its Response to Tuvell's Statement of Facts, IBM argued that Tuvell's 35-page response to IBM's Statement of Facts, as well as his own 28-page Statement of Facts, improperly contained conclusory argument and legal citations in violation of L.R. 56.1. (Doc. No. 87). IBM also filed a Motion and supporting Memorandum to Strike Portions of Plaintiff's Affidavit and Certain Exhibits Submitted in Opposition to the Motion for Summary Judgment, seeking to strike portions of Tuvell's Affidavit which lacked personal knowledge or other evidentiary foundation, as well as three exhibits that were irrelevant and inadmissible. (Doc. Nos. 89, 90).

essential functions required of his job, even with a reasonable accommodation." (Add. 13). The Court further ruled that even if Tuvell were a qualified handicapped person, his failure to accommodate claims could not succeed because the record evidence demonstrated that IBM engaged in the interactive process by offering Tuvell various accommodations, including receiving his performance reviews from a different supervisor, medical leave for doctor's appointments and the ability to apply for other jobs on IBM's internal job listing application. (Add. 18). The Court held, with respect to Tuvell's request for a new supervisor or transfer to a new position, that Tuvell had not demonstrated that either would enable him to perform the essential functions of his job given his serious impairments in "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities," as set forth in his medical reports. (Add. 20).

The Court awarded summary judgment on Tuvell's disability discrimination claims, (Counts VI-VIII), because Tuvell could not establish that he was a qualified handicapped person, or that he was subjected to adverse actions or that IBM's legitimate reasons for actions were a pretext for discrimination. (Add. 21-22). The Court specifically found that the "tangible acts" on which Counts VI-VII were based did not constitute adverse employment

actions because none of them caused "real harm" or any effect on Tuvell's "pay, benefits, title or any other term or condition of his employment." (Add. 24).

With respect to Tuvell's hostile work environment claim (Count VII), the Court concluded that while Tuvell found certain incidents "subjectively offensive," the "complained of 'tangible acts' represent regular business practices and policies . . . and relatively standard workplace interactions and criticisms," and, as such, "do not approach the level of severe or pervasive conduct that would be objectively offensive." (Add. 25).

Finally, the Court found that Tuvell could not prevail on his retaliation claims (Counts V-VIII), because the "pre-termination actions complained of by Tuvell are not adverse employment actions" and IBM offered a legitimate, nonretaliatory reason for the termination of Tuvell's employment, for which Tuvell could not demonstrate pretext. (Add. 26). The Court entered summary judgment on Tuvell's claims of other types of discrimination based on age, gender and race (Counts V-VIII), because Tuvell offered no facts supporting such claims. (Add. 27).

STATEMENT OF THE FACTS

A. Tuvell At Netezza and IBM

Tuvell is a white male hired by Netezza Corporation on November 3, 2010, when he was age 64. At Netezza, Tuvell reported to Daniel Feldman and also worked with Fritz Knabe. IBM acquired Netezza in January 2011, at which time Tuvell became an IBM employee. Tuvell, a software developer, worked in IBM's Performance Architecture Group under the supervision of Daniel Feldman, reporting on a "dotted line" to Fritz Knabe. (R.A. 10-11).

B. Tuvell's Claim Of Post Traumatic Stress Disorder

Tuvell's FAC alleges that he suffers from Post Traumatic Stress Disorder ("PTSD"). (R.A. 583) For purposes of summary judgment, IBM does not contest that the condition which disabled Tuvell is PTSD.[3]

The "traumatic" event on which Tuvell's alleged PTSD is based occurred fourteen (14) years before Tuvell became an IBM employee. In 1997, Tuvell was allegedly offered a job by Microsoft Corporation but Microsoft rescinded that offer after Tuvell and his wife met with Microsoft employees in Seattle. (R.A. 98, 241-42). Tuvell considered Microsoft's treatment of him and his family as tantamount to "rape," recounting the situation in a complaint he submitted to

[3] For purposes of summary judgment, IBM did not challenge the claimed disability. However, in the event of a trial, IBM would dispute that the disabling condition is PTSD.

Microsoft entitled, "Sleepless in Boston. How Microsoft Raped My Family While Recruiting Me, January 24-April 20, 1997." (R.A. 99, 247-48, 1201). In 2001, Tuvell was diagnosed with PTSD based on the Microsoft incident by a licensed social worker (Stephanie Ross) who has been treating him since 1993. (R.A. 241-42, 1042, 1187).

C. Tuvell's Inappropriate Communications With And Behavior Towards His Supervisors While An IBM Employee

For the first six months that Tuvell worked for IBM (November 2010 – April 2011), Tuvell's employment was uneventful. That changed with Tuvell's reaction to two normal workplace incidents, the first of which occurred on May 18, 2011. On that date, Knabe advised Feldman that Tuvell failed to complete an assignment. When Feldman raised the issue with Tuvell, he became upset, called Knabe a "liar" and denied that Knabe ever gave him that particular assignment. (R.A. 100, 259, 269-274, 556-57).

The second "incident" took place on June 8, 2011. At that time, Knabe asked Tuvell about an outstanding work assignment in front of other employees and, according to witnesses, in the ensuing discussion both Tuvell and Knabe raised their voices. (R.A. 101, 260-265). There is no dispute that all that followed –including Tuvell's insistence that he was being harassed and discriminated against – stemmed from those two incidents, which Tuvell acknowledges and describes at page 4 of his brief.

Following the June 8 discussion with Knabe, Tuvell sent him an aggressive email in which he berated Knabe for his misunderstanding of Tuvell's communications with him. Addressing their earlier disagreement, Tuvell wrote:

> At about 3pm, you jumped on me for not having run a perf-stat-ready build (i.e. turbo), with stats, so that Steve could use the stats. You did so publically, in the Camb office, in a LOUD voice, in a CONDESCENDING manner (you know, like the time you publically berated Michael Sporer when he and everyone else became impatient when you fumbled for 15 minutes at the Wahoo status meeting with a recalcitrant presentation . . .) . . . This was not acceptable behavior from my point of view, and I asked you to get off my back.

(R.A. 849). The next day, Knabe told Feldman that he did not think he could maintain a good working relationship with Tuvell. On June 10, 2011, Feldman told Tuvell that he did not believe that Tuvell and Knabe could continue working effectively together, and assigned Tuvell to provide performance architecture support on a different project in place of another employee, Sujatha Mizar, a younger, female, Asian employee. (R.A. 101, 104, 328-333). Mizar, in turn, was assigned to work with Knabe. Tuvell's assignment to the new project did not result in any change in his pay or rank. (R.A. 101, 331-33).

Tuvell testified that he believed that Feldman's decision to have him and Mizar switch projects was motivated by age, sex, and race discrimination, as

Mizar is an Asian female who is younger than Tuvell and, in his opinion, less qualified. (R.A. 104, 274-75, 435).[4]

Two days later, on June 12, 2011, Tuvell sent Feldman a disturbing email that began as a status update on work assignments but quickly devolved into a diatribe against Knabe and Feldman. In the email, Tuvell referenced an assortment of tests that Knabe suggested Tuvell run, which Tuvell described as "worthless," which "'must' have been obvious to [Knabe], but it's his manner to arbitrarily assign scut work to me (seemingly due to neuroses of his own, as has become increasingly clear to me)." (R.A. 852). The email then described Tuvell's perception of what had transpired that week:

> BTW, have you noticed that all the above were 5 days of work packed into only 3 days? I did this voluntarily, of course, as I always step up where above-and-beyond-the-call-of-duty is required. Nevertheless, that good deed didn't go unpunished, because [Knabe] shat upon me in public (Camb office) with lies, bullying/harassment and yelling, and surreptitiously (behind my back, refusing to talk to me face-to-face) causing me to be 'fired' from the Wahoo project on Fri. This was an 'illegal' adverse job action (in the IBM sense, perhaps even in the civil law sense), because it was a consummated false defamation of me (IBM policy calls it 'harassment'), totally without due process.

[4] Tuvell is not pursuing his race, age, or gender discrimination claims on appeal, presumably because he had no evidence to support those claims.

(R.A. 853). Given the tone of Tuvell's email and his stated intent to pursue the matter formally with Human Resources ("HR"), Feldman advised Tuvell that he should copy HR on all future correspondence with Feldman. (R.A. 851).

