

# Exhibit 115



*Employment  
Practices Group*

*Defining workplace rights*

May 30, 2014

Robert S. Mantell  
Rodgers, Powers & Schwartz LLP  
18 Tremont Street, Suite 500  
Boston, MA 02108

*Re: Walt Tuvell v. International Business Machines, Inc.  
Docket Number C.A. No. 13-cv-11292-DJC*

Dear Mr. Mantell:

This will serve as the written report of my expert opinions in connection with my retention in the above matter in which your client, Walt Tuvell, alleges various forms of discrimination, harassment and retaliation under state and federal law, as outlined in the 8-count First Amended Complaint and Demand for Jury Trial against International Business Machines, Inc. ("IBM" or the "company") as the Defendant.

Issues addressed here include whether IBM properly responded to Mr. Tuvell's complaints of workplace conflict; whether IBM properly responded to Mr. Tuvell's complaints about inappropriate behavior including but not limited to discrimination and retaliation; whether IBM selected the appropriate investigator to investigate Mr. Tuvell's complaints of illegal behavior; whether IBM took or failed to take appropriate interim measures at the outset of the investigation; whether IBM conducted a prompt, thorough and impartial investigation into his complaints; and otherwise whether the company properly handled aspects of the employer-employee relationship. Opinions will be rendered as to whether the company otherwise acted reasonably in following sound employment practices, consistent with industry standards, in connection with the issues outlined herein. At times, I will also be opining on whether IBM failed to abide by its internal policies and procedures and the importance of an employer complying with the letter and spirit of its written guidelines.

This report is a summary of the expert opinion testimony I am offering in this matter. This report is preliminary in nature as discovery is ongoing and depositions have recently been taken and more are scheduled next month. I have yet to review any deposition transcripts. If additional relevant information becomes available to me, I reserve the right to and expect to supplement this report.

In the field of Human Resources and employment law, certain accepted industry standards are recognized in law or as "reasonable" or "best practices" for the handling of employer-employee issues in all aspects of Human Resources, including maintaining and enforcing policies,

managing employees, handling conflict and disputes between or among employees, responding to complaints of discrimination (which includes harassment) and retaliation, and conducting internal investigations. Sources relied on to form opinions about action employers should take when faced with such issues include the following: guidance and model policies promulgated by governmental agencies such as the Equal Employment Opportunity Commission (“EEOC”) and state fair employment practices agencies such as the Massachusetts Commission Against Discrimination (“MCAD”); court decisions; legal analyses published in legal journals and discussed at continuing legal education courses and programs; books and treatises; and the sharing of practical approaches and strategies at professional conferences and continuing education courses for Human Resources professionals and employment attorneys. Some specific sources are cited herein, but I am not citing to every espoused principle about sound employment practices that is contained in books, papers and articles that I have read, relied on, referenced or even published or delivered myself.

The EEOC's Guidance, including but not limited to its "Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors," No. 915.002, 6/18/99<sup>1</sup> citing *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and its Enforcement Guidance entitled “Policy Guidance on Current Issues of Sexual Harassment,” No. 915.050, 3/19/90 and last reformatted 6/28/10,<sup>2</sup> is widely cited and relied on by employers, Human Resources professionals and workplace investigators as a practical guide for both preventing harassment and discrimination in the workplace and for conducting a proper workplace investigation. The MCAD publishes “Sexual Harassment in the Workplace Guidelines,” 10/2/02,<sup>3</sup> that, similarly, offer guidance and best practices for preventing, responding to, and investigating sexual harassment complaints. While sexual harassment was not alleged here, sexual harassment is a form of discrimination, to which the same principles apply. There are, of course, many other resources on workplace complaints and investigations with which I am familiar, and all are consistent with these authorities.

Professional organizations, as well, are a source for establishing and communicating the industry standard. For example, the Society for Human Resources Management (“SHRM”), the world’s largest professional association devoted to human resource management and an organization of which I am a member, is a key authority relied upon in articulating industry “best practices” for the handling of employer-employee issues in all aspects of Human Resources as well. Another noted authority relied upon for the articulation of such “best practices” is Business and Legal Resources (“BLR”), an acknowledged authority providing updated coverage of state and federal laws and industry standards on a variety of workplace matters.<sup>4</sup> BLR’s business and legal resources are prepared by lawyers and industry experts for the business world so that organizations can have access to appropriate tools and resources for compliance. The Association of Workplace Investigators (“AWI”) is a professional organization designed to

<sup>1</sup> Available at <http://www.eeoc.gov/policy/docs/harassment.html>.

<sup>2</sup> Available at <http://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf>.

<sup>3</sup> Available at <http://www.mass.gov/mcad/shtoc.html>.

<sup>4</sup> I spoke at BLR's National Employment Law Update in November 2010, in Las Vegas, Nevada, and I have been quoted in BLR publications.

promote and enhance workplace investigations, and is a resource for the proper conduct of investigations.<sup>5</sup>

My evaluation of the company's action is based on whether it followed its own policies and industry standards with respect to these practices, as articulated in the sources described above and throughout this report, have been adhered to and followed. Wherever possible, I rely on the company's version of the facts, as I am not making any credibility determinations.

**I. SUMMARY OF OPINIONS**

**(1) THE COMPANY'S REPEATED REFUSAL TO ACT RESPONSIVELY TO THE WORKPLACE DISPUTE OR INSTITUTE INTERIM MEASURES TO PREVENT FURTHER ESCALATION OF THE DISPUTE WHILE MR. TUVELL'S COMPLAINT WAS PENDING WAS CONTRARY TO BEST PRACTICES**

- A. The Company Failed to Intervene Early On to Mediate the Conflict Between Walter Tuvell and Fritz Knabe, Contrary to Best Practices
- B. The Company Failed to Implement Interim Measures When Mr. Tuvell Claimed Discriminatory Treatment

**(2) THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES OR ITS INTERNAL POLICIES IN SELECTING RUSSELL MANDEL AS INVESTIGATOR**

- A. Mr. Mandel Reviewed and Sanctioned Ms. Due's Investigation, Thus Destroying Any Independence
- B. Mr. Mandel Was a Person Accused of Engaging in Wrongdoing
- C. The Company Failed to Comply With Best Practices When It Selected Mr. Mandel as Investigator Because He Lacked Knowledge and Capability to Apply Best Practices and Company Policies That Were in Place to Ensure Neutrality and a Fair Process
  - 1. Not Understanding Third Party Complaints
  - 2. Failing to Interview Mr. Tuvell While He Was on STD
  - 3. Failing to Appreciate the Timeliness Requirement in the Policy

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<sup>5</sup> I am a member of the Board of Directors of AWI, have been a speaker at the AWI annual conference, and have been conference chair of the AWI annual conference in 2012 and 2013 and will continue in this role in 2014. I have published in the AWI Quarterly, which is a peer-reviewed publication.

4. *Chastising Him For Availing Himself of the Corporate Open Door Process*
5. *Denying Mr. Tuvell Access to Company Systems*
6. *IBM Knew or Should Have Known that Mr. Mandel Had a History of Failing to Conduct Prompt or Neutral Investigations, Contrary to Policy*
7. *Failing to Treat the Complaining Party and Accused Equally*

D. *The Company Failed to Comply with Best Practices Because It Insisted on Using Mr. Mandel as an Investigator Notwithstanding Mr. Tuvell's Clear Assertion That He Did Not Have Faith in the Integrity of Any Process Spearheaded by Mr. Mandel*

(3) **THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES AND ITS OWN POLICY BY NEGLECTING TO INVESTIGATE ALL COMPLAINTS OF DISCRIMINATION AND RETALIATION AND, FURTHER, BY FAILING TO THOROUGHLY INVESTIGATE WHEN IT DID**

A. *The Company Failed to Follow Best Practices and Its Internal Policies in that It Did Not Acknowledge and Investigate Mr. Tuvell's Discrimination and Retaliation Claims*

1. *Lisa Due, Investigation #1, and June 29, 2011 Report*
2. *Mr. Mandel, Investigation #2, and September 15, 2011 Report*
3. *Mr. Mandel, Investigation #3, and February 1, 2012 Report*

B. *The Company's Failure to Apply Best Practices With Regard to Mr. Tuvell's Claim of Disability Discrimination and Retaliation Meant that the Complaints Were Not Fully Investigated, the Relevant Evidence Was Not Gathered, and the Conclusions Reached Were Not Based on Credible Evidence Analyzed for Factual and Logical Consistency*

## II. FACTS AND DATA CONSIDERED

### A. IBM Policies

#### 1. *Discrimination and Harassment Policies*

In the “About Your Job” June 2009 policies, IBM outlines its harassment, EEO, and workplace diversity policies. (TUVELL 5881) The company maintains a policy entitled “Equal Opportunity.” In this policy, the company states that hiring and advancement are based on job-related requirements and an individual’s qualifications to perform a job. All aspects of employment are carried out free of discrimination and harassment based on gender, disability, and other protected characteristics. Anyone who believes he/she has been a victim of any violation of IBM’s equal opportunity policies is strongly urged to talk to a manager or bring the complaint through any of IBM’s communication channels.

IBM also maintains a policy entitled “Harassment and Inappropriate Behavior.” In that policy, IBM states its commitment to providing a work environment free from harassment based on gender, disability, and other protected characteristics. The policy states that IBM employees who engage in harassment or inappropriate behavior are subject to a range of discipline. The relative seriousness of the conduct and any past warnings will be considered. In certain circumstances, it may be appropriate to transfer the offender to another department or location. If the victim requests it, he/she may be transferred to another department or location.

The complaint procedure states that employees are encouraged to report misconduct to management, senior management, or the Human Resources department. Additional other channels are available as well, including websites and outside telephone numbers. Aggrieved employees are advised that complaints will be investigated “promptly and dealt with appropriately.” Retaliation is forbidden.

#### 2. *IBM’s Concerns and Appeals Program (Open Door, Panel Review & Confidentially Speaking)*

The Concerns and Appeals program, dated May 19, 2008, is contained in a 10-page policy and procedure, and it outlines the Open Door policy, eligibility, investigation, Panel Review, and the like. (TUVELL 2557-67)

IBM provides an overview of its program. It is available when an employee has a problem, question, or comment that could affect job satisfaction and work performance. The program consists of three (3) different processes: Open Door, Panel Review, and Confidentially Speaking. The employee may choose any of the processes. Panel Review decisions cannot be appealed through the Open Door process and vice versa. A Confidentially Speaking concern may be converted to a Panel Review or an Open Door before a response is given. When an appeal is requested, the individual responsible for administering the process has sole discretion to determine the scope of the investigation which may be conducted.

The Open Door process reviews an action by management that affects an employee. All issues, except policy decisions and operational business decisions, are eligible for review under this process. The intent is to ensure an *objective and thorough* review of the issues, and ensure the employee was treated fairly.

Under the panel review process, a panel of employees and managers will decide appeals involving the interpretation of company policies or established practices that affect employees.

Confidentially Speaking is a confidential 2-way communication channel for an employee to use to raise concerns, express opinions, or report questionable behavior.

With regard to Open Door, the “trained investigator,” who is usually a senior manager, gathers relevant facts and recommends a solution to the reviewing executive. The investigation and conclusion are designed to take place in a timely fashion, normally thirty (30) to sixty (60) business days. The time period may be extended for various reasons, such as the complexity of issues and availability of parties involved.

