ENDNOTES

1· Dual-purpose (FRAP 35, 40) petitions are explicitly envisioned, hence implicitly permitted, by FRAP 35(b)(3).

2· FRAP 40.

3· FRAP 40(a)(2) (emphasis added): "[E]ach point of law or fact that the petitioner believes the *court has overlooked or misapprehended*". These points need not be listed here at the beginning; instead, they are stated with particularity and argued in context, below.

4· FRAP 35.

5· FRAP 35(b)(1) and 35(b)(1)(A) (emphasis added): "The petition must begin with a statement that … the *panel decision conflicts* with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases)".

6· FRAP 35(b)(1) and 35(b)(1)(B) (emphasis added): "The petition must begin with a statement that … the proceeding … involves an issue on which the *panel decision conflicts* with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Such cases are listed in the *CASES CITED* section, with citations given in the *ARGUMENT* section, below.

7· Neither FRAP 35 nor 40 requires citation to applicable authoritative state law (but they do not forbid it, either).

8· FRAP 35(b)(1) and 35(b)(1)(A): "The petition must begin with … citation to the conflicting case or cases". Additional particularized citations are given in context, below.

9· A prime example of how PSOF-exclusion and QDI-exclusion are intertwined occurs in the courts' handling of Tuvell's *discrimination* claims: see en. 44 in the *QDI-Ex-*

clusion With Particularity section.

10· Or "axioms," if you will, since these are the fundamental, "given," not-to-be-questioned, rules of engagement, upon which further consequences are based.

11· As used herein, unless otherwise explicitly noted or implicitly deducible from context: (i) "*issue* [of dispute]" means "*genuine* issue"; (ii) "*facts* [of the case]" means "*material* facts". In turn, the terms "genuine" and "material" are used with their meanings as defined in *Sensing*, p. 152: (i) "*genuine*" means "can be resolved in favor of either party"; (ii) "*material*" means "has the potential of affecting the outcome of the case".

12· The "in context" tenet doesn't appear explicitly in *Sensing,* but is imputed implicitly as a corollary of the "whole record" tenet from numerous other sources (the leading one being simply "Context matters", *BNSF v. White*, p. 69). The danger of out-of-context snippets, seen many times in IBM's filings in this case, is well-captured in Cardinal Richelieu's famous cynical aphorism: "If you give me six lines written by the hand of the most honest of men, I will find something in them which will hang him."

13· The continuing vitality and axiomatic nature of the SJSOR's "non-movant trumps movant" and "all inferences" tenets recently figured in a rare "error-correction" (summary vacation) reprimand of the 5th Cir. by the Supreme Court (*Tolan*, p. 1, internal punctuation suppressed, emphasis added): "In articulating the factual context of the case, the Fifth Circuit failed to adhere to the <u>axiom</u> that in ruling on a motion for summary judgment, [t]he evidence of the *nonmovant is to be believed*, and *all justifiable inferences* are to be drawn in his favor."

14· *"De minimus" proof/persuasion of facts* means mere demonstration that a *reasonable trier of fact <u>could</u> (> 0% probability) resolve facts* in non-movant's favor. As a general rule *(though not always)*, that requires production of evidence of "significant

probative value", which means a "non-conclusory reason" that fact-finder can arguably hang their hat on ("> 0% probability"). However, the clause *"though not always"* does indeed apply in Tuvell's case. For, by case law in the *context of employment discrimination and retaliation*, a showing *of causative facts* is *not* required: instead, a mere *showing of pretext* ("not-the-true-reason"), without more (that is, without a showing of actual discriminatory or retaliatory *animus*), already suffices to defeat summary judgment— by the so-called ***"pretext-only"*** holdings of *Reeves* and *Bulwer* (see below in this endnote). Since Tuvell's PSOF does indeed provide many instances of such pretext (with SJSOR-sufficient "light burden" *showings of pretext* [not showings of substantive discrimination/retaliation; *Reeves, Bulwer*], via such accepted forms as "contradictory statements" and "shifting explanations"), the courts' opinion conflicts with authority:

(i) *Reeves* (p. 147, emphasis added): "[O]nce the employer's justification has been eliminated, discrimination may well be the *most likely* [> 50% probability] alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."