D. Tuvell Complains That Work Assignments Are "Harassment" And IBM Conducts An Investigation Into His Work Situation

Two days later, on June 14, 2011, Feldman sent both Tuvell and Mizar an email asking that they submit daily reports on their work transitioning into their new roles. While Mizar submitted a transition report to Feldman that day, Tuvell did not. The following day, Feldman sent Tuvell another email, reiterating his earlier request for a daily report and clarifying that he required reports from both Tuvell and Mizar. (R.A. 105, 476-77). In response to Feldman's request for a status update, Tuvell responded with a harshly worded email mocking Feldman's request and accusing him of harassment and retaliation. The email begins as follows:

> Oh Come on. Ok, you want a status report, I'll give you a status report. It is identical to Sujatha's. As if you didn't know that was obviously going to be the case, and which is the reason I didn't bother sending you this redundant, utterly useless information. I tried looking for 'my own words', but Sujatha's words can't be bettered and all we're really after here is clear communications, right?
>
> *   *   *
>
> As long as you insist on interacting with me in this sort of blatant (not even an attempt at subtlety) snide

> harassment/retaliation, I might as well bring the following piece of information (below) about this 'transition" to the attention of [Human Resources] . . . you and [Knabe] now appear to be on a campaign of actively persecuting me (this email of yours is a sample piece of evidence).

(R.A. 475).

In his June 15, 2011, Tuvell complained to HR Specialists Kelli-Ann McCabe and Diane Adams, that Feldman's request that Tuvell file a daily report constituted "blatant" and "snide harassment/retaliation," even though Feldman also required a daily report from Mizar.[5] (R.A. 106, 435-39, 543-46). On June 16, 2011, Tuvell sent multiple emails to Adams and McCabe, complaining of harassment by Feldman and Knabe based on Feldman's decision to switch Tuvell's work assignment with Mizar, and stating that it was impossible for him to continue to work with Feldman. (R.A. 106, 544-45). That same day, Adams forwarded Tuvell's email to Lisa Due, a Senior Case Manager in IBM's HR Department, who conducted an investigation. (R.A. 107, 383-85). In sum, despite six months of uneventful employment, within six days of the change in his work assignments, Tuvell concluded he could no longer work with Feldman.

Due's investigation expanded to include another complaint by Tuvell on June 17, 2011, which was based upon an email he received from Feldman

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[5] Tuvell's assertion that he was "disciplined" for failing to provide the status report, (App. Br. 7), is not supported by the record.

requesting Tuvell's "independent perspective on the transition" to his new assignment. (R.A. 489). In that email, Feldman asked Tuvell for a "first draft for a detailed (one-day granularity) schedule for your work on the assigned projects between now and the beginning of your medical leave," in light of the fact that Tuvell was to be out for approximately a month beginning in early July for elective cosmetic surgery followed by vacation. (*Id.*). In response to Feldman's simple request, Tuvell wrote a lengthy email accusing Feldman of "engaging in a program of badgering/harassing/bullying blackballing me." (R.A. 486-88). Specifically, Tuvell characterized Feldman's request for a work schedule as "an impossible-to-succeed blackballing task."[6] (*Id.*). During the course of her investigation, Due asked Feldman to provide her with examples of similar requests to other employees and confirmed that Feldman had indeed asked other employees for such schedules. (R.A. 781).

Due's investigation included interviews with five individuals, including Tuvell, who described his experience working with Feldman and Knabe as "torture" and "rape." (R.A. 107, 389, 549, 753-59). After speaking with the five individuals, Due concluded that Tuvell's complaints were unsupported. (R.A.

[6] Tuvell's email also included several *ad hominem* attacks against Feldman, *e.g.*, "[y]ou are no hero"; "[t]o what extent could there be a smidgen of envy/jealousy/hate that I succeeded where everybody else, both in and out of the performance group, and throughout the company, and you yourself, failed?" (R.A. 486-87).

387). On June 29, 2011, Due sent Tuvell an email informing him of the results of her investigation and advising him of his appeal rights if he was dissatisfied with her findings. (R.A. 109, 1074). Based on Due's investigation and findings, IBM determined that moving Tuvell to another supervisor was not warranted. (R.A. 107-08, 387, 392-93). Tuvell appealed Due's findings to Russell Mandel, the Program Director for IBM's Concerns and Appeals, the following day, (R.A. 895), and submitted a more detailed Open Door Complaint based on the same issues in August of that year, *see* pp. 25-26.

E. Tuvell Continues To Communicate With His Supervisor Inappropriately And Receives A Written Warning

In early July of 2011, Tuvell took a medical leave of absence for elective cosmetic surgery, followed by a vacation, and returned to work in early August of 2011. (R.A. 109). On July 6, 2011, before taking leave, Tuvell sent an email to one his colleagues and Feldman, explaining that he had completed an assignment regarding a wiki page and telling them they could find the results of his work by searching the wiki. Tuvell also attached a link and wrote, "if you're lazy you can just click this link." (R.A. 445). Feldman responded to Tuvell's email thanking him for the link and, following up on a previous conversation he and Tuvell had regarding Tuvell's communication style, mentioned that his use of the word "lazy" was "the sort of thing you want to avoid." (R.A. 444).

Initially, in response to Feldman's feedback, Tuvell sent an email to Feldman and his co-worker and apologized for his use of language that could have been interpreted as offensive. (R.A. 445). Then, on July 20, 2011, Tuvell sent Feldman and his co-worker an email retracting his apology for the July 6 email because he had concluded that "obviously no apology was necessary." (R.A. 444-47).

On August 3, 2011, shortly after Tuvell returned to work, Feldman met with him to discuss his pending and future assignments and to discuss Tuvell's recent behavior. During that meeting, Feldman gave Tuvell a written warning for his disruptive conduct, including Tuvell's July 2011 emails. (R.A. 110, 401, 443-47). While Tuvell claims that the written warning resulted from a "pre-existing, secret plan to write [him] up for something," (App. Br. 10), the reality is that Tuvell's disrespectful and inappropriate emails to Feldman beginning in June of that year compelled Feldman to reach out to HR for guidance on how to counsel Tuvell on the tone of his communications.[7] At that time, HR advised Feldman

[7] In addition to the emails already described, Tuvell sent others that were equally disrespectful towards Feldman, including a status update on June 30 which prompted Feldman to contact HR about a warning. That email consisted only of the word "Nil"; when Feldman requested clarification as to the meaning of that email, Tuvell wrote: "'Nil' meant what it's meant all along with these entirely superfluous 'transition updates': nothing to speak of with respect to the demotion . . . this letter is obviously intended as harassment, an [sic] I take objection to is [sic] as such. I guess I should at least thank you for putting in email for me." (R.A. 1131-33, 1287-91).

that he should first provide verbal counseling and, if that did not resolve the issue, proceed with a written warning, which Feldman did on August 3, 2011, after Tuvell continued to engage in inappropriate and disrespectful communications with him. (R.A. 1287-1291).

Shortly after his meeting with Feldman, on August 11, 2011, Tuvell contacted Kathleen Dean, a nurse in IBM's Medical Department, and informed her that he wanted to apply for Short Term Disability leave due to a "sudden condition." (R.A. 115, 415). Dean responded to Tuvell with information on how to apply for STD leave and on August 15, 2011, Tuvell informed Feldman that he intended to use sick days until his request for STD was approved. (R.A. 18, 115, 415). Tuvell's application for STD was allowed by IBM as a reasonable accommodation on August 17, 2011.

F. Tuvell Submits His First Corporate Open Door Complaint

One day later, on August 18, 2011, Tuvell submitted an Open Door Complaint, which is an internal IBM process whereby an employee can raise a concern and request an investigation. Tuvell's Open Door Complaint was titled "Claims of Corporate and Legal Misconduct" and was submitted in two parts: the first part was 129 pages long and titled "Acts of Fritz Knabe," while the second part was 153 pages long and titled "Acts of Dan Feldman." Tuvell estimated that

he spent over 22 hours per day on these documents over the course of 2-3 weeks.[8] (R.A. 116, 243-44, 745).

