UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES, INC. Defendant.	C.A. No. 13-CV-11292-DJC

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC.

Pursuant to Fed. R. Civ. P. 56, Defendant International Business Machines, Inc. ("IBM") submits this Memorandum of Law in support of its Motion for Summary Judgment. For the reasons set forth below, IBM submits that there are no genuine issues of material fact and IBM is entitled to judgment in its favor on all Counts of the First Amended Complaint as a matter of law.

INTRODUCTION

On June 6, 2013, Plaintiff filed a 31-page, 199-paragraph, 8-count First Amended Complaint ("FAC")[1], alleging a myriad of discrimination and retaliation claims, including handicap, race, gender, age, "or any combination thereof," arising out of an employment relationship with IBM that lasted for less than a year and a half. Plaintiff performed actual work for just over seven months, with the rest of his tenure spent on IBM-approved leaves of absence (even though, unbeknownst to IBM, he was working for an IBM competitor during the last two months of his employment).

[1] The Eight Counts in the FAC are as follows: (I) "Failure to Engage in the Interactive Process – ADA and Chapter 151B"; (II) "Failure to Reasonably Accommodate Plaintiff – ADA and Chapter 151B"; (III) "Failure to Assist In Helping Mr. Tuvell Obtain the Reasonable Accommodation of Reassignment to a Vacant Position for Which He Was Qualified – ADA and Chapter 151B"; (IV) "Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 – ADA and Chapter 151B"; (V) "Failure to Reassign Plaintiff to Open Job Postings SWG-0456125 and SWG-0436579 On the Basis of Handicap Discrimination, Retaliation For Availing Himself of the Reasonable Accommodation of Medical Leave, Retaliation for Engaging in Other Protected Conduct, Race, Gender, Age, and/or Any Combination Thereof – ADA and Chapter 151B"; (VI) "Tangible Job Actions on Account of Handicap, Retaliation, Race, Age, and/or Any Combination Thereof – ADA and Chapter 151B"; (VII) "Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – ADA and Chapter 151B"; and (VIII) "Failure to Investigate and Remediate Harassment on the Basis of Handicap, Retaliation, Race, Gender, Age and/or Any Combination Thereof – Chapter 151B and the ADA".

While Plaintiff has sought to complicate this matter, the undisputed facts are simple. Plaintiff's employment began in January 2011, and was uneventful until May 2011, when a manager whom Plaintiff was supporting, Fritz Knabe, expressed concern about an aspect of Plaintiff's work product to Plaintiff's direct manager, Dan Feldman. When Mr. Feldman raised the issue, Plaintiff became defensive and denied any error on his part. A few weeks later, when Mr. Knabe asked Plaintiff about another assignment, Plaintiff became very upset at what he perceived as criticism of his work. Because it was clear that Plaintiff and Mr. Knabe could not work effectively together, Mr. Feldman assigned Plaintiff to another project, reporting to Mr. Feldman. This was not a demotion, as Plaintiff alleges: his title, salary, and terms of employment all remained unchanged.

Plaintiff was unhappy with Mr. Feldman's handling of this situation, and shortly after receiving a warning from Mr. Feldman, he took a leave from which he did not return. Plaintiff thereafter submitted over 500 pages of complaints to Human Resources, claiming that Messrs. Knabe and Feldman were "liars and bullies," and describing what had occurred as "torture" and "rape." SOF[2] ¶ 17. Plaintiff's internal complaints were first investigated by Senior HR Case Manager Lisa Due, and then by Concerns & Appeals Program Director Russell Mandel, both of whom concluded that Plaintiff's claims were unfounded. SOF ¶¶ 17, 29.

Plaintiff remained on leave from IBM until May of 2012, when he was terminated for repeatedly refusing to tell IBM where he had been working while on his IBM leave of absence. Plaintiff's personal LinkedIn webpage indicated that he was working for EMC, an IBM competitor. While Plaintiff denied working for EMC, he refused to tell IBM where he was working. As a result he was terminated. In fact, IBM learned that he had actually been working for another competitor, Imprivata, since March of 2012, while on his leave from IBM.

Over the course of extensive discovery, Plaintiff has produced no evidence that he was subjected to discrimination or retaliation based upon his alleged handicap, race, age, gender, "or any

[2] "SOF" refers to IBM's Statement of Material Facts as to Which There Is No Genuine Issued to be Tried, which is being filed herewith.

combination thereof." Plaintiff remained on leave with the option of returning to his job until IBM terminated him because he refused to tell IBM where he was working (even though at the time he was an IBM employee on a leave of absence), and IBM had expressed concerns about his working for a competitor. In sum, there was nothing discriminatory or retaliatory about any of IBM's actions towards Plaintiff, and thus judgment should enter for IBM.

ARGUMENT & AUTHORITIES

It is settled that summary judgment is proper if there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The mere existence of some alleged factual dispute will not defeat a properly supported summary judgment motion, however. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-252 (1986). Rather, the plaintiff must "affirmatively point to specific facts that demonstrate the existence of an authentic dispute," Melanson v. Browning-Ferris Indus., 281 F.3d 272, 276 (1st Cir. 2002), and cannot avoid summary judgment merely by speculating that his treatment by his employer was based on impermissible considerations of handicap, age, or gender. Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(party resisting summary judgment cannot rely on hearsay, conjecture, or "unsupported statements of belief"); Dorman v. Norton Co., 64 Mass. App. Ct. 1, 10 (2005)(affirming summary judgment on discrimination claim).

As set forth below, the undisputed facts demonstrate that Plaintiff cannot make out a *prima facie* case of discrimination or retaliation of any kind, nor can he refute IBM's legitimate, nondiscriminatory/nonretaliatory reasons for its actions regarding his employment. Therefore, his claims must fail as a matter of law.

