In The

United States Court Of Appeals

For The

First Circuit

Case No. 15-1914

WALTER TUVELL,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES,

Defendant-Appellee.

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

PETITION FOR REHEARING, AMENDED (TER)

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PREFACE

In the matter of Tuvell v. IBM, this is a petition for rehearing of the appellate panel's *per curiam* opinion issued on May 13, 2016, which affirmed the district court's opinion (Memorandum and Order, Dkt. 94, dated Jul. 6, 2015, filed Jul. 7, 2015).

AUTHORITY

This is a dual-purpose[1,†] petition, authorized by FRAP (Federal Rules of Appellate Procedure) 35 and 40.

† Superscript *numbers* are to be *ignored*. They refer to *endnotes* (not *footnotes*) that that exist only in a *separate* "annotated" version of this petition, which is available for the panel to consult at their discretion. The *only* difference between the two versions (apart from the presence of the endnotes themselves and references thereto) is the content of this footnote.

REASONS WHY REHEARING SHOULD BE ALLOWED

Rehearing should be allowed because this petition raises issues of *mistakes*‡ satisfying the following required criteria (underlined) of FRAP rules:

(A) Panel rehearing (FRAP 40)[2] — the panel has overlooked or misapprehended several points of (procedural and/or substantive) law or fact,[3] resultantly causing great harm to Tuvell (throwing the case into confusion and destroying it).

(B) *En banc* rehearing (FRAP 35)[4] — the panel's decision conflicts with certain decisions of the United States Supreme Court and the First Circuit Court of Appeals,[5] as well as other Circuit Courts of Appeals,[6] and also applicable holdings of the Supreme Judicial Court of Massachusetts (SJC)[7] (see *Cases Cited*, below).[8]

According to these FRAP rules, it is our burden here to point out how *"mistakes were made by the courts"* (of the two types listed, (A) and (B)) — i.e., that *"the courts' (joint) opinion was wrongly decided"* — and *not* to "re-argue the case-in-chief on the merits." To do the latter would be wastefully duplicative, because those case-in-chief materials are already readily available to the courts.

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‡ As mentioned in the remarks at the beginning of the *QUESTIONS PRESENTED* section, below, the mistakes we identify herein first appeared in the opinion of the district court. The question may be asked: Why didn't we raise these district court mistakes already in our Appellate briefs (principal and reply) we presented to the appellate panel? The answer is that it was *inappropriate (not ripe)* to do so, by rule. The panel's review of the district court's opinion is *de novo*: the panel looks at appellant's case-in-chief with fresh eyes, and comes to its own independent determination, owing no deference to the district court's opinion; raising issues of *mistake* by the district court would be out-of-bounds for that inquiry. It is only *here, at rehearing* level, that issues of *mistake* are in order (FRAP 35, 40). Since the panel *adopted* the district's opinion, any mistakes at the district level are equally attributable to the appellate level, so are appropriate here.

QUESTIONS PRESENTED

Throughout, we speak of "the courts" to refer indiscriminately to both district court and appellate panel for this case. Similarly, when there is no need to distinguish the opinions of the two courts, we just say "the (joint) opinion" (abbreviated "op.") to refer to both indiscriminately. No confusion results thereby, since the appellate court adopted the district court's opinion without reservation (saying "the district court got it right"), so both courts can justifiably be assigned coequal, joint ownership.

(A) Were the courts' opinions rightly decided?
[Suggested answer: No.]

(B) At summary judgment, are the courts bound by the summary judgment standard of review (as promulgated by, e.g., *Sensing v. Outback Steakhouse*)?
[Suggested answer: Yes.]

(C) At summary judgment, are the courts required to accurately consider all documents properly submitted by the parties pursuant to FRCP (Federal Rules of Civil Procedure) 56 and LR (Local Rule) 56.1?
[Suggested answer: Yes.]

(D) Must the courts observe Supreme Court precedent for its cases cited herein?
[Suggested answer: Yes.]

(E) Should the courts observe the precedent of the First Circuit, the other federal Circuits, and the Massachusetts Supreme Judicial Court (SJC), for their cases cited herein?
[Suggested answer: Yes.]

