
In The
United States Court of Appeals
for the
First Circuit

Case No. 15-1914

WALTER TUVELL,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant-Appellee.

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

BRIEF FOR PLAINTIFF-APPELLANT

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**CORPORATE DISCLOSURE STATEMENT AND STATEMENT
OF FINANCIAL INTEREST**

Pursuant to Fed. R. App. P. 26.1, Appellant Walter Tuvell makes the following disclosure:

- 1) For non-governmental corporate parties please list all parent corporations:

None.

- 2) For non-governmental corporate parties please list all publicly held companies that own 10% or more of the party's stock:

None.

- 3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

None.

- 4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable – not a bankruptcy appeal.

/s/ Andrew P. Hanson, Esq.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a) and Loc. R. 34(a), Plaintiff-Appellant Walter Tuvell respectfully submits that oral argument should be heard for this appeal to assist this Court in reaching a decision involving numerous issues of significance to the public. These issues include whether an employer may reject applications for job transfer from an employee on short-term disability leave precisely because the employee is on short-term disability leave, and yet, avoid liability for doing so under the Americans with Disabilities Act and Massachusetts General Laws Chapter 151B. These issues also include whether an employer may insist that an employee on short-term disability leave return to work for his harassing supervisor but simultaneously take the position that the employee is not a qualified disabled person eligible for a job transfer, in spite of medical documentation explaining that the employee can only function in a new work environment.

JURISDICTIONAL STATEMENT

A. The District Court has jurisdiction of this matter on account of Plaintiff-Appellant Walter Tuvell's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., see 28 U.S.C. § 1331, and on account of diversity of citizenship between Plaintiff-Appellant Walter Tuvell (Massachusetts) and Defendant-Appellee International Business Machines, Inc. (New York), as the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332(a)(1).

B. The Court of Appeals for the First Circuit has jurisdiction of this appeal under Fed. R. App. P. 3 and 4 and by virtue of its appellate jurisdiction over district courts within its circuit. See 28 U.S.C. § 1291.

C. The Notice of Appeal in this action was timely filed on August 5, 2015, following the entry of judgment on July 8, 2015. See Fed. R. App. P. 4(a)(1)(A).

D. This appeal is from a final order granting summary judgment against Plaintiff-Appellant Walter Tuvell, and judgment in favor of Defendant-Appellee International Business Machines, Inc., was entered. Addendum "ADD" 1-27.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed reversible error by concluding Tuvell was not a qualified disabled person.
2. Whether the District Court committed reversible error by concluding Tuvell was reasonably accommodated by IBM throughout his employment.
3. Whether the District Court committed reversible error by concluding IBM lawfully rejected Tuvell's two applications for job transfer.
4. Whether the District Court committed reversible error by concluding Tuvell was not subjected to an unlawful hostile work environment.
5. Whether the District Court committed reversible error by concluding Tuvell was not subjected to other unlawful adverse actions, separate from the rejections for transfer, while he was still employed.
6. Whether the District Court committed reversible error by concluding Tuvell's termination was not unlawfully discriminatory and/or retaliatory.
7. Whether the District Court committed reversible error by concluding IBM's investigations into Tuvell's protected complaints were lawful and adequate.

STATEMENT OF THE CASE

A. RELEVANT FACTS

Tuvell suffers from the disability of Post-Traumatic Stress Disorder (“PTSD”), A615, and IBM was aware of his disability. A1293. Tuvell was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a Ph.D. in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Daniel Feldman, his supervisor, and IBM acknowledges a lack of performance issues prior to May 18, 2011, the day on which harassment started, triggering Tuvell’s PTSD. A258-A259, A614, A649-A653, A749-A751. Feldman also regarded Tuvell’s work in the Performance Architecture area as competent and his interactions with others to be professional. A648, A654.

On May 18, 2011, Fritz Knabe, a supervisor, falsely accused Tuvell of failing to perform work, and Feldman failed to investigate when Tuvell pointed out that falsity. A616, A657-A658, A700-A701, A706-A707, A725. On June 8, 2011, Knabe yelled at Tuvell and falsely accused him of failing to provide work, and again Feldman refused to investigate and refused Tuvell’s request for a three-way meeting to clear the air. A616. Feldman was aware of Tuvell’s PTSD at least as early as May 26, 2011. A661.

On June 10, 2011, Feldman demoted Tuvell's level of work from that of a "Band 8" employee to that of a lesser "Band 7," and he simultaneously switched a less qualified employee, Sujatha Mizar, into Tuvell's position. A614, A616-A617, A647, A664-A670, A671, A746, A753, A786, A808, A840, A864, A875, A931-A932. Tuvell, a Band 8 employee, was thereafter responsible for work that had been performed by a Band 7 employee. A616, A753, A786. Due acknowledged the reassignment to be to a "lesser role." A753, A786. Tuvell was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower-level work. A671, A746, A864. The change also constituted a "public humiliation." A864. IBM's own policies regard such an "undesirable reassignment" as a tangible adverse employment action. A875, A931-A932. Further, the reassignment meant change of worksite to Marlborough from (mostly) Cambridge, which Tuvell regarded as a preferable location, and an increase in commuting distance of thirty miles each direction. A666, A669-670, A746. Via the demotion, Feldman unilaterally assigned Tuvell to switch roles with Mizar, despite Tuvell having decades more relevant experience for the position and despite Mizar's lack of a Ph.D. A614, A616-A617, A647.

IBM takes the position that the demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's]

unhappiness with working with Knabe.” A726. However, IBM asserted to the contrary, “IBM policy is pretty clear that supervisors aren’t changed because an employee’s not getting along with their current supervisor.” A1168.

IBM also justified the demotion based on Tuvell’s alleged failure to produce certain Excel graphics, as allegedly required by Knabe. A654-A658, A668.

However, Tuvell was never asked to produce Excel graphics. A616. Moreover, Feldman and Knabe both knew that Tuvell did not use Excel, so it defies logic to believe Knabe’s claim that he asked Tuvell to complete such an assignment.

A657-A658, A700-A701. Finally, IBM’s descriptions of the Excel incident are inconsistent, as it elsewhere described Tuvell as performing his work “too slowly,” as opposed to not providing the work at all. A706-A707, A725.

The demotion also came two days after Knabe yelled at Tuvell and, with knowing falsity, accused him of not producing work. A616. Feldman refused to investigate, and refused to respond to Tuvell’s repeated inquiries for more detail concerning his alleged misconduct. A616. Feldman repeatedly denied Tuvell’s requests for a three-way meeting with Knabe, himself, and Feldman to clear the air. A616, A660-A661. While Feldman claimed to have rejected the option of a meeting as it would create an unhealthy “habit,” he had convened just such a three-way meeting between the three of them in March 2011, concerning a different issue. A660, A746. Moreover, as Tuvell was being demoted, Knabe, who was not

disabled and had acknowledged yelling at Tuvell, was not reassigned or otherwise disciplined in any way. A662-A664, A785, A790-A791.

On June 12, 2011, Tuvell complained to Feldman about the “harassment and yelling” and “‘illegal’ adverse job action.” A864. That same day, Feldman required that all verbal communications with Tuvell be in the presence of an Human Resources (“HR”) professional, and all written communications with Tuvell be copied to an HR professional, based on Tuvell’s past history of litigation and engaging in protected complaints about harassment. A617, A862, A934.

The next day, June 13, 2011, which was just three days after the demotion, Feldman, the decision-maker with respect to the demotion, wrote an email to his boss and a member of HR in which he claimed Tuvell was “irrational and potentially dangerous” in conjunction with his PTSD, and Feldman advocated barring Tuvell from the workplace and firing him. A672-A673, A1293.

Tuvell complained to HR of harassment and disability discrimination on June 13, 2011. A708.

Two days later, Feldman disciplined Tuvell for failing to provide a joint status update on the transition of his work to Mizar, even though Mizar had already submitted the applicable joint report, A617, A674-A678, A935, A947-A948, A950. The next day, June 16, 2011, Feldman imposed on Tuvell the impossible task of piecing together, independently of Mizar and Feldman, on a single day’s

notice, a detailed day-by-day schedule for three weeks, reflecting his taking over of Mizar's four duties on his reassignment, which was unachievable given that Tuvell had no acquaintance of his four entirely new responsibilities in the transition, and Feldman refused to provide Tuvell an example of such a schedule. A618, A620, A747, A936, A952-A953, A955, A958.

Four days later, on June 20, 2011, Feldman again referred to Tuvell's diagnosis of PTSD and claimed that Tuvell was "potentially dangerous." A679, A787-A788. However, Tuvell did not engage in any violent or threatening conduct whatsoever. A615, A783-A784.