I. PLAINTIFF'S FAILURE TO ACCOMMODATE CLAIMS MUST BE DISMISSED BECAUSE HE WAS NOT A QUALIFIED HANDICAPPED PERSON AND IBM REASONABLY ACCOMMODATED HIS ALLEGED DISABILITY.

The gravamen of Counts I-V is that IBM purportedly failed to accommodate Plaintiff's alleged disability in violation of M.G.L. c. 151B and the ADA, either by changing his supervisor or

his job. See Tobin v. Liberty Mutual, 553 F.3d 121, 126 n.4 (1st Cir. 2009)(claim for failure to engage in "interactive process" is actually subsidiary theory of "reasonable accommodation argument"). These claims must fail because Plaintiff was not a qualified handicapped person within the meaning of c. 151B or the ADA, and because IBM engaged in the interactive process and provided Plaintiff with reasonable accommodations for his alleged disability.

A. Background on Plaintiff's Alleged Disability.

Plaintiff's asserted disability is based on a purported diagnosis of Post-Traumatic Stress Disorder ("PTSD").[3] SOF ¶¶ 2-3. The "traumatic" event that precipitated Plaintiff's alleged PTSD had nothing to do with IBM. Rather, it was the alleged withdrawal of a job offer from Microsoft in 1997, which he described as a "rape" of him and his family. Id. Plaintiff alleges that his PTSD was then "triggered" while working at IBM by the two relatively mundane workplace interactions described above, in which Plaintiff received mild constructive criticism regarding his work, which he again described as a "rape" and the equivalent of being "tortured." SOF ¶ 17. Specifically, in May of 2011, Mr. Knabe, who was running a development project on which Plaintiff was assisting, advised Mr. Feldman that Plaintiff had not completed an assignment in a timely fashion. SOF ¶ 7. When Mr. Feldman asked Plaintiff about the issue, Plaintiff flatly denied any error, and called Mr. Knabe a "liar." Id. A few weeks later, Mr. Knabe asked Plaintiff about another work assignment, and during that discussion both Mr. Knabe and Plaintiff raised their voices. SOF ¶ 8.[4]

In light of these events, in mid-June of 2011, Mr. Knabe told Mr. Feldman that he did not think he and Plaintiff could work together effectively. As a result, Mr. Feldman assigned Plaintiff to a project reporting to him, while another employee, Sujatha Mizar (who is female and Asian), was assigned to work on Mr. Knabe's project. SOF ¶ 10. There was nothing adverse about this

[3] For purposes of this Motion only, IBM is not challenging Plaintiff's claimed disability because it is not material to the disposition of this Motion. Plaintiff was examined by an expert, Dr. Ronald Schouten of Harvard Medical School, who concluded that while Plaintiff exhibits symptoms of one or more personality disorders, he does not suffer from PTSD. Regardless of the label used, Plaintiff is not a qualified handicapped individual.

[4] Plaintiff contends that only Mr. Knabe raised his voice, which is contradicted by a co-worker who heard both raising their voices. SOF, ¶ 9. That is not material dispute for purposes of this Motion, however, because regardless of whose voice was raised the incident itself certainly did not rise to the level of harassment or discrimination of any kind.

switch in assignments, which did not impact Plaintiff's pay, title, or terms of employment. Rather, Mr. Feldman was simply trying to create productive working relationships between IBM colleagues. Plaintiff, however, refused to accept the transition, and unleashed a torrent of inappropriate and increasingly hostile emails at Mr. Feldman and Human Resources during June and early July of 2011, and eventually received a written warning from Mr. Feldman in early August of 2011. SOF ¶¶ 15-17, 25.[5]

Shortly thereafter, in mid-August 2011, Plaintiff took a medical leave of absence from which he never returned, claiming that he was totally impaired from working. SOF ¶ 26. According to his provider's report, Plaintiff had a severe impairment in his ability to manage conflicts with others and participate in group activities, and a serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. SOF ¶¶ 32-33.

While Plaintiff told Human Resources that he could not work with Mr. Feldman, the medical documentation Plaintiff provided stated that he could not work at all, did not provide any estimate of when Plaintiff might be able to return to work, and did not propose any modifications to enable that return. SOF ¶¶ 32-36, 41-52. Indeed, Plaintiff's Medical Treatment Reports ("MTR") for September, October, and November of 2011 all stated unequivocally that Plaintiff was totally impaired to work and failed to suggest any modifications that would enable Plaintiff to return to work. Id. In December of 2011, Plaintiff submitted a MTR from Stephanie Ross, a social worker who has treated him for over 20 years, stating that he continued to be totally impaired from working but adding the contradictory caveat, "for current job assignment." SOF ¶ 47. The December MTR continued to note that Plaintiff had serious impairment in multiple areas, including getting along

[5] Plaintiff was out of the office for most of July of 2011, first on a medical leave of absence for cosmetic surgery, followed by a previously scheduled vacation. He returned briefly in August before going on another leave of absence from which he never returned. SOF ¶ 19.

well with others without behavior extremes, managing conflicts with others, interacting in group activities, and having good autonomous judgment. SOF ¶ 48.[6]

Further, Plaintiff's own testimony demonstrates his inability to work for IBM in any capacity, as he admitted that during this time period he was unable even to be in close proximity to the IBM facilities. SOF ¶ 43. Specifically, Plaintiff testified that in or around December of 2011, he happened to be near the IBM facilities on a weekend and stopped with his wife and daughter at a gas station. This was the gas station he usually patronized while commuting to IBM. According to Plaintiff, because he was "triggered by being that close to [IBM] and that gas station," he proceeded to "blow up" and hit the dashboard, the interior of the roof of the car and the door frame as hard as he could, and then yelled as loud as he could for as long as he could, describing himself as "full-blown crazy." Id. Again, he was not even interacting with anyone from IBM at this point; merely being near IBM's facilities triggered this violent episode.