All regular and part-time employees, *including employees on a leave of absence*, are eligible to utilize the Open Door process.

Prior to utilizing Open Door, the employee must give management an opportunity to resolve the concern. That is, the employee must first discuss the issue with his first-line manager. If the employee has already done that and is unsatisfied, the employee must contact the next level of management or the first level of management *not involved in the issue*. The employee may pursue Open Door if he disagrees with the response of the second management.

The policy also explicitly states that IBM has Open Doors to the corporate office, a special process known as Corporate Open Door. The corporate office includes senior executives who report directly to the Chairman. Concerns directed to the corporate office will be acknowledged by the Corporate Employee Relations Special Programs staff. The concern will be assigned to the appropriate executive for handling. Where appropriate, appeals sent to the corporate office will have an appropriate senior executive review recommendations and comments prior to a final decision being made.

Employees may request a Corporate Open Door by bringing the matter to the attention of senior management in the Operating Unit or to the local Human Resources Manager. A Corporate Open Door may be requested through the Essential Links on the On Demand Workplace or directly through a particular website address. Alternatively, employees may initiate an Open Door upon writing a letter to the appropriate executive, sending a Lotus Note to “APPEALS/Armonk/IBM” or by calling a particular phone number. Within two (2) days, the employee will normally receive a phone call. At that time, the employee will be advised which executive has been assigned to handle the Open Door.

The investigator is the representative of the executive to whom the appeal is assigned. Usually it will be someone from the local area. The investigator must be objective, as the policy states, *“The investigator...must not have been involved in the issue being investigated and, in IBM’s*

*opinion, is sufficiently removed organizationally from the employee to provide objectivity.”* (Emphasis supplied) The policy further states, “The investigator’s primary responsibility is to provide an objective and thorough review of the issues. In addition, the investigator is responsible for recommending: any disciplinary action management should take, an action plan to prevent the issue(s) from recurring, and an action plan to ensure an equitable result for the employee making the appeal.”

Under normal circumstances, the investigator should interview the complaining employee and his management. The investigator should consider interviewing others who have relevant knowledge, including individuals suggested by the complaining employee.

At the conclusion of the investigation, the employee will be advised either over the phone or in person. Also, the employee will usually receive a written response from the reviewing executive.

### *3. Revised Concerns and Appeals Program*

The Concerns and Appeals Program was revised effective January 11, 2012. I note that the 2012 policy and procedure differs from the 2008 one in several respects. (Bates 2342-52) It states that a trained investigator is assigned to act as the designated reviewer. It omits the language that that investigator is “usually a senior manager.” Further, it states that the process will normally take forty-five (45) to sixty (60) days.

Section 2.4 from the 2008 policy is entirely omitted in the 2012 version. That is, Section 2.4 describing the Corporate Open Door process was stricken from the revised policy. Accordingly, IBM no longer encourages employees to report concerns to the corporate office.

In the revised policy Section 2.5 “The Investigator,” IBM has stronger language regarding the need for objectivity and lack of bias on the investigator’s part. It contains the following new language that was not included in the 2008 version: “The reviewer who is assigned the case must not have had any involvement in the underlying decision being appealed and must be, in IBM’s opinion, sufficiently removed from the management decision being reviewed.”

### *4. Leaves of Absence Policy*

IBM’s policy 2.4 “At Work and Away” references attendance, leaves of absence, short-term disability, and FMLA. Employees are advised that they may be granted a personal leave of absence without pay depending on a variety of circumstances. During such absence, employees are still eligible for medical and dental coverage as well as selected other benefit plans that IBM provides.



## 5. *Business Conduct Guidelines*

IBM maintains a comprehensive set of policies about appropriate workplace behavior in a document entitled Business Conduct Guidelines or “BCG.” (IBM 2353-85) In its Guiding Principles, the company discusses its commitment to integrity, business ethics, and compliance. While many of the issues discussed are unrelated to this case (i.e. gifts and bribes, competitors, immigration, and international trade), several provisions are directly on point.

In the letter from Samuel Palmisano, Chairman, President and Chief Executive Officer, IBM states that it is well established that all employees are expected to comply with laws and ethical practices in all aspects of business. Mr. Palmisano describes the Guidelines as values and includes a statement about “personal responsibility to manifest the highest standards of trust, ethics and responsibilities in all of our actions and relationships.” (IBM 2357)

The Business Conduct Guidelines provide general guidance for resolving a variety of legal and ethical questions. In addition to BCG, employees are told that they are expected to comply with other applicable policies, directives, and guidelines of IBM, some of which are referenced in the BCG. IBM states its commitment to comply with all laws and regulations that apply to its business.

Section 2.0 of the BCG is entitled “Speaking Up.” There, IBM states that it is each employee’s “responsibility to know and follow the Business Conduct Guidelines [which] includes reporting potential violations. IBM will promptly review your report and will not tolerate threats or acts of retaliation against you.”

In Section 2.1, “Raising Concerns and Reporting Violations,” IBM states, “If you know of, or have good reason to suspect, an unlawful or unethical situation or believe you are the victim of prohibited workplace conduct, immediately report the matter through any of IBM’s Communication Channels.” (IBM 2361) IBM goes on to give a bulleted list of seven (7) potential reporting channels, to include but not be limited to a manager, Human Resources, the Concerns and Appeals program, internal audit, and Trust & Compliance. The policy states that the Concerns and Appeals program includes “Open Door” to higher management as well as the “Confidentially Speaking” program. Employees are reminded that these programs allow them to submit concerns online, by email, regular mail, fax or phone. The clear message is that IBM wants employees to speak up when issues arise.

In Section 3.5, “Reporting, Recording and Retaining Information,” IBM emphasizes the importance of honesty and truthfulness by all employees. The company reinforces that employees must be accurate, complete and honest when making any reports. Employees are warned, “Never make misrepresentations or dishonest statements to anyone. If you believe that someone may have misunderstood you, promptly correct the misunderstanding. Reporting inaccurate or incomplete information, or reporting information in a way that is intended to mislead or misinform those who receive it, is strictly prohibited and could lead to serious consequences.” (IBM 2367)

Accurate information in connection with workplace investigations, according to IBM, is particularly important. IBM states that it expects full cooperation from all employees, which includes employees' "promptly, completely, and truthfully" participating in the investigative process.

6. *Leaves of Absence Policy*

IBM's policy 2.4 "At Work and Away" references attendance, leaves of absence, short-term disability, and FMLA. Employees are advised that they may be granted a personal leave of absence without pay depending on a variety of circumstances. During such absence, employees are still eligible for medical and dental coverage as well as selected other benefit plans that IBM provides.

B. *Other Documents*

I reviewed a number of documents that have been produced to date during the course of this litigation for the purpose of reviewing, assessing and commenting upon the company's employment practices and procedures.

In the course of my examination of the facts, the following documents contained facts or data that I considered in forming the opinions expressed in this report:

- All documents referenced within this report
- Tuvell Bates #1-1526
- Select documents produced by IBM in discovery
- First Amended Complaint and Demand for Jury Trial
- Various pleadings filed with the Massachusetts Commission Against Discrimination
- Policies and procedures of IBM, including but not limited to Business Conduct Guidelines, Concerns and Appeals Program, and About Your Job
- Notes, report, and other writings pertaining to Russell Mandel's investigation
- Notes, report, and other writings pertaining to Lisa Due's investigation
- IBM's Supplemental and Further Supplemental Interrogatory Answers
- Select excerpts from Lisa Due's deposition

- Various communications between Walter Tuvell and various IBM representatives
- Various communications among IBM representatives
- Various Open Door Complaints filed by Walter Tuvell and associated documents
- Various documents associated with Mr. Tuvell's application for Software Developer positions and IBM's responses

### **III. CHRONOLOGY OF RELEVANT FACTS**

In this report, I will not be providing a detailed recitation of Walter Tuvell's employment history, as it is unnecessary in my analysis here. In the Complaint, Mr. Tuvell outlines relevant background information. In addition, in Russell Mandel's September 15, 2011 report, he cites background information. (IBM 11148)

#### *May 18 – First Sign of Trouble*

The so-called "Excel graphic" incident took place on May 18, 2011, whereby Walter Tuvell, Band 8 Advisory Software Engineer, complained that Fritz Knabe, Distinguished Engineer and a dotted line supervisor to Mr. Tuvell, treated him inappropriately by defaming him. Further, Mr. Tuvell complained that Mr. Knabe falsely accused him of failing to produce assigned work and publicly yelled at him on June 8, 2011. Mr. Tuvell also characterized Mr. Knabe's behavior as bullying and harassment. Thereafter, Mr. Tuvell repeatedly requested a 3-way meeting with Mr. Knabe and his manager, Daniel Feldman, Director, Netezza Performance Architect, Software Group, Information Management, to clear the air and resolve differences.

It is undisputed that Mr. Tuvell made multiple requests for a 3-way meeting. The facts apparently show that, on at least six (6) occasions according to Mr. Tuvell's count, Mr. Tuvell asked Mr. Feldman to call a 3-way meeting with him, Mr. Knabe and Mr. Feldman to clear the air, and Mr. Feldman consistently refused each time. (For example, on May 19, 2011 and May 20, 2011, Mr. Tuvell stated to Mr. Feldman that a 3-way meeting was needed (TUVELL 512); a June 14, 2011 email from Mr. Tuvell to Dan Feldman, Kelli-ann McCabe, Vice President of Human Resources, Netezza, and Diane Adams, Netezza Steady State HR Leader, also states that he had repeatedly requested a 3-way meeting. (TUVELL 265). Mr. Feldman himself admitted refusing to review/discuss the matter with Mr. Tuvell, and admitted refusing 3-way meetings.<sup>6</sup> (IBM 8997) It was confirmed in the investigative notes of Lisa Due, Human Resources representative, that Mr. Feldman refused to have a 3-way meeting. (IBM 11137)

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<sup>6</sup> Mr. Feldman apparently testified in his deposition that requests had been made and that he refused. I have not reviewed any deposition transcripts.

Also, in a goodbye letter to colleagues from June 14, 2011, Mr. Tuvell stated that he repeatedly asked for a 3-way conversation to clear the air, but that has been refused. (IBM 8825)

In Russell Mandel's September 15, 2011 report, he addresses the reasons why Mr. Feldman rejected the suggestion for a 3-way meeting. He stated as follows:

Mr. Tuvell requested a three-way meeting between Mr. Knabe, Mr. Feldman and Mr. Tuvell to discuss the events of the prior week. Mr. Feldman refused because he "wasn't interested in mediating dispute but in building credibility by delivering results."

(IBM 11152; IBM 8997)

It also appears that the company took no steps to attempt to mediate or otherwise resolve the conflict that existed between these two co-workers. Rather, the company determined that removing Mr. Tuvell from his position was the appropriate action step.