Meanwhile, Lisa Due, an IBM Senior Case manager, was conducting IBM's initial investigation of Tuvell's complaints that month. A382-A387, A389. However, when conducting that investigation, Due did not explore the qualifications of Mizar, the employee who took over Tuvell's work upon his demotion, and Due did nothing to inquire of Feldman about his attitudes towards Tuvell's PTSD. A768, A782. Further, Due claimed that the following sentences provided by Tuvell in support of one such complaint, were "inappropriate":

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

A435, A802-A803.

Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much," as if the length and detail of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." A1080-A1081, A1083-A1088, A1091-A1101. In explaining reasons why Tuvell performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." A708. Yet, pursuit of claims was protected, and Tuvell never neglected, and IBM has never identified, any job task that Tuvell neglected as the result of lodging his internal, protected complaints. A708.

Prior to Due's completion of her investigation, she met with Mandel, who instructed her to inform Tuvell that Due had no reason to conclude that Tuvell had been mistreated. A794-A795. In addition to never seriously investigating Tuvell's complaints of discrimination, Due also never investigated whether Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. A797, A1078.

Tuvell appealed Due's adverse conclusion to Mandel, after learning of it on June 29, 2011. A552, A619, A894-A895. However, Mandel was biased as an appeal investigator, because he had already instructed Due how to respond with respect to her initial investigation. A794-A795. Meanwhile, on June 30, 2011, in response to one of Tuvell's protected complaints of harassment, Feldman

threatened, “assertions of bad faith . . . are inconsistent with success.” A1131. After this reasonable and protected complaint of harassment by Tuvell, A1136, Feldman urged HR to discipline him based directly on that complaint. A1135.

On August 3, 2011, Feldman prohibited Tuvell from using a previously-agreed, reasonable amount of his workday to draft his internal complaints of discrimination, and then Feldman threatened Tuvell with termination when he said, “Now wait a minute, Dan.” A620-A621. Also, on August 3, 2011, reflecting a pre-existing, secret plan to write up Tuvell for something, Tuvell was given a Formal Written Warning, with threat of termination, for innocently penning the innocuous vernacular phrase “if you’re lazy you can just click this link”; meanwhile, Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Tuvell. A620-A621, A662-A664, A785, A790-A791, A1287-A1291.

Though Mandel understood that Tuvell’s complaint included the allegations that his demotion was discriminatory and/or retaliatory, Mandel never investigated whether that demotion was appropriate, and he failed to inquire as to whether Feldman exhibited any animus based on handicap and/or retaliation. A893, A909-A910.

The harassment that Tuvell experienced at the hands of Feldman triggered serious symptoms of PTSD. A621-A622, A899, A965. For that reason, beginning

on or about August 11, 2011, Tuvell went onto medical leave, and ultimately his pay was lowered, and eventually completely curtailed, until he was terminated more than eight months later. A622, A624, A631, A636, A746, A1043-A1044.

On August 25, 2011, Mandel refused to advance Tuvell's internal complaints of discrimination and retaliation while on STD, stating, over Tuvell's objections, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." A899-A901, A904, A966, A1261. Then, Knabe and Feldman, but not Tuvell, were accorded the opportunity to review Mandel's draft conclusions, and offer suggestions. A1265-A1274. Mandel's eventual conclusions did not address Tuvell's allegations of wrongdoing against Knabe or Mandel. A626-A627.

Mandel had already completed his investigation by September 15, 2011, A397; nevertheless, he did not inform Tuvell of the negative conclusion of his investigation until November 17, 2011, which was *19 weeks* after the investigation had been requested. A619, A626. Moreover, Mandel was an inappropriate investigator under IBM's own conflict-of-interest policy, as he, personally, had been accused by Tuvell of wrongdoing and discrimination, based on his failure to advance the investigation during the pendency of Tuvell's disability leave, and his false assertions to Tuvell about IBM's practice of investigating third party

complaints. A799-A800, A897-A898, A903-A904, A929-A930, A941-A942, A1215-A1218, A1221, A1226-A1228, A1237-A1238, A1245.

While out on leave, the harassment by IBM continued, including: curtailing Tuvell's computer access based expressly on his being on medical leave, A687-A688, A1296; admittedly curtailing Tuvell's use of the IBM email system because he forwarded his protected complaints of harassment and discrimination to others within IBM, calling it "misuse," A1073; curtailing Tuvell's access to IBM's email system, because "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application," A1073; and counting as sick days Tuvell's work at home. A625.

Even though Tuvell made it clear that he would be medically unable to return to work until the investigation was properly completed, A899, A965, IBM refused to complete the investigation until four-and-a-half months after it commenced. A619, A626. On September 15, 2011, Tuvell's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [due to STD leave]. It is easy to return access once you return from STD." A905-A906, A1076. This adverse action even interfered with his ability to enter an IBM building to interview for his transfer, thereby completing his figurative and literal banishment from the workplace. A1204-A1205.

In order to remain a productive employee of IBM, Tuvell medically required the reasonable accommodation of a work environment that did not exacerbate his PTSD, such as a different supervisor, or a transfer to a new department, so that he would not have to interact with Feldman's harassment. A365-A368, A461-A462. Indeed, Ross's December 19, 2011 Medical Treatment Report Form ("MTR") that was provided to IBM states that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. Tuvell on many occasions informed IBM that he could no longer work in any capacity with Feldman, for medical reasons, (fear of further harassment exacerbating PTSD), and requested that he be accorded a new supervisor, or a transfer to a different position. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. IBM repeatedly rejected Tuvell's requests. A624, A626, A629-A631.

On January 23, 2012, Stephanie Ross, a highly-qualified social worker with many years of experience working with trauma victims, stated that while she advised Tuvell "not to return to [his] specific job environment," that "Patient has good functioning in the absence of trauma related stimuli." A1040-A1041, A1045-A1048, A1194-A1195. On January 31, 2012, Ross reiterated that "the only course to recovery for Tuvell required a reassignment by the company." A465. On September 28, 2012, Ross stated, "in a new setting with different people it was

possible that Tuvell could function quite well and attend his work.” A466. Ross testified that she believed that Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. A1050-A1051, A1187-A1188. Ross reported that Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. A1051.

In December 2011, Tuvell went to IBM’s Littleton facility to interview for a transfer that he affirmatively pursued, and his PTSD was not triggered by the interview or other efforts to pursue a transfer. A746, A1052-A1053, A1204-A1205. Tuvell conducted himself professionally at the December 1, 2011 interview with Chris Kime, a Development and Solutions Manager. A973-A974, A992. Tuvell was interviewed by two other individuals on or about December 8, 2011, and Kime reported that “the conversations were very positive” and their interactions were congenial. A997, A1015, A1060. Tuvell’s many communications with Kime concerning the position were “cordial and professional.” A1013.

Tuvell was qualified for an open position in IBM’s Littleton office, SWG-0436579 (“The 579 Position”), for which he applied on November 28, 2011. A627, A977, A980-A983. Tuvell met all of the “minimal qualifications” listed in the job requisition, including advanced academic degree and fluency in English,

and he exceeded the amount of required experience with “C” programming language and software design, by decades. A614, A744-A745, A975-A976, A978-A979, A1055-A1056. Moreover, Tuvell possessed the vast majority of the “preferred” qualifications sought. A614, A744-A745, A975-A976, A978-A979, A1055-A1056.

Kime acted as Hiring Manager for The 579 Position and drafted the posting himself. A976-A979. Kime reviewed Tuvell’s resumes, and concluded they had had “little doubt that you [Tuvell] have technical skills that we could use on the project.” A984-A986, A1058. On or about December 1, 2011, Kime interviewed Tuvell by phone, which screened Tuvell’s background and qualifications. A987-A989. At the interview, Kime concluded that Tuvell “had strong technical skills and that with those skills he could potentially be a contributing member of the team.” A991. As a result of the interview, Kime asked his support lead and also the next most senior member of the Littleton team to interview Tuvell. A993-A994. Kime acknowledged that the interviews with his own management team did not exclude Tuvell as a candidate. A998, A1000-A1001. Kime reported that he and his subordinates were “excited by Walt’s evident technical skills.” A695. Kime considered Tuvell’s technical knowledge and ability to be a strength. A999. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for The 579 Position. A1003. Kime believed Tuvell had “deep technical skills and

ability to produce solid documentation.” A969, A1013-A1014. Nevertheless, Kime notified Tuvell on January 6, 2012, that he had been rejected for the transfer. A969.

On January 6, 2012, Kime communicated the following as the primary reason for the rejection: “I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization.” A969, A1013-1014.

IBM’s own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. A876, A931-A932. Tuvell had amply reported that Feldman had been harassing him. A278-A282, A334-A339, A435-A436, A616-A617. Moreover, Tuvell’s medical documentation required him to report to a different person. A461. Furthermore, IBM took the position that Tuvell’s June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to “accommodate [Tuvell’s] unhappiness with working with Knabe.” A726.