In sum, while Plaintiff makes much of his demand for a new supervisor as a reasonable accommodation that would have enabled him to return to work at IBM, the MTRs from Plaintiff's medical providers and his own admissions flatly refute that assertion.

B. Plaintiff Is Not A Qualified Handicapped Person.

To prevail on Count II, his failure to accommodate claim, Plaintiff must show that: "(1) he is a handicapped person within the meaning of the statute; (2) he is qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) the employer knew of his disability but did not reasonably accommodate it upon a request." Henry v. United Bank, 686 F.3d 50, 59-60 (1st Cir. 2012); Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010)(reciting the legal standard for a failure to accommodate claim under the ADA and c. 151B). Plaintiff must first demonstrate that he is a qualified handicapped person, that is, one who "is capable of performing

[6] While the December MTR indicated that Plaintiff could return to work if he had a different supervisor in a different setting, Ms. Ross testified that it was only "possible" that a new supervisor and setting would enable Plaintiff's return to work. SOF ¶ 50.

the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." G.L. c. 151B, § 1(16); see Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 381-384 (1993).

In determining whether an individual is able to perform the "essential functions" of his job and is, thus, a qualified handicapped person, courts have looked to, among other things, an individual's own characterization of his disability and the findings of the individual's physician. Beal v. Board of Selectman, 646 N.E.2d 131, 136 (1995)(plaintiff's own assertion that she could not return to work and doctor's statement of permanent disability supported employer's contention that she was unable to perform essential functions of job); Pesterfield v. Tennessee Valley Authority, 941 F.2d 437, 442 (6th Cir. 1991)(determination that employee was not "qualified" individual under Rehabilitation Act supported by employee's doctor's medical opinion that employee was incapable of functioning if there was slightest hint of criticism).

Plaintiff cannot succeed on his claim of disability discrimination because he has not established that he was capable of performing his job with or without a reasonable accommodation. Instead, the evidence provided by Plaintiff's own medical providers, as well as Plaintiff's own testimony, establishes that he was totally impaired to work from August through December of 2011, after which time he remained on leave while applying for long term disability benefits. Indeed, by his own admission Plaintiff could not even be in the vicinity of IBM without becoming "full-blown crazy" and engaging in violent outbursts. SOF ¶ 43. Because Plaintiff was certified as "totally incapacitated to work," he was unable to perform any aspects of his or any other job and thus not a qualified handicapped person. See August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992)(plaintiff's statement on disability insurance forms that he was totally disabled along with psychiatrist's statements demonstrate that plaintiff was not capable of performing essential functions of job); Beal, 646 N.E.2d at 137 (police officer not a qualified handicapped person

because her inability to respond to stressful situations rendered her unable perform the essential functions of job).

Moreover, from January through May of 2012, despite not providing any additional medical forms to IBM, aside from notification that he was applying for long term disability benefits, Plaintiff refused to return to his job at IBM. SOF ¶¶ 55-56, 67-72. Plaintiff's refusal – or inability – to return to his position rendered him incapable of performing the essential functions of his job. Mulloy v. Acushnet Co., 460 F.3d 141, 150 n. 5 (1st Cir. 2006)("Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise."). As a result, Plaintiff was not, as a matter of law, a "qualified handicapped person" and his disability discrimination claims under c. 151B and the ADA must be dismissed.

C. IBM Provided Plaintiff With A Reasonable Accommodation.

Even assuming *arguendo* that Plaintiff were a qualified handicapped person, his failure to accommodate claims cannot succeed for the simple reason that *IBM granted him a reasonable accommodation when it permitted him to take medical leave until such time as he was able to return to his position.* SOF ¶ 55. Plaintiff was not terminated, nor did he suffer any other adverse actions, as a result of his extended leave of absence due to his claimed disability. Rather, IBM still considered Plaintiff to be an employee even after, unbeknownst to IBM, Plaintiff had taken a permanent, full-time position with an IBM competitor while Plaintiff was still claiming to be disabled and seeking long term disability benefits from IBM. SOF ¶¶ 73-81.[7] In addition to granting him extended medical leave, IBM made a further attempt to reasonably accommodate Plaintiff by offering to have him receive his performance reviews from a different manager (Mr. Feldman's manager John Metzger), while also giving him the continued ability to take leave for

[7] Plaintiff's eventual termination had nothing to do with his purported disability; rather, he was ultimately terminated after he refused to respond to IBM's inquiries about the identity of his employer, and whether it was an IBM competitor, while he was still employed at IBM. SOF ¶ 79.

medical appointments whenever necessary. SOF ¶¶ 67, 71. Plaintiff, however, continued to insist that the only accommodation he would accept was a new supervisor and/or transfer to a new position. SOF ¶ 72.

Merely because Plaintiff insisted that a new supervisor was the only accommodation he would accept does not make his unilateral demand a required or reasonable accommodation as a matter of law. Neither the ADA nor c. 151B entitles a disabled employee to the accommodation of his choice, including that of a reassignment to a new supervisor. See Bryant v. Caritas Norwood Hospital, 345 F. Supp. 2d 155, 170 (D. Mass. 2004)(ADA "does not require the employer to grant its disabled employee's accommodation of choice, even if it is reasonable one, and instead provides the employer with 'the ultimate discretion to choose between effective accommodations'"); Litovich v. Somascan, Inc., 2008 U.S. Dist. LEXIS 108627 at * 25 (D. Mass. Dec. 17, 2008)(a disabled employee is "not entitled to the accommodation of her choice, but only to a reasonable accommodation"); Darian v. University of Massachusetts Boston, 980 F. Supp. 77, 89 (D. Mass. 1997)(nursing student's refusal to accept university's reasonable accommodation in lieu of the accommodation she requested doomed her failure to accommodate claim).