(ii) *Bulwer* (slip opinion, p. 19, internal punctuation omitted, emphasis added): "[T]he burden of persuasion at summary judgment remains with the *defendants* [not plaintiff], who, as the *moving parties*, have the burden of *affirmatively demonstrating the [total] absence* of a genuine issue of material fact on every relevant issue, *even if* they would not have the burden on an issue if the case were to go to trial."

15· The PSOF in this case obviously (by inspection) satisfies the pleading criteria of the SJSOR, *Sensing*, p. 152, internal punctuation omitted (see also en. 14): "Once the moving party has pointed to the [alleged] absence of adequate evidence supporting the nonmoving party's case [DSOF], the nonmoving party must come forward with facts that show a genuine issue for trial [PSOF]. … At this [summary judgment] stage, the nonmoving party may not rest upon mere [conclusory] allegation or denials [RespDSOF] of the movant's pleading, but must set forth specific facts show-

ing that there is [existence of] a genuine issue of material fact [DF] as to each issue upon which he would bear the ultimate burden of proof at trial [such proof is not required at summary judgment stage though]."

16· Invisibly; *sub silentio*; the courts *"paid no attention"* to the PSOF. When we say the courts "excluded/ignored" the PSOF, we're *not* saying the courts "*said*" they were excluding/ignoring it — they simply "*did*" exclude/ignore it (from all externally detectable points-of-view we can imagine). Perhaps inadvertently. In particular, we are *not* arguing that the PSOF was "rejected" or "stricken" by the courts, for that kind of language would connote a *positive act* (with a motive), which we do not perceive.

17· Also called "judicial thumb on the scale." If this were done *intentionally* (which we do not allege, see en. 16), it would even qualify as judicial misconduct.

18· Aided by the search functionality of a word processing program.

19· In some instances, certain offers of proof or of legal theories may be included (many others exist) in our arguments, but those offers are *optional*; see fn. 4 in the *AUTHORITY* section. See also en. 14.

20· For which we rely on the main teaching of *BNSF v. White*, p. 57 (emphasis added), to the effect that: "[T]he anti-retaliation provision … covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context [of retaliation] that means that the employer's actions must be harmful to the point that they *could well dissuade a reasonable worker from making or supporting a charge of discrimination*."

21· Because under the aegis of *course/conduct/context* of complaints about discrimination and retaliation.

22· EEOC Compliance Manual, § 8, Retaliation, May 20, 1998, at 8-II(B)(2), emphasis added: "Examples of Opposition: *Complaining to anyone* about alleged discrimina-

tion against oneself or others."

23· Because *ordained and solicited* by IBM policy (Corporate Open Door process).

24· We do not claim that the single Excel graphics episode, *standing by itself in isolation without more*, suffices to impel the courts to overturn their decision. Rather, what we claim is: (i) the Excel graphics example is just a *prototype*, intended to be applied to all the *"particularized" PSOF facts* (see section on *PSOF-Exclusion With Particularity*), and those *in toto* do suffice to overturn the courts' decision (by SJSOR "all issues"); (ii) the Excel graphics had material *consequences* (the domino effect of kicking off the whole avalanche of all facts of this case), and *all those consequential facts in aggregate* do suffice to overturn the courts' opinion (by SJSOR "all inferences"). An explicit example of such a "stand-alone impeller" for overturning the courts' decision is given in the section on *Three-Way Meeting; Yelling; Demotion/Reassignment*, below.

25· The proffered SJSOR-style "light burden" adequate proof amounts to item (i) in the following list. More robust (non-required) offers of proof would include items (ii) and (iii) as well.