On January 6, 2012, Kime gave one other reason in addition to the fact that Tuvell was on disability leave as the justification for denying his application; namely, a “concern about the work being to [Tuvell’s] liking.” A969. However, after Tuvell was fully informed of the nature of the job, Tuvell wrote to Kime, on

December 9, 2011, “You gave me quite a good picture of what you’re doing, and it feels very much like what I’d like/want to be doing.” A995-A996, A1060.

IBM later changed its purported rationale for rejecting Tuvell’s application for the job in Kime’s group; at his deposition, Kime testified it was because he couldn’t offer Tuvell development work. A298-299. The published job description, which was drafted by Kime, and which formally designated the position as “Software Developer,” was explicitly described as entailing “software development activities,” for the purpose of “develop[ing] the next major release for this platform.” A975, A977-A978, A1065. IBM has also claimed, after the fact, that its own STD justification was a lie, and that a different reason, Tuvell’s past inability to work with his harassers, was the true reason for the rejection. A916-A919, A1021-A1022, A1069.

However, even if that were true, the evidence shows that Kime relied on the negative evaluation of Feldman, and that Feldman explicitly and discriminatorily wanted to fire Tuvell, as early as June 13, 2011, precisely because of Tuvell’s diagnosis of PTSD. A672-A673, A1293. Kime acknowledges that Feldman’s input was significant in the decision, and acknowledged that Tuvell’s candidacy ended upon Kime’s communication with Feldman. A159. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime’s hiring of Tuvell, based on the fact that “it isn’t working out in this group, with

these responsibilities and this set of relationships.” A1004-A1005, A1063.

Feldman verbally rated Tuvell a “3,” which represents a low ranking, but above those facing termination. A1009, A1063. On December 13, 2011, Feldman reported to Kime that Tuvell “had had difficulties working with other people in the group.” Id. Then, in a written exchange that had seemingly concluded when Kime thanked Feldman for his “time and candor,” Feldman initiated further conversation and volunteered that he would not hire Tuvell again. A1063. As of that day, Kime no longer considered hiring Tuvell for the position. A1009-A1011. Just prior to his rejection for transfer, Tuvell had engaged in protected conduct by complaining about unlawful harassment and discrimination, and failure to reasonably accommodate his handicap. A624-A628.

After Tuvell was rejected for the transfer, and after Tuvell’s health care provider had certified on December 19, 2011, that “the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting,” A461, IBM steadfastly maintained its position that Tuvell was capable of performing his job in his current position under Feldman, ignoring the medical certification. A631.

Tuvell was medically incapable due to his PTSD of continuing to serve in his then-current position under Feldman’s harassment, and at the time of his application for the transfer he had been on short-term disability (“STD”) for

months, and was exhausting his benefits. A367, A466, A621-A622, A624, A631, A1147, A1303. He was already on two-thirds compensation, and within three weeks of the January 6, 2012 rejection, he was placed on completely unpaid leave. A624, A631. The denial of the transfer directly inflicted financial harm on Tuvell, because IBM reduced and eventually stopped paying him while on leave, because he was not medically able to continue in active service under a harassing supervisor. A367, A466, A621-A622, A624, A631, A1147, A1303.

In addition, after rejecting Tuvell, IBM held the position open (and indeed reposted it after rejecting Tuvell), and continued seeking a candidate to fill it. A1016. The second posting, which was numbered SWG-0456125 (“The 125 Position”), was otherwise identical to The 579 Position. A1017-1019. Kime was the hiring manager for The 125 Position, he did not consider Tuvell’s application for The 125 Position, and he did not even respond to Tuvell’s application, because he was advised by HR not to do so. A1018-1020. Kime’s rejection of Tuvell occurred shortly after he learned that Tuvell was on STD leave, see A403, and shortly after he wrote to Feldman, “I do not envy you having to deal with HR and lawyers at this point – certainly I did not understand the STD situation and underestimated its significance.” A1071. The reposted position also lapsed without being filled. A1018-A1020.

On January 22, 2012, Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Tuvell a requested transfer based on retaliation and in violation of the obligation to reasonably accommodate. A911-A913, A1280. Mandel, the investigator, never looked into whether the rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate Tuvell. A914, A916. On March 2, 2011, Tuvell filed a third Corporate Open Door Complaint, alleging that Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. A919-A920, A1257-A1258. Mandel never opened up an investigation to respond to this Complaint, and there was no formal response. A747, A920-A921. There are extensive facts showing IBM's investigations were wildly inadequate. A1309-A1418.

On March 13, 2012, Mandel, the employee in charge of IBM's investigations into Tuvell's complaints of discrimination and retaliation, *threatened Tuvell with termination if he continued emailing his protected complaints of discrimination to others.* A925, A1129.

On May 7, 2012, IBM wrote to Tuvell, stating that it believed Tuvell to be working for EMC, a competitor, and threatening termination. A635, A1143, A1150. On May 8, 2012, Tuvell denied working for EMC. A635. Tuvell explained that he did not wish to inform IBM where he was working, as he feared a

retaliatory response. A635. On May 11, 2012, IBM demanded to know where Tuvell was working, citing an inapplicable policy, and its need to confirm that Tuvell was not working for a competitor. A635, A745-A746, A1157-A1159, A1163. On May 15, 2012, IBM demanded to know Tuvell's employer, purportedly based on its duty to confirm that Tuvell was not working for a competitor. A636, A1151, A1165. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a non-employee there, and he suggested that he be permitted to submit the information about his alternate employment to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. A635-A636, A745, A1157-A1158. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2012. A636.

At the time of discharge, Tuvell was disabled (PTSD), and his disability was known to IBM. E.g., A615, A1293. Tuvell had lodged repeated, recent protected complaints of discrimination and retaliation. A635-A636, A1140-A1141, A1151. Tuvell was qualified for the position, as IBM kept offering to reinstate him to that position once he returned from sick leave, and that work had previously been performed by a more junior-level employee with fewer qualifications. A614,

A616-A617, A647, A666-A668, A753, A786. IBM attempted to fill Tuvell's position. A197.

After leaving IBM, Tuvell worked for years at a high level, thereby demonstrating the effectiveness that reasonable accommodation would have had. A747.

B. PROCEDURAL HISTORY

On March 12, 2012, Tuvell filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination. A11. The Equal Employment Opportunity Commission ("EEOC") issued Right-to-Sue Letters on February 19, 2013, and Tuvell timely filed a civil action in Massachusetts Superior Court. A11. Following IBM's removal of the complaint to the District Court on federal question and diversity grounds, Tuvell filed an Amended Complaint. A10-A40. Following discovery, IBM moved for summary judgment, which was granted by the District Court. Addendum ("ADD") 1-27. Tuvell thereafter filed the instant appeal. A210-A211.

SUMMARY OF ARGUMENT

This Court reviews decisions granting summary judgment under a de novo standard. Brief at 24-25. Viewed in the light most favorable to Tuvell, the facts presented to the district court suffice to sustain a jury verdict in his favor on all Counts in his Amended Complaint. Brief at 24-61.

Tuvell, a highly-qualified and experienced mathematician, performed well early in his tenure at IBM. However, in the Spring of 2011, he began to be harassed and falsely accused of performance deficiencies. Following a specific discussion with Feldman, his immediate boss, about Tuvell's PTSD, Tuvell's work environment quickly disintegrated into a hostile nightmare, as he tried in vain to thwart off unjustified, false attacks on his performance and his right to be free from discrimination and retaliation. Brief at 37-60.

Tuvell experienced a plethora of adverse actions that were either ignored completely by the District Court, Brief at 37-60, or tossed aside due to the erroneous conclusion that Tuvell was not a qualified disabled person. Tuvell's medical documentation repeatedly stated that he could only return to work from his disability leave, but that he could return to work, if he could work for a new supervisor or be transferred to a new position. Brief at 25-29.

Thereafter, Tuvell applied for a transfer to an open position at a different location from his primary harasser, and by all accounts, he aced his interviews.

Right when Kime, the hiring manager, learned that Tuvell was on disability leave and received cancerous feedback from Feldman, however, Tuvell's hopes were dashed and he was explicitly rejected for the transfer because he was on disability leave, even though he was eminently qualified for the position. This constituted unlawful retaliation and discrimination in violation of the ADA and Chapter 151B. Brief at 37-60.

The District Court also erred by dismissing the fact that IBM effectively froze Tuvell out of the workplace, slowly diminishing his pay and insisting, unreasonably, that he return to work under his harasser. Brief at 29-37.

The District Court also erred by failing to credit the voluminous evidence Tuvell presented that IBM had simply scoffed at his legitimate, sincere, protected complaints of discrimination and failed to investigate them with any reciprocal sincerity. Brief at 57-60.

For these reasons, and the reasons explained below, the decision granting summary judgment must be reversed and the matter remanded for trial so Tuvell can pursue his claims for failure to reasonably accommodate (Count II, Count IV, and Count V), and unlawful discrimination, retaliation, and failure to investigate (Counts VI-VIII).