On this point, the U.S. Supreme Court's analogous decision in Ansonia Bd. of Educ. v. Philbrook is instructive. There, the Court examined Title VII's religious accommodation clause, which mirrors the ADA's reasonable accommodation clause, to determine whether a school was obligated to provide a teacher with the accommodation of his choice, instead of the unpaid leave the school allowed. Philbrook, 479 U.S. 60, 68-69 (1986). The Second Circuit had ruled that, while the employer's unpaid leave policy was a reasonable accommodation, Title VII required the employer to accept the employee's requested accommodation unless it posed an undue hardship. Id. at 66. The Court disagreed, explaining that "[b]y its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."

Id. Elaborating based on statutory language nearly identical to that found in the ADA, the Court explained:

> [t]he employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.' 42 U.S.C. 2000e(j). Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship. . . . the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.

Id. at 68-69 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)). The Court also noted that unpaid leave was likely a reasonable accommodation because "generally speaking, the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either the employment opportunities or job status." Id. at 71. The bottom line is that IBM provided Plaintiff with a reasonable accommodation and, as a matter of law, it was not obliged to provide Plaintiff with the accommodation of his choice. Therefore, IBM complied with its obligations under the ADA and c. 151B and Plaintiff's failure to accommodate claims must be dismissed.

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

Laying aside the fact that Plaintiff was not entitled to the accommodation of his choice, Plaintiff's insistence on a new supervisor was not a reasonable accommodation as a matter of law.[8] See Cailler v. Care Alternatives of Massachusetts, LLC, 2012 U.S. Dist. LEXIS 39414 at *23 (D. Mass. March 23, 2012)("A reasonable accommodation provided to an employee with a handicap is to allow her to perform the essential functions 'of the position involved,' . . . *i.e.*, the plaintiff's original position."); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 384 (2nd Cir. 1996)(holding that employee's request for a new supervisor was not required under the ADA).

[8] In addition to not being reasonable as a matter of law, Plaintiff himself did not and could not identify anyone who could appropriately serve as his manager in place of Mr. Feldman. SOF ¶ 51.

In recognizing an employer's right to define the essential functions of a job, including reporting to a particular supervisor, the Wernick court explained that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy." Id.; Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 33, (EEOC Notice No. 915.002)("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation."); Weiler v. Household Finance Corp., 101 F.3d 519, 526 (7th Cir. 1996)(ruling that the ADA does not require an employer to transfer an employee to work for another supervisor, or to transfer the supervisor); Bradford v. City of Chicago, 121 Fed. Appx. 137, 139 (7th Cir. 2005)(holding that employer was not required to change employee's supervisor as a reasonable accommodation even though that supervisor exacerbated employee's preexisting bipolar disorder). Moreover, even if a change in supervisor had been required, IBM in fact offered Plaintiff the accommodation of having Mr. Metzger provide him with his performance reviews, instead of Mr. Feldman. Plaintiff, however, refused this proposed reasonable accommodation as well.

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

E. IBM Was Not Required To Transfer Plaintiff To An Open Position For Which He Was Not Qualified.

In Counts III, IV, and V, Plaintiff claims that he was denied the reasonable accommodation of transfer to an open position based on his request to be transferred to a different position within IBM. As with Plaintiff's demand for a new supervisor, to the extent that Plaintiff is claiming that he was entitled to a transfer to a different position, the Supreme Judicial Court has ruled that assignment to a new position is not a "reasonable accommodation" under c. 151B. See Godfrey v. Globe Newspaper Co., Inc., 928 N.E.2d 327, 336 (Mass. 2010)(citing Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 454 (2002)(reasonable accommodation does not require employer to

"fashion a new position")); Beal, 419 Mass. at 541-542 (employer may refuse to accommodate handicap that "necessitates the substantial modification of employment standards"); Cox, 414 Mass. at 390 ("reasonable accommodation does not include waiving or excluding an inability to perform an essential job function"). Accordingly, Plaintiff's claim that IBM was required to transfer him to an open position as a reasonable accommodation under c. 151B is not supported by Massachusetts law and summary judgment should be entered as to that claim.

Under federal law, "reassignment to a vacant position" may be a reasonable accommodation in certain circumstances, but only if the employee is qualified for the position. 42 U.S.C. §§ 12111(9),(10)(B). While courts are split on how active employers must be in assisting a *qualified* handicapped person to relocate to an open position within the company, no court has held that an employer is required to relocate an employee to an open position if that employee is not capable of performing the essential functions of the position. Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012)(accommodation not reasonable where employee cannot demonstrate it would enable him to perform essential functions of job); Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 24, (EEOC Notice No. 915.002)("An employee must be 'qualified' for the new position").

In the present case, on December 8, 2011 Plaintiff applied for a position with Christopher Kime's group (the "SWG-0436579" position). SOF ¶ 57. In the course of evaluating Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance history on IBM's internal website but was unable to locate it, later learning that Plaintiff's leave prevented his supervisor from giving him a performance review. SOF ¶ 60. Mr. Kime then contacted Mr. Feldman in an effort to get an idea about Plaintiff's work performance history at IBM and learned of Plaintiff's difficulties working with other people in Mr. Feldman's group. SOF ¶ 61. After reviewing his credentials, Mr. Kime concluded Plaintiff was not an appropriate candidate for the position because Plaintiff appeared to be more interested in development work than the position offered, which was more of a software

maintenance role for a mature product, and because the position involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in that setting. SOF ¶ 62-65. None of that had anything to do with Plaintiff's alleged disability. Id. Given that he was deemed to be not qualified for the position with Mr. Kime, IBM was under no obligation to transfer Plaintiff to a new position as a reasonable accommodation. Ladenheim v. American Airlines, 115 F. Supp. 2d 225, 231 (D.P.R. 2000)("a plaintiff is not entitled to be reassigned to the position of his choice."); Jones, 696 F.3d at 91.