*Walt Tuvell Seeking HR's Help to Assist with the Rift Between Him and Fritz Knabe*

**June 10 – Demotion and Mr. Tuvell Seeking HR Intervention**

On June 10, 2011, Mr. Tuvell was removed from his position as Band 8 Advisory Software Engineer and switched to the job held by Sujatha Mizar. Interestingly, I have never seen reference to Ms. Mizar's job title. Mr. Tuvell's Band remained unchanged. In Lisa Due's notes, she acknowledges that Mr. Tuvell's switch with Sujatha Mizar is a demotion. She states, "Walt [Tuvell] is a band 8, one he switched with is a band 7. So think it is going to be a lesser role so manager needs to augment it...according to advice by Diane [Adams]." (IBM 11130)

While the reason for his demotion was not documented at the time, IBM has since stated that Mr. Tuvell was demoted because of his "inability to work effectively with Mr. Knabe." (May 11, 2012 position statement, Page 4)

Also, on June 10, 2011, Mr. Tuvell sent an email to Kelli-ann McCabe with the subject "A request for help." He forwarded her several emails pertaining to the yelling and conflict that had recently taken place involving him and Mr. Knabe. He stated, "I would like to learn how I could have handled things better." Mr. Tuvell had previously requested that his manager, Daniel Feldman, hold a 3-way meeting to include him and Mr. Knabe. (IBM 8855) He also provided her with documentation pertaining to the weekly report that he had sent to Mr. Feldman. (IBM 8852)

It is interesting that, in its position statement, IBM continually refers to Mr. Tuvell's transfer away from Mr. Knabe as "an accommodation." For example, at the top of Page 16, IBM states that the change in assignment "was an accommodation to Complainant and who could not work with Mr. Knabe." Mr. Tuvell never requested this so-called "accommodation" and, indeed, protested it repeatedly in the days and weeks ahead.

More specifically, Mr. Tuvell considered this transfer to be a "demotion," and an adverse job action for a variety of reasons. I start with stating that IBM considers an "undesirable reassignment" to be a tangible adverse employment action, according to its "Harassment and

Inappropriate Behavior” policy. (TUVELL 66) Several reasons support Mr. Tuvell’s contention that this was a demotion. First, he was assuming the role of a less qualified, less educated employee who was in a lower Band than he was. Next, he had been doing highly significant research in an advanced development position that was unique in the industry, and it was creative, inventive programming work; now, he would be taking on more lower-quality work assignments. (TUVELL 583) In his former job, Mr. Tuvell worked on a high-profile new product (Wahoo) as opposed to lower profile work on old products. It was a loss of prestige and opportunity. Mr. Tuvell reports that Mr. Feldman had described his former job as a plum position. Also, the work location changed, and Mr. Tuvell much preferred working in Cambridge where he had been removed from.

As was revealed later in Lisa Due’s interview, In an interview with John Metzger, the questions were framed: *“Is the move to Michael’s team a demotion? Did he discuss with Walt? Preferred by Walt?”* (IBM 11133) It was also acknowledged that Sujatha Mizar was *“not as senior skilled.”* (IBM 11138-39) (Emphasis supplied)

June 13 – *Mr. Tuvell Describes His Now Former Job as Perfect for Him and a “Plum Position”*

Mr. Tuvell sent a lengthy email to Ms. McCabe on June 13, 2011 with further explanation of the context and situation. (IBM 8847-49) He made reference to the Wahoo project that he was working on as “the best possible position for me.” He also stated that Mr. Feldman told him it was a “plum position for anybody to nab.” Ms. McCabe and Mr. Tuvell met on June 13, 2011. (IBM 8832)

June 13 – *Mr. Feldman Expresses Desire to Have Mr. Tuvell Terminated*

Also on this day, it appeared that Mr. Feldman was advocating for Mr. Tuvell’s termination because of his medical/psychological condition and alleged violent tendencies. More particularly, Mr. Feldman felt strongly about Mr. Tuvell being “irrational and potentially dangerous.” In a June 13, 2011 email that Mr. Feldman sent to John Metzger, his supervisor and the Vice President, Product Strategy, and Kelli-ann McCabe, Mr. Feldman expressed concerns that Mr. Tuvell was a danger, and he referenced Mr. Tuvell’s May 26 disclosure that he suffers from Post Traumatic Stress Disorder (“PTSD”) and Depression. He further stated that Mr. Tuvell raised his voice to him on occasion and rose from his chair in anger when discussing a work issue. (IBM 8689) He also stated that a recent email from Mr. Tuvell was “quite bizarre,” and stated that it contained complaints and threats. He stated that Mr. Tuvell seems to be angry with Fritz Knabe, and he expressed fear that he was perceived the same way. He stated that he believed Mr. Tuvell’s behavior was unpredictable.

Significantly, Mr. Feldman expressed his opinion that Mr. Tuvell should be terminated. He stated that he was involved in a “similar situation” with a prior employer where an employee engaged in threatening behavior. That employee was terminated immediately. He suggested that the company “take a similar action.” I am told that Mr. Feldman admitted at his deposition that, by this language, he was advocating for Mr. Tuvell’s termination.

Mr. Tuvell’s “weekly report” that was submitted in a June 12, 2011 email seemed to prompt Mr. Feldman’s correspondence. (TUVELL 260-262) In that email, Mr. Tuvell stated that, during the week of June 5 to June 12, 2011, Fritz Knabe was bullying, harassing, and yelling at him and told lies which constituted “defamation.” He said that Mr. Feldman told him that Mr. Knabe falsely accused him of being a liar and a bully, and opined that such conduct is illegal.

Dan Feldman responded to Mr. Tuvell’s June 12, 2011 weekly report by stating that all future communications will include Human Resources. (IBM 8864)

In that weekly report, Mr. Tuvell also complained about the June 10<sup>th</sup> demotion. He said that he suffered “public humiliation” because he was removed from his high-profile position on Wahoo to a “highly symbolic deportation to Siberia.” He said he was unjustly accused. He stated that he had since filed a complaint pursuant to corporate processes.

Further, he criticized Dan Feldman for refusing his multiple requests for a 3-way meeting to include Mr. Knabe.

Also that day, Mr. Tuvell noted that Mr. Feldman was making the process adversarial by, among other things, addressing him as “Dear Dr. Tuvell” in his last communication. He also stated that he felt retaliated against. (IBM 8863-64)

Mr. Tuvell reached out to colleagues after learning of his demotion. For example, he told Huamin Chen that he was “fired” from Wahoo for reasons that he did not understand. Mr. Chen expressed his shock and disappointment, referring to Mr. Tuvell as a “great colleague.” (IBM 8828-29) Similarly, co-worker Jeffrey Keller said that he was completely surprised to learn of Mr. Tuvell’s leaving, and said that he was “sorry to hear it.” (IBM 8829) Other colleagues expressed well wishes to Mr. Tuvell as well, upon learning of his departure.

*June 13-14 – Mr. Tuvell Alerts IBM to Upcoming Leave of Absence and Vacation*

By email dated June 13, 2011, Mr. Tuvell advised Mr. Feldman that he was undergoing surgery on July 7 and would be away from the office for approximately four (4) weeks. He said that he would be able to work at home on many, but not all, of those days (but unable to work on some days). He also stated that he expected to “double-up on the time-away-from-office and take a week-long vacation.” (IBM 8840)

On June 14, 2011, Mr. Tuvell further clarified and revised his anticipated leave of absence, stating that he would not be working July 7 or 8, he anticipated being able to work July 11-22, he would be on vacation July 25-29, and he would return to the office on August 1. (IBM 8833-34)

*June 15 – Complaint of Gender and Age Discrimination*

In his June 15, 2011 email to Dan Feldman, Kelli-ann McCabe, and Diane Adams, Walt Tuvell expresses his opinion that his demotion was due to gender and age.<sup>7</sup> Sujatha Mizar replaced him

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<sup>7</sup> He also referenced “snide harassment/retaliation,” without elaborating, and softly said that “perhaps even race” might be a factor in his position switch.

in his position. More specifically, he said that he was replaced with an employee who lacked the educational degrees and relevant work experience that he had and, thus, had inferior qualifications. He expressly pointed out that Ms. Mizar was someone of a different gender and one who is much younger than him. He explicitly stated that the company could have replaced him “with another person in his group (Ashish Deb), who also has a PhD, is male, and is over 40.” He stated that replacing him with Mr. Ashish would have made more sense from a business standpoint because the work Mr. Ashish was doing was more compatible with Mr. Tuvell’s background. He expressly stated that the adverse job action created a “prima facie case (and even stronger) for discrimination on the grounds of both age and sex...” (TUVELL 265-266)

**June 16-30 – *Lisa Due Conducted Investigation***

In an email from Diane Adams in HR to Mr. Tuvell, on June 16, 2011, she stated, “Walt, just wanted to let you know that Lisa Due has been assigned to look into your concerns. She is a very experienced, knowledgeable HR professional. You can expect to hear from her over the next few days as she will want to better understand the situation and get your perspective.” (IBM 4707)

Further, in written discovery, the company was asked to describe the investigation(s) of Mr. Tuvell’s “complaints of discrimination, harassment and/or retaliation” to include all action the company took to investigate. (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14) The company was asked to identify the complaints, identify whether an investigation followed, and identify who acted as investigator, identify witnesses, identify documentation generated, identify documents reviewed, identify conclusions, any corrective or remedial measures, and the like. In its answer, the company advised that it conducted three (3) investigations (one by Ms. Due and two by Mr. Mandel).

With regard to Investigation #1, in June of 2011, the company stated that Human Resources representative Lisa Due acted as the investigator.<sup>8</sup> In connection with that investigation, the company represented that Ms. Due interviewed the following individuals:<sup>9</sup>

- Walter Tuvell
- Fritz Knabe
- Dan Feldman

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<sup>8</sup> Kelli-ann McCabe stressed that Lisa Due was “the lead” to handle Mr. Tuvell’s issues. (TUVELL 641-642) Inexplicably, I am told that Ms. Due testified at her deposition that she was not investigating Mr. Tuvell’s complaint but, rather was engaged in something called “management consultation.” This contradicts the documents that I reviewed and relied on.

<sup>9</sup> I was told that, at her deposition, Ms. Due testified that she did not interview Mr. Aggarwal, Mr. Chen, Mr. Keller, or Mr. Title. This contradicts written discovery answers. Her notes, however, offer no evidence that she did interview any of these four (4) individuals who she now says she did not interview. Further, her internal investigation notes indicate that she interviewed Kelli-ann McCabe and Diane Adams, who are not named in the company’s discovery responses.

- Devesh Aggarwal
- Huamin Chen
- Steven Lubars
- Jeffrey Keller
- Gerrold “Richard” Title

It appears the scope consisted of three (3) issues: Whether Mr. Tuvell was “defamed” in connection with the Excel graphics issue, whether he was demoted because of it, and whether he acted inappropriately by taking papers from Dan Feldman and becoming angry about it. Significantly, the scope *did not* include the discrimination or retaliation claims that Mr. Tuvell raised.

Some noteworthy notations in the documentation of Lisa Due include the following:

- According to the interview of Kelli-ann McCabe on June 16, 2011, Ms. McCabe and Diane Adams told Mr. Feldman that the tone in one of his messages (presumably the so-called “Dear Dr. Tuvell” email) “was over the top.”
- Dan Feldman referred to Mr. Tuvell as an “emotional crusty individual.”  
  