ARGUMENT

I. STANDARD OF REVIEW

This Court’s review of the district court’s grant of summary judgment is “de novo and not deferential.” Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 152 (1st Cir. 2009) (citation omitted). Summary judgment is only appropriate where “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Id. (citations omitted). A “genuine” issue is one that could be resolved in favor of either party, and a “material fact” is one that has the potential of affecting the outcome of the case. Id. (citations omitted).

The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” Id. (citations omitted). If the moving party “has pointed to the absence of adequate evidence supporting the nonmoving party’s case, the nonmoving party must come forward with facts that show a genuine issue for trial.” Id. (citation omitted). The test is whether, as to each essential element, there is “sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 152-53 (citation omitted).

In reviewing a grant of summary judgment, this Court “constru[es] the record in the light most favorable to the nonmovant and resolv[es] all reasonable inferences in the party’s favor.” *Id.* at 153 (citation omitted). Thus, to survive summary judgment, a plaintiff “is not required to rely only on *uncontradicted* evidence.” *Id.* (citation omitted) (emphasis in original). Where the record contains inconsistencies “that favor in some lights the defendants and in others the plaintiff,” as long as the “plaintiff’s evidence is both cognizable and sufficiently strong to support a verdict in [his or] her favor, the factfinder must be allowed to determine which version of the facts is most compelling.” *Id.* at 153, 162-63 (citation omitted) (reversing entry of summary judgment in disability discrimination case).

II. TUVELL WAS A QUALIFIED DISABLED PERSON, WHICH SUPPORTS HIS CLAIMS UNDER COUNT II, COUNT IV, COUNT V, AND COUNT VI

Under 42 U.S.C. § 12101 *et seq.* (the “ADA”) and Massachusetts General Laws Chapter 151B (“Chapter 151B”), a qualified disabled person is a disabled person who is capable of performing the essential functions of a particular job, *with* or *without* a reasonable accommodation. ADD 30, 42 U.S.C. § 12111 (8) (the position one “holds or desires”); ADD 33, G.L. c. 151B, § 1(16) (a “particular job”). IBM has conceded that Tuvell, who suffers from the disability of Post-Traumatic Stress Disorder (“PTSD”), A615, was a disabled person entitled to

protection under the ADA and Chapter 151B. See Addendum (“ADD”) 13. As for whether Tuvell was a qualified disabled person, a reasonable jury could find that he was.

Tuvell took the position that he was medically able to perform work for IBM if he was provided the reasonable accommodation of a work environment that did not exacerbate his PTSD, such as a different supervisor, or a transfer to a new position away from Feldman. E.g., A461. Indeed, Ross’s December 19, 2011 MTR states that “the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting.” A461. On January 23, 2012, Ross stated that while she advised Tuvell “not to return to [his] specific job environment,” that “Patient has good functioning in the absence of trauma related stimuli.” A1045-A1048, A1194-A1195. On January 31, 2012, Ross reiterated that “the only course to recovery for Tuvell required a reassignment by the company.” A465. On September 28, 2012, Ross stated, “in a new setting with different people it was possible that Tuvell could function quite well and attend his work.” A466; see Cargill v. Harvard University, 60 Mass. App. Ct. 585, 603 (2004) (plaintiff’s burden is merely to show that a reasonable accommodation is “possible”); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Sensing, 575 F.3d at 156-57 (plaintiff raised genuine issue of material fact that she was qualified disabled

person based partly on doctor's notes discussing her ability to return to certain position).

Ross, a highly qualified social worker with many years of experience working with trauma victims, testified that she believed that Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. A1040-A1041, A1050-A1051, A1187-A1188. Ross reported that Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. A1051.

In December 2011, Tuvell went to IBM's Littleton facility to interview for a transfer that he affirmatively pursued, and his PTSD was not triggered by the interview or other efforts to pursue a transfer. A746, A1052-A1053, A1204-A1205. Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. A992. Tuvell was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. A997, A1015, A1060. Tuvell's many communications with Kime concerning the position were "cordial and professional." A1013.

After leaving IBM, Tuvell worked for years at a high level, thereby demonstrating the effectiveness that reasonable accommodation would have had.

A747. See Sensing, 575 F.3d at 157 (plaintiff raised genuine issue of material fact that she was qualified disabled person based partly on how she worked following diagnosis of disability).

The district court silently ignored all of this evidence, and it was error to do so. Instead, the district court focused on the initial MTRs from Ross that stated Tuvell was initially “totally disabled.” ADD 13. Massachusetts and Federal law confirms that employees may be considered qualified disabled individuals, even if they claim “total disability” (*without* accommodation) on medical documentation, so long as they claim that they can return to work *with* reasonable accommodation. Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997). Tuvell claimed, with written support from Ross, that there were at least two possible reasonable accommodations available to him. This distinguishes and defeats the “total disability” rationale.

Similarly, the district court focused on descriptions of Tuvell’s PTSD-related symptoms and challenges in the vacuum of professional therapy while ignoring what actually occurred in the real world following his professional therapy when he (1) successfully interviewed in an IBM facility for transfer to another IBM position and (2) thereafter worked at a high level for years for another company.

The evidence positively demonstrates that Tuvell could continue working at IBM, if only he was provided with reasonable accommodation, and thus, he was qualified.

III. TUVELL WAS NOT PROVIDED REASONABLE ACCOMMODATION THROUGHOUT HIS EMPLOYMENT – COUNT II

To make out a reasonable accommodation claim, Tuvell must show he suffers from a disability, he is a qualified disabled person, and IBM knew of his disability but did not reasonably accommodate him upon request. Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010). Tuvell need not establish discriminatory animus to prevail on this claim. See id.

IBM has conceded that Tuvell suffers from a disability, see ADD 13, and the facts supporting Tuvell’s status as a qualified disabled person are outlined supra at 25-29.

As for the third prong, there is no dispute that IBM was aware of Tuvell’s requests to accommodate his disability, see ADD 17, and a genuine issue of material fact exists as to whether IBM adequately offered or provided reasonable accommodation in response. The “accommodation” offered by IBM, to continue an unpaid medical leave indefinitely until Tuvell was able to return to work under Feldman, see ADD 16, was inadequate for two reasons. First, the indefinitely long, uncompensated leave that IBM proposed is not a valid, effective, or

acceptable reasonable accommodation, for there were acceptable options that would have returned Tuvell to work immediately, and accorded him equal career opportunities; second, the requirement that Tuvell return to working below Feldman was diametrically opposed to Tuvell's medical limitations. E.g., A461.

The harassment that Tuvell experienced at the hands of Feldman triggered serious symptoms of PTSD. A621-A622, A899, A965. In order to remain a productive employee of IBM, Tuvell medically required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Feldman's harassment. A365-A368, A461-A462. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. Tuvell on many occasions informed IBM that he could no longer work in any capacity with Feldman, for medical reasons, and requested that he be accorded a new supervisor, or a transfer to a different position. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. IBM repeatedly rejected Tuvell's requests. A624, A626, A629-A631. Beginning on or about August 11, 2011, Tuvell went onto medical leave, and ultimately his pay was lowered, and eventually completely curtailed, until he was terminated more than eight months later. A622, A624, A631, A636, A746, A1043-A1044.

The accommodation suggested by IBM could be found by a jury to be unreasonable and inadequate.

A. LEAVE WITH NO PAY WAS NOT A REASONABLE ACCOMMODATION

Under the ADA, reasonable accommodations are modifications to the work environment that permit an employee to perform the essential functions of a desired position, or enable the disabled to “enjoy equal benefits and privileges of employment as are enjoyed by . . . employees without disabilities.” ADD 35, 29 C.F.R. § 1630.2 (o)(1)(ii) & (iii). Similarly, under Chapter 151B, reasonable accommodations are adjustments to a job or work environment that allow one to perform the essential functions of a position and to enjoy “equal terms, conditions and benefits of employment.” ADD 37-38, MCAD Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B (1998), at 2-3.

As numerous cases have held, a reasonable jury could find that forcing Tuvell to stay out of work, without compensation, when transfer to gainful employment under a different supervisor is an available option, fails to satisfy IBM’s legal obligations to provide a reasonable accommodation. Williams v. Philadelphia Housing Auth. Police Dep’t, 380 F.3d 751, 771-72 (3rd Cir. 2004); Noon v. IBM, No. 12 Civ. 4544(CM)(FM), 2013 WL 6504410, at *13 (S.D.N.Y. Dec. 11, 2013), at 35; Walters v. Mayo Clinic Health Sys.-Eau Claire Hosp., Inc., 998 F. Supp. 2d 750, 764 (W.D. Wisc. 2014) (leave not sufficient where other

accommodations available). Just because an employer has attempted one type of accommodation does not divest it of its responsibility to provide another, if the first attempt is not effective. Ralph v. Lucent Technologies, 135 F.3d 166, 172 (1st Cir. 1998); Smith v. Bell Atl., 63 Mass. App. Ct. 702, 721 (2005). While Tuvell's initial medical leave may be considered a temporary reasonable accommodation, in response to his major, immediate symptoms, eventually the extended, indefinite and uncompensated medical leave ceased being reasonable, when other reasonable accommodations were available that would permit him to fully participate in the workplace and earn a living. A621-A622, A624, A631, A746-A747, A899, A965, A1043-A1044.