RELIEF SOUGHT

(A) Correction (vacation) of the appellate panel's opinion.

(B) Correction (reversal) of the district court's opinion.

(C) Remand to district court for further proceedings.

(D) Costs and fees to the extent applicable.

CASES CITED

(A) *Bulwer v. Mt. Auburn Hospital*, SJC-11875 (Mass. SJC, 2016).

(B) *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006, unanimous).

(C) *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999, unanimous).

(D) *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219 (2d Cir., 1994). [Cited only in a footnote.]

(E) *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir., 2001).

(F) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000, unanimous).

(G) *Sensing v. Outback Steakhouse of Florida*, *LLC,* 575 F.3d 145 (1st Cir., 2009).

(H) *Tolan v. Cotton*, 572 U.S. ___ (2014, *per curiam*). [Cited only in an endnote.]

CERTIFICATE OF COMPLIANCE

(A) This brief complies with the **type-volume limitation** of FRAP 32(a)(7)(B), because the *ARGUMENT* section of the brief (which *excludes* the front-matter part of the brief exempted by FRAP 32(a)(7)(B)(iii), and the optional appendix of endnotes, discussed in fn. † in the *AUTHORITY* section, above) contains less than 3,500 words. (Even *including* all those exempted parts, the *total* number of words in the *entire* document is less than 9,000 words.) The brief also complies with the additional **page-length limitations** of FRAP 35(b)(2) and 40(b), because it (the *ARGUMENT* section) does not exceed 15 pages.

(B) This brief complies with the **typeface requirements** of FRAP 315.42(a)(5) and the **type style requirements** of FRAP 32(a)(6), because this brief has been prepared using Linux Fedora LibreOffice 5.0.6.2 Writer, in proportionally spaced 14-point regular Times New Roman font, double-spaced between lines (with acceptable coordinated variations for title page, headings, footnotes and endnotes, lists, displayed quotations, emphasis, etc.). The brief is published electronically in PDF format, with page size 8½″-by-11″, and 1″ margins on all sides (with page number footers in the bottom margin, as is allowable). When printed, the brief is intended to be rendered on unglazed white paper.

Signed: */s/ Walter E. Tuvell*

Dated: *June 4, 2016*

CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically via the First Circuit's CM/ECF system, on Jun. 4, 2016. It will be served electronically via CM/ECF to all counsel of record and other registered participants of the Court's CM/ECF system. I hereby certify that paper copies will be sent to all participants not registered in CM/ECF.

Signed: */s/ Walter E. Tuvell*

Dated: *June 4, 2016*

ARGUMENT

Introduction

The courts' errors are categorized into two general (intertwined)[9] classes:

(A) **"PSOF-Exclusion"** errors.

(B) **"QDI-Exclusion"** errors.

We first discuss PSOF-exclusion, which is deeply rooted in the *summary judgment standard of review*. Our analysis must begin there.

Summary Judgment Standard Of Review (SJSOR)

This case is currently in the posture of appellate review over IBM's motion for *summary judgment*. As such, the **SJSOR** (Summary Judgment Standard of Review) governs the proceedings, both at district court (upon initial review) and at appellate panel (upon independent non-deferential plenary *de novo* review). We argue that, while the courts *paid lip service* to the SJSOR (op., pp. 1–2), they ***utterly failed to observe*** that standard, resulting in a wrongful decision.

The SJSOR, as promulgated by, e.g., *Sensing* (§ II(A), pp. 152–153) and its many parents, siblings and progeny, **strictly mandates the duties** incumbent upon any tribunal reviewing summary judgment. We formulate the SJSOR as a rubric of six (6) **core tenets:**[10]

(A) **All Issues —** *All* (not just "some") *issues*, especially *disputed genuine issues of material fact* ("DFs"),[11] must be considered ("admitted into discussion").

(B) **Whole Record —** The *entire* (not just "part" of the) *record as a whole, concerning each and every issue*, must be considered.