It appears that Kelli-ann McCabe referred to Mr. Tuvell as “crusty” as well. Both knew at the time that Mr. Tuvell was suffering reactions from his PTSD.
- John Metzger recognized that Dan Feldman and Walt Tuvell would not work well together and said there may be an opportunity for Mr. Tuvell to work with another manger. (IBM 11133)
- In an interview with John Metzger, the questions were framed: “*Is the move to Michael’s team a demotion? Did he discuss with Walt? Preferred by Walt?*” (IBM 11133) (Emphasis supplied)
- Dan Feldman seems to admit that Fritz Knabe engaged in wrongdoing. Lisa Due’s notes of her interview with Mr. Feldman state, “Fritz is a bully and a liar, dan (sic) said you exhibited some bullying behavior *too*.” (IBM 11138) (Emphasis supplied)
- Mr. Feldman picked Sujatha Mizar to replace Mr. Tuvell, “*Sujatha [Mizar] is not as senior skilled.*” (IBM 11138-39) (Emphasis supplied)



It appears that HR was saying that Dan Feldman was “putting company at risk” by “sending inflammatory emails -- taking the bread crumbs.”<sup>10</sup> It seems he was told “do not respond, have HR check emails.” It seems he was further told “no retaliation/retrib!” (IBM 11137)

Interestingly, in Lisa Due’s notes, she included notes of a meeting or interview that she had with Russ Mandel on June 27, 2011.<sup>11</sup> (IBM 11143) While it is unclear the meaning of the notes, they state as follows:

Rules of court of law don’t exactly apply to the business environment.  
One of the things that differentiates IBM from others is this organization that investigates appeals.

Manager is treating different than everyone else...making sure you are doing your job.

Think being too nice to the manager, from complex case perspective.  
Employee didn’t bring the complaint.

Tell the ee: manager/hr communicated complain (sic) re; weather (sic) mistreated (sic), find no reason to conclude that.

Now up to manager to manage the employee. Then turn it over to HR/manage as performance.

No need to place him in another role. Like a tantrum for a 2 yr old, they will learn to do it again if you give in what they need.

I prefer respect but fear is not a bad second choice.

In the conclusion, Lisa Due notes that there was “not really anything for defamation,” and performance management needed to take place. There was no problem, and Mr. Tuvell was free to look for another position if he did not want to be in his existing role. (IBM 11145)

#### **June 16 – *Requests for Interim Measures***

By email dated June 16, 2011, from Mr. Tuvell to Diane Adams and Kelli-ann McCabe, Mr. Tuvell stated that it was not feasible for him to continue to work with Dan Feldman, and he predicted that he would continue to be bombarded with harassment and retaliation and anticipated having to leave the company due to a “hostile environment.” (IBM 8504-05) In

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<sup>10</sup> I am told that Ms. Due testified in her deposition that she did not recall further context for these notations.

<sup>11</sup> I am told that, at her deposition, Lisa Due testified that she did not “interview” Russell Mandel but, rather, gave him a “briefing.” I am told that she has been an IBM employee since 1997 and had a role as an investigator for many years. I was told that she became a Senior Case Manager in 2008, and she was responsible for conducting investigations. IBM referred to her as a “very experienced, knowledgeable HR professional.” (IBM 4707) Accordingly, it is unknown why she needed to involve him during her investigation to either gather information from him or otherwise inform him of her findings.

response, six (6) minutes later, Diane Adams expressed, “I don’t think we should be making any changes before this matter is looked into. Agreed?” (IBM 8504) Lisa Due agreed, stating that it was “too premature” to make any change. (IBM 8503)

In a second June 16, 2011 email from Walter Tuvell to Kelli-ann McCabe and Diane Adams with a subject line of “Help,” Mr. Tuvell stated that it was “not reasonable for IBM to require [him] to work for a known-abusive boss.” He stated that it may not have yet been “proven” that he was abusive, and he stated that “IBM cannot comfortably support a policy of ‘presumed non-abusive’ in a case like this, because the consequences of being wrong are just too high.” (TUVELL 738-39) He stated that Mr. Feldman was starting to set him up, and he asked them to remove all possibility of letting this happen.

#### *June 23 – Another Request for Interim Measures*

In Mr. Tuvell’s June 23, 2011 email to Lisa Due, he made it abundantly clear – once again-- that he sought a separation from Mr. Feldman while Ms. Due/Human Resources was investigating his complaints. He stated that he was having difficulty coping in the “transition” of the new position. He reiterated that he has made it clear to Human Resources that he was nearly incapacitated by a recurrence of his PTSD, could not eat because of stomach problems caused by anxiety, could not sleep because of lack of food, and could not concentrate because of lack of sleep and intrusive thoughts. He advised Ms. Due that he sought psychological help and was taking medication.

He stated, “I have begged HR to release [me] from the grasp of the likes of Dan [Feldman], yet I am still forced to be here, more vulnerable than ever, and tortured beyond my ability to stand it.” He asked if there was an opportunity to allow him not to work with his “tormentor” at that time. (TUVELL 666-67)

Ms. Due rejected his request to remove him or Mr. Feldman from their respective positions, characterizing it as “premature” to make any changes while the investigation was ongoing. (TUVELL 667-68)

#### *June 28 – Another Request for Interim Measures*

Further, in a June 28, 2011 email from Mr. Tuvell to Mr. Feldman, Diane Adams, Kelli-ann McCabe, and Lisa Due, he stated that he has “BEGGED HR to get [him] away from [Mr. Feldman], as fast as possible, and I hereby repeat that plea. I do not trust you, and I fear you (i.e. do not feel safe around you), for good/rational reasons correctly/truthfully stated...” (TUVELL 672-73) He reiterated his concern that he is being subjected to a hostile work environment when he works with Dan Feldman. Nevertheless, he stated, “I’ve been forced to continue working for Dan [Feldman] and I despise every moment of it. I CONSIDER IT RETALIATION. My health (both physical and mental) is suffering, as I have duly informed all of you.” (TUVELL 673)

June 29 – *Lisa Due’s Report of Investigative Findings – Investigation #1*<sup>12</sup>

Ms. Due begins her June 29, 2011 email/report by stating, “As you know, I was asked to conduct an investigation into concerns raised regarding your treatment by your manager, Mr. Daniel Feldman. I have completed my investigation and found that there was insufficient factual information to support your allegations.”<sup>13</sup> (IBM 8283)

With respect to work life going forward, Ms. Due advised Mr. Tuvell that he could proceed with his current assignment. Alternatively, she advised him that he was free to apply for other positions within IBM, and she referenced the Global Opportunity Marketplace (“GOM”) job system and provided him with the website address. She reminded him that he would be required to perform his current job while pursuing the search for a new role.

She also provided him with an appeal mechanism. That is, she stated that he could engage Russell Mandel, HR Program Director of Concerns & Appeals, if he disagreed with her investigative findings. She stated that Mr. Mandel would review whether the investigation was performed properly under IBM’s investigation guidelines.

What the conclusion/ report shows is telling: There was absolutely no mention of Mr. Tuvell’s claims of discrimination or retaliation. No mention also of the Fritz Knabe’s admitted voice raising, which one can also construe as yelling.<sup>14</sup> No mention is made of Mr. Feldman acting inappropriately. There is also no record of what documentation, if any, was reviewed in connection with the investigation. No conclusions were reached about whether Mr. Tuvell was “defamed” or harassed in connection with the Excel graphics issue, whether he was demoted because of it, and whether he acted inappropriately by taking papers from Dan Feldman and becoming angry about it.

I was advised that Ms. Due testified at her deposition that she admittedly failed to investigate Mr. Tuvell’s claims of discrimination and, further, did not seek to determine whether Mr. Feldman had a history of engaging in inappropriate comments based on age or gender or had a history of engaging in age or gender discrimination. This admission confounds me, as Mr. Tuvell very clearly and unequivocally claimed “discrimination” in his many complaints.

June 29 -- *Mr. Tuvell’s Appeal of Lisa Due’s June 29, 2011 Report on Investigation #1*

On June 29, 2011, fifty (50) minutes after receiving Lisa Due’s report that Investigation #1 lacked merit, Mr. Tuvell sent an email to Mr. Mandel, Ms. Due, Ms. Adams, Ms. McCabe, and

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<sup>12</sup> As per IBM’s Supplemental Interrogatory Responses, #14, this is the first investigation conducted (one by Ms. Due and two by Mr. Mandel).

<sup>13</sup> It is my understanding that Lisa Due testified at her deposition that she was conducting a “management consultation investigation,” which, frankly, I do not understand. The documents I reviewed are very clear that the company investigated Mr. Tuvell’s complaints -- and rightly so, though the investigations were seriously flawed.

<sup>14</sup> Ms. Due received the email with Mr. Fritz’s apology to Mr. Tuvell (TUVELL 8532-8537), but apparently ignored it.

Mr. Metzger indicating that he was going to appeal. He stated that Ms. Due’s conclusion was “utterly wrong,” and he criticized it because she never stated the basis upon which she based her finding. (TUVELL 715-16) He expressed his intent to enter the IBM Concerns & Appeals process, effective immediately.<sup>15</sup> (TUVELL 716)

Kelli-ann McCabe, in an email dated June 29, 2011 to Lisa Due and Diane Adams, asked what happens next. (IBM 8475) Ms. Due responded, “Typically, Russ [Mandel] would review what I have done and then get back to the employee. ***In this matter, I already ran the case by Russ. He may have all the information he needs or contact me to fill in gaps.*** Then he will close with the employee.” (IBM 8474) (Emphasis supplied) \* See also note below from August 18, 2011.

*June 29 – Mr. Tuvell Seeks Alternative Position*

In an email dated June 29, 2011 from Mr. Tuvell to John Metzger and others, Mr. Tuvell expressly asked Mr. Metzger for help in finding a job at Netezza outside the influence of Dan Feldman and Fritz Knabe. (IBM 716)

*June 30 – Mr. Tuvell Working While on STD Leave*

An email exchange from June 30, 2011 demonstrates that the company asked for Mr. Tuvell’s response, and he gave it, while out of work on STD. That is, Mr. Feldman emailed Mr. Tuvell and said that he realized that Mr. Tuvell was out sick and would not be able to write the summary he asked for, but he asked him to focus on writing the summary when he was well enough to return to the office. A half-hour later, Mr. Tuvell responded and provided a summary. Mr. Feldman responded and asked him additional questions that were work-related. He then stated that Mr. Tuvell should not be working if he was recording the day as a sick day. (TUVELL 674-75) Mr. Tuvell explained that he was able to work, but just unable to do certain things such as drive a car. Nevertheless, he was capable of working a full 8-hour day and was doing that on June 30. (TUVELL 675)

***July 1 – Mr. Tuvell Re-Lodges Complaint of Gender and Age Discrimination; Adds Complaint of Race Discrimination and Retaliation***

On July 1, 2011, Mr. Tuvell sent a lengthy email to Mr. Mandel regarding a number of “topics for discussion.” He provided the factual background for what prompted him to raise concerns. He reiterated his claim for discrimination, saying, “I’m a man, far over 40, Caucasian. Sujatha [Mizar] is a woman, far under 40. Sujatha is also well-known to be very much under-qualified compared to me. (For example, I have a PhD, she doesn’t, not to mention my decades of much more relevant experience). This amounts to a prima facie case for discrimination on the bases of age, sex and race. This is especially so since Dan [Feldman] has refuse to state to me any reason whatsoever (much less cohere/truthful) for the demotion.” (TUVELL 718)

He also stated that Mr. Feldman’s acts after the complaint amount to retaliation, and he cited several examples including Mr. Feldman addressing him as “Dr. Tuvell,” asking for detailed

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<sup>15</sup> He stated that he would be on a medical leave for two (2) weeks beginning Thursday, July 7, followed by a pre-scheduled vacation. He stated that he would not be able to participate in the process during that period.

day-by-day plan documents over the ensuing three (3) weeks, and the like. He concluded the letter by saying that he had been the victim of “retaliation” and subjected to a “hostile work environment.” (TUVELL 719)

**July 5 – *Additional Request for Interim Measures – to Russell Mandel***

In a July 5, 2011 email from Mr. Mandel, Mr. Tuvell stated that he wanted to reiterate what had been discussed days earlier: “I requested to be removed from my hostile work environment (according to my perception), but you explained to me that it is ‘impossible’ (i.e. not within IBM policy) for that to happen at this time (if ever). I will abide by that decision to the best of my ability, but I reiterate it will be hard for me to do so, and that I continue working under these conditions only under the most strenuous protest.” (TUVELL 719)

Later on July 5, 2011, Mr. Tuvell reiterated his desire to be separated from Dan Feldman in another email to Russell Mandel. He stated that he was doing his best to continue to work with Mr. Feldman “under protest.” (TUVELL 679) He stated that he does not trust Mr. Feldman and he fears him – and stated “(Specifically, retribution and “blackball”).”