F. IBM Attempted To Engage In The Interactive Process But Plaintiff Refused.

Count I of Plaintiff's Complaint alleges that IBM failed to engage in the interactive process. In fact, IBM made numerous attempts to engage in the interactive process, but Plaintiff refused to participate, insisting that only the accommodations he demanded would be acceptable. Plaintiff's unilateral demands do not constitute engaging in the interactive process. It is settled that "a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." Rennie v. United Parcel Service, 139 F. Supp. 2d 159, 168 (D. Mass. 2001); Feliberty v. Kemper Corp., 98 F.3d 274, 280 (7th Cir. 1996)). As the ADA's regulatory scheme provides, "the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." 29 C.F.R. pt. 1630 App. § 1630.9. The obligation to find a reasonable accommodation, therefore, is mutual and incumbent upon both the employee and the employer. Calero-Cerezo v. United States, 355 F.3d 6, 24 (1st Cir. 2004); Mengine v. Runyon, 114 F.3d 415, 420 (3rd Cir. 1997)("We agree that both parties have a duty to assist in the search for an appropriate reasonable accommodation and to act in good faith.").

In contrast to the interactive process just described, Plaintiff's only effort to engage with IBM's overtures was to repeatedly demand transfer to a new supervisor and/or a new position. SOF ¶¶ 67-72. When IBM asked Plaintiff to find a psychiatrist after the nurse practitioner treating him

indicated that he needed to remain on leave past six weeks, Plaintiff refused to consider seeking appropriate treatment, insisting there was nothing medically wrong with him and that he was only ill because of IBM's alleged actions. SOF ¶¶ 35-40. In an effort to accommodate Plaintiff and return him to his job, IBM offered to have Mr. Metzger provide Plaintiff with performance-related feedback and reviews instead of Mr. Feldman. SOF ¶ 71. Plaintiff refused that accommodation as well and declined to suggest any alternatives other than transfer to a new position under a different supervisor, which was not, as a matter of law, a reasonable accommodation. SOF ¶ 72.

In short, Plaintiff's "participation" in the interactive process consisted of repeatedly demanding that IBM acquiesce to the only accommodation he would accept, while consistently refusing to consider any alternatives set forth by IBM. Nonetheless, even while he was refusing to engage in the interactive process, IBM continued to provide Plaintiff with leave until such time as he was able to return to work (and during that leave Plaintiff began working for an IBM competitor without advising IBM). In so doing, IBM satisfied its obligation to engage in the interactive process and provide Plaintiff with a reasonable accommodation. Phelps, 251 F.3d at 28 n.7 (employer's decision to provide medical leave to employee unable to work satisfied its obligations to engage in the interactive process, despite employee's requests for other accommodations). Therefore, judgment should enter in IBM's favor with respect to Count I.

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

Plaintiff has failed to make out a *prima facie* case of disability discrimination or provide any evidence demonstrating that the legitimate business reasons proffered by IBM are pretext for discrimination and, as such, his disability discrimination claims – Counts V-VIII – must fail.

A. Plaintiff's Disability Discrimination Claims Fail Because He Has Offered No Proof Of Any Discriminatory Animus By IBM

To establish a *prima facie* disability discrimination claim, a plaintiff "must prove 'that (1) he suffers from a disability or handicap, as defined by the ADA; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and (3) the defendant took an adverse employment action against him because of, in whole or in part, his protected disability.'" Kinghorn v. Massachusetts General Hospital, slip op. No. 11-12078 at *11 (D. Mass. July 1, 2014) (quoting Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91 n. 7 (1st Cir. 2007)).[9] If a plaintiff is able to set forth a *prima facie* case of discrimination, the well-known burden shifting framework applies, but "the ultimate burden of proving unlawful discrimination rests at all times with the plaintiff." Id. (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000)).

As an initial matter, Plaintiff's disability discrimination claims fail for the same reason as his failure to accommodate claims, namely, the fact that Plaintiff was not a qualified handicapped individual. Furthermore, Plaintiff's claims should be dismissed because of the two arguably adverse actions he experienced – his failure to get a job with Mr. Kime's group and his termination. The former is not legally an adverse action and neither one of them had any connection to his alleged disability.

First, Plaintiff identifies his failure to get a position with Christopher Kime's group as an adverse action based on both his disability and retaliation. While Plaintiff was certainly disappointed by his failure to get the position, those feelings alone do not render the action adverse. See King v. Boston, 71 Mass. App. Ct. 460, 468 (2008)(discrimination claim requires "real harm" as opposed to subjective feelings of "disappointment and disillusionment"). In contrast, the rejection from the position is not adverse because it did not materially or otherwise adversely

[9] As "Chapter 151B is considered the state analogue to the [ADA], Massachusetts courts look to cases decided under the federal counterpart to inform its interpretation." Henry v. United Bank, 68 F.3d 50, 59 (1st Cir. 2012).

impact Plaintiff's conditions of employment with IBM, which at all times remained unchanged. That is, Plaintiff already had a job with IBM which remained open for him. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1988)(an adverse employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). Nor did Plaintiff's rejection from the new position "inflict[] direct economic harm", because Plaintiff remained employed by IBM and has not alleged, or demonstrated, that the position with Mr. Kime's group would have resulted in a promotion, greater benefits or prestige. Id. at 762; Freeman v. Potter, 200 Fed. Appx. 439, 442 (6th Cir. 2006). Indeed, Plaintiff never suffered any change in his employment status at IBM until he refused to identify the company he was working for while on leave from IBM: his salary, benefits, title, and overall responsibilities all remained the same.