(C) **In Context —** Issues must be considered *in the context* of the record-as-a-whole (as opposed to "out-of-context line-by-line" isolation).[12]

(D) **Non-Movant Trumps Movant —** Issues must be *construed* in the *light most favorable* to, and *credit awarded* to, *non-movant* (not to movant).

(E) **All Inferences —** *All* (not just "some") *reasonable inferences* from these tenets must also be *favorably interpreted* and *credited* to *non-movant*.[13]

(F) **Light Burden —** Non-movant bears only the *light burden* of *mere production* of facts; he *need* offer *only de minimus* (i.e., non-conclusory) proof/persuasion, and *no* legal theories supporting relief (but he *may* offer some of either). Fact-finding is for the jury at trial, not for the court at summary judgment.[14] "Enough evidence" is *not* a criterion (though sometimes colloquially cited).

To belabor the obvious: "must" here means *mandatory*. The reviewing tribunal has *absolutely no discretion* in the matter (by self-imposed, advertised, rule).

PSOF (Plaintiff's Statement Of Facts)

Conforming to customary practice for summary judgment in the 1st Circuit (see FRCP 56 and LR 56.1), seven (7) **key documents** were filed by the parties in this case, none of which was flagged as defective, and all of which are officially included in the record of this case forwarded to the appellate panel:

(A) **DSOF —** Defendant's Statement of Facts, Dkt. 74 (Dec. 15, 2014).

(B) **DMemo —** Defendant's Memorandum in Support of Summary Judgment, Dkt. 75 (Dec. 15, 2014).

(C) **RespDSOF —** Plaintiff's Response to DSOF, Dkt. 82 (Feb. 12, 2015). Note that RespDSOF refers to PSOF nineteen (19) times. Of the two, RespDSOF is *reactive* (to the DSOF), while PSOF is the *active* one. Both must be credited.

(D) **PSOF**[15] **—** Plaintiff's Statement of Facts, Dkt. 83 (Feb. 12, 2015). It explicitly declares on its face that it is submitted "[p]ursuant to LR 56.1".

(E) **PMemo —** Plaintiff's Memorandum in Opposition to Summary Judgment, Dkt. 85 (Feb. 12, 2015).

(F) **RepPMemo —** Defendant's Reply to PMemo, Dkt. 86 (Mar. 2, 2015).

(G) **RespPSOF —** Defendant's Response to PSOF, Dkt. 87 (Mar. 2, 2015).

In customary practice, and by inspection in the present case, the **PSOF** is the *most important* of these key documents to be considered at summary judgment time, *above and beyond the others* (RespDSOF is second most important, but is *limited* by being *reactive* to DSOF). For, by the SJSOR ("non-movant trumps movant" tenet), the PSOF *determines* the first-tier "facts/DFs of the case" *that courts must credit*. The DSOF is consigned to a second-tier "jaundiced view".

But that ("*courts must credit*") did not happen.

PSOF-Exclusion

With that background, the "PSOF-exclusion" class of errors can now be defined like this (with a great deal of explication to follow):

PSOF-EXCLUSION THESIS: The courts subtly[16] excluded, ignored and overlooked the PSOF (failing to consider and credit it, or even acknowledge its existence), misapprehending its crucial significance with no justification whatever (explicit or implicit, intentional or inadvertent), though the courts were unconditionally required to include it. The courts thus patently failed to hew to the SJSOR's strict "all issues" and "whole record" tenets. The courts resultantly improperly/erroneously/falsely resolved disputed facts in favor of movant, thus violating the SJSOR's "non-movant trumps movant" tenet too. This was grave legal error of procedural law ("basic rules of the game").[17]

This pervasive PSOF-exclusion maneuver, originating with the district court and propagated to the appellate panel, comprises the crux issue (root cause) for many of the arguments in this petition. It was a *systemic error* of procedural law that tainted every aspect of the courts' reasoning, and inevitably spawned further, derivative, errors.

As *proof of our thesis*, we begin by noting four (4) characteristics of the courts' treatment of the above seven (7) key documents:

(A) Only two (2) of the key documents (DSOF, RespDSOF) are *listed* (op., p. 2) among the documents the courts relied upon for their facts, *"unless otherwise noted"*.