Russell Mandel, the Program Director for IBM's Concerns and Appeals, investigated Tuvell's first Open Door Complaint. On or around September 15, 2011, Mandel completed a lengthy report based on his interviews of nine people, including Tuvell. The report concluded that Tuvell was not subjected to any adverse or unfair employment actions. (R.A. 116, 397, 1431-1449).

G. Tuvell Takes A Medical Leave of Absence from IBM And Submits Medical Treatment Reports Indicating He Is Totally Impaired And Unable To Work

On or about August 15, 2011, Tuvell provided a Medical Treatment Report ("MTR") to Dean, completed by Tuvell's health care provider, which indicated that Tuvell suffered from a sleep disorder and stress reaction and that he was "totally impaired" for work. (R.A. 118, 571). The MTR also indicated that Tuvell suffered *severe* impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities, and that he suffered *serious* impairment in his

[8] Tuvell repeatedly claims that Feldman agreed to let him use a "reasonable amount of his workday to draft his internal complaints of discrimination," (App. Br. 10), but Tuvell's source of that "agreement" appears to be his own email to Feldman *informing* him that his complaint to Human Resources "will claim some of my hours to be devoted to it, which I will legitimately charge against hours I could have spent doing productive technical work." (R.A. 864).

ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. (*Id*.).

Tuvell submitted another MTR dated September 9, 2011, completed by the same health care provider, which again indicated that Tuvell was "totally impaired" for work. (R.A. 118, 574-75). After receiving the MTR, Dean emailed Tuvell and informed him that because the MTR indicated a sleep disorder and acute stress reaction, it would have to be completed by a specialist, not his family physician (in Tuvell's case, a nurse practitioner). Dean also indicated that because his MTR mentioned a psychotherapist, Tuvell should provide his psychotherapist with an MTR to complete as well. (R.A. 422).

In response, Tuvell sent Dean three emails within 24 hours, challenging her request that his MTR be completed by a specialist and accusing her of not "playing it straight" by asking that a psychotherapist complete his form. (R.A. 420). In his haste to attack the legitimacy of Dean's request, Tuvell overlooked information in his MTR which explicitly stated that he was seeing a psychotherapist, writing

> The MTR . . . does NOT mention EITHER of the words 'psychotherapist' or 'acute' . . . Therefore, you provably misrepresented the MTR, in writing. And hence, your reason for not granting/certifying the MTR is provably FALSE. Why would you do that? What is going on . . . Please explain yourself, in clear language. Promptly.

(*Id*.). Dean responded that the request for a psychotherapist to complete the form was based on information provided in the MTR indicating that Tuvell was in psychotherapy but ultimately informed Tuvell that she would accept the September MTR completed by his physician while she consulted with IBM's physician about Tuvell's questions. (R.A. 119, 418-23).

Dean subsequently contacted Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, about Tuvell's resistance to having his MTR completed by a specialist. Dr. Snyder explained that IBM's process for psychological disorders required an MTR to be completed by a psychiatrist if an employee is out for 6-8 weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." (R.A. 119, 417). Dean conveyed Dr. Snyder's explanation to Tuvell and informed him that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR if he was not able to return to work in the next month. (R.A. 120, 428).

Tuvell responded to Dean's request for proper medical certification by asking if she was joking and insisting that there was nothing a psychiatrist could do to help him because there was nothing "wrong" with him, as the "only" reason he was out on STD was due to his belief that he was "being subjected to abuse at work." (R.A. 120, 427-28). Given Tuvell's adamant resistance to seeing a

psychiatrist, and in an effort to accommodate Tuvell, Dean ultimately informed him that IBM would accept a completed MTR from the Licensed Social Worker ("LICSW") who treated him. (R.A. 121, 409-411).

Tuvell subsequently provided IBM with MTRs completed by Stephanie Ross, the social worker who was the only source of treatment for his purported psychological distress, for the months of October and November of 2011, stating that Tuvell was "totally impaired" for work. (R.A. 121, 455-59). The October MTR completed by Ross indicated that Tuvell suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety." Ross also rated Tuvell as having serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising. (*Id*.).

The MTR completed by Ross in November identified PTSD for the first time as Tuvell's diagnosis and indicated that Tuvell was still "totally impaired" for work. (R.A. 122, 458-59). The MTR also indicated that Tuvell continued to have serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, interaction and active participation in group activities, managing conflict with others, setting realistic goals, and having good autonomous judgment. (*Id*.). Ross

testified about Tuvell during her deposition that at the time she completed the MTR in November 2011,

> any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Tuvell] was triggered into a state that involved hyper-reactivity, hyper-arousal. He was in a state of very difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded.

(R.A. 122-23, 363). Ross further testified that she was concerned for Tuvell's mental health stability and believed that just going into the building where he worked and seeing Feldman or Knabe could trigger his obsessive thoughts, depression, or other strong reactions. (R.A. 123, 364).

Ross's opinion was plainly supported by Tuvell's own behavior. In or around that time, Tuvell testified that he was in close proximity to the IBM office on a weekend and stopped at a gas station with his wife and daughter and proceeded to "blow up," hitting the dashboard, the interior roof of the car and door frame as hard as he could, and yelling as loud as he could for as long as he could, describing himself as "full-blown crazy" because he was "triggered by being that close to [IBM] and that gas station." (R.A. 121-22, 276-77).

Tuvell provided IBM with another MTR on December 16, 2011, again completed by Ross, that continued to rate him "totally impaired for work," adding "for current job assignment." (R.A. 123, 461-62). The MTR indicated that

Tuvell was seriously impaired with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, setting realistic goals and having good autonomous judgment. (*Id*.).

In the December MTR, Ross did not affirmatively check off the section that asked if the employee could work with temporary modifications but did write that the "only modification that would be possible is a change of supervisor and setting." (R.A. 123-24, 461). This was the first time Tuvell submitted forms from a health care provider specifically requesting a change in supervisor as an accommodation. Ross later testified that it was only "possible" that a new supervisor and setting would enable Tuvell's return to work. (R.A. 124, 367). For his part, Tuvell, while employed, did not identify anyone who could serve as his manager in place of Feldman. At his deposition, Tuvell conceded he could not identify any other manager. (R.A. 124; S.A. 1-2)[9].

In or around that time, Ross explained that Tuvell was "unable to drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical," a description she included in Tuvell's appeal of the

[9] IBM has moved for leave of Court to file a Supplemental Appendix comprised of two pages of Tuvell's deposition transcript which were inadvertently omitted from the Appendix. This reference is to those two pages.

denial of Long Term Disability ("LTD") benefits from MetLife, specifically writing that his "symptoms would return if [he] had to drive near the facility, and he would have to pull over and manage intense anxiety symptoms and emotional overwhelm." (R.A. 124-25, 465-66).

While Tuvell was on medical leave, IBM restricted his VPN access to IBM's internet and to IBM facilities because while Tuvell was on STD leave and not working, there was no need for that access. During this time, Tuvell continued to email complaints using IBM's Lotus Notes to HR and numerous other IBM employees, including senior executives who had no involvement in his employment situation. IBM subsequently restricted Tuvell's access to Lotus Notes and IBM's internal corporate network based on his disruptive use of those systems. (R.A. 125-30, 451, 1073, 1075-76, 1252).

Tuvell exhausted his STD leave on January 25, 2012, at which time he remained out of work on an approved, unpaid leave. On or around April 25, 2012, IBM learned that Met Life denied Tuvell's claim for LTD benefits and informed Tuvell that they would continue to accommodate him by holding his position open for him and granting him unpaid leave while he appealed the denial of LTD benefits. (R.A. 130).

H. Tuvell Applies For Another Position With IBM While Out On Leave And Impaired To Work

On December 8, 2011, Tuvell was interviewed for an open position he had applied for through IBM's Global Opportunity Marketplace ("GOM") by Christopher Kime, one of the decisionmakers tasked with filling the position. Without being solicited, Tuvell told Kime that he was on STD leave prior to his interview, but Kime had no knowledge of and did not seek any information related to Tuvell's medical condition or the circumstances surrounding Tuvell's STD leave. (R.A. 131, 288). Indeed, Tuvell falsely advised Kime that he was "coming back from STD leave" and had a "completely clean bill of health" and was "symptom free," notwithstanding the fact that he had submitted MTRs to IBM describing him as "totally impaired" for work in both November and December of 2011. (R.A. 131, 403, 458-61).