To the extent the failure to get the position could be considered an adverse action, Plaintiff has not demonstrated that he was denied the position based on his alleged disability. As an initial matter, while Mr. Kime was aware that Plaintiff was on short term disability leave at the time he chose him to interview for the position, he had no knowledge of Plaintiff's medical condition and did not make any inquiry into the circumstances surrounding Plaintiff's leave. SOF ¶ 58. Indeed, Plaintiff (falsely) advised Mr. Kime that he had a "completely clean bill of health." SOF ¶ 57. In the course of evaluating Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance history on IBM's internal website but was unable to locate it, later learning that Plaintiff's leave prevented his supervisor from giving him a performance review for the relevant period. SOF ¶ 60. Mr. Kime then contacted Mr. Feldman in an effort to get an idea about Plaintiff's work performance history at IBM and learned of Plaintiff's difficulties working with other people in Mr. Feldman's group. SOF ¶ 61.

After reviewing his credentials, Mr. Kime concluded Plaintiff was not an appropriate candidate for the position, not because of any discriminatory motive, but rather because Plaintiff

appeared to be more interested in development work than the position offered, which was more of a software maintenance role for a mature product, and because the position involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in that setting. SOF ¶ 61. None of that had anything to do with Plaintiff's alleged disability. Id. Plaintiff has not established that Mr. Kime's testimony regarding the legitimate business reasons for not offering him the position were pretext. Indeed, instead of presenting specific facts demonstrating a discriminatory reason, Plaintiff continues to assert vaguely that he was not accepted for the position based on, not only his disability, but also his age, race, gender, and as retaliation. Such groundless speculation cannot counter IBM's proffered legitimate business reason. See Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991) (stating that "[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive" (internal quotations omitted)).

Second, while Plaintiff alleges that he was terminated from IBM based on his disability, the undisputed facts do not support that claim. Plaintiff had been on extended leave from IBM for approximately ten months when IBM learned that he may have been working for a competing company in violation of IBM's Business Conduct Guidelines. SOF ¶¶ 73-81. According to Plaintiff's personal LinkedIn web page, he was working for IBM competitor EMC while working at IBM. Id. In response, IBM contacted Plaintiff and simply asked him to confirm that he was not working for EMC while on leave from IBM. Id. Plaintiff responded by repeatedly and inexplicably refusing to tell IBM for which company he was working while he was still an IBM employee, and accusing IBM of harassment and defamation. Id. As a result of his refusal to disclose his new employer's identity, IBM terminated Plaintiff's employment.[10] Plaintiff has not offered any evidence contradicting IBM's stated reason for his termination. Plaintiff's specious assertions of

[10] IBM subsequently learned that Plaintiff had begun working for another company, IBM competitor Imprivata, in March of 2012, while still on extended medical leave from IBM. SOF ¶ 79.

disability discrimination, grounded in nothing more than Plaintiff's suppositions, are not sufficient to establish a claim of discrimination. Accordingly, IBM's motion for summary judgment with respect to these claims should be allowed. See Mesnick, 950 F.2d at 824.

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

As for the other "tangible acts" identified by Plaintiff in Count VI and VII, they do not constitute adverse employment action as a matter of law. An adverse employment action "refer[s] to the effects on working terms, conditions, or privileges that are material, and thus governed by [c. 151B, § 4(1)], as opposed to those effects that are trivial and so not properly the subject of a discrimination action. . . . There must be 'real harm'; 'subjective feelings of disappointment and disillusionment' will not suffice." King, 71 Mass. App. Ct. at 468; MacCormack v. Boston Edison Co., 423 Mass. 652, 664 (1996); Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 157 (1st Cir. 2009)(an adverse action has been defined as "any material disadvantage[] in respect to salary, grade, or other objective terms and conditions of employment").

In the FAC, Plaintiff points to an assortment of acts he deems adverse under the ADA and Chapter 151B, including: disabling his access to IBM facilities and its computer systems while he was on medical leave, refusing to progress and finalize review of his internal complaint, Mr. Feldman's issuance of a formal warning letter, and treating work at home days as sick days. None of the above actions are "adverse" under either Massachusetts or federal law.

First, IBM only limited Plaintiff's access to facilities and computer networks while he was on medical leave and "totally incapacitated to work." SOF ¶¶ 53-54. As such, there was no business reason for Plaintiff to have access to the facilities or networks and his limited access to both resulted in no "real harm" to his ability to not work during his medical leave.

Second, Plaintiff has provided no evidence in support of his claim that IBM failed to progress and finalize his internal complaint, or somehow delayed it. To the contrary, both Ms. Due and Mr. Mandel testified that they each conducted separate investigations, which included

interviewing multiple witnesses, including Plaintiff, and reviewing relevant internal documents. After completing their respective investigations, each of them concluded that Plaintiff's allegations were unfounded. SOF ¶¶ 17, 29. In any event, failure to properly investigate a complaint is not an adverse action as a matter of law. See Symonds v. Federal Express Corp., 2011 U.S. Dist. 150056 at *53 (D. Me. Dec. 31, 2011)("Failure to investigate complaints of discrimination cannot be considered an adverse employment action.").

Third, the formal warning letter Mr. Feldman gave Plaintiff, warning him of inappropriate behavior also failed to affect – materially or otherwise – the terms or conditions of Plaintiff's employment, as neither Plaintiff's pay grade, benefits, nor his title were affected by the letter. SOF ¶ 25. Finally, Plaintiff's "work at home" days were treated as sick days only after he had advised that he was unable to work and, as such, IBM reasonably treated such days that he did not come to work as sick days.

Accordingly, to the extent Plaintiff's discrimination and retaliation claims are based on any of the above "tangible acts," those claims must fail, as such acts are not adverse employment actions under state or federal law. See, e.g., Butler v. Wellington Mgmt. Co., LLP, 2011 Mass. App. Unpub. LEXIS 823 (Mass. App. Ct. Jun. 22, 2011) (summary judgment for employer affirmed where employee failed to demonstrate that she was adversely affected by multiple employment actions, including: supervisor's decision to stop meeting with her one-on-one; removal from a work assignment; assignment to an office away from her peers; and, assignment to an inaccessible mentor).