Mr. Mandel responded by stating that he had “[n]othing to add, but we have not take[n] any action because we have not concluded that you are indeed working in an inappropriate work environment and I’m still looking into your issues.” (TUVELL 719-20)

**July 6 – *The So-Called Lazy Incident***

Mr. Tuvell sent an email to Mr. Feldman and colleague Garth Dickie regarding the word “lazy,” writing, “If you’re lazy you can just click” the link he provided. (IBM 11162) This email was subsequently referred to as the “lazy scandal” or lazy issue. On July 1, 2011, after being criticized for his choice of words, Mr. Tuvell subsequently apologized, prompted by Mr. Feldman, for his use of the word “lazy” stating that it was an “innocent” and “jocular throw-off.” On July 20<sup>th</sup>, he sent an email apologizing for his apology because “laziness” was not an insult and, therefore, “no apology was necessary.”

**August 3 – *Written Warning***

A Formal Warning Letter dated August 3, 2011 was issued to Mr. Tuvell from Dan Feldman. The disciplinary document states that proper workplace behavior is a condition of employment, and Mr. Tuvell violated it by engaging in the following conduct:<sup>16</sup>

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<sup>16</sup> I note in Further Supplemental Response of Defendant, International Business Machines, Inc. to Plaintiff’s First Set of Interrogatories dated May 13, 2013, Response #9, that the warning was due to Mr. Tuvell’s “escalating inflammatory e-mails and speech aimed at Fritz Knabe, Devesh Agrawal, Sujatha Mizar, and Mr. Feldman, which Plaintiff did not correct even after counseling. Specifically, Plaintiff demonstrated an escalating set of unprofessional and inappropriate comments and behaviors, as well as disregarding management direction from May through July of 2011. This included his confrontation with Mr. Feldman on May 18, 2011, and Mr. Knabe on June 8, 2011, his calling Mr. Knabe a “bully” and a “liar,” his unprofessional comments that Mr. Knabe was “threatened” by Plaintiff and that Mr. Knabe was “going insane,” making “nonsensical” statements and “worthless” comments, and committing “illegal acts” and public humiliation” and denigrating the work of his peers by discussing or referring to their work as “an unbelievable poor solution,” the data provided should be “considered

- Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments, verbally or via notes; specifically, your email of 20 July 2011 addressed to Garth Dickie and me.
- Conduct in the workplace that creates, encourages or permits an inappropriate work environment.

(TUVELL 726)

August 3 to termination date -- *Leave of Absence, STD*

Mr. Tuvell left after a fainting episode in Mr. Feldman’s office during the Formal Warning Letter meeting on August 3, 2011 and never returned to work. He stated that he could not work with Dan Feldman again, and subsequently applied for STD on August 11. He was either on a leave of absence or STD until the cessation of his employment.

August 5 – *Russell Mandel Wrongly Stating that IBM Fails to Accept Third-Party Complaints; States that Mr. Mandel Disqualified from Acting as Investigator*

Mr. Tuvell strongly criticizes Russell Mandel for saying that IBM does not accept third-party complaints. That is, on August 5, 2011, Russell Mandel sent an email to Walter Tuvell stating, “IBM does not accept third-party employee complaints. If [co-worker] Mr. Haldar has a complaint about his treatment, he should complain using the C&A process.”<sup>17</sup> (TUVELL 442)

In response, also on August 5, Mr. Tuvell advised Mr. Mandel that he was incorrect about “that third-party statement.” He pointed to language in the IBM policies that state:

If you know of, or have good reason to suspect, an unlawful or unethical situation...immediately report the matter through any of IBM’s Communication Channels:

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suspicious/unreliable until proven innocent,” “a terrible idea,” “stonewalling,” “lazy,” and being a “script monkey.” Notably, however, Mr. Feldman had already indicated at the time of events that none of these were necessarily inappropriate, as no finding had been made that Mr. Tuvell “violated” any employment expectations. (TUVELL 309).

<sup>17</sup> That email was preceded by Mr. Tuvell’s email from the morning of August 5 when he wrote to inform Diane Adams and Russell Mandel of an incident that had happened the day before, in which Mr. Tuvell stated that he believed he was required to report under IBM’s policies and procedures and believed that it would generate a Formal Warning Letter to the perpetrators, Gordon Booman and Dan Feldman. More specifically, Gordon Booman had written in an email, “I think the regression test you describe is Amal’s raison d’être...No?” Mr. Tuvell explained that the phrase “raison d’être” is a French phrase meaning “reason for existence.” Mr. Tuvell pointed out that, given IBM’s demonstrated propensity for taking such language at literal face value as it had with his “lazy” letter, the plain meaning of the sentence was that the reason for existence of Amalendu Haldar is the regression test. Mr. Tuvell expressed that this “devalues all aspects of Amal (such as his human-being-ness, for example) so it is offensive, intimidating, harassment, bullying, etc.”<sup>17</sup> (TUVELL 442-443) Mr. Tuvell pointed out that Amal is not Caucasian, and he expressed the suspicion that this could properly be considered to be discrimination based on race, color, religion, national origin, or other protected category. (TUVELL 444)

- Your manager is usually the best place to start
- IBM Human Resources
- Concerns & Appeals Programs

IBM will promptly review your report of unlawful or unethical conduct, and will not tolerate acts or threats of retaliation against you for making that report.

(Mr. Tuvell was quoting from IBM 2361 of the BCG).

Mr. Tuvell also pointed out other policy language that states that the company will take action if it learns about potential harassment based on any of the protected categories.

If Russell Mandel knew that the company did, in fact, accept third-party complaints and failed to say so, Mr. Tuvell said that he knowingly misrepresented the process and “hence he was corrupt.” If he did not know but should have known, then Mr. Tuvell characterized him as “incompetent.” In either case, it is Mr. Tuvell’s belief that Mr. Mandel has proven himself “unqualified to be the head of C&A.” Given that he was “compromised in this way,” Mr. Tuvell states that he is unqualified to “hear/investigate/adjudicate this very Complaint.”

Mr. Tuvell’s words were crystal clear. He considered Mr. Mandel to be tainted and lacking in objectivity due to his actions toward him. He had no confidence in Mr. Mandel from that point forward. (TUVELL 619)

After pointing out language from IBM policy and explaining that he was asserting the complaint on his own behalf, Mr. Tuvell reasserted his complaint, seeking IBM’s response. Mr. Mandel never responded. Mr. Tuvell stated that HR “went into deep silence mode.” Despite the company’s promise of a “prompt” investigation, neither Diane Adams nor Russell Mandel responded, which Mr. Tuvell characterized as quite uncharacteristic in his experience. (IBM 618)

***It appears there was never a response to this email.***

August 11 – STD

On August 11, 2011, Mr. Tuvell advised IBM that he came down with a “sudden condition” that would require short-term disability together with a longer-term solution, potentially involving an accommodation. He sought assistance on applying for STD benefits. (TUVELL 453) As of that day, Mr. Tuvell advised Mr. Feldman that he would be taking the next day off, August 12, and that he had spoken to his physician and applied for STD. (TUVELL 454)

The IBM Medical Treatment Report Form from Mr. Tuvell’s personal physician indicates that Mr. Tuvell’s diagnosis was sleep disorder and stress reaction, and he was “unable to get adequate

rest to be able to function at his job responsibilities” and needed to be out of work. (TUVELL 456)

IBM approved Mr. Tuvell’s application for STD, and a medical leave of absence was granted. According to Mr. Tuvell, the leave was necessitated by two factors: (1) mental/psychological damage due to Mr. Feldman’s infliction of emotional distress and bullying upon him, resulting in upset stomach, ability to eat, lack of sleep, and the like; and (2) knowledge that any one-on-one unmonitored communications with Mr. Feldman could result in worsening emotional distress. (TUVELL 622) IBM certified Mr. Tuvell’s STD leave from August 15, 2011 through September 14, 2011. (TUVELL 741) In that documentation, IBM states that managers and employees should communicate weekly during the STD absence.

August 18 -- *Corporate Open Door Filing/Complaint of Age, Sex, and Race Discrimination and Retaliation*

On August 18<sup>th</sup>, while on a leave of absence, Mr. Tuvell continued to pursue his complaints against the company. Mr. Tuvell filed a Corporate Open Door complaint, which was addressed to Samuel Palmisano, Steve Mills, Randy MacDonald, Robert Weber, and Lynea St. Pier, with a cc to Arvind Krishna, Pratyush Moghe, David Flaxman, and Russell Mandel. In his submission, Mr. Tuvell explained that he sought high level corporate intervention as a result of his belief that the C&A process, with Mr. Mandel at the helm, was corrupt and incompetent. (TUVELL 619)

Mr. Tuvell expressly stated that he was submitting the complaint pursuant to the Corporate Open Door clause of the IBM Concerns and Appeals program as well as the Confidentially Speaking clause. He stated that he submitted a draft complaint two (2) weeks earlier, but this submission was the final version. (TUVELL 460-742) In Part One, Mr. Tuvell details the “acts of Fritz Knabe.” (TUVELL 461) Further, Mr. Tuvell states that the perpetrators of the misconduct include Fritz Knabe, Dan Feldman, “and others (IBM HR and Legal personnel and processes).” (TUVELL 465)

In his “Theory of the Case; Blackballing” Section, Part Two, Mr. Tuvell expressed, “IBM wanted to get rid of me because I am “*too old*.” (TUVELL 466) (emphasis added) He stated that age is a barrier at Netezza. He further stated that somebody learned that he was “the oldest employee at Netezza” and raised it as an issue. He said that IBM, for various reasons, decided to “blackball” Mr. Tuvell, and Fritz Knabe and Dan Feldman “were recruited to ‘do the deed.’” (TUVELL 466-67)

Mr. Tuvell stated that management, HR, and Legal were acting together in a “conspiracy” against Mr. Tuvell. (TUVELL 467)

Mr. Tuvell expressed the seriousness of the stress that he was feeling, and he referenced “intentional infliction of emotional distress” which he also refers to as IIED. He stated that he “literally passed-out at one-on-one meeting with Dan [Feldman], due directly and precisely to the stress induced by his badgering.”<sup>18</sup> (TUVELL 467)