As a part of his consideration of Tuvell's candidacy, Kime looked for Tuvell's job performance review history (known in IBM as a "PBC"), but was unable to find one on IBM's internal website. Kime therefore reached out to Feldman, who explained that Tuvell's leave had prevented Feldman from providing him with a PBC. (R.A. 132, 289, 294-95). Kime then asked Feldman about Tuvell's performance and Feldman informed him that Tuvell had good technical skills but had difficulties working with other people in his group and had been moved from one team to another and still had not found a role that

appeared to work for him and the team. (R.A. 133, 290-93.). Kime testified that at no point during their telephone conversation did Feldman mention that Tuvell had filed any internal complaints with IBM regarding harassment or discrimination and that Kime was not aware of Tuvell's complaints at that time. (R.A. 133, 294-96).

Kime was not aware at the onset of the interviewing process that Tuvell did not have a PBC that Kime could present to his management chain for a discussion on Tuvell's qualifications. (R.A. 134, 291, 297). On January 6, 2012, Kime emailed Tuvell to tell him that he would not be offering him the position. Kime testified that he could not move forward with taking Tuvell directly from STD leave based on the difficulty of assessing his work performance without any PBC available. Kime also explained to Tuvell that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." (R.A. 134, 297, 406-07).

Kime testified that he concluded that Tuvell was not an appropriate candidate for the position because Tuvell appeared to be interested in development work, while the position involved software maintenance for a mature product and involved working in a close team environment. (R.A. 297-300). Specifically, Kime testified that he managed "a small team of dedicated individuals who have all spent a significant amount of time working on the

product and we were looking for individuals who would be able to make a long-term commitment. . . Looking at Mr. Tuvell's job history I did not see any positions that he had held for that type of a time span." (R.A. 299). Kime's review of Tuvell's job history, in addition to Feldman's feedback, led him to conclude that Tuvell

> had moved looking for a position he would like. In my interactions with Mr. Feldman he indicated that he had not been able to find a position that Mr. Tuvell liked. Given my limited resources and opportunities of what I could offer him to work on, I was certainly concerned that we may have difficulty finding a position that Mr. Tuvell would be happy in and committed to.

(R.A. 300).

On January 11, 2012, Tuvell sent Feldman an email asking why he did not receive the Kime position, stating that his failure to get the position was retaliation for taking STD leave, and demanding that Feldman provide him with other ideas for reasonable accommodations. (R.A. 1180-81). Feldman responded to Tuvell's inquiry by explaining that he was not chosen for the position because Kime's team did not think he was the right fit and informed Tuvell that the decision was reviewed by HR to ensure that it was made for legitimate business reasons. (R.A. 1180) Feldman also offered a variety of additional accommodations, including having someone other than Feldman provide Tuvell with performance feedback, allowing Tuvell to leave work as necessary to attend

any doctor's appointments, and ongoing access to GOM to look for open positions under a different supervisor. (R.A. 139-40, 1180, 1184). Tuvell rejected all of Feldman's proposed accommodations and on January 23, 2012, Tuvell's counsel requested as a reasonable accommodation that IBM transfer Tuvell to the Kime position, to which he had previously applied and been rejected, and which had been reposted after the first posting for the position expired. (R.A. 17-18, 140).

IBM denied Tuvell's request for reassignment, but proposed additional alternative accommodations, including returning to his job but receiving feedback from a different manager. (R.A. 140, 1184). Tuvell nevertheless independently applied for the reposted position with Kime on January 25, 2012, but was not considered for the position for the same reasons he had not been selected for the identical, previously-posted position. (R.A. 140-41, 302-03).

On February 15, 2012, John Metzger, Feldman's supervisor, wrote to Tuvell directly and offered him the alternate accommodation of receiving his performance evaluations from Metzger directly, instead of from Feldman. Tuvell rejected Metzger's proposed accommodation. (R.A. 28, 141-42).

I. Tuvell Finds New Employment While On Leave From IBM And Is Subsequently Terminated From IBM For Failing To Inform IBM Where He Is Working

Unbeknownst to IBM, in or around the same time Tuvell was communicating with Feldman and Metzger about potential accommodations – *and applying for LTD benefits from IBM* – Tuvell was also interviewing for a full-time job with Imprivata, which offered him a job on February 28, 2012. (R.A. 19, 141, 149). Without IBM's knowledge, Tuvell began working for Imprivata on March 12, 2012. (R.A. 143, 149, 250-253, 257). Tuvell's salary at Imprivata was greater than what he was earning at IBM and Tuvell is therefore claiming lost wages of $21,510.00. (*Id*.).

On May 7, 2012, while Tuvell was still on leave, Adams sent Tuvell an email asking him to confirm that he was not working for EMC Corporation while on leave from his employment with IBM. IBM's Business Conduct Guidelines require employees on leave to inform IBM if they begin working for another company so IBM can run a conflict check and ensure that the company is not a competitor. (R.A. 31, 143-44, 1156-65). Tuvell's response was to accuse IBM of defamation and demand that Adams produce evidence that he was violating IBM's Guidelines. Adams replied by informing Tuvell that his LinkedIn page listed EMC as his current employer. What followed were additional requests that Tuvell inform IBM for which company he was working while on leave and

responses from Tuvell that were, in general, accusations of retaliation and harassment and refusals to provide the name of his new employer. (R.A. 143-44, 1156-65).

Finally, on May 15, 2012, Adams informed Tuvell that he had to identify his employer by 5:00 PM the following day or IBM would be forced to terminate his employment. (*Id.*). Despite this request, Tuvell continued to refuse to provide IBM with the name of the company he was working for while on leave and on May 17, 2012, Tuvell's employment from IBM was terminated based on his refusal to advise IBM of where he was working, despite repeated requests that he do so. (R.A. 145, 453).

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment to IBM on all Eight Counts of the FAC alleging discrimination, harassment and retaliation. The District Court reviewed extensive undisputed evidence regarding Tuvell's claims that he was harassed, discriminated and retaliated against by IBM and determined that the record evidence, including admissions made by Tuvell during his deposition and in response to IBM's Statement of Material Facts Not in Dispute, did not support his claims.

Those claims are, quite simply, based entirely on Tuvell's extreme and irrational reaction to two benign workplace interactions and its aftermath. Within six days of a change in assignments, Tuvell concluded he could no longer work with Feldman. Even a cursory review of Tuvell's numerous, hyper-aggressive emails and excerpts from what amount to hundreds of pages of "Claims of Corporate and Legal Misconduct" reveals a wholly disproportionate reaction to what occurred on May 18 and June 8, 2011.[10]

Tuvell's extreme and irrational reaction to the workplace disagreement which occurred is precisely the conduct which caused Tuvell's health care providers to certify him "totally impaired for work." They reported to IBM that

[10] Many of those emails are cited herein and portions of Tuvell's Claims of Corporate and Legal Misconduct Addendums are included in the Record Appendix and can be found at R.A. 1107-12, 1114-27, 1230-38, 1253-58, 1278-1280.

Tuvell was disabled from work because he had serious impairments in getting along well with others without behavioral extremes, managing conflicts with others, initiating social contacts, negotiating and compromising, setting realistic goals and having good autonomous judgment. Relying on Tuvell's health care providers and Tuvell's own testimony, the Court correctly found that Tuvell was not a qualified handicapped person.

Even if IBM had an obligation to accommodate Tuvell's disability, it did so. IBM provided Tuvell with the reasonable accommodation of a leave from work until such time as he was capable of returning to his job. It offered him the ability to return to work and have performance reviews from another manager and time off for medical appointments. It also allowed him to search for other positions but he did not identify one for which he was qualified

IBM is entitled to summary judgment on the FAC in its entirety because in addition to the accommodations he received, he was not subject to any actionable adverse actions or a hostile work environment, and IBM adequately investigated his complaints. Finally, IBM is entitled to summary judgment on Tuvell's claim that his termination was discriminatory or retaliatory because IBM established a legitimate reason for termination – he would not identify his current employer – and Tuvell could not establish pretext.