(i) In Mandel's Open Door Report (IBM11168), Mandel reports that Knabe told Mandel *both* that Knabe "suggested" that Tuvell "use Excel charts", *and* that Tuvell used a "nonstandard choice of operating system" which made it "*impossible* to run Microsoft Office tools such as Excel" (emphasis added). Further, Knabe also admitted at his deposition (p. 24) that he knew Mr. Tuvell "did not use Excel", though he didn't "recall the exact date" he learned this (it was certainly on or before Feb. 1, 2011, see item (ii) following). Feldman also admitted at his deposition (p. 39) that, as of May 18, 2011, he "knew that they [Microsoft Windows and Excel] were *not installed* on his [Tuvell's] system" (emphasis added). Those establish pretext (logically inconsistent self-contradiction).

(ii) In Mandel's Open Door Report (IBM11169), Mandel reports that Knabe told

Mandel that Tuvell did not "seem to have access [to Excel] or familiarity with a suitable Excel substitute". However, Knabe had received an email from Tuvell (on Feb. 1, 2011, and Tuvell spoke to Knabe about that email within a day), wherein Tuvell wrote, "I work in OpenOffice [referring to the OpenOffice Calc program, which is a 'suitable Excel substitute'], I've exported to Excel for you, hope it works." Further, Knabe received another email from Tuvell (Apr. 7, 2011), containing a major technical document authored by Tuvell ("PMtest.pdf") which Knabe himself had instructed Tuvell to produce, which Knabe admitted at his deposition (p. 110) demonstrated that Tuvell used a "very sophisticated … excellent" statistics and graphics package "[f]ar more sophisticated than" (hence a "suitable substitute for") Excel. Those establish pretext (contradiction).

(iii) IBM has variously claimed that: (α) Tuvell "had not been able to produce" the Excel graphics (Knabe dep., p. 37); (β) Knabe "[didn't] recall" when he learned that Tuvell "was not going to prepare" the graphics (Knabe dep., pp. 38–39); (γ) Knabe told Feldman that he was "frustrated" because Tuvell was "moving too slowly [on the Excel graphics] and [not] getting the tooling and tests done in a timely manner" (Mandel Open Door report, IBM11169; see also IBM's response to Interrogatory 4, Sep. 26, 2013); (δ) Feldman claimed Knabe "complained about Excel graphics not being produced in a timely fashion", yet he "[couldn't] recall" exactly what Knabe said about it, and he recalled nothing else about the conversation (Feldman dep., p. 38); (ε) Knabe "[didn't] recall" telling Tuvell of any deadline for the graphics (Knabe dep., p. 39); (ζ) Feldman did recall Knabe "asked for a specific deliverable [the graphics in Excel format] and a specific time frame" (Feldman dep., pp. 39–40); (η) Knabe thought Tuvell "did not appear to grasp [or] comprehend" what Knabe wanted with regard to the graphics (Mandel Open Door report, IBM11168); (θ) Knabe reported "Tuvell offered to generate the data [for the graphics] in a usable [comma-separated value, CSV] format" (Mandel Open Door report, IBM11168); (ι) Knabe "[didn't] recall" whether Tuvell offered to help Knabe reformat in CSV for-