(B) Close inspection[18] reveals that only two (2) of the key documents (DMemo, PMemo) were in fact *"otherwise noted."*

(C) That leaves fully three (3) of the key documents (PSOF, RepPMemo, RespP-SOF) *completely unacknowledged* as a source for the courts' facts.

(D) Most conspicuous (by its *absence*) was the crucial PSOF — which was pointedly **entirely invisible** from the courts' vision of the case.

Continuing with our proof, deeper analysis (presented in separate sections, below) reveals that the courts' PSOF-exclusion principal: (i) not merely "passively neglected to mention" the PSOF; (ii) but actively had adverse consequences to Tuvell, namely, crediting many of IBM's facts (instead of Tuvell's) which were in actual substantive conflict and dispute with the PSOF ("movant trumped non-movant" — 180° the wrong way around from the SJSOR). The courts, by "explicitly nowhere observing" the PSOF, silently (without rationale or explanation) elevated the DSOF to dominance, and relegated the PSOF to obscurity. The courts thereby failed to meet the SJSOR "whole record" tenet, because they considered only an inexplicably-chosen "non-PSOF subset". Plaintiff's banished PSOF facts were *not permitted to figure at all into DF calculations* — though the SJSOR ("all issues" tenet) strictly mandates that *all* of plaintiff's facts (especially those within the PSOF) *must* be considered, acknowledged, referenced, and credited (SJSOR "non-movant trumps movant"). The courts thus wreaked massive havoc on the genuine and material DFs of this case. That is *ipso facto* illegitimate.

The courts' systemic failure to consider and credit the utterly crucial PSOF wholly eviscerated the SJSOR "all issues" tenet, to plaintiff's great detriment. The

wrongful PSOF-exclusion, together with its consequent "unreasonable non-inferences", comprehensively disemboweled Plaintiff's case — because only the crucial PSOF could hope to reveal the many DFs that do indeed exist in this case (and which only a trial, not summary judgment, can resolve).

The courts' failure to allow plaintiff's PSOF to figure into the DF calculus constituted egregious, harmful, fatal error, causing a false opinion to be rendered, which must be corrected (vacated/reversed and remanded).

Once the PSOF-exclusion error was ensconced into place, it became the systemic progenitor of many additional errors flowing from it — as will be reviewed in separate sections, below (by referencing certain relevant facts asserted in the PSOF).[19] Due to space limitations, not all such PSOF-driven facts can be individually addressed in detail here; but our arguments are generalizable, and all of Plaintiff's arguments on the record, hereby reasserted, continue to remain in full force (are not waived). All facts asserted in the PSOF, if properly credited, provide numerous potential reasons (to the extent they are genuine and material) to correct the courts' opinion, and deny IBM's motion for summary judgment.

Q.E.D. (PSOF-Exclusion thesis, modulo forward references to separate sections below.)

PSOF-Exclusion With Particularity

High-level PSOF-exclusion errors tainted many areas of the courts' opinion, spawning low-level errors many times over. We present here a discrete "particularized" list (FRAP 40(a)(2)) of specific PSOF facts that the courts were *required to consider/credit*, but erroneously *didn't* (in whole or in part, recalling the SJSOR's "all issues" and "whole record"): ¶¶ 1, 2–8, 10–18, 21–32, 35–40, 42–52, 54–91 (all hereby incorporated by reference).

As for *with-particularity fact-areas* where PSOF-exclusion factored heavily in the courts' wrongful rejection of Tuvell's arguments, we cite these:

(A) **Three-Way Meeting; Yelling; Demotion/Reassignment**. A whole section is devoted to this topic, below.

(B) **Retaliation.**[20] Op., p. 26.

(C) **Investigation.** Op., p. 25, fn. 9.

(D) **Hostile work environment** (especially "*hyper-critical hyper-scrutiny*" [a well-known blackballing/retaliatory tactic], such as: (i) "bad" [though *protected*][21] emails; (ii) "lazy" letter; (iii) Formal Warning Letter; (iv) complaining to "too many" people [also *protected*];[22] (v) complaining to upper management [also *protected*];[23] (vi) other tangible acts). Op., pp. 23–25.