ARGUMENT

THE STANDARD OF REVIEW

While this Court reviews the District Court's grant of summary judgment *de novo*, the District Court ruling should be upheld where the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Farmers Ins. Exch. v. RNK, Inc*., 632 F.3d 777, 782 (1st Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). The mere existence of some alleged factual dispute will not defeat a properly supported summary judgment motion. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-252 (1986). Rather, the plaintiff must "affirmatively point to specific facts that demonstrate the existence of an authentic dispute," *Melanson v. Browning-Ferris Indus.,* 281 F.3d 272, 276 (1st Cir. 2002). At summary judgment, the Court must ignore "conclusory allegations, improbable inferences, and unsupported speculation," *Balser v. IUE Local 201 v. Gen. Elec. Co.*, 661 F.3d 109, 118 (1st Cir. 2011), and keep in mind that "an absence of evidence on a critical issue weighs against the party – be it the movant or the nonmovant – who would bear the burden of proof on that issue at trial." *Perez v. Volvo Car Corp*., 247 F.3d 303, 310 (1st Cir. 2001) (citations omitted).

I. TUVELL IS NOT A QUALIFIED HANDICAPPED PERSON THUS IBM IS ENTITLED TO JUDGMENT ON THE DISABILITY CLAIMS IN COUNTS I-VIII

The District Court properly concluded Tuvell failed to demonstrate he was capable of performing the essential functions of his job, even with a reasonable accommodation, relying on the MTRs from Tuvell's health care providers from August through December 2011, Tuvell's own testimony, and on the testimony of Stephanie Ross, his therapist. For that reason, summary judgment on the disability-based claims Counts I through VIII should be affirmed.

Tuvell's disability-based claims, which are essentially claims of failure to accommodate, failure to engage in the interactive process, disability discrimination, harassment, and failure to investigate, are based entirely on his *completely unfounded* insistence that his supervisor harassed and bullied him, thereby requiring Tuvell's removal from his supervision based on Tuvell's purported PTSD. Two HR investigations comprised of interviews of numerous witnesses concluded that Tuvell's complaints were unfounded.

The incidents Tuvell cites as intolerable harassment are set forth *supra* at pp. 17-18. The incidents, individually and combined, lack any objective basis for a reasonable person to construe them as harassment or behavior that depart in any way from the "ordinary slings and arrows that workers routinely encounter in a hard, cold world." *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000).

Indeed, it is difficult to even characterize them as "slings and arrows." If these innocuous interactions "triggered serious symptoms of PTSD," (App. Br. 31), as Tuvell claims, Tuvell was demonstrably not a qualified handicapped person, capable of performing the essential functions of his position or *any* position, the conclusion reached by his health care providers who certified he was totally disabled from work.

To prevail on Counts I-VIII,[11] to the extent they allege disability discrimination, Tuvell must first demonstrate that: (1) he is a handicapped person within the meaning of the ADA and G.L. c. 151B; and (2) he is qualified to perform the essential functions of the job with or without reasonable accommodation. *Henry v. United Bank*, 686 F.3d 50, 59-60 (1st Cir. 2012); *Faiola v. APCO Graphics, Inc*., 629 F.3d 43, 47 (1st Cir. 2010) (reciting the legal standard for disparate treatment and failure to accommodate claims under the ADA and Mass. Gen. Laws c. 151B). To demonstrate that he is a qualified handicapped person, Tuvell must show that he is an individual who "is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." Mass. Gen. Laws c. 151B, § 1(16); *see Cox v. New England Tel. & Tel. Co*., 414 Mass. 375, 381 (1993). Importantly, Tuvell

[11] Tuvell has abandoned his claims of age, race, and gender discrimination on appeal, as he makes no mention of them in his brief or his Statement of Issues.

"bears the initial burden of producing some evidence that an accommodation that would allow him [] to perform the essential functions of the position would be possible, and therefore that he [] is a 'qualified [disabled] person.'" *Godfrey v. Globe Newspaper Co., Inc.*, 928 N.E.2d 327, 333 (2010).

As determined by the District Court, Tuvell cannot succeed on his claims of disability discrimination because he "failed to demonstrate that he was capable of performing the essential functions required of his job, even with a reasonable accommodation." (Add. 13). In determining whether an individual is able to perform the "essential functions" of his job and is therefore a qualified handicapped person, courts have looked to, among other things, an individual's own characterization of his disability and/or the findings of the individual's physician. *Beal v. Board of Selectman*, 646 N.E.2d 131, 137-38 (1995) (plaintiff not a qualified handicapped person where she asserted that she could not return to work and her doctor diagnosed her with chronic fatigue, sleep disorder, and susceptibility to black outs during stressful situations, rendering her incapable of performing essential functions of position as police officer); *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437, 442 (6th Cir. 1991) (employee was not "qualified" individual under Rehabilitation Act where, "contrary to plaintiff's contention that he was perfectly capable of returning to work in June 1980 and was therefore a qualified handicapped person within the meaning of the Act, the

evidence supports the district court's finding that in 1980, plaintiff presented himself as an individual incapable of performing the normal, interactive functions of his job and incapable of functioning if there was the slightest hint of criticism.").

Here, the evidence provided by Tuvell's health care providers and his own testimony and writings establish that he was totally impaired to work from August through at least December of 2011, the last MTR provided, after which time he remained on leave while applying for LTD benefits. The MTRs submitted by Tuvell's health care providers indicate that he suffered from "severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities." (R.A. 455-62). Indeed, by his own admission, Tuvell could not even be in the vicinity of IBM without becoming "full-blown crazy" and engaging in violent outbursts. (R.A. 276-77). These behavioral shortcomings and Tuvell's MTRs and LTD application confirm that Tuvell was "totally incapacitated to work," and thus, he was not a qualified handicapped person. *See August v. Offices Unlimited, Inc*., 981 F.2d 576 (1st Cir. 1992) (plaintiff unable to offer any facts undermining statements on long term disability forms stating he was totally disabled); *see also Pesterfield,* 941 F.2d at 442 (not qualified handicapped person where unable to function when criticized).

Tuvell argues that the District Court erred in holding that he was not a qualified handicapped person because it failed to consider "what actually occurred in the real world following his professional therapy," which included his ability to interview for a job with Kime and his assertion that after January 2012, he was able to work for an employer other than IBM. (App. Br. 29). Tuvell's argument fails because the ability to go to an interview does not demonstrate he could handle the responsibilities of the job, including getting along with others without behavioral extremes. Indeed, Tuvell's MTR for that same time period indicates that he had "serious impairment" in doing just that. (R.A. 462). Moreover, Tuvell points to no record evidence indicating that he "worked at a high level for years" at another company.

Accordingly, the District Court properly concluded, after reviewing substantial evidence submitted by both parties, that Tuvell was not a qualified handicapped person because "[n]othing in the record demonstrates that Tuvell would have been able to successfully interact with groups or deal appropriately with criticism." (Add. 15). That determination should not be disturbed.

II. IBM WAS NOT REQUIRED TO PROVIDE TUVELL WITH A REASONABLE ACCOMMODATION BUT DID SO ANYWAY

The gravamen of Counts I-V is that IBM purportedly failed to accommodate Tuvell's alleged disability in violation of M.G.L. c. 151B and the ADA. The District Court concluded there was no obligation to accommodate since Tuvell was not a qualified handicapped person. However, the Court also found IBM had accommodated Tuvell, though it had no obligation to do so, and that ruling should be affirmed.

In addition to granting him extended medical leave, IBM made a further attempt to reasonably accommodate Tuvell by proposing he receive his performance reviews from a different manager, John Metzger, while also giving him the continued ability to take leave for medical appointments whenever necessary. (R.A. 140-42).

That Tuvell insisted a new supervisor was the only accommodation he would accept does not make his unilateral demand a required or reasonable accommodation, and this Court can so find as a matter of law. Neither the ADA nor Mass. Gen. Laws c. 151B requires an employer to provide a disabled employee the accommodation of his choice, including that of reassignment to a new supervisor. *See Bryant v. Caritas Norwood Hospital*, 345 F. Supp. 2d 155, 170 (D. Mass. 2004) (ADA "does not require the employer to grant its disabled employee's accommodation of choice, even if it is reasonable one, and instead

provides the employer with 'the ultimate discretion to choose between effective accommodations.'"); *Litovich v. Somascan, Inc.*, 2008 U.S. Dist. LEXIS 108627 at * 25 (D. Mass. Dec. 17, 2008) (a disabled employee is "not entitled to the accommodation of her choice, but only to a reasonable accommodation"); *Darian v. University of Massachusetts Boston*, 980 F. Supp. 77, 89 (D. Mass. 1997) (nursing student's refusal to accept university's reasonable accommodation or demonstrate that it was unreasonable doomed her failure to accommodate claim).