C. Plaintiff Was Not Subjected To A Hostile Work Environment

Plaintiff also alleges, in Count VII, that the "tangible" actions created a hostile work environment on the basis of his disability, age, gender, race, and retaliation. To rise to the level of harassment or a hostile work environment, as Plaintiff appears to allege, "the alleged harassment must be severe or pervasive." Alvarado v. Donahoe, 687 F.3d 453, 461 (1st Cir. 2012) (citing

Gómez-Pérez v. Potter, 452 Fed. Appx. 3, 9 (1st Cir. 2011). In addition, "any abuse must be both objectively offensive (as viewed from a reasonable person's perspective) and subjectively so (as perceived by the plaintiff)." Id. As just explained, the "tangible acts" Plaintiff characterizes are neither adverse nor, even viewed collectively, objectively offensive, and Plaintiff's hostile work environment claim should be dismissed. Id. (taunting and mocking comments about employee's psychiatric condition, while callous and objectionable, did not rise to level of severe and pervasive). See also Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17, 44 (1st Cir. 2011) (appellant could not show hostile work environment where, *inter alia*, supervisor regularly refused to meet with appellant, yelled at her, and limited her movements around workplace).

III. PLAINTIFF CANNOT ESTABLISH A CLAIM FOR RETALIATION.

Plaintiff's claims for retaliation, Counts VI-VIII, are based upon the same alleged adverse actions as his discrimination claims and are equally without merit. A plaintiff seeking to establish a *prima facie* case of retaliation under 151B and the ADA must show, by a preponderance of the evidence, "that (1) he engaged in protected conduct; (2) suffered an adverse employment action; and (3) [that] there was a causal connection between the protected conduct and the adverse action." Jones v. Walgreen Co., 679 F.3d 9, 28 n. 7 (1st Cir. 2012) (Colón-Fontánez v. San Juan, 660 F.3d 17, 36 (1st Cir. 2011)). If a plaintiff establishes these factors, the *McDonnell Douglas* burden shifting scheme follows, ultimately requiring Plaintiff to demonstrate that the adverse action was the result of discriminatory animus. Id.

First, as already described, Plaintiff's failure to get an offer from Mr. Kime was not an adverse action under state or federal law. Moreover, IBM has provided a legitimate reason for not offering Plaintiff the position for which he interviewed. Indeed, Mr. Kime was not even aware of what Plaintiff's disability was and had no reason to disbelieve Plaintiff's (false) assurance that he had a clean bill of health and was able to return to work without restrictions. SOF ¶¶ 57-58. Nor

was Mr. Kime aware, at the time Plaintiff applied for the position, that Plaintiff had filed any complaints regarding his disability either internally or externally. SOF ¶ 62.

Second, to the extent Plaintiff's retaliation claim is based on Mr. Feldman's comments to Mr. Kime regarding Plaintiff's difficulties working well with the individuals in his group, that claim must fail as such comments were not an adverse action, did not lead to an adverse action, and were not motivated by discriminatory animus. Mr. Feldman's comments were based on his experience managing Plaintiff during his time at IBM and his honest assessment of Plaintiff's performance based on that experience. His comments were offered in response to a legitimate request for an assessment of Plaintiff's performance, rendered necessary by the fact that Plaintiff did not have a written performance review on file. See, e.g. Dickenson v. UMass Mem. Medical Group, 2011 U.S. Dist. LEXIS 30932 (D. Mass. Mar. 24, 2011)(Plaintiff's mediocre performance was legitimate, non-retaliatory reason for his poor performance review and less than full raise). Moreover, there is no evidence that Mr. Feldman's assessment of Plaintiff's interpersonal difficulties, while candid, was in any way false or exaggerated and was only one part of Mr. Kime's assessment of Plaintiff's candidacy. SOF ¶ 65.

Third, IBM had a legitimate reason for Plaintiff's termination, given Plaintiff's refusal to provide information to IBM concerning where he was working while was on a medical leave of absence from IBM. SOF ¶ 79. As set forth above, Plaintiff had been on extended leave from IBM for approximately ten months when IBM learned that he may have been working for IBM competitor EMC in violation of IBM's Business Conduct Guidelines. SOF ¶¶ 73-81. When IBM contacted Plaintiff and simply asked him to confirm that he was not working for EMC, or another competitor, Plaintiff refused. Instead, he accused IBM of harassment and defamation. Id. As a result of his refusal to disclose his new employer's identity (which turned out not to be EMC, but another IBM competitor Imprivata), IBM made the legitimate decision to terminate Plaintiff's employment. There was nothing discriminatory or retaliatory about IBM's actions in this regard.

Finally, even if Plaintiff could satisfy his *prima facie* case with respect to these actions, his claim still fails because he has provided no evidence that IBM's stated reason for either was pretext, and that the real reason was retaliation. Plaintiff's protected activity did not immunize him from "the same risks that confront virtually every employee every day in every work place," including recommendations reflective of his performance and an expectation that he abide by IBM's policies and procedures. See Blackie v. Maine, 75 F.3d 716, 723 (1st Cir. 1996) (affirming summary judgment in favor of employer on FLSA retaliation claim where employees failed to show that adverse action stemmed from retaliatory motive). As mere speculation or inferences of retaliatory motive are insufficient to satisfy a plaintiff's burden of establishing pretext, Plaintiff's claims must fail. See e.g., Karathy, 84 Mass. App. Ct. at 256-57 (in affirming summary judgment for employer on plaintiff's retaliation claim, Court observed that the Massachusetts SJC has held that "the bare assertion of inferences … raises no genuine issue of material fact.").