B. REQUIRING TUVELL TO WORK UNDER CONDITIONS CONTRARY TO HIS MEDICAL LIMITATIONS WAS NOT REASONABLE

IBM's proposed accommodation of forced leave until Tuvell could return to work under Feldman was also not reasonable, contrary to the district court's conclusion, see ADD Memo Order pp. 16, 19, given that continued working with Feldman in any capacity was directly contrary to Tuvell's medical limitation. A631, A1184. IBM submitted its proposal after Tuvell's health care provider certified on December 19, 2011, that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." A461. On many other occasions, Tuvell informed IBM that he was medically incapable of returning

to work under Feldman, and described his symptoms. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. IBM's proposals were not reasonable accommodations, because they were contrary to Tuvell's medical limitations.

C. TUVELL'S REQUEST FOR A NEW SUPERVISOR WAS A VALID REQUEST FOR REASONABLE ACCOMMODATION THAT WAS UNLAWFULLY DENIED – COUNT II

One accommodation Tuvell sought that would satisfy the medical limitations placed on him was to stay in the same position working under a different supervisor. A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184. The district court erroneously accepted IBM's self-serving dismissal of reassignment to another management team as not being a reasonable accommodation. ADD MO p. 17, 19. Transfer to a different supervisor, depending on the facts, may indeed be a valid reasonable accommodation. Ralph, 135 F.3d at 171-72 (employer changed supervisors as a reasonable accommodation); Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-23 (2nd Cir. 1999) (change of supervisor may be reasonable accommodation).

In this case, change of reporting relationship to a different supervisor was reasonable under the facts. IBM's own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. A876, A931-A932. Tuvell had amply reported that Feldman had been harassing him, and

consequently, a change of supervisor was reasonable as it was absolutely consistent with IBM's promulgated policy. A278-A282, A334-A339, A435-A436, A616-A617. Moreover, Tuvell's medical documentation required him to report to a different person. A461. Furthermore, IBM took the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." A726. Therefore, a genuine issue of fact exists as to whether Tuvell's request to report to a different supervisor was a viable request for reasonable accommodation that IBM unlawfully failed to provide.

D. TUVELL SOUGHT REASSIGNMENT TO A VACANT POSITION, FOR WHICH HE WAS QUALIFIED, AND IBM VIOLATED ITS DUTY TO REASONABLY ACCOMMODATE TUVELL BY REJECTING HIM FOR THE TRANSFER – COUNT II AND COUNT IV

A second reasonable accommodation that Tuvell requested was reassignment to a vacant position, A618, A625-A626, A631, A694, A747, A781, A927-A928, A1149, A1171, A1174, A1179, A1183-A1184, and the ADA requires employers to reassign employees to a vacant position to reasonably accommodate their disabilities. ADD 30; 42 U.S.C. § 12111(9)(B). If the employee is qualified, he or she must be transferred to a vacant, appropriate position, if required as a reasonable accommodation. Duvall v. Georgia-Pacific Consumer Products, L.P., 607 F.3d 1255, 1260 (10th Cir. 2010). There is no need for the employee to prove

that he or she is the “best” qualified applicant to obtain the reassignment. EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012); ADD 40-41, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment (“EEOC Guidance”). Rather, the employee need only show himself to be minimally qualified to establish **entitlement** to reassignment. ADD 41-42, EEOC Guidance (“Reassignment means that the employee **gets** the vacant position if s/he is qualified for it.”) (emphasis supplied).

There is ample evidence to conclude that Tuvell was qualified for the open position in IBM’s Littleton office, SWG-0436579 (“The 579 Position”), for which he applied on November 28, 2011. A627, A977, A980-A983. Tuvell met all of the “minimal qualifications” listed in the job requisition, including advanced academic degree and fluency in English, and he exceeded the amount of required experience with “C” programming language and software design, by decades. A614, A744-A745A975-A976, A978-A979, A1055-A1056. Moreover, Tuvell possessed the vast majority of the “preferred” qualifications sought. A614, A744-A745, A975-A976, A978-A979, A1055-A1056.

Kime, a Development and Solutions Manager, acted as Hiring Manager for The 579 Position and drafted the posting himself. A973-A974, A976-A979. Kime reviewed Tuvell’s resumes, and concluded they had had “little doubt that you

[Tuvell] have technical skills that we could use on the project.” A984-A986, A1058. On or about December 1, 2011, Kime interviewed Tuvell by phone, which screened Tuvell’s background and qualifications. A987-A989. At the interview, Kime concluded that Tuvell “had strong technical skills and that with those skills he could potentially be a contributing member of the team.” A991. As a result of the interview, Kime asked his support lead and also the next most senior member of the Littleton team to interview Tuvell. A993-A994. Tuvell’s was interviewed by these other individuals on or about December 8, 2011, and Kime reported that “the conversations were very positive.” A997, A1060. Kime acknowledged that the interviews with his own management team did not exclude Tuvell as a candidate. A998, A000-A1001. Kime reported that he and his subordinates were “excited by Walt’s evident technical skills.” A695. Kime considered Tuvell’s technical knowledge and ability to be a strength. A999. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for The 579 Position. A1003. Kime believed Tuvell had “deep technical skills and ability to produce solid documentation.” A969, A1013-A1014. Consequently, a jury could reasonably find that Tuvell met the minimal qualifications for The 579 Position. Nevertheless, Kime notified Tuvell on January 6, 2012, that he had been rejected for the transfer. A969. IBM’s failure to reassign Tuvell to The 579 Position was an unlawful breach of its duty to reasonably accommodate him.

The district court held that this transfer to Kime's group "would not have been reasonable under the circumstances," given Tuvell's impairments "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities." ADD MO pp. 19-20. This conclusion was ludicrous and must be reversed, because IBM itself maintained (by offering to reinstate him) that Tuvell was capable of returning to work on Feldman's team. A1184. If Tuvell was able to function well enough in a team to be able to return to work under Feldman, it defies logic to conclude that he could not do so in a new position under Kime, especially given his doctor's advice.

In addition, the district court erroneously held that IBM reasonably accommodated Tuvell by encouraging him to apply for open positions in the company, ADD 19, because this "encouragement" was an illusory sham. IBM completely sabotaged Tuvell's attempt to transfer to Kime's group on two occasions (discussed more infra at 37-46) to a position for which he was eminently qualified and for which he interviewed well.

IV. TUVELL'S TRANSFER WAS REJECTED BECAUSE OF HIS DISABILITY (AND/OR HIS TAKING REASONABLE ACCOMMODATION) OR RETALIATION – COUNT V

Tuvell has satisfied his prima facie burdens to demonstrate that the rejection of his application for The 579 Position was due to disability, his avilment of reasonable accommodation based on that disability, and/or retaliation.

First, it is unquestioned that Tuvell was disabled due to PTSD, (as discussed supra at 25-26), and that just prior to his rejection for transfer, Tuvell had engaged in protected conduct by complaining about unlawful harassment and discrimination, and failure to reasonably accommodate his handicap. A624-A628. See ADD 26.

Second, as established above, Tuvell was qualified for the transfer, exceeding by decades the experience and credentials required of the position. Supra at 34-36.

Third, the rejection of Tuvell's application for transfer on January 6, 2012, was an adverse action under both the ADA and Chapter 151B. Tuvell was medically incapable due to his PTSD of continuing to serve in his then-current position under Feldman's harassment, and at the time of his application for the transfer he had been on STD for months, and was exhausting his benefits. A367, A466, A621-A622, A624, A631, A1147, A1303. He was already on two-thirds compensation, and within three weeks of the January 6, 2012 rejection, he was

placed on completely unpaid leave. A624, A631. The denial of the transfer directly inflicted financial harm on Tuvell, because IBM reduced and eventually stopped paying him while on leave, because he was not medically able to continue in active service under a harassing supervisor. A367, A466, A621-A622, A624, A631, A1147, A1303. Therefore, many cases support the proposition that the rejection of the transfer was an adverse action, and the district court's conclusion to the contrary, ADD MO p. 22, should be reversed. Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (denial of hardship transfer could be an adverse action); Lewis v. City of Chicago, 496 F.3d 645, 655 (7th Cir. 2007) (refusal to transfer away from harasser is an adverse action); Taylor v. Roche, 196 Fed. Appx. 799, 803 (11th Cir. 2006) (same).