Finally, Tuvell's argument that unpaid leave is not a reasonable accommodation (App. Br. 32), is not supported by the cases on which he relies, in which none of the employees were certified as "totally impaired to work." *Williams v. Phila. Housing Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004) (work restriction only foreclosed carrying firearms); *Noon v. IBM*, 2013 U.S. Dist. LEXIS 174172 (S.D.N.Y. Dec. 11, 2013) (employee with back problems not precluded from all work); *Walters v. Mayo Clinic*, 998 F. Supp. 2d 750, 764 (W.D. Wis. 2014) (employee could perform all job duties). *Compare Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986) (unpaid leave is likely a reasonable accommodation for purposes of Title VII reasonable accommodation provision). Moreover, Tuvell's assertion that IBM "forced" him to stay out of work ignores that Tuvell failed to seek appropriate psychiatric help, as requested by IBM, or consider trying alternative reasonable accommodations that might

have enabled his return to work, choosing instead to remain on medical leave while insisting he could not work with Feldman.

Accordingly, IBM complied with its obligations under the ADA and Mass. Gen. Laws c. 151B and the District Court's award of summary judgment on those claims should be affirmed.

A. Tuvell's Demand For A New Supervisor Was Not A Reasonable Accommodation

As the District Court found, Tuvell's insistence on a new supervisor was not a reasonable accommodation as a matter of law. Citing authority from this Court, the District Court noted that, "[c]ontrary to Tuvell's arguments, IBM was under no obligation to, essentially, 'find another job for an employee who is not qualified for the job he or she was doing.'" (Add. 19, citing *August,* 981 F.2d at 581 n.4); s*ee also Cailler v. Care Alternatives of Massachusetts*, LLC, 2012 U.S. Dist. LEXIS 39414 at *23 (D. Mass. March 23, 2012) ("A reasonable accommodation provided to an employee with a handicap is to allow her to perform the essential functions 'of the position involved,' . . . *i.e*., the plaintiff's original position."); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 384- 85 (2nd Cir. 1996) (holding that employee's request for a new supervisor was not required under the ADA).

In recognizing an employer's right to define the essential functions of a job, including reporting to a particular supervisor, the *Wernick* court explained

that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." *Id.*; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 33, (EEOC Notice No. 915.002) ("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation."); *Weiler v. Household Finance Corp.*, 101 F.3d 519, 526 (7th Cir. 1996) ("In essence, Weiler asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility.").

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

B. IBM Was Not Required To Transfer Tuvell To An Open Position For Which He Was Not Qualified

In Counts III, IV, and V, Tuvell claims that he was denied the reasonable accommodation of transfer to a different position within IBM. As with Tuvell's demand for a new supervisor, to the extent that Tuvell is claiming that he was entitled to a transfer to a different position, the Supreme Judicial Court has ruled that assignment to a new position is not a "reasonable accommodation" under Mass. Gen. Laws c. 151B. *See Godfrey,* 928 N.E.2d at 336 ("[n]either

elimination of an essential duty from a position nor assignment to an unrelated position are 'reasonable accommodations'") (citing *Russell v. Cooley Dickinson Hosp., Inc*., 437 Mass. 443, 454 (2002) (reasonable accommodation does not require employer to "fashion a new position")); *Cox*, 414 Mass. at 390 ("reasonable accommodation does not include waiving or excluding an inability to perform an essential job function"). Accordingly, Tuvell's claim that IBM was required to transfer him to an open position as a reasonable accommodation under Mass. Gen. Laws c. 151B is not supported by Massachusetts law and summary judgment should be affirmed as to that claim.

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

Hardship Under the Americans with Disabilities Act, Question 24, (EEOC Notice No. 915.002) ("An employee must be 'qualified' for the new position").

It is incumbent on the plaintiff to "show that a proposed accommodation would enable [him] to perform the essential functions of [his] job." *Reed v. LePage Bakeries, Inc*., 244 F.3d 254, 259 (1st Cr. 2001). Here, at the same time that Tuvell was demanding transfer to the Kime position, his MTRs indicated that he had, among others, serious impairments "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities." (R.A. 458-62). As such, Tuvell has not demonstrated that transferring him to a different work setting – *particularly* where IBM determined that Tuvell was not subject to any discrimination or harassment in his previous setting – would have been a reasonable accommodation enabling him to perform the essential functions of his job. (Add. 20) (citing *Jones,* 696 F.3d at 90).

Accordingly, the District Court properly concluded that "Tuvell's admitted, serious impairments 'getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities' indicates that even his desired transfer would not have been reasonable under the circumstances." (Add. 19-20).

While Tuvell argues that the District Court's conclusion to this effect was "ludicrous," because "IBM itself maintained (by offering to reinstate him) that Tuvell was capable of returning to work on Feldman's team," (App. Br. 38), that argument distorts IBM's reasonable accommodation of Tuvell and should be disregarded. IBM's decision to accommodate Tuvell by holding his position open for him is not the equivalent of a health care provider – or IBM – determining that Tuvell was actually capable of returning to work.

C. <u>IBM Attempted To Engage In The Interactive Process But Tuvell Refused</u>

Tuvell does not appear to pursue his claim of failure to engage in the interactive process, which is set forth in Count I of the FAC, since it is not one of the seven issues he presents for review. To the extent that he does, this Court should affirm the District Court's determination that IBM was not obligated to engage in the interactive process where "no reasonable trier of fact could find that the employee was capable of performing the job, with or without reasonable accommodation." (Add. 16; quoting *Sullivan v. Raytheon Co.,* 262 F.3d 41, 47-48 (1st Cir. 2001)). In the alternative, the District Court properly found that IBM engaged in the interactive process with Tuvell.

It is settled that "a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." *Rennie v. United Parcel Service*, 139 F. Supp. 2d 159, 168

(D. Mass. 2001); 29 C.F.R. pt. 1630 App. § 1630.9 ("the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability").

In contrast to the interactive process just described, Tuvell's only effort to engage with IBM's overtures was to repeatedly demand transfer to a new supervisor and/or a new position. When IBM asked Tuvell to find a psychiatrist after his nurse practitioner indicated that he needed to remain on leave for more than six weeks, Tuvell refused to consider seeking appropriate treatment, insisting there was nothing medically wrong with him and that he was only ill because of IBM's alleged actions. (R.A. 427-28). In a further effort to accommodate Tuvell, IBM offered to have Metzger provide him with performance-related feedback and reviews instead of Feldman. Tuvell refused that accommodation too, and declined to suggest any alternatives other than transfer to a different supervisor, which was not, as a matter of law, a reasonable accommodation.

In short, Tuvell's "participation" in the interactive process consisted of repeatedly demanding that IBM acquiesce to the only accommodation he would accept, while consistently refusing to even consider, much less try, any alternatives set forth by IBM. Nonetheless, IBM continued to provide Tuvell with leave until such time as he was able to return to work and in so doing,

satisfied its obligation to engage in the interactive process and provide Tuvell with a reasonable accommodation.

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

As an initial matter, the remaining disability-based discrimination claims set forth in Counts VI-VIII, also fail because Tuvell was not a qualified handicapped individual. In addition, those claims were properly dismissed because with respect to the two arguably adverse actions he experienced – his failure to get a job with Kime's group and the termination of his employment – Tuvell cannot establish a *prima facie* case or overcome IBM's legitimate reason. The Court's conclusion that Tuvell failed to establish a *prima facie* case of disability discrimination or provide any evidence demonstrating that the legitimate business reasons proffered by IBM are pretext for discrimination is supported by the record and should be affirmed.