mat (Knabe dep., p. 39); (κ) Knabe "made a quick sketch [on a Post-It Note] showing a series of strip charts, each with all three quantities plotted" (Mandel Open Door report, IBM11168); (λ) Knabe "[didn't] know" if he provided Tuvell with said Post-It Note (Knabe dep., p. 40); (μ) Knabe did not recognize the Post-It Note when presented to him, nor whether it related to the graphics Knabe requested of Tuvell (Knabe dep., p. 40); (ν) the Post-It Note bears no resemblance whatsoever to Knabe's description of it (it contained no "three quantities plotted"; see the Post-It Note itself, and Knabe dep., pp. 143–145); (ξ) Knabe himself admitted that to derive Knabe's desired Excel graphics from the Post-It Note "would be extremely difficult … [and] would require clairvoyance [mind-reading]" (Knabe dep., pp. 107–108); (ο) "Mr. Knabe states that while [Tuvell's] reports contained much useful data, it [was] difficult to analyze the information because there were over 20 reports, each in a separate file corresponding to a different test, making it difficult to recognize trends or patterns across tests. In addition, the choice of ASCII art made it difficult to understand any particular test's results because three separate quantities were represented in three separate graphs, making it difficult to see at a glance how the different quantities were varying relative to each other over time and impossible to view the entire graph at once, as many extended for pages and pages. Mr. Knabe states that he suggested that Mr. Tuvell use Excel charts, because the data could be displayed far more concisely." (Mandel Open Door report, IBM11167–11168); (π) Knabe "[didn't] recall" why he wanted Tuvell to make the graphics (Knabe dep., p. 43), or why he needed the graphics (Knabe dep., p. 44); (ρ) Feldman claimed at his deposition (p. 39) that Tuvell "essentially refused [to Dan's face] to produce Excel graphics," yet he also "[couldn't] remember if Tuvell den[ied] that he had even been asked to produce Excel graphics"; (σ) etc. Those establish pretext (shifting contradictory and/or significantly different explanations).

26· Workplace abuse, particularly defamation, is the main stressor that exacerbates Tuvell's personal/peculiar "flavor" of PTSD. The legal theory underlying Tuvell's fear

of defamation is that known-false attack on reputation in regard of vocation constitutes defamation *per se* (without proof of special damages). Tuvell was familiar with this legal theory because he'd experienced workplace defamation abuse previously, at a different employer, as Tuvell told Feldman at their meeting on May 26, 2011.

27· For unknown reasons, the courts rely on a case (*Che v. Mass. Bay Transp. Auth.*, op., p. 23) that promotes a "**pretext-plus**" theory, which is *no longer good law*. The courts even go so far as to repeat their no-longer-good-law pretext-plus bias in their argument in the first paragraph of op., p. 17.

28· Quote: "For purposes of the ADA, with [only] a few exceptions, *conduct resulting from a disability [such as Tuvell's great fear of pretext-based harassment] is considered to be part of the disability, rather than a separate basis for termination.* The link between the disability and termination [or other adverse act, such as demotion/reassignment] is particularly strong where it is the employer's *failure to reasonably accommodate a known disability* [such as granting three-way meeting] that leads to discharge [or other adverse acts] for performance inadequacies resulting from that disability." (*Humphrey*, pp. 1139–1140, emphasis added.)

29· Quote: "Based on th[e] record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee [at least in retaliation cases]." "*[R]eassignment* was … virtually an admission that respondent was *demoted* when [] responsibilities were taken from her [at least in retaliation cases]". (*BNSF v. White*, pp. 71, 80, Alito's concurrence, emphasis added.)

30· See *Cleveland's* comment about *confusion of language*, in the Fourth Proof, below.

31· PTSD is a serious affliction, and has some symptoms that can be "scary-sounding" to the uninitiated. (One of the goals is to protect disabled individuals from stereotyping and stigmatization prejudice based on "scary-sounding" symptoms.) Amongst the typical symptoms, all of which were exhibited by Tuvell, are hyper-vigilance, hyper-arousal, hyper-reactivity, hyper-startle, hyper-focus and hypo-mania.

32· Tuvell's PTSD is specifically sensitive to workplace bullying/harassment/abuse (col-

loquially, "blackballing"), especially defamation.

33· At oral argument for this case (Apr. 5, 2016), IBM's counsel admitted for-the-record that: "[I]n each of those MTRs, he [Tuvell] was described as 'totally disabled' from working. These [the MTRs] are the **basis** on which he **sought** and **received** short-term disability [STD]." This proves *both* that: (i) the MTRs were indeed submitted *for the purpose of STD* (not for any ADA-related reason); and (ii) IBM *believed* the MTRs' contention that Tuvell "had PTSD" (for otherwise Tuvell *wouldn't* have received the STD leaves).