Lastly, after rejecting Tuvell, IBM held the position open (and indeed reposted it after rejecting Tuvell), and continued seeking a candidate to fill it. A1016; Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003). The reposted position also lapsed without being filled. A1018-A1020. See, e.g., Jones v. Walgreen Co., 679 F.3d 9, 14, 20, n.7 (1st Cir. 2012) (outlining respective prima facie burdens).

There is direct evidence that Tuvell's disability was the primary factor in the rejection. On January 6, 2012, Kime communicated the following as the primary reason for the rejection: "I underestimated the difficulty of moving forward with

bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization.” A969, A1013-1014. This is direct evidence of discriminatory animus and causation, and the district court erred by completely ignoring it. See ADD 20-22. See Sensing, 575 F.3d at 161 (plaintiff put forth sufficient evidence that adverse employment action taken, at least in part, because of disability where manager stated he was not “comfortable” with plaintiff returning to work from leave due to potential liability).

On January 6, 2012, Kime gave one other reason in addition to the fact that Tuvell was on disability leave as the justification for denying his application; namely, a “concern about the work being to [Tuvell’s] liking.” A969. Pretext, and the reasonable jury’s inference of discriminatory animus arising therefrom, is established by this alleged justification. For, after Tuvell was fully informed of the nature of the job, Tuvell wrote to Kime, on December 9, 2011, “You gave me quite a good picture of what you’re doing, and it feels very much like what I’d like/want to be doing.” A995-A996, A1060.

There is additional evidence of disability animus. IBM curtailed Tuvell’s access to IBM’s email system, because “you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application.” A1073. On August 25, 2011, IBM refused to advance Tuvell’s internal complaints of

discrimination and retaliation while he was on STD, stating, “I do not plan on discussing your concerns directly with you until you return from Short Term Disability.” A899, A966. Even though Tuvell made it clear that he would be medically unable to return to work until the investigation was properly completed, A899, A965, IBM refused to complete the investigation until four-and-a-half months after it commenced. A619, A626. On September 15, 2011, Tuvell’s badge access to IBM buildings was curtailed, because, as he was told, “you don’t need access to IBM facilities since you aren’t working [due to STD leave]. It is easy to return access once you return from STD.” A905-A906, A1076.

IBM later changed its purported rationale for rejecting Tuvell’s application for the job in Kime’s group, providing further evidence of pretext. At his deposition, Kime testified it was because he couldn’t offer Tuvell development work. A298-299. This assertion is shown to be blatantly pretextual by the published job description itself, which was drafted by Kime, and which formally designated the position as “Software Developer,” and was described as entailing “software development activities,” for the purpose of “develop[ing] the next major release for this platform.” A975, A977-A978, A1065. IBM has also claimed, after the fact, that its own STD justification was a lie, and that a different reason, Tuvell’s past inability to work with his harassers, was the true reason for the rejection. A916-A919, A1021-A1022, A1069. A jury would be free to reject these

explanations as pretextual, as they are inconsistent with the reasons given to Tuvell at the time of the rejection. See A969; Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 431-32 (1st Cir. 2000) (pretext established where reasons given for employment action during litigation differ from reasons given at the time of the action); NLRB v. Hotel Employees, 446 F.3d 200, 208 (1st Cir. 2006) (same).

However, even if that were true, the evidence shows that Kime relied on the negative evaluation of Feldman, and that Feldman explicitly and discriminatorily wanted to fire Tuvell, as early as June 13, 2011, precisely because of Tuvell's diagnosis of PTSD. A672-A673, A1293. Kime acknowledges that Feldman's input was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman, sufficient to establish the "cat's paw" theory. A159. Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-59 (1st Cir. 1999) (where a non-discriminatory employee makes a rejection based on an evaluation conducted by someone motivated by discriminatory animus, the employer is liable for discriminatory motives of the evaluator); Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 570 (1981). On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." A1004-A1005, A1063. Feldman verbally rated Tuvell a "3," which represents a low ranking, but

above those facing termination. A1009, A1063. On December 13, 2011, Feldman reported to Kime that Tuvell “had had difficulties working with other people in the group.” A1007-A1008. Then, in a written exchange that had seemingly concluded when Kime thanked Feldman for his “time and candor,” Feldman initiated further conversation and volunteered that he would not hire Tuvell again. A1063. As of that day, Kime no longer considered hiring Tuvell for the position. A1009-A1011.

The prima facie case, and the proof of pretext via false and changing justifications for the rejection, likewise support Tuvell’s claim based on retaliation. However, Tuvell also has ample direct evidence of retaliatory animus to support his retaliation claim. Due, an IBM Senior Case manager who investigated some of Tuvell’s internal complaints of discrimination, claimed that the following protected sentences provided by Tuvell in support of one such complaint, were “inappropriate”:

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

A435, A802-A803. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell’s requests for reasonable accommodation, repeatedly asserted that Tuvell complained “too much,” as if the length and detail of his complaints disqualified their content, and dismissed Tuvell’s initial complaint as a “diatribe.” A1080-A1081, A1083-A1088, A1091-A1101. In explaining reasons

why Tuvell performed in an unsatisfactory manner, IBM asserted that his focus, “beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM.” A708. Yet, Tuvell never neglected, and IBM has never identified, any job task that Tuvell neglected as the result of lodging his internal, protected complaints. A708; Buckner v. Lew, No. 5:13-CV-199-FL, 2014 WL 1118428, at *13 (E.D.N.C. Mar. 20, 2014) (employer’s assertion that plaintiff’s work would suffer due to her lodging of EEO complaint supported retaliation claim). A jury could find that IBM’s overt hostility based on Tuvell’s protected conduct establishes the true motive behind these rejections.

On August 3, 2011, Tuvell was prohibited from using a previously-agreed, reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Tuvell with termination. A620-A621. Also, on August 3, 2011, Tuvell was given a formal discipline, with threat of termination, for innocently penning the innocuous vernacular phrase “if you’re lazy you can just click this link”; meanwhile, Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Tuvell. A620-A621, A662-A664, A785, A790-A791. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell’s direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on “your history of suing

when you feel you've been wronged." A617, A862, A934. In response to one of Tuvell's protected complaints of harassment, Feldman threatened, "assertions of bad faith . . . are inconsistent with success." A1131. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based directly on that complaint. A685-A686, A1135. Finally, the rejection for the transfer took place in close temporal proximity, well within three months, to a number of Tuvell's protected oppositions to unlawful conduct and requests for reasonable accommodation. A624-A628. Jones v. Walgreen Co., 679 F.3d 9, 21 (1st Cir. 2012) (three-and-a-half-month gap between protected conduct and adverse action may raise an inference of retaliation); Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 50 (1st Cir. 2010) (three months between protected act and termination may raise inference of retaliation); Ritchie v. Dep't of State Police, 60 Mass. App. Ct. 655, 666 (2004).

Thus, there is ample direct evidence, as well as evidence of pretext, sufficient for a reasonable jury to conclude that Tuvell was rejected for the transfer based on disability discrimination, his avilment of reasonable accommodation, and/or retaliation. The district court's holding on these issues, see ADD 21, 23, 26, should be reversed so a jury can decide the question of causation.

V. THE EVIDENCE REGARDING TUVELL’S SECOND DENIAL OF TRANSFER ALSO SUPPORTS LIABILITY

Tuvell’s second attempt to transfer to Kime’s group was also rejected under circumstances supporting liability for Tuvell’s claims of failure to reasonably accommodate, discrimination, and retaliation. The second posting, which was numbered SWG-0456125 (“The 125 Position”), was otherwise identical to The 579 Position, A1017-1019, and all the evidence discussed supra at 34-46 regarding Tuvell’s application to The 579 Position is sufficient to establish liability on Tuvell’s claims regarding his rejection from The 125 Position. In addition, Kime was the hiring manager for The 125 Position, he did not consider Tuvell’s application for The 125 Position, and he did not even respond to Tuvell’s application, because he was advised by HR not to do so. A1018-1020. Kime’s rejection of Tuvell occurred shortly after he learned that Tuvell was on STD leave, see A403, and shortly after he wrote to Feldman, “I do not envy you having to deal with HR and lawyers at this point – certainly I did not understand the STD situation and underestimated its significance.” A1071.

VI. TUVELL WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT BASED ON DISABILITY, RETALIATION, OR A COMBINATION THEREOF – COUNT VII

The harassment experienced by Tuvell rises to the level of a hostile work environment. Numerous courts have held that as few as three or four incidents

may constitute severe or pervasive conduct sufficient to create a hostile work environment. Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 16-17 (1st Cir. 1999) (three incidents of harassment demonstrate hostile work environment); Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass. App. Ct. 549, 567 (2008) (four incidents are sufficient to generate liability for harassment); Gerald v. University of Puerto Rico, 707 F.3d 7, 22 (1st Cir. 2013) (three incidents); McAuliffe v. Suffolk Co. Sheriff's Dep't, 21 MDLR 27 (MCAD Feb. 12, 1999) (three incidents). On June 13, 2011, Tuvell's supervisor, Feldman, noted to agents of IBM that Tuvell reported suffering from PTSD and that Feldman considered Tuvell to be "irrational and potentially dangerous," and he petitioned IBM to fire Tuvell and disable his access to IBM buildings. A672-A673, A1293. On June 20, 2011, Feldman again referred to Tuvell's diagnosis of PTSD and claimed that Tuvell was "potentially dangerous." A679, A787-A788. However, Tuvell did not engage in any threatening conduct whatsoever. A615, A783-A784. These communications are direct evidence of animus against Tuvell's PTSD.