A. Tuvell's Disability Discrimination Claims Fail Because He Cannot Make A *Prima Facie* Case of Discrimination or Establish Pretext

To establish a *prima facie* disability discrimination claim, a plaintiff "must establish that (1) [he] suffers from a disability or handicap, as defined by the ADA; (2) [he] was nevertheless able to perform the essential functions of [his] job, either with or without reasonable accommodation; and (3) the defendant took

an adverse employment action against [him] because of, in whole or in part, [his] protected disability.'" *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91, 100 n. 7 (1st Cir. 2007); *Faiola,* 629 F.3d at 47 (reciting the legal standard for disparate treatment and failure to accommodate claims under the ADA and Mass. Gen. Laws c. 151B). If a plaintiff is able to set forth a *prima facie* case of discrimination, the burden shifting framework applies, but "the burden of proving unlawful discrimination rests with the plaintiff at all times." *Freadman,* 484 F.3d at 99 (internal citations omitted).

As already demonstrated, Tuvell cannot establish a *prima facie* case of disability discrimination because he cannot demonstrate that he was a handicapped person capable of performing the essential functions of his job. In addition, Tuvell's disability discrimination claim regarding the Kime position fails because Tuvell cannot demonstrate: (1) that his failure to get the Kime position was an adverse employment action; or (2) that the legitimate reason articulated for not giving him the position is a pretext for discrimination.

First, while Tuvell was disappointed by his failure to get the Kime position, disappointment alone does not render the action adverse. *See King v. Boston*, 883 N.E.2d 316, 323 (2008) (discrimination claim requires "real harm" as opposed to subjective feelings of "disappointment and disillusionment"). Tuvell's failure to get the position did not materially or otherwise adversely impact his conditions of

employment with IBM, which at all times remained unchanged. That is, Tuvell already had a job with IBM which remained open for him. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1988) ("a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). Nor did the rejection of Tuvell's application for the new position "inflict[] direct economic harm," because Tuvell remained employed by IBM and has not alleged, or demonstrated, that the position with Kime's group would have resulted in a promotion, greater benefits or prestige. *Id*. at 762.

Further, even if the failure to get the Kime position could be considered an adverse action, Tuvell has not demonstrated that the legitimate reason for IBM's decision was a pretext for discrimination. As an initial matter, Kime was aware that Tuvell was on STD leave before he interviewed him for the position.[12] (R.A. 403). Moreover, Kime had no knowledge of Tuvell's medical condition and did not make any inquiry into the circumstances surrounding Tuvell's leave. Indeed, Tuvell (falsely) advised Kime that he was "coming back" from STD with a

[12] This is in contrast to Tuvell's assertion that he applied for the position, "aced his interviews," and "[r]ight when Kime, the hiring manager learned that [he] was on disability leave" he was explicitly rejected for the job. (App. Br. 24). Kime's knowledge of Tuvell's STD prior to interviewing him completely undermines Tuvell's assertion that Kime discriminated against him because he was on STD.

"completely clean bill of health." (*Id*.). Kime testified that it was difficult to assess Tuvell's candidacy without a PBC and that he ultimately concluded Tuvell was not an appropriate candidate for the position, in part, due to his concern about Tuvell's ability to work well with a small team – a conclusion that is amply supported by the evidence in the record concerning Tuvell's interactions with Knabe, Feldman, HR and IBM's medical group.

Tuvell has not established that Kime's legitimate business reasons for not offering him the position were pretextual. Indeed, instead of presenting specific facts demonstrating a discriminatory reason, Tuvell continues to assert vaguely that he was not accepted for the position based on his disability and/or retaliation.[13] Such groundless speculation cannot counter IBM's proffered legitimate business reason. *See Mesnick v. General Electric Co.,* 950 F.2d 816*,* 824 (1st Cir. 1991) ("[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive." (Internal quotations omitted)).

[13] At the District Court, Tuvell claimed that the rejection was based on retaliation, disability, and race, gender, and age discrimination. (R.A. 35). On appeal, he alleges only that it was caused by retaliation and/or disability discrimination.

B. The Termination of Employment Was Not Discriminatory or Retaliatory

As for the termination of his employment in May 2012, which would constitute an adverse action, IBM is entitled to summary judgment because IBM articulated a legitimate reason for that termination and Tuvell has no evidence of pretext. Tuvell was on extended leave from IBM for approximately ten months when IBM learned that he may have been working for a competing company in violation of IBM's Business Conduct Guidelines. According to Tuvell's personal LinkedIn web page, he was working for IBM competitor EMC while working at IBM. After learning this, IBM contacted Tuvell about his employment (R.A. 1156-65), but Tuvell responded by repeatedly and inexplicably refusing to tell IBM for which company he was working while he was still an IBM employee, while accusing IBM of harassment and defamation. (*Id*.). As a result of his refusal to disclose his new employer's identity, IBM terminated Tuvell's employment. (R.A. 145).

As noted by the District Court, Tuvell failed to offer any evidence contradicting IBM's stated reason for his termination. (Add. at 23). Tuvell's specious assertions of disability discrimination and retaliatory discharge, grounded in nothing more than Tuvell's suppositions, are not sufficient to support claims of discrimination and the District Court's award of judgment should be affirmed.

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

As for the other "tangible acts" identified by Tuvell in Count VI and VII, they do not constitute adverse employment actions as a matter of law. An adverse employment action "refer[s] to the effects on working terms, conditions, or privileges that are material, and thus governed by the statute, as opposed to those effects that are trivial and so not properly the subject of a discrimination action. . . Material disadvantage for this purpose arises when objective aspects of the work environment are affected." *King*, 883 N.E.2d 316 at 323 (internal citation omitted); *Sensing v. Outback Steakhouse of Florida, LLC*, 575 F.3d 145, 157 (1st Cir. 2009) (an adverse action has been defined as "any material disadvantage[] in respect to salary, grade, or other objective terms and conditions of employment").

Tuvell points to an assortment of acts he deems adverse under the ADA and Chapter 151B, alleging IBM: disabled his access to IBM facilities and its computer systems while he was on medical leave; held off on finalizing review of his complaint while he was on leave; issued a warning letter on August 3, 2011; and treated work at home days as sick days. None of the above actions are "adverse" under either Massachusetts or federal law.

First, IBM limited Tuvell's access to facilities and computer networks only while he was on medical leave and admittedly "totally incapacitated to work." As such, there was no business reason for Tuvell to have access to the facilities or

networks and his limited access to both resulted in no "real harm" to his ability to not work during his medical leave.

Second, Tuvell has provided no evidence in support of his claim that IBM failed to progress and finalize his internal complaint, or somehow delayed it. To the contrary, both Due and Mandel testified that they each conducted separate investigations, which included interviewing multiple witnesses, including Tuvell, and reviewing relevant internal documents. After completing their respective investigations, each of them concluded that Tuvell's allegations were unfounded. In any event, failure to properly investigate a complaint is not an adverse action. *See Symonds v. Federal Express Corp.*, 2011 U.S. Dist. LEXIS 150056 at *53 (D. Me. Dec. 31, 2011) ("Failure to investigate complaints of discrimination cannot be considered an adverse employment action.").

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

Accordingly, to the extent Tuvell's discrimination (and retaliation) claims are based on any of the above "tangible acts," those claims must fail as such acts are not adverse employment actions under state or federal law. As explained by the District Court, while Tuvell found these incidents "subjectively offensive," the "complained of 'tangible acts' represent regular business practices and policies . . . and relatively standard workplace interactions and criticisms" which "do not approach the level of severe or pervasive conduct that would be objectively offensive." (Add. 25).

D. Tuvell Was Not Subjected To A Hostile Work Environment Thus Judgment On Count VII Should Be Affirmed

In Count VII, Tuvell alleges that certain "tangible" actions created a hostile work environment on the basis of his disability, age, gender, race, and retaliation, although, as with his other discrimination claims, he now appears to limit this claim solely to disability discrimination and retaliation. To rise to the level of harassment or a hostile work environment, as Tuvell appears to allege, "even a string of trivial annoyances will not suffice to make an adverse action showing: 'the alleged harassment must be severe or pervasive.'" *Alvarado v. Donahoe*, 687 F.3d 453, 461 (1st Cir. 2012) (quoting *Gómez-Pérez v. Potter*, 452 Fed. Appx. 3, 9 (1st Cir. 2011). In addition, "any abuse must be both objectively offensive (as viewed from a reasonable person's perspective) and subjectively so (as perceived by the plaintiff)." *Id*.