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<sup>18</sup> Mr. Tuvell states that this incident occurred after Mr. Feldman gave him the Formal Warning Letter dated August 3, 2011. He said he started to fold the letter, saying, “I’ll look at it later,” but Mr. Feldman told him that it needed to



Mr. Tuvell framed his complaint in another way: “Premeditated conspiracy of defamation, deceit/fraud and IIED (intentional infliction of emotional distress), with the aim of coercing me to resign -- or alternatively to fabricate false ‘evidence against me’ leading to ‘dismissal for cause’ -- all motivated by age discrimination. Said conspiracy against me (and presumably many other employees) has been secretly sponsored/supported by IBM at corporate level for years, in the sense of systemic, widespread coordination involving management/HR/Legal.” (TUVELL 468) Mr. Tuvell summarized the basis of Part One of his complaint as follows:

- On May 18, 2011, Fritz Knabe told Dan Feldman that Mr. Tuvell disobeyed orders and failed to produce certain Excel graphics for him. That was a lie, according to Mr. Tuvell.
- On at least six (6) occasions, Mr. Tuvell asked Mr. Feldman to call a 3-way meeting with those players to clear the air; Mr. Feldman consistently refused each time. (For example, on May 19, 2011, Mr. Tuvell emailed Mr. Feldman to say that a 3-way meeting was needed.) (TUVELL 512)
- On June 8, 2011, Fritz Knabe yelled loudly at Mr. Tuvell in public, and Mr. Tuvell stated that Mr. Knabe was lying about what he was accusing him of.
- On June 10, 2011, Mr. Feldman informed Mr. Tuvell that Mr. Knabe had told him that Mr. Knabe was the “bully” and “liar,” to which Mr. Tuvell disagreed.
- On June 10, 2011, Mr. Feldman “executed an adverse job action,” which was removing Mr. Tuvell from the highest position in the Performance Architecture Group to the lowest.
- Mr. Tuvell pointed out that the demotion constituted a prima facie case of discrimination on the basis of age and possibly sex and race as well. (TUVELL 469) Mr. Feldman “switched” Mr. Tuvell with Sujatha Mizar, who is a non-Caucasian woman under age 40 who was less qualified than Mr. Tuvell. (TUVELL 469)

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be turned back in and instructed him not to fold it. Mr. Tuvell laid the letter on the floor next to his chair, and he leaned his head back and closed his eyes for “a moment” or so he thought. When he opened his eyes, he reached to pick up the letter but it was not there. He was confused and dazed. His clothing was drenched in sweat, and his face felt “devoid of blood.” He said that Mr. Feldman was looking at him in a “funny” manner, and he realized later on that he had passed out. (TUVELL 614)

Further articulating on the retaliation claim, Mr. Tuvell asserts that the Formal Warning Letter was bogus and it would not have been issued had he not initiated the C&A process. (TUVELL 615) He stated that the Formal Warning Letter was issued by Mr. Feldman, Diane Adams, HR, and Legal in order to interfere with the C&A process itself. (TUVELL 615-16) Mr. Feldman specifically advised Mr. Tuvell, according to Mr. Tuvell, that all of his actions have been taken with the knowledge and advice of HR, Diane Adams, and Legal. (TUVELL 616)

- Mr. Tuvell noted that he went on medical leave and received short-term disability benefits from July 10 through July 24. He was then on vacation from July 24 to July 31. (TUVELL 506)
- In an email dated June 10, 2011, Fritz Knabe expressed his disappointment with how his working relationship with Mr. Tuvell on the project has come apart and, further, stated, “I’m sorry for the embarrassment and anger I provoked when raising my voice. Clearly we were both frustrated!” (TUVELL 580)

In Part 2 of his complaint, Mr. Tuvell articulates his concerns about the “acts of Dan Feldman, HR, Legal.” (TUVELL 590)

In his particular allegations, Mr. Tuvell expressed his criticism about how Dan Feldman treated him following the Excel graphics/Fritz Knabe incident, which was retaliatory in nature. For instance, Mr. Feldman ordered him to produce a day-by-day plan describing how he intended to spend his next three (3) weeks on various work projects, he addressed him as “Dr. Tuvell,” which was highly unusual, and he initiated a campaign of “impossible planning exercises.” He also reported that Mr. Feldman threatened him on June 30 about comments he made about two (2) colleagues in the course of the C&A process. (TUVELL 593) Further, Mr. Tuvell claims that John Metzger, with whom he met on three (3) occasions (June 13, June 15, and July 1), was involved in the blackballing campaign against him. (TUVELL 594)

Mr. Tuvell criticized Mr. Feldman for threatening him about the “lazy” email (Mr. Tuvell wrote, “Or if you’re lazy you can just click this link”), and then falsely accused him of yelling and threats of dismissal on August 3. (TUVELL 594-95; 723) Mr. Feldman issued a Formal Warning Letter to Mr. Tuvell on August 3 and, two (2) days later, Mr. Tuvell submitted a complaint to Diane Adams and Russell Mandel about the use of the term *raison d’être*, saying that was “worse” than Mr. Tuvell’s use of the word “lazy.” The company refused to investigate the French phrase.

Mr. Tuvell pointed out that moving someone like him with high-level expertise to a low-level project “like Sujatha’s so-called ‘Dev-Emu/FPGA’ is a waste of talent. (TUVELL 601) He explained that he received the “worst assignment” when he was demoted to Sujatha’s level, indicating that it was purposeful for him to “tie my own noose.” (TUVELL 602) Additionally, he was required to provide a detailed and independent day-by-day 3-week schedule on the new project with one day’s notice. (TUVELL 602) He stated that this was an impossible undertaking.

Mr. Tuvell then criticized HR. He stated that his complaint to HR about Mr. Feldman’s behavior prompted the following response: “Your manager has assigned you do (sic) a task, so you must do it.” (TUVELL 605)

Mr. Tuvell then complained of John Metzger’s actions. Mr. Metzger supervises Fritz Knabe and Dan Feldman. Mr. Tuvell explained that he had never before met individually with Mr. Metzger

but,<sup>19</sup> since the incidents occurred, he has had three (3) one-on-one meetings (June 13, June 15, and July 1) with him. (TUVELL 606)

Mr. Tuvell criticized Lisa Due's factual findings. He said that she became the lead on the Open Door process on June 16, she met with him on June 20, and she issued her report on June 29, opining that insufficient factual information existed to support Mr. Tuvell's allegations. (TUVELL 607) He pointed out that her investigation centered on Mr. Tuvell's concerns about Mr. Feldman's treatment of him. To the contrary, he stated that his primary charge (on the June 20 phone call) was the claim of defamation against Fritz Knabe, among other complaints. He pointed out that Mr. Knabe admitted yelling at him, yet this evidence was ignored. (TUVELL 608) He criticizes the fact that she provided no reasons to support her conclusion.

Significantly, Mr. Tuvell asserted, "Thus I claim the whole C&A process in general, and Lisa Due and *Russell Mandel* in particular, knowingly foster[ed] a fraudulent and abusive hostile work environment." (TUVELL 609) (Emphasis added)

Mr. Tuvell states that he filed an appeal with Russell Mandel, the C&A Program Director, immediately upon receiving Ms. Due's June 29 report. He had a twenty-five (25) minute phone call with Mr. Mandel on July 1, and he said that Mr. Mandel identified himself as the "top dog" in the C&A program. He was skeptical of Mr. Mandel, expressing that he "wasn't being quite straight enough with [him]." (TUVELL 609) Mr. Tuvell describes that call as introductory and "perfunctory" in nature; by agreement, it was the catalyst for Mr. Tuvell to write out a detailed complaint outlining his concerns. (TUVELL 609-610; 715-720) There was no interview that followed.

Among other things, Mr. Tuvell accused Dan Feldman of engaging in harassment/retaliation based on his invoking the C&A process. (TUVELL 610) He also expressed that Diane Adams from HR assisted him in this endeavor. (TUVELL 610)

Mr. Tuvell advised that, upon receipt of the August 5 disciplinary notice, he sent an "emergency letter" to Samuel Palmisano, Randy MacDonald, and Robert Weber complaining that the warning was in retaliation for his use of IBM's Concerns and Appeals process and constituted "retaliation/retribution/revenge upon me for taking part in that protected process." (TUVELL 728) He asked them to take immediate action to order Dan Feldman and Diane Adams to stop harassing him and to have the Warning Letter withdrawn.

#### August 18 – *Ms. Due Again Discusses Mr. Mandel's Involvement in Her Investigation*

In an August 18, 2011 email from Lisa Due to Lynea St. Pier, Ms. Due confirms that Mr. Mandel was involved in her investigation and approved her findings. (IBM 8904) She wrote, "Just a heads up that you may be or have gotten a case in regards to Walter Tuvell (his latest was a 100 page letter to SJP and others).. . . So you know, Mr. Tuvell did not agree with my

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<sup>19</sup> Mr. Tuvell did meet Mr. Metzger in his hiring interview.

findings (*approved by Legal and Russ*)<sup>20</sup>. . . I would be happy, thrilled even, to fill you in on the details. Just ping me!” (Emphasis added)

August 25 -- *Follow Up to Corporate Open Door Filing*

On August 25, 2011, Mr. Tuvell sent an email to Mr. Palmisano, Mr. MacDonald, Mr. Weber, Mr. Mills, and Ms. St. Pier, advising that he filed his complaint filed seven (7) days earlier and it had gone unanswered. That is, he advised them that he had not heard back from anyone to date. He received no acknowledgement of receipt of his filing. (TUVELL 743) He stated this inaction was contrary to the policy, which states that the Corporate Open Door process will ensure contact normally within two (2) business days and the company would assign a case worker within that time frame. He complained that a week was not “prompt” contact with him.

That afternoon, Mr. Mandel responded, stating:

I will begin investigating your issue(s) now that I have returned from vacation. I do not plan on discussing your concerns directly with you until you return from Short Term Disability, so you may concentrate on your health improving.

(TUVELL 745)

*The company never responded to the Confidentially Speaking Submission.*

August 25 – *Mr. Tuvell Stating that Mr. Mandel Is Disqualified from Acting as Investigator/Appellate Reviewer*

Mr. Tuvell’s response ninety (90) minutes later was quite explicit. He responded to Mr. Mandel, and he also copied Mr. Palmisano, Mr. MacDonald, Mr. Mills, Mr. Weber, and Ms. St. Pier. He began by saying:

This is ABSOLUTELY UNACCEPTABLE. The very REASON I’m on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse (IIED) that is being heaped upon me by Dan Feldman, and yourself, and everybody else who has touched this case to date. And you know it. The ONLY way for me to recover sufficiently to return to work from STD is to settle this case. Properly and correctly.

(TUVELL 744-45)

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<sup>20</sup> I note that IBM redacted “Russ” from the document that it produced at IBM 8904. One can only presume that IBM did not want Mr. Tuvell to know, for purposes of this litigation, that Mr. Mandel was involved in the Lisa Due investigation and approved her findings before they came to him for the “appeal.” IBM 8906 reveals that Russ Mandel did, in fact, “approve” her findings.