Prototype: Excel Graphics

Let the "Excel graphics" episode stand for our *prototypical example* of PSOF-exclusion error. We proceed to present an *illustrative rigorous proof* of the courts' error for this example. This example argument/proof generalizes, *mutatis mutan-*

dis, to all items in the "particularized" PSOF-exclusion list, above.[24]

IBM asserts, and the courts accept (op., p.3), concerning the Excel graphics episode, that "Mr. Knabe advised Mr. Feldman that [Tuvell] had failed to complete a work assignment [the Excel graphics] in a timely fashion" (DSOF ¶ 7, p. 2). This instance of IBM's assertion, and all other instances of the assertion, explicitly or implicitly stand for the proposition that Knabe's report to Feldman was *true*. Indeed, Knabe himself has given sworn testimony that he "ask[ed] Mr. Tuvell to provide those [Excel] graphics" (Knabe dep., p. 35).

Tuvell asserts, and the courts reject, the diametrically opposite proposition, that Knabe's report to Feldman was *false* (RespDSOF ¶7, p. 3; PSOF ¶¶ 1, 3–4, pp. 1–2), with properly provided adequate proof per SJSOR's "light burden" tenet.[25]

> According to the SJSOR ("non-movant trumps movant"), the courts were *tightly bound* to credit Tuvell's version of the Excel graphics episode/fact, not IBM's version. But they did the *exact opposite* (op., p. 3).

Now, the opposed stances ("true" vs. "false") of the parties in this example *proves* that the Excel graphics episode/fact was a true DF ("disputed fact", which is obviously "genuine" and "material", since the Excel graphics episode kicked off the whole avalanche of all facts in this case). But existence of even a *single* DF, such as this, already suffices to *defeat* a motion for summary judgment (by SJ-

SOR's "all issues"). This therefore *proves* rigorously that the courts *erred* in *granting* summary judgment.

Q.E.D. (Excel graphics example.)

Three-Way Meeting; Yelling; Demotion/Reassignment

Going beyond PSOF-exclusion "*discrete facts*" mentioned above, this section analyzes a PSOF-exclusion *"fact-area"* which is "particularized" in a different sense, namely, to Tuvell's individual circumstances.

PSOF ¶¶ 2, 5–8, pp. 1–3, asserts factual statements of injuries (psychological PTSD retraumatization, yelling incident [defamation, see below], undesirable demotion/reassignment, continuing harassment), and Tuvell's protests thereto, and his requests for three-way meeting. By the SJSOR ("all issues", "non-movant trumps movant", "all inferences"), the courts were bound to credit these PSOF facts. But they *failed* to do so. We proceed to *prove* this.

The "stressor" (as it is technically called) for the retriggering of Tuvell's PTSD was IBM's falsity regarding the Excel graphics episode. Tuvell's retraumatization prompted him to explicitly reveal his PTSD affliction to IBM on May 26, 2011 (PSOF ¶ 10, p. 3) (though implicitly it had been objectively apparent prior to that), and to cite his PTSD as the impetus for his requests for three-way meeting as reasonable accommodation therefor. Tuvell was initially worried about the specter

of "mere defamation".[26]

But as time went on, and the abusive behavior escalated (notably the yelling incident, and especially Feldman's continued refusal of requests for three-way meeting), the pretextual nature of IBM's behaviors led Tuvell to conclude (justifiably, by the *pretext-only* theory; *Bulwer, Reeves*),[27] that something "*seriously more illegal* than defamation" must be motivating IBM's behavior, namely discrimination and/or retaliation based on some combination of protected characteristics (age, sex, race, ultimately PTSD disability). This prompted Tuvell to upgrade his "mere defamation" complaint to IBM accordingly.