34· That is, neither Tuvell nor his health-care providers had any idea at the time they innocently filled out the MTRs that IBM would try to pervert the MTRs in out-of-context twisted ways to pretend they reported "bad" things about him that were never intended. See Cardinal Richelieu's aphorism in en. 12.

35· Ross dep., p. 80 (emphasis added):

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

A. Yes.

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

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

36· Noting that PTSD has only intermittent disabling active phases, it is nevertheless fully recognized by the ADA, as emphasized by the ADA Amendments Act (ADAAA), 29 CFR Ch. XXIV §1630.2(j)(3)(iii): "[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activites indicated: … post-traumatic stress disorder … substantially

limit[s] brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above."

37· Working for a specified individual supervisor was *not* an "essential job function" for Tuvell's job, because the position existed independently of the identity of the group's supervisor.

38· The MTRs were governed by IBM's STD policy (employee handbook contract), which only contemplates the employee's *job-as-assigned* (not only "essential job functions"), *without accommodation*: "'Unable to work' means unable to perform the duties of the job you held at the time of your sickness or accident, or the duties of any other job IBM determines that you are capable of performing" (*About Your Benefits — Income & Asset Protection,* Document Number USHR109, Jul. 1, 2010, p. 15). We repeat again that *at the time of events*, nobody at IBM ever spoke to anyone (Tuvell or another) about any suspicion that Tuvell was "incapable" ("totally disabled") of doing any job.

39· Because *context was ignored* at summary judgment, Tuvell's rights were abridged. *In context*, alongside the rigid check-box/number-circling exercise, the MTRs (which are all in the record) carry the following important material in flexible narrative format inscribed by Tuvell's health-care providers, which the courts were *bound to credit according to the SJSOR* ("in context", "whole record", "non-movant trumps movant" tenets), but refused to do so:

(i) Ongoing acute stress symptoms, especially regarding perception of retaliation following sudden demotion without cause. Disruption of sleep, eating, symptoms of helplessness & anxiety. [MTR of Oct. 12, 2011.]

(ii) Pt. [patient] continues to experience intense triggering of symptoms with any reference to work environment & incident of demotion & lack of investigation. Symptoms of high reactivity, anxiety, and fear resume easily. [MTR of Nov. 3, 2011.]

(iii) Pt. continues to experience extreme triggering regarding workplace previously assigned. Only modification that would be possible is a change of supervisor & setting. Unable to return to previous setting w/ [with] current supervisor & setting. PTSD symptoms exacerbate immediately. [MTR of Dec. 19, 2011.]

40· Plaintiff's Appellate Reply Brief (p. 1, Bliss letter dated Jan. 24, 2012 [*chronologically following* all MTRs, see en. 39], emphasis added): "The ADA does not require IBM to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell's manager as a reasonable accommodation, since *Mr. Tuvell is capable of performing the job*."

41· As already highlighted above, the courts' verbiage in its decision at op., p. 14, fn. 5, is now invalidated because of the courts' PSOF-exclusion.

42· And along with discreditation of the "totally disabled"/not-QDI argument, additional discreditations follow (by the SJSOR "all inferences" tenet), like a domino effect. As a result, *everything* in the courts' decision tainted by the QDI-exclusion error is now invalidated, and must now be reopened for reconsideration (just as everything tainted by PSOF-exclusion must be reopened for reconsideration). Here are just three examples:

(i) The finding by the courts (op., pp. 15, 18) to the effect that Tuvell "could not and did not identify anyone who could serve as his manager in place of [] Feldman", is now shown to be hopelessly prejudicial (insinuating that "Tuvell could work for no one") because of its misleading *out-of-context misrepresentation*. (So this is another place, in addition to ignoring the PSOF, where the courts blindly accepted IBM's false arguments without actually consulting actual record.) In context, the actual transaction tells a very different story (Tuvell dep., vol. II, p. 89):

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

A. Yeah.

Q. Did you identify somebody there you thought could manage you? *[Where the second "you" refers to its immediate referent, Feldman's group, not to Tuvell per-*

sonally, or so Tuvell thought, as his next answer shows.]