During this time and thereafter, Feldman and IBM engaged in a number of harassing acts, which in any combination constitutes a hostile work environment. Among them: (1) on May 18, 2011, Fritz Knabe, supervisor, falsely accused Tuvell of failing to perform work, and Feldman failed to investigate when Tuvell pointed out that falsity, A616, A657-A658, A700-A701, A706-A707, A725; (2) on

June 8, 2011, Knabe yelled at Tuvell and falsely accused him of failing to provide work, and again Feldman refused to investigate and refused Tuvell's request for a three-way meeting to clear the air, A616; (3) Feldman demoted Tuvell's level of work from that of a "Band 8" employee to that of a lesser "Band 7," and he simultaneously switched a less qualified employee, Sujatha Mizar, into Tuvell's position, A614, A616-A617, A647, A664-A670, A671, A746, A753, A786, A808, A840, A864, A875, A931-A932; (4) Feldman required that all verbal communications with Tuvell be in the presence of an HR professional, and all written communications with Tuvell be copied to an HR professional, based on Tuvell's past history of litigation and engaging in protected complaints about harassment, A617, A862, A864, A934; (5) Feldman disciplined Tuvell for failing to provide a status update on the transition of his work to Mizar, even though Mizar had already submitted the applicable joint report, A617, A674-A678, A935, A947-A948, A950; (6) Feldman imposed on Tuvell the impossible task of piecing together, independently of Mizar and Feldman, on a single day's notice, a detailed day-by-day schedule for three weeks, reflecting his taking over of Mizar's four duties on his reassignment, which was unachievable given that Tuvell had no acquaintance of his four entirely new responsibilities in the transition, and Feldman refused to provide Tuvell an example of such a schedule, A618, A620, A747, A936, A952-A953, A955, A958, see Laster v. Kalamazoo, 746 F.3d 714, 732 (6th

Cir. 2014) (heightened scrutiny may constitute a Title VII violation); (7) reflecting a preexisting secret plan to write up Tuvell for something, Feldman issued a Formal Written Warning to him on August 3, 2011, with a threat of termination, because Tuvell wrote, “or if you’re lazy you can just click this link;” A620-A621, A662-A664, A785, A790-A791, A1287-A1291; (8) Feldman forbade Tuvell from spending pre-agreed time on his internal complaint of harassment, and then threatened Tuvell with termination when he said, “Now wait a minute, Dan.” A620-A621.

Tuvell went out on STD due to severe PTSD symptoms caused by Feldman’s harassment. A621-A622, A899, A965. While out on leave, the harassment by IBM continued, including: (9) refusal to appropriately act on Tuvell’s internal complaints of harassment while he was on medical leave, and delaying resolution by four-and-a-half months, A619, A626; (10) curtailing Tuvell’s computer access based expressly on his being on medical leave A687-A688, A1296; (11) admittedly curtailing Tuvell’s use of the IBM email system because he forwarded his protected complaints of harassment and discrimination to others within IBM, calling it “misuse,” A1073; (12) barring Tuvell from IBM facilities expressly because he was out on disability leave, A905-A906, A1076; see Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005) (“exclusion” and “denial of support” may contribute to the creation of a hostile work environment)

(citation omitted); (13) counting as sick days Tuvell's work at home A625; (14) denying Tuvell a transfer based on his being on STD, A969, A1013-1014; (15) threatening to fire Tuvell for circulating his protected complaints of discrimination to certain IBM employees A925, A1129; (16) threatening to fire Tuvell when he declined to reveal where he worked at a second job, and falsely accusing Tuvell of violating an inapplicable internal policy, A635, A745-A746, A1143, A1150, A1157-A1159, A1163; (17) consistently rejecting Tuvell's requests for reasonable accommodation, which would have allowed Tuvell to return to work and be paid. A94, A631, A634, A461. A reasonable jury could find that IBM's conduct could be severe or pervasive, such that a hostile work environment was created. See, e.g., Clifton v. MBTA, 445 Mass. 611, 617 n.5 (2005) (hostile work environment may be manifested even by a series of "pinpricks" that slowly add up to a wound).

VII. TUVELL SUFFERED A NUMBER OF ADVERSE ACTIONS WHILE STILL EMPLOYED ON TOP OF HIS TWO REJECTIONS FOR TRANSFER

In addition to constituting a link in a chain of harassment constituting an unlawful hostile work environment, a number of the actions just enumerated are sufficient, in and of themselves, or in combination, to constitute tangible adverse actions, such that they "well might have dissuaded a reasonable worker from" engaging in protected activities, such as opposing discrimination or unlawful retaliation. Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct.

2405, 2415 (2006). See also Sensing, 575 F.3d at 160 (actions that disadvantage employees with respect to terms and conditions of employment constitute “adverse employment actions” for discrimination claim).

One of the adverse actions Tuvell suffered in the midst of suffering the two rejections for job transfer that were also adverse actions (discussed supra at 34-46) was IBM’s curtailment of his access to IBM’s buildings, computer networks, and email systems with which he could communicate with coworkers. A687-A688, A905-A906, A1073, A1076, A1296. This adverse action even interfered with his ability to enter an IBM building to interview for his transfer, thereby completing his figurative and literal banishment from the workplace. A1204-A1205; Billings v. Town of Grafton, 515 F.3d 39, 54, n.13 (1st Cir. 2008) (combination of slights may together rise to the level of an adverse action, including barring access to selectman’s office).

The August 3, 2011 formal warning letter, with its threat of discharge, may also constitute an adverse action, based on its falsity. A616, A620-A621, A657-A658, A700-A701, A706-A707, A725, A790, A1287-A1291. Ritchie, 60 Mass. App. Ct. at 665 (false reprimands and evaluations are adverse actions for purposes of a Rule 12 motion); Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 97 (1st Cir. 2006).

The reassignment of Tuvell from doing the highest-level work within the Performance Architecture group to the lowest could also be considered an adverse action by a reasonable jury considering Count VI, where Tuvell, a Band 8 employee, was thereafter responsible for work that had been performed by a Band 7 employee. A616, A753, A786. Due acknowledged the reassignment to be to a “lesser role.” A753, A786. Tuvell was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower-level work. A671, A746, A864. The change also constituted a “public humiliation.” A864. IBM’s own policies treat an “undesirable reassignment” as a tangible adverse employment action. A875, A931-A932. Further, the reassignment meant change of worksite to Marlborough from (mostly) Cambridge, which Tuvell regarded as a preferable location, and an increase in commuting distance of thirty miles each direction. A666, A669-670, A746; Burlington Northern, 126 S. Ct. at 2416 (reassignment of job functions were adverse, even if they fell within the worker’s pre-existing job description).

There is sufficient evidence that Tuvell’s demotion of June 10, 2011, was based on his disability. Feldman was aware of Tuvell’s PTSD at least as early as May 26, 2011. A661. Tuvell was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Feldman, and

IBM acknowledges a lack of performance issues prior to May 18, 2011, the day on which harassment started, triggering Tuvell's PTSD. A258-A259, A614, A649-A653, A749-A751. Feldman also regarded Tuvell's work in the Performance Architecture area as competent and his interactions with others to be professional. A648, A654. Via the demotion, however, Feldman assigned Tuvell to switch roles with Mizar, despite Tuvell having decades more relevant experience for the position and despite Mizar's lack of a Ph.D. A614, A616-A617, A647.

IBM takes the position that the demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." A726. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." A1168. Evidence of pretext generates an inference of discrimination to be resolved by the jury. Lipchitz v. Raytheon Co., 434 Mass. 493, 501, 506-07 (2001).

IBM also justified the demotion based on Tuvell's alleged failure to produce Excel graphics, as allegedly required by Knabe. A654-A658, A668. However, that justification is pretextual, as Tuvell was never asked to produce Excel graphics. A616. Moreover, Feldman and Knabe both knew that Tuvell did not use Excel, so Knabe could not have logically asked him to complete such an

assignment. A657-A658, A700-A701. Finally, IBM's descriptions of the Excel incident are inconsistent, as it elsewhere described Tuvell as performing his work "too slowly," as opposed to not providing the work at all. A706-A707, A725; Velez v. Thermo King, Inc., 585 F.3d 441, 449 (1st Cir. 2009) (pretext based on changing explanations).