At that point, having been properly apprised of Tuvell's PTSD status and notified of his discrimination/retaliation claims, IBM was required by the ADA to engage with Tuvell in an interactive process/dialogue concerning accommodation, and award him the three-way meeting he'd been requesting so urgently. But not only did IBM refuse to engage in interactive discussion or award three-way meeting, it took the plainly discriminatory/retaliatory step of unilaterally demoting/reassigning Tuvell to an position undesired by Tuvell — again based on Knabe's falsity (about his reason for yelling). This trammeled Tuvell's rights under such decisions as *Humphrey*[28] and *BNSF v. White*[29] (see PSOF ¶¶ 14–17, pp. 4–5).

The courts were bound by the SJSOR ("non-movant trumps movant", "all inferences") to credit these PSOF facts, and were further bound (by *Humphrey* and

BNSF v. White) to find that IBM was guilty of failure to engage in interactive process, of failure to accommodate (three-way meeting), and of discrimination/retaliation (demotion/reassignment). But the courts failed to do so. That was error.

Q.E.D. (Three-way meeting; yelling; demotion/reassignment.)

QDI: MTR; STD; "Totally Disabled"; And All That

The "QDI-exclusion" class of errors refers to the courts' wrongful crediting of IBM's woefully flawed (but superficially plausible-sounding)[30] *"totally disabled"/not-QDI argument*, which goes like this:

(A) On his MTRs (Medical Treatment Reports), Tuvell's health-care providers checked certain *"totally disabled"* check-boxes, and circled certain number-choices consistent with typical PTSD symptoms[31] and with Tuvell's particular circumstances.[32]

(B) "Therefore" Tuvell *was "totally disabled from being able to do his job, or indeed any job of any kind"* (paraphrased; IBM Appellate Brief, p. 43).

(C) ***IF*** this "totally disabled" argument were valid/creditable (which it isn't!), then of course Tuvell would not be a "QDI (Qualified Disabled Individual) in the sense of the ADA" — that is, he would not be able to: "perform all essential job functions, *with or without reasonable accommodation*." That in turn would mean that Tuvell was not covered by the ADA at all (since QDI is a prerequisite for ADA coverage), so all his ADA claims would automatically fail.

QDI-EXCLUSION THESIS: The courts (op., p. 13) wrongly credited the above "totally disabled"/not-QDI argument, thereby excluding all of Tuvell's issues that were QDI related. It was grievous error for the courts to do so.

As *proof of our thesis*, we now present no fewer than five (5) (!) "clear and convincing arguments" that IBM's "totally disabled"/not-QDI argument is utterly specious and false, *on many different levels.* Each one yields a proof of our thesis.

First Proof — Tuvell's MTRs were filed for the *sole purpose* of *short-term disability* benefits (leave), and *not* for any ADA purpose whatsoever; this is undisputed.[33] And in *that* (STD) context, Tuvell's health-care providers routinely[34] filled out the MTRs, correctly and accurately, with the *meaning*[35] that: (i) under the PTSD-exacerbating conditions Tuvell found himself subjected to, he was (temporarily[36]) able to perform only 0% of his *job-as-assigned functions (essential or not)*[37] *without accommodation*; and (ii) that he could work only 0% with his harassers Feldman and Knabe (but could work 100% with all non-harassers). The problem for IBM is that double-underlined phrase in the preceding sentence: the very terms of IBM's own STD plan did *not* include a "with or without accommodation" clause[38] — and so, the STD MTRs are *inconsistent with (inapplicable to)* the ADA concept of "with or without accommodation". Since the courts unquestioningly swallowed IBM's bait to interpret the MTRs *out-of-context* in the non-STD ADA manner, the courts thereby *violated* the SJSOR ("in context" tenet). That was error, harmful to Tuvell. *Q.E.D. (QDI-Exclusion thesis.)*

Second Proof — The MTRs are very short documents (2 pages each), so everything on an MTR is naturally in the *context* of everything else. Importantly, Tu-

vell's health-care providers inscribed certain short (but extremely informative) free-form narrative writing (as opposed to mere check-box checking and number-circling) on the MTRs. That inscribed writing indicated Tuvell could function well if he were just *accommodated*, to the extent of removing the abuse that was being committed upon him.[39] Yet, the courts unquestioningly accepted IBM's insinuation to interpret the MTRs in an *out-of-context* ("line-by-line isolation") manner, *looking only at the check-boxes and circled-numbers*, and closed its eyes to the inscribed writing. The courts thereby again *violated* the SJSOR ("whole record", "in context", "non-movant trumps movant"). That was error, harmful to Tuvell. *Q.E.D. (QDI-Exclusion thesis.)*