Mr. Tuvell took great offense at Mr. Mandel’s statement that he would not be contacting Mr. Tuvell to investigate his complaints because he was on STD leave. Mr. Tuvell characterized it as “delay.” He stated, “You cannot point to any policy that prevents IBM from working with me on my case NOW.” He states that no policy of IBM states anything relating to “STD disqualification.” To the contrary, he cites IBM’s policies that promise a prompt investigation. He stated, “I hereby INSIST upon being afforded that ‘promptness’ right IMMEDIATELY.” (TUVELL 744)

Mr. Tuvell asked that the investigation be initiated by having the persons accused of wrongdoing contacted. Following that, Mr. Tuvell asked for the opportunity to formally respond to what they had to say in writing. He identified the following as key witnesses: “Fritz Knabe, Dan Feldman, John Metzger, Diane Adams, Lisa Due, Russell Mandel, Arvind Krishna.” (Emphasis added)

Mr. Tuvell made it abundantly clear that Mr. Mandel was not the appropriate choice of an investigator. He stated that Mr. Mandel was “not a ‘competent authority’” to hear his case, as he was specifically a “named party to the wrongdoing.” He referenced that Mr. Mandel still had not responded to the email regarding the issuance of a third-party complaint (which was on August 5). Mr. Tuvell stated that it was “IMPERATIVE” that the investigation be turned over to “an independent body” who would be considered a “trusted higher authority” for further handling. He asked that IBM Board of Directors name an independent investigator free from bias and conflict. If that did not occur, he stated that any conclusions contrary to Mr. Tuvell would be “too-obviously-suspect.”

Furthermore, Mr. Tuvell demanded that an investigation begin by August 29. He asked for regular updates on the progress of his case.

***It appears there was no response to this email.***

***August 28, 2011: Addendum to Corporate Open Door Filing/ Claims Disability Discrimination***

On August 28, 2011, Mr. Tuvell submitted an addendum to his Corporate Open Door complaint, in light of recent events. Mr. Tuvell stated that he believed the company’s delay in investigating his complaint, and even responding promptly to its submission, was based on his STD status -- disability.<sup>21</sup> He claims that such inaction violated IBM’s policy of “prompt” action in response to employee problems, constituted a hostile workplace because of his disability (which was the reason for his STD status), and constituted “illegal (ADA) disability discrimination (because of STD status).” (TUVELL 753) In his submission, Mr. Tuvell elaborated on the reasons he felt he was the victim of disability discrimination on the basis of his mental health. (TUVELL 757-58)

***August 30 -- Mr. Tuvell Questioned Status of Corporate Open Door / Stating that Mr. Mandel Is Disqualified from Acting as Investigator/Appellate Reviewer/ Additional Request for Interim Measures***

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<sup>21</sup> Mr. Mandel expressly said so in emails to Mr. Tuvell. (TUVELL 745, 823).

By email dated August 30, 2011 to Samuel Palmisano, Randy MacDonald, Steve Mills, Robert Weber, and Lynea St. Pier, with a copy to Russell Mandel, Arvind Krishna, Pratyush Moghe, David Flaxman, and others, with a subject line “Corporate Open Door -- what is going on?” (TUVELL 1519-20) Mr. Tuvell asked for a status update. He stated that he expected Mr. Mandel to contact him after his latest writing on August 25. That did not happen.

In his email, Mr. Tuvell stated that IBM was legally bound to “promptly” investigate his complaint, and he stated that the company’s “delaying tactics just compounds the misconduct.”

In addressing the “corporate officers,” Mr. Mandel quoted the C&A document relating to the “Corporate Open Door” policy that states, “Concerns directed to the corporate office will be acknowledged to the employee by the corporate employee relations staff.” That did not happen. He further quoted policy language which states, “The concern will be assigned to an appropriate executive for handling, such as Division General Managers or other senior executives.” Mr. Tuvell, again, pointed out that that had not happened.

Mr. Tuvell addressed Lynea St. Pier, and stated, “According [to] the ‘Confidentially Speaking’ documentation, you’re supposed to contact me about the Complaint I filed with you. You’ve never done that. Not even a single word. If you’re deferring to others, you need to tell me that (and who it is you are deferring to).” He characterized her inaction as exhibiting “silent treatment,” which he states is contrary to IBM’s values and policy.

In this writing, Mr. Tuvell expressly stated, once again, that Russell Mandel is not the appropriate investigator. He stated as follows:

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email (“no third-part[y] complaints” and “STD/leave disqualification from due process”), Russell Mandel has proven he is not qualified to hear my case, so somebody else needs to be appointed. But there is even an over-riding reason Russell cannot be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in “blackballing me,” and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: “The investigator, however, must not have been involved in the issue being investigated and, in IBM’s opinion, is sufficiently removed organizationally from the employee to provide objectivity.”

(TUVELL 1519)

Also in this writing, Mr. Tuvell, again, asked to be separated from Mr. Feldman. He explained that he was on STD as a result of the “illicit/illegal stress” that Dan Feldman (and others) inflicted on him. He stated that he has “many, many times demanded to be removed from Dan’s ‘leadership’ (if you can call it that), but to date have been blindly/unthinkingly refused (sometimes explicitly, sometimes implicitly).”

At the conclusion of the email, Mr. Tuvell asked, “WHAT IS GOING ON?” He had repeatedly asked that question in the course of the email.

August 30 -- *Mr. Mandel’s Response/ Statement that No Investigation While Mr. Tuvell Out on STD*

An hour after Mr. Tuvell’s email, Mr. Mandel responded that he was investigating Mr. Tuvell’s concerns but, as previously explained, “I am simply not going to discuss with you the concerns you raised while you were out on STD since you are not supposed to be working during this time.” He also advised him that he was working on the investigation, but just would not be speaking directly with Mr. Tuvell while he was out on leave.

Finally, Mr. Mandel chastised Mr. Tuvell for addressing his email to the corporate executives. He told him that he needed to communicate his concerns about the investigative process “through the appropriate IBM channels.” He stated that Mr. Tuvell should be communicating with him “alone” since he is the investigator. He told Mr. Tuvell that he was “disturbing senior IBM executives” who were not involved in the process. He directed him to stop sending any emails, directly or with a cc, to the senior executives. (TUVELL 1518)

August 31 -- *Mr. Tuvell Reiterates His Concern About Mr. Mandel Being Investigator / STD Disqualification*

In his August 31, 2011 email to Mr. Mandel, Mr. Tuvell began by expressing, once again, his belief that Mr. Mandel was the inappropriate choice of investigator. He stated, “Concerning your personal involvement in the investigation: My objection to this has already been stated in multiple places, with reasons (another one of which occurs in this very note of yours, see next paragraph), and I hereby reassert my position.” (TUVELL 821)

Mr. Tuvell points out that he desires to and has the right to participate in the C&A investigation regardless of his status on being on STD leave. He points out that nothing in IBM policy states that he is disqualified from participating because he is on a leave of absence. He reminded Mr. Mandel that he was aware that Mr. Tuvell was “fully capable of conducting ‘C&A business’ while on leave.” He further stated, “By refusing to accord me my rights to a full/proper C&A investigation, you are therefore knowingly preventing me from ‘recovering’ sufficiently to ‘return to work’ -- that is, you yourself are affirmatively ‘coercing me to remain ‘disabled’ (in the sense of my current STD leave).”

September 4, 2011 – *Addendum to Corporate Open Door Filing/ STD Disqualification/ Interim Measures/ Disability Discrimination/Retaliation/Denied Access to Company Systems*

On September 4, 2011, Mr. Tuvell sent another appeal document through the Corporate Open Door process by addressing an email to Samuel Palmisano, Randy MacDonald, Steve Mills, Robert Weber, and Lynea St. Pier, with a cc to Mr. Mandel, Arvind Krishna, Pratyush Moghe, and David Flaxman. (TUVELL 824) Attached to the email was an addendum to his complaint. The addendum focuses on Mr. Mandel’s refusal to handle Mr. Tuvell’s appeal because Mr.

Tuvell was on a leave of absence. Mr. Tuvell emphasized that the Corporate Open Door has been “the main audience for [his] Complaint all along,” and he reiterated his distrust for Human Resources “for very good reasons.” He states that the C&A explicitly states that employees “on leave” are fully eligible to participate in the C&A process.

Among other things, Mr. Tuvell complains about IBM’s refusal to remove him from working with Dan Feldman (interim measures), violation of ADA law, and hostile work environment. (TUVELL 828-29)

Included in Mr. Tuvell’s complaint is the fact that he has been denied access to Netezza systems. A September 7, 2011 email from Mr. Tuvell to the helpdesk states that he cannot access Netezza VPN via Juniper Network Connect, and this does not allow him to track the status of his help ticket. (TUVELL 860-61) In an email to Mr. Mandel, Mr. Tuvell states that he cannot log in to Netezza and asks if he is being blacklisted. (TUVELL 860) Mr. Mandel responds that Mr. Tuvell has no need to access heritage Netezza systems while he is out on STD. (TUVELL 860)

Mr. Tuvell vehemently objected to his lack of access. He had advised Mr. Mandel, via a September 7, 2011 email, that he was an employee in good standing and needed to access Netezza. He stated that he was using Netezza to study and, further, stated that no IBM policy prohibits employees on leave from their normal access rights. He stated the company’s action here run afoul of the ADA. (TUVELL 862)

Mr. Tuvell also complained that his IBM badge would not allow him into IBM buildings, as noted in a September 13, 2011 email to Mr. Mandel. (TUVELL 866) In response, in a September 14, 2011 email, Mr. Mandel stated that Mr. Tuvell did not need access to IBM facilities since he is on STD and not working. (TUVELL 866)

Mr. Tuvell stated that Mr. Mandel was harassing him and retaliating against him by refusing him access to the building. In a September 14, 2011 email, Mr. Tuvell stated that he went to an IBM location to visit a friend, and his badge did not work. (TUVELL 867) He asked for Mr. Mandel to point to the policy document that states the privileges that employees on disability leave lose as a result of the leave.

September 15, 2011 – *Report by Russell Mandel – Investigation #2*<sup>22</sup>

In this 19-page document, dated September 15, 2011, Russell Mandel purportedly reported his findings of the Open Door complaint of Mr. Tuvell. (IBM 11147-65) (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14) Note that Mr. Tuvell was not notified of these findings until over two months later, in November. Mr. Mandel noted, “This investigator became involved because Mr. Tuvell escalated the finding of Ms. Due’s investigation.” (IBM 11147) The conclusions focus on four issues, including: 1) “Did Mr. Knabe yell at Mr. Tuvell?” 2) “Was Mr. Tuvell unfairly “demoted?” 3) “Was Mr.

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<sup>22</sup> As per IBM’s Supplemental Interrogatory Responses, #14, this is the second investigation conducted (one by Ms. Due and two by Mr. Mandel).



Tuvell unfairly asked to provide a project plan for his last three weeks prior to his leave of absence?” and 4) “Was Mr. Tuvell unfairly given a Formal Warning Letter?” The answers to these questions seem to be the findings of the investigation.

First, with regard to whether Mr. Knabe yelled at Mr. Tuvell, Mr. Mandel found the answer to be “no.” (This contradicts Knabe’s admission.) Mr. Mandel found that Mr. Tuvell was the only one who believed Mr. Knabe yelled, and Mr. Knabe and Steven Lubars (an Advisory Software Engineer who reported to Mr. Knabe) were also present at the June 8 meeting. Mr. Knabe apparently admits that he raised his voice, but Mr. Lubars denied it.