IV. IBM'S ALLEGED FAILURE TO INVESTIGATE CLAIM FAILS BECAUSE THERE WAS NO UNDERLYING DISCRIMINATION.

Count VIII of the FAC, for alleged failure to investigate, also must be dismissed because no independent claim of failure to investigate exists absent underlying proof of discrimination. See Keeler v. Putnam Fiduciary Trust Co., 238 F.3d 5, 13 (1st Cir. 2001). Nor is there support for the notion that a failure to investigate is a distinct adverse action for purposes of retaliation or discrimination claims. See Fincher v. Depository Trust and Clearing Corp., 604 F.3d 712, 721 (2nd Cir. 2010) ("an employer's failure to investigate a complaint of discrimination cannot be considered an adverse employment action taken in retaliation for the filing of the same discrimination complaint"); Symonds v. Federal Express Corp., 2011 U.S. Dist. 150056 at *53 (D. Me. Dec. 31, 2011) ("Failure to investigate complaints of discrimination cannot be considered an adverse employment action."); Cook v. CTC Comm. Corp., 2007 U.S. Dist. LEXIS 80849, at *8 (Oct. 15, 2007) ("Evidence of a flawed investigation is relevant only if [the plaintiff] proves that [human

resources] intentionally failed to investigate properly in order to concoct a pretext for her termination.").

Moreover, to the extent Plaintiff's failure to investigate claim is relevant to any consideration of damages, such a claim still fails in light of ample evidence that IBM conducted appropriate investigations and determined that Plaintiff's claims of harassment and/or discrimination were unfounded. SOF ¶¶ 17, 29. Aside from his own conclusion that the investigations must have been flawed because they did not result in his preferred outcome, Plaintiff has offered no evidence that such investigations did not take place or that they were conducted in bad faith. [11] See, e.g., Parra v. Four Seasons Hotel, 605 F. Supp. 2d 314, 336 (D. Mass. 2009) (finding acceptable an employer's testimony that an investigation took place, consisting of a discussion with the plaintiff and a review of the customer complaint upon which plaintiff's complaint was based, despite plaintiff's claim that no investigative action was taken whatsoever, and concluding that "while the [employer's] response could surely have been more robust and better documented, it does not amount to a failure to investigate wide-ranging claims of discrimination"); Verdrager v. Mintz, Levin et al., 2013 Mass. Super. LEXIS 206 at *28-29 (Mass. Super. Ct. 2013) (allowing motion for summary judgment on failure to investigate claim where there was no underlying discrimination and in light of evidence that employer investigated complaint by reviewing complaint and conducting interviews related to complaint).

V. PLAINTIFF'S CLAIMS OF AGE, GENDER, AND RACE DISCRIMINATION MUST BE DISMISSED AS THEY ARE ENTIRELY BASED UPON CONJECTURE AND UNSUPPORTED SPECULATION.

To the extent Plaintiff alleges age, gender, and race discrimination under Chapter 151B in Counts V-VIII, IBM is entitled to summary judgment because Plaintiff cannot demonstrate that any action taken by IBM was based on discriminatory animus. Thompson v. Coca-Cola Co., 522 F.3d

[11] Plaintiff has hired an expert, Julie Moore, an attorney who has never worked in human resources, to offer her opinion as to purported deficiencies in IBM's investigation. Ms. Moore's report, however, is irrelevant at this stage in the proceedings and will be the subject of a motion to strike given its lack of relevance, unreliability, and overall failure to conform to the requirements of Fed. R. Evid. 702.

168, 176 (1st Cir. 2008) (holding that to make out a *prima facie* case of age, gender, or race discrimination, an employee must show that the determinative cause of the challenged employment decision was discriminatory animus) (citing Weber v. Cmty. Teamwork, Inc., 434 Mass. 761, 775 (2001)).

For purposes of addressing Plaintiff's discrimination claims as succinctly as possible, IBM assumes that Plaintiff has satisfied the first prongs of his *prima facie* case, that is, that Plaintiff is a member of a protected class (*i.e.*, white, male, and over 40). As explained above, the only legally cognizable adverse employment action Plaintiff arguably experienced was his termination for failing to disclose the identity of his full-time employer while he was still employed by IBM.[12]

Regardless of what adverse actions Plaintiff believes he experienced, Plaintiff has provided no evidence of discriminatory animus motivating any of IBM's employment decisions. Indeed, Plaintiff was not able to articulate any basis for his race, gender, and age discrimination claims, testifying during his deposition that the basis of his age, gender, and race claims was his belief that one of the individuals to whom he reported – Mr. Knabe – "lied" about Plaintiff's work, which means that "something bigger" was "at play" and "it had to be illegal." SOF ¶ 11. Plaintiff did not offer any more specific testimony, or produce any evidence, that his termination or failure to be hired for a new position was in any way based on his age, race, or gender.

As these facts demonstrate, Plaintiff's claims of age, race, and gender discrimination "rest[] merely upon conclusory allegations, improbable inferences, and unsupported speculation." de la Cruz, 218 F.3d at 5. Plaintiff's kitchen-sink approach to his allegations of discrimination, none of which have any basis in fact, have produced exactly the kind of claims for which summary judgment is appropriate, as they amount to nothing more than "groundless accusations by [a] disgruntled . . . employee[] . . . us[ing] the claim of discrimination as an excuse for deficiency or as

[12]While Plaintiff points to, as an adverse action, the fact that Mr. Feldman switched his and a co-worker's job assignments and that the co-worker was Asian, female, and under 40, the switch did not result in a downgrade of Plaintiff's pay or any other material aspect of his employment and is not, therefore, an adverse employment action.

an instrument of revenge." Poon v. Massachusetts Institute of Technology, 74 Mass. App. Ct. 185, 194-195 (2009) (affirming summary judgment for employer on discrimination and retaliation claims where employee had a history of interpersonal conflicts and plaintiff could offer no evidence of pretext).

VI. CONCLUSION

For the foregoing reasons, IBM submits that summary judgment should enter in its favor and all Counts of the FAC should be dismissed as a matter of law.

Respectfully submitted,
INTERNATIONAL BUSINESS
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CERTIFICATE OF SERVICE

This is to certify that on December 15, 2014, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Matthew A. Porter
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