The demotion also came two days after Knabe yelled at Tuvell and, with knowing falsity, accused him of not producing work. A616. Feldman refused to investigate, and refused to respond to Tuvell's repeated inquiries for more detail concerning his alleged misconduct. A616. Feldman repeatedly denied Tuvell's requests for a three-way meeting with Knabe, himself, and Feldman to clear the air. A616, A660-A661. While Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had convened just such a three-way meeting between the three of them in March 2011, concerning a different issue. A660, A746. A reasonable jury could find that Feldman was not proactive in resolving the underlying issues, because he realized that the grievances against Tuvell had no actual merit. Moreover, as Tuvell was being demoted, Knabe, who was not disabled and had acknowledged yelling at Tuvell, was not reassigned or otherwise disciplined in any way. A662-A664, A785, A790-A791. See, e.g., Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129 (1997) (disparate

treatment is the “most probative means of establishing that the plaintiff’s termination was a pretext for [unlawful] discrimination.”).

Just three days after the demotion, on June 13, 2011, Feldman, the decision-maker with respect to the demotion, wrote an email to his boss and a member of HR in which he claimed Tuvell was “irrational and potentially dangerous” in conjunction with his PTSD, and Feldman advocated barring Tuvell from the workplace and firing him. A672-A673, A1293. There is much other direct evidence demonstrating discriminatory animus with respect to Tuvell’s disability, as described supra at 9, 15, 40.

VIII. THE TERMINATION WAS DISCRIMINATORY AND/OR RETALIATORY – COUNT VI

There is also sufficient evidence that Tuvell’s May 17, 2012 termination, A636, was based on retaliation and/or disability discrimination. At the time of discharge, Tuvell was disabled (PTSD), and his disability was known to IBM. E.g., A615, A1293. Tuvell had lodged repeated, recent protected complaints of discrimination and retaliation. A635-A636, A1140-A1141, A1151. There is sufficient evidence that Tuvell was qualified for the position, as IBM kept offering to reinstate him to that position once he returned from sick leave, and that work had previously been performed by a more junior-level employee with fewer qualifications. A614, A616-A617, A647, A666-A668, A753, A786. The May 17,

2012 termination was an adverse action. A636. See, e.g., Sensing, 575 F.3d at 157 (termination is an adverse employment action). The final element of the prima facie discrimination case is established because IBM attempted to fill Tuvell's position. A197. The final element of the prima facie retaliation case is established because the termination occurred within days of Tuvell's making protected complaints about unlawful harassment and retaliation. A635-A636, A1140-A1141, A1151.

The direct evidence of animus based on disability and retaliation described supra at 9, 15, 40, 43-45, applies equally here, and establishes a genuine issue of material fact that Tuvell's termination was based on disability discrimination and/or retaliation for complaining of discrimination and/or seeking or availing himself of reasonable accommodation. The evidence of retaliatory animus includes the fact that on March 13, 2012, Mandel, the employee in charge of IBM's investigations into Tuvell's complaints of discrimination and retaliation, *threatened Tuvell with termination if he continued emailing his complaints of discrimination to others*. A925, A1129. ADD 46, EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II (B)(2) (complaining to *anyone* about discrimination is protected opposition under the ADA).

There is also evidence of pretext specific to the termination. On May 7, 2012, IBM wrote to Tuvell, stating that it believed Tuvell to be working for EMC,

a competitor, and threatening termination. A635, A1143, A1150. On May 8, 2012, Tuvell denied working for EMC. A635. Tuvell explained that he did not wish to inform IBM where he was working, as he feared a retaliatory response. A635. On May 11, 2012, IBM demanded to know where Tuvell was working, citing an inapplicable policy, and its need to confirm that Tuvell was not working for a competitor. A635, A745-A746, A1157-A1159, A1163. On May 15, 2012, IBM demanded to know Tuvell's employer, purportedly based on its duty to confirm that Tuvell was not working for a competitor. A636, A1151, A1163. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a non-employee there, and he suggested that he be permitted to submit the information about his alternate employment to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. A635-A636, A745, A1157-A1158. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2012. A636. The evidence of pretext, along with the prima facie case, establishes an inference of discriminatory or retaliatory motive sufficient to reach the jury. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000); Lipchitz, 434 Mass. at 501, 506-07 (showing that one or more articulated reasons are false generates inference of discrimination).

IX. IBM'S INVESTIGATIONS WERE UNLAWFUL AND/OR INADEQUATE – COUNT VIII

A reasonable jury could find that IBM's investigations of Tuvell's complaints of discrimination were inadequate, delayed, biased, and unlawful. An inadequate response to an internal complaint "could itself foster a hostile environment and so give rise to liability therefor." Lightbody v. Wal-Mart Stores East, L.P., No. 13-cv-10984-DJC, 2014 WL 5313873, at *5 (D. Mass. Oct. 17, 2014). Also, a failure to properly investigate, in addition to supporting a hostile work environment claim, may form an independent basis for liability. College-Town v. MCAD, 400 Mass. 156, 167-68 (1987); Kenney v. R&R Corp., 20 MDLR 29, 31 (MCAD Feb. 9, 1998).

Tuvell complained to HR of harassment and disability discrimination on June 13, 2011. A708. Lisa Due conducted IBM's initial investigation of Tuvell's complaints that month. A382-A387, A389. However, when conducting that investigation, Due did not explore the qualifications of Mizar, the employee who took over Tuvell's work upon his demotion, and Due did nothing to inquire of Feldman about his attitudes towards Tuvell's PTSD. A768, A782. Prior to Due's completion of the investigation, she met with Mandel, who instructed her to inform Tuvell that Due had no reason to conclude that Tuvell had been mistreated. A794-A795. In addition to never seriously investigating Tuvell's complaints of

discrimination, Due also never investigated whether Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. A797, A1078.

Tuvell appealed Due's conclusion to Mandel. A619, A894-A895.

However, Mandel was biased as an appeal investigator, because he had already instructed Due how to respond with respect to her initial investigation. A794-A795. Moreover, Mandel was an inappropriate investigator under IBM's own conflict-of-interest policy, as he, personally, had been accused by Tuvell of wrongdoing and discrimination, based on his failure to advance the investigation during the pendency of Tuvell's disability leave, and his false assertions to Tuvell about IBM's practice of investigating third party complaints. A799-A800, A897-A898, A903-A904, A929-A930, A941-A942, A1215-A1218, A1221, A1226-A1228, A1237-A1238, A1245.

In August 2011, Mandel repeatedly, and over Tuvell's objections, refused to advance the investigation because Tuvell was on medical leave. A899-A901, A904, A966, A1261. Mandel informed Tuvell of the negative conclusion of his investigation on November 17, 2011, *19 weeks* after the investigation had been requested. A619, A626. Given that IBM takes the position that Mandel had already completed his investigation by September 15, 2011, A397, with no explanation for the additional two-month delay in informing Tuvell of the result, a

jury could conclude that IBM intentionally used the delay to keep Tuvell out of the workplace.

Mandel's investigation was biased and one-sided, as Knabe and Feldman, but not Tuvell, were accorded the opportunity to review Mandel's draft conclusions, and offer suggestions. A1265-A1274. Though Mandel understood that Tuvell's complaint included the allegations that his demotion was discriminatory and/or retaliatory, Mandel never investigated whether that demotion was appropriate, and he failed to inquire as to whether Feldman exhibited any animus based on handicap and/or retaliation. A893, A909-A910. Mandel's conclusions did not address Tuvell's allegations of wrongdoing against Knabe or Mandel. A626-A627.

On January 22, 2012, Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Tuvell a requested transfer based on retaliation and in violation of the obligation to reasonably accommodate. A911-A913, A1280. Mandel, the investigator, never looked into whether the rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate Tuvell. A914, A916. On March 2, 2011, Tuvell filed a third Corporate Open Door Complaint, alleging that Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. A919-A920, A1257-A1258. Mandel never opened up an investigation to respond to this

Complaint, and there was no formal response. A747, A920-A921. For these and for many other reasons, see A1309-A1418, a reasonable jury could conclude that IBM's investigation and response to Tuvell's complaints were inadequate. See College-Town, 400 Mass. at 167-68 (holding employer liable for its "deferential and inadequate" investigation).

CONCLUSION

For the aforesaid reasons, Tuvell respectfully requests that this Court reverse the entry of summary judgment and remand the case for trial. Tuvell also requests that he be awarded attorney's fees and costs.

Respectfully submitted,

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By his Attorney

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/s/ Andrew P. Hanson
Andrew P. Hanson, Esq.

Dated: December 1, 2015

CERTIFICATE OF FILING AND SERVICE

I, Elissa Matias, hereby certify pursuant to Fed. R. App. P. 25(d) that, on December 1, 2015, the foregoing Brief for Plaintiff-Appellant was filed through the CM/ECF system and served electronically on the individual listed below:

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