Third Proof — IBM's "totally disabled" argument had its *after-the-fact genesis* with IBM's *external lawyers* (at the MCAD hearings on this case) — the argument was never raised (or claimed to be raised) by anyone at IBM *at the time of events*, as IBM's own *internal lawyer*, Bliss, has self-admitted.[40] Since it was concocted after-the-fact, IBM's "totally disabled" argument was by definition *post hoc rationalization for earlier actions [namely, any action depending on "not-QDI" for its rationale, such as denial of transfer]* — that is, it was ***by definition pretextual*** ("not the real reason"). Hence, the courts' wrongful acceptance of IBM's pretext here again abridges Tuvell's pretext-only rights under *Bulwer* and *Reeves*. *Q.E.D. (QDI-Exclusion thesis.)*

Fourth Proof — IBM's "totally disabled" argument must not be credited in any event (even ignoring pretext), though the courts erroneously did so, due to the on-point holding of *Cleveland* (pp. 802–803, commentary added, internal punctuation omitted, emphasis in original and also added) and its accords:[41]

> [D]espite the [misleading, mere] *appearance* of conflict that arises from the [superficial, out-of-context] *language* of the two statutes [SSDI (analogous to STD, both having **no** "reasonable accommodation" clause) and ADA] … the two claims *do not inherently conflict* … because there are too many situations in which an SSDI claim and an ADA claim can *comfortably exist side by side* [even if claimant or health-care providers declare "total disability" on disability benefits application] … [especially since] the ADA defines a "qualified disabled individual" to include a disabled person who can perform the essential functions of her job *with reasonable accommodation* [as *Tuvell* declares in this case (plaintiff's Appellate Brief, p. 29), and which the court *must* credit, by the SJSOR "nonmovant trumps movant" and "all inferences" tenets] [but SSDI does not have such a clause].

Q.E.D. (QDI-Exclusion thesis.)

Fifth Proof — IBM *knew at the time* it terminated Tuvell that he was working for another company (though Tuvell didn't disclose the identity of that company, Imprivata, at the time of events). So IBM knew Tuvell couldn't possibly have been "disabled from working at 'any' job", as IBM now claims (IBM Appellate Brief, p. 43). So yet again we see that IBM's "totally disabled" argument was *false/pretextual*, and the courts erred yet again by agreeing with IBM, and again violating the SJSOR ("whole record" tenet this time). *Q.E.D. (QDI-Exclusion thesis.)*

QDI-Exclusion With Particularity

High-level not-QDI errors tainted many areas of the courts' opinion, spawning low-level errors many times over. We present here a "particularized" list (FRAP 40(a)(2)) of not-QDI fact-areas the courts erroneously *excluded*, though they were *required* to *include* them. For, the courts' exclusions of these fact-areas were *wholly predicated* on the now-discredited "totally disabled"/not-QDI argument.[42]

(A) **Accommodation;[43] interactive process; transfer.** Op., pp. 16, 20.

(B) **Discrimination;[44] retaliation.** Op., p. 21.

(C) **Termination.** Op., p. 22. At this time, we further bring one *additional* argument regarding the termination:[45] the courts' decision abridged Tuvell's "symptoms-of-disability" rights under *Humphrey*.[46]

Conclusion

For the reasons presented herein, plaintiff's claims (Complaint, Dkt. 10; Appellate briefs, principal and reply; etc.) were wrongly rejected. The courts' decision granting summary judgment in this case was patent error (stemming from the "PSOF-exclusion" and "QDI-exclusion" blunders), and must be corrected. Without correction, manifest injustice results.

No employment case can be secretly deemed "*too big (complicated) to succeed*". That would provide a *carte blanche "how-to" blueprint* for employers to blithely commit discrimination/retaliation.