A. No. *[Tuvell answered this way because he was not a manager, so had no knowledge of the various criteria that figure into managerial promotions at IBM, such as qualifications, availability, desire, etc.]* It was certainly nobody in that group that I felt was qualified to be a manager of that group. Including me, of course.

(ii) The finding by the courts (op., p. 15) to the effect that "[a] position transfer would not guarantee that Tuvell would never have to see, or hear about, Feldman again", is just plain silly. For, "seeing and hearing" Feldman was never a problem for Tuvell. All of Tuvell's problems with Feldman arose in the context of *interacting* with Feldman as a bullying/harassment manager, and if that reporting arrangement weren't in effect the problem would disappear.

(iii) The finding of the courts (op., p. 18) to the effect of IBM's giving Tuvell the "opportunity" to receive feedback and performance evaluations from Metzger (Feldman's supervisor) as a "reasonable accommodation", is too impossibly duplicitous to fathom. For, Tuvell's problems with Feldman were related, not to performance evaluation *per se*, but to day-to-day manager/employee *interactions* (which would continue under IBM's "opportunity"), and in any case it would still be Feldman who would send his (skewed) reports to Metzger, upon which Metzger would base his feedback and performance evaluations. And that's not even to mention that Metzger had already shown himself to be an ally of Knabe and Feldman, and a foe of Tuvell, and Tuvell had already accused him of wrongdoing in his internal complaints to IBM (which were forwarded to Metzger).

43· The courts' citation of "likelihood of success [of proposed accommodation]" at op., p. 18, seems to be another example of the courts' failure to observe the SJSOR's "light burden" tenet. For, the courts seem to be hinting that a "*high* likelihood of success" is required; whereas the "light burden" tenet really requires only "> 0% probability." See en. 14.

44· By its blanket citation to the *McDonnell Douglas* framework (op., p. 20, fn. 8), the courts cite an *incorrect standard* for the Tuvell's burden and nature of proof. That framework only applies to discrimination cases relying on *indirect evidence*. The *Tuvell* case, however, relies on a great deal of *direct evidence*, obviating the utility of *McDonnell Douglas* for almost all of *Tuvell*. No only that, but even if the courts *had* applied the correct (direct evidence) standard, they *still* would have missed the correct decision on this question of discrimination — because of *PSOF-exclusion* (because Tuvell's direct evidence is raised in the PSOF, which the courts *ignored*).

45· It hasn't been raised previously because it's a legal theory, and it's not necessary to raise legal theories at summary judgment time.

46· To be more specific about this legal theory: Tuvell's *refusal to name* his new employer (Imprivata) to IBM — which IBM claims was the *sole* reason for his termination (DSOF ¶ 79, p. 17) — was prompted by Tuvell's PTSD symptoms (en. 31), which caused him overwhelming fear that IBM would retaliate upon him by interfering with his advantageous relationship with Imprivata (PSOF ¶¶ 56–57, pp. 17–18). At the time, IBM *was well acquainted* with Tuvell's PTSD, and that his refusal to name Imprivata was based precisely on his PTSD symptoms (Tuvell's email of May 10, 2012: "I will, however, tell you why I refuse to inform you where I now work. The reason is that I fear IBM, either by rogue individuals or corporately, would happily use such information to work back-channels to get me fired"). Therefore, according to *Humphrey* (en. 28), IBM terminated Tuvell for the *very sole reason of his PTSD disability*.