As just explained, the "tangible acts" Tuvell lists are neither adverse nor, even viewed collectively, objectively offensive, and judgment as to Tuvell's hostile work environment claim should be affirmed. *Id*. (taunting and mocking comments about employee's psychiatric condition, while callous and objectionable, did not rise to level of severe and pervasive). *See also Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17, 44 (1st Cir. 2011) (appellant could not show hostile work environment where, *inter alia*, supervisor regularly refused to meet with appellant, yelled at her, and limited her movements around workplace).

IV. IBM IS ENTITLED TO JUDGMENT ON THE CLAIMS FOR RETALIATION IN COUNTS V-VIII

Tuvell's claims for retaliation, included in Counts V-VIII, are based on the same alleged adverse actions as his discrimination claims and are equally without merit. A plaintiff seeking to establish a *prima facie* case of retaliation under 151B and the ADA must show, by a preponderance of the evidence, "that (1) he engaged in protected conduct; (2) suffered an adverse employment action; and (3) [that] there was a causal connection between the protected conduct and the adverse action." *Jones v. Walgreen Co*., 679 F.3d 9, 21 n. 7 (1st Cir. 2012). If a plaintiff establishes these factors, the *McDonnell Douglas* burden shifting scheme follows, ultimately requiring the plaintiff to demonstrate that the adverse action was the result of retaliatory animus. *Id*. at 21.

As an initial matter and, as already described, Tuvell's failure to get an offer from Kime was not an adverse action under state or federal law. Nor has Tuvell demonstrated that his complaints against Feldman caused him not to get the Kime position; indeed, prior to making the decision not to hire him, Kime was not aware that Tuvell had filed any complaints regarding his disability either internally or externally. (R.A. 290-93). Moreover, IBM has provided a legitimate reason for not offering Tuvell the position for which he interviewed, as discussed *supra* at pp. 33-35.

Second, to the extent Tuvell's retaliation claim is based on Feldman's comments to Kime regarding Tuvell's difficulties working well with the individuals in his group, his claim still fails as such comments were not an adverse action and did not lead to an adverse action. Feldman's comments were offered in response to a legitimate request for an assessment of Tuvell's performance, rendered necessary by the fact that Tuvell did not have a written performance review on file. (R.A. 289-95).

Moreover, there is no evidence that Feldman's assessment of Tuvell's interpersonal difficulties, while candid, was in any way false or exaggerated. Feldman did not impugn or question Tuvell's technical abilities and his feedback on Tuvell's interpersonal skills was based on his experience managing Tuvell during his time at IBM. That assessment is amply supported by the record in this

case, which includes countless examples of Tuvell's over-the-top, inflammatory attacks on his colleagues and human resources professionals in response to routine requests and criticisms. Indeed, Tuvell does not dispute, nor could he, the veracity of Feldman's feedback, which was consistent with Feldman's experience working with Tuvell and supported by the limitations set forth in Tuvell's MTRs indicating that Tuvell suffered from severe impairment in his ability to get along well with others without behavioral extremes, among other things. (R.A. 458-62). *See, e.g. Dickenson v. UMass Mem. Medical Group*, 2011 U.S. Dist. LEXIS 30932 at * 43-45 (D. Mass. Mar. 24, 2011) (plaintiff's performance issues were legitimate, non-retaliatory reason for his poor review and failure to get promoted). Indeed, Feldman's concerns about Tuvell's ability to work effectively with his colleagues predate any of Tuvell's protected activity, further undermining Tuvell's assertion that Feldman's comments to that effect were motivated by retaliatory animus. *Mole v. University of Massachusetts*, 442 Mass. 582, 594 (2004) (where "problems with an employee predate any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation").

Feldman's honest assessment of Tuvell's interpersonal difficulties is distinguishable from the situations underlying the cases cited by Tuvell (App. Br.

43), in which decisionmakers relied on inaccurate, biased evaluations. In *Thomas v. Eastman Kodak*, for example, the plaintiff provided sufficient evidence that her supervisor's evaluations of her were unfair based on conflicting, positive evaluations from previous supervisors and current customers. 183 F.3d 38, *62-64 (1st Cir. 1999). Tuvell has pointed to no such evidence here.

IBM has also established that it had a legitimate reason for Tuvell's termination given Tuvell's refusal to provide information to IBM concerning where he was working while on a leave of absence from IBM. As set forth *supra*, pp. 37-38, there was nothing discriminatory or retaliatory about IBM's actions in this regard.

Finally, even if Tuvell could satisfy his *prima facie* case with respect to these actions, his claim still fails because he has provided no evidence that IBM's stated reason for either was pretext, and that the real reason was retaliation. Tuvell's protected activity did not immunize him from "the same risks that confront virtually every employee every day in every work place," including recommendations reflective of his performance, the possibility of being rejected for a different position, or an expectation that he abide by IBM's policies and procedures. *See Blackie v. Maine*, 75 F.3d 716, 723 (1st Cir. 1996) (affirming summary judgment in favor of employer on FLSA retaliation claim where employees failed to show that adverse action stemmed from retaliatory motive).

As mere speculation or inferences of retaliatory motive are insufficient to satisfy a plaintiff's burden of establishing pretext, judgment as to these claims should be affirmed.

V. IBM'S ALLEGED FAILURE TO INVESTIGATE CLAIM CANNOT SUCCEED BECAUSE THERE WAS NO UNDERLYING DISCRIMINATION

The District Court also properly entered summary judgment on Count VIII, alleging a failure to investigate, because no independent claim of failure to investigate exists absent underlying proof of discrimination. *See Keeler v. Putnam Fiduciary Trust Co*., 238 F.3d 5, 13 (1st Cir. 2001). Nor is there support for the notion that a failure to investigate is a distinct adverse action for purposes of retaliation claims. *See Fincher v. Depository Trust and Clearing Corp*., 604 F.3d 712, 721 (2nd Cir. 2010) ("an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint"); *Cook v. CTC Comm. Corp*., 2007 U.S. Dist. LEXIS 80849, at *8 (D.N.H. Oct. 15, 2007) ("Evidence of a flawed investigation is relevant only if [the plaintiff] proves that [human resources] intentionally failed to investigate properly in order to concoct a pretext for her termination.").

Moreover, to the extent Tuvell's failure to investigate claim is relevant to any consideration of damages, such a claim still fails in light of ample evidence

that IBM conducted appropriate, good faith investigations and determined that Tuvell's claims of harassment, discrimination and retaliation were unfounded. Aside from his own conclusion that the investigations were flawed because they did not result in his preferred outcome, Tuvell has offered no evidence that such investigations did not take place or that they were conducted in bad faith. *See, e.g., Parra v. Four Seasons Hotel*, 605 F. Supp. 2d 314, 336 (D. Mass. 2009) (finding acceptable an employer's testimony that an investigation took place, consisting of a discussion with the plaintiff and a review of the customer complaint upon which plaintiff's complaint was based); *Verdrager v. Mintz, Levin et al*., 2013 Mass. Super. LEXIS 206 at *28-29 (Mass. Super. Ct. 2013).

VI. TUVELL HAS NOT APPEALED JUDGMENT AS TO HIS RACE, AGE, AND GENDER DISCRIMINATION CLAIMS

Tuvell has not appealed judgment as to his race, age, and gender discrimination claims and, as such, the District Court's decision with respect to those claims should not be disturbed. To the extent Tuvell continues to press his claims of age, gender, and race discrimination under Chapter 151B in Counts V-VIII, the dismissal of them should be affirmed because, as determined by the District Court, "Tuvell has offered no facts to support his discrimination claims based on age, gender or race." (Add. 27).

CONCLUSION

For all of the above stated reasons, the District Court's July 7, 2015 Memorandum and Order entering summary judgment for IBM should be affirmed in its entirety.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Appeal No. 15-1914

I, Anne E. Selinger, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,637 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen point Times New Roman.

/s/Anne E. Selinger
Anne E. Selinger (Court of Appeals No. 1164576)

CERTIFICATE OF SERVICE

Appeal No. 15-1914

I, Anne E. Selinger, certify that on January 21, 2016, I electronically filed the Brief for Defendants-Appellee with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the below counsel of record is registered as an ECF Filer and that he will be served by the CM/ECF system:

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