Second, Mr. Mandel stated that Mr. Tuvell was not unfairly demoted. He explained that Mr. Tuvell was not demoted at all, as he was a Band 8 and he remained a Band 8. He found that it was “completely appropriate” to have Mr. Tuvell and Ms. Mizar exchange work assignments. He stated this was regular procedure at IBM, and also opined that Mr. Tuvell was not providing the support that Mr. Knabe required. He stated that Mr. Tuvell harbored animosity toward Mr. Knabe and, in support of this conclusion, referenced the name calling that Mr. Tuvell purportedly engaged in.

Third, Mr. Mandel concluded that Mr. Tuvell was not unfairly asked to provide a project plan for the three (3) weeks prior to going out on a leave of absence for STD and vacation. He cited Ms. Due’s investigative findings, stating that other team members who worked for Mr. Feldman also had to provide project plans and it was common practice throughout IBM.<sup>23</sup> He said this was especially true with an employee who was resistant to providing status reports.

Fourth, Mr. Mandel concluded that the August 3<sup>rd</sup> Formal Warning Letter was not inappropriate. He stated that Mr. Tuvell demonstrated an escalating set of unprofessional and inappropriate comments and behaviors and, further, that he disregarded management direction between May and July. He stated this included his May 18 confrontation with Mr. Feldman and his purported name calling of Mr. Knabe on June 8. It included Mr. Tuvell’s comments to Mr. Feldman that Mr. Knabe was engaging in illegal acts, going insane, and the like.

Moreover, he made a special NOTE about the August 3 Warning Letter in which he stated the following:

It is common practice in IBM to provide warning letters when employees exhibit this type of behavior. In more serious cases warning letters include restrictions such as no salary increase, no promotions and no job movement unless in the best interest of the company for a specified period of time, as well as impact on salary, PBC assessments, etc.

(IBM 11163)

The conclusions reference nothing about any discriminatory or retaliatory treatment.

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<sup>23</sup> Ms. Mizar apparently was required to do them as well. (IBM 11157)

In connection with this investigation, Mr. Mandel interviewed twelve (12) individuals, including Mr. Tuvell, Mr. Feldman,<sup>24</sup> Ms. Due, Mr. Knabe, and others. Note that Mr. Mandel spoke with Mr. Tuvell by phone on July 1, 2011. (IBM 11160) As noted earlier, the call was not substantive in nature, and it lasted perhaps twenty-five (25) minutes, according to Mr. Tuvell. It could not properly be considered an “interview,” and Mr. Mandel acknowledges such when he repeatedly told Mr. Tuvell that he would not “interview” him while he was on STD. Accordingly, the indication that Mr. Mandel interviewed Mr. Tuvell in connection with his investigation is inaccurate.

In his report, Mr. Mandel acknowledges that Mr. Tuvell complained that IBM wanted to terminate him because he was “too old.” He referenced Mr. Tuvell’s claim that he was “the oldest employee at Netezza.” He referenced Mr. Tuvell’s claim that, because of his age, Mr. Knabe and Mr. Feldman treated him unfairly and demoted him. In addition, Mr. Mandel acknowledged that Mr. Tuvell complained that he was retaliated against for complaining about age discrimination and other improper treatment. As examples, he stated that Mr. Feldman unfairly asked him to produce a project plan, made threats to him, and provided him with a warning letter. He further complained that Lisa Due engaged in the cover up of Mr. Feldman’s and Mr. Knabe’s actions by her conclusion that insufficient facts supported Mr. Tuvell’s claims. Yet he fails to address the discrimination or retaliation claims.

I note in Mr. Mandel’s report that he gives a recitation of facts with regard to Mr. Tuvell’s, Mr. Knabe’s, and Mr. Feldman’s actions, yet he does not indicate that a factual dispute exists as to what took place. Clearly, Mr. Tuvell’s version of events is at odds and conflicts with the version offered by Mr. Knabe and Mr. Feldman, at least in several respects. Mr. Mandel does not state that he determined credibility and disbelieved Mr. Tuvell’s version of events and explained why. This is contrary of the role of an investigator, who is responsible for determining credibility, when differing versions are offered, and explained the basis for that.

Mr. Mandel addresses the issue of whether Mr. Knabe yelled at Mr. Tuvell. He states that Mr. Tuvell claimed that Mr. Knabe became “very animated and angrily attacked” him by “yelling loudly” and “shouting” at Mr. Tuvell. (IBM 11153) He further described Mr. Knabe’s “yelling,” and stated that he had to increase the volume of his voice to make himself heard over Mr. Knabe’s yelling. Mr. Mandel reports that Mr. Knabe stated that he felt “they both raised their voices but felt no one was ’yelling.’” Mr. Mandel references Mr. Knabe’s June 10, 2011 email where he apologized for “raising his voice.” (IBM 11155)

Another interesting disparity I noted was the fact that Dan Feldman had the opportunity to review Mr. Mandel’s report of the investigation and make corrections. (IBM 10268-69, 10274-75) Mr. Tuvell had no such opportunity.

***Mr. Tuvell is not notified of this report until November.***

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<sup>24</sup> Interestingly, in a September 9, 2011 email from Dan Feldman to Mr. Tuvell, he stated that he had not seen the complaint. Rather, Mr. Mandel was dealing with it. Mr. Feldman explained that his role was limited to providing Mr. Mandel any support he asks for and communicating with Mr. Tuvell about regular work issues involving manager/subordinate. (TUVELL 892)

September 21 – ***Mr. Tuvell Appeals to IBM’s Corporate Trust & Compliance Officer/ Further Appeal to Have Russell Mandel Disqualified as Investigator***

On September 21, 2011, Mr. Tuvell sent an email to Richard Kaplan, Corporate Trust & Compliance Officer, with a subject line “There is a cancer growing on IBM.” He stated that he was filing a formal report/complaint, and he attached the four (4) Complaint documents that he had produced to date. He stated that he already filed this complaint with HR and C&A, and it was “in process” as he understood it. He opined that Russell Mandel was stonewalling the complaint and could not be trusted. He also stated that he filed the complaint with the Corporate Open Door process and confidentially speaking process, but received no response at all. (TUVELL 892)

The next day, Mr. Mandel responded to Mr. Tuvell, stating that the complaint that he directed to Richard Kaplan had been forwarded to him. He stated that the concerns raised with Mr. Kaplan were identical to those that Mr. Mandel was currently investigating. He stated that he would continue to be the individual responsible for investigating Mr. Tuvell’s concerns. He stated that all correspondence regarding concerns should be sent only to him as he is the sole point of contact. (TUVELL 892-93)

September 22, 2011: ***Addendum to Corporate Open Door Filing/ Disability Discrimination/ Retaliation/ STD Delay***

On September 22, 2011, Mr. Tuvell submitted an additional addendum setting forth new claims, including an ADA violation. (TUVELL 880) Mr. Tuvell elaborates on the “anti-ADA behavior” of Mr. Mandel by stating that he revoked his IBM badge physical access to IBM buildings and denied him access to Netezza VPN. (TUVELL 883) He further states that Mr. Mandel has engaged in a “delay-of-justice” by refusing to process his C&A complaint while he is on leave. (TUVELL 883) He states that Mr. Mandel has not communicated with Mr. Knabe or Mr. Feldman in regards to his complaint, contrary to his responsibility to promptly investigate. (TUVELL 884)

October 18, 2011 – ***Mr. Tuvell Reiterating Interest in Being Interviewed in Investigation; Complaint of Discrimination; IBM Encouraging Transfer***

In an October 18, 2011 email from Mr. Tuvell to Mr. Mandel, Mr. Tuvell reiterates his interest in participating in the investigation, advising Mr. Mandel, “You have no legitimate excuse for not discussing/progressing/resolving my C&A with me.” He characterized his situation as perhaps the “worst recorded case of discrimination (retaliation) corruption in American corporate history.” (TUVELL 906-07)

Mr. Mandel, in an October 18, 2011 email to Mr. Tuvell, states that IBM is open to providing Mr. Tuvell with assistance in finding a new position within IBM. (TUVELL 907-908)

October 22, 2011 – *Reiterating Retaliation Claim*

In an October 22, 2011 email from Mr. Tuvell to Mr. Feldman and Mr. Mandel, Mr. Tuvell reiterates his discrimination/retaliation complaints: “All of the retaliation by you/HR/Legal is of course in the context of my original complaint about age/sex/racial discrimination, which you/HR/Legal of course are trained to know about...” (TUVELL 918)

November 3, 2011 -- ***Mr. Tuvell Files an Additional Addendum to Open Door Complaint of Age, Disability, Sex and Race Discrimination and Harassment/ STD Leave***

In this new submission under the Corporate Open Door policy, Mr. Tuvell states that he has been the victim of discrimination and retaliation based on age and disability and, also, perhaps sex and race. (TUVELL 929) He again complains about IBM’s refusal to process his C&A complaint while he is on leave. He also cites Mr. Mandel’s denial of an ADA reasonable accommodation as another basis of his complaint. (TUVELL 930) He outlines some of the bases for his discrimination complaints within the document. (TUVELL 933-34) He also stated that he had been the victim of “unrelenting, unrepentant retaliation” which began “immediately after, and precisely because of, the filing of [his] discrimination-rooted C&A complaint.” (TUVELL 934) He further stated that he “emphatically raised to everyone’s attention the discriminatory nature of [his] complaint, emphasizing front-and-center that discrimination was a foundation centerpiece of [his] Theory of the Case.” (TUVELL 936) He again reiterates that Mr. Mandel’s refusal to process his C&A complaint while he is on leave is discriminatory and retaliatory. (TUVELL 936)

Mr. Tuvell lodges a new allegation, which is that the company, through Dan Feldman, “stole” some of his full pay STD benefits by improperly classifying some of his regular work-at-home days to be STD days, thus shortening his eligibility for benefits. (TUVELL 937-38; 956-58) He characterized this as “pure and simple” harassment and retaliation. (TUVELL 939)

November 7-15, 2011 -- ***Mr. Mandel Finally Invites Mr. Tuvell to Participate in Investigation While on STD***

Mr. Tuvell notes that Mr. Mandel emailed him on Monday, November 7 “totally out of the blue” proposing to complete the appeal investigation. (TUVELL 1237) A phone call was set up for November 17, at which time Mr. Mandel provided his conclusions. Mr. Mandel’s notes on the report, according to Mr. Tuvell, coincide with his own notes of the discussion and confirm that the conversation that day was a report of Mr. Mandel’s conclusions. (IBM 11166-11184)

More particularly, Mr. Mandel sent an email to Mr. Tuvell on November 7, 2011, stating as follows:

In order to meet your request that I complete your investigation while you are still out on Short Term Disability, I would like to give you the opportunity to provide your point of view on the issues I have investigated in case you have anything to add to the various LotusNotes I have

received from you. If not, I would be happy to schedule time to provide you my findings.

(TUVELL 962)

I note that Mr. Mandel had already completed his investigation and drafted a report which was dated September 15, 2011 – and he indicated that Mr. Tuvell had been interviewed in connection with it. This is inaccurate, as he had not interviewed Mr. Tuvell.

Two (2) days later, on November 9, 2011, Mr. Tuvell responded and said that he would be inclined to discuss the issues with him.<sup>25</sup> He asked various questions about what conclusions and reasons behind them that he might be given and what opportunity he would have to respond to anything adverse that might be included in his findings. (TUVELL 970) He also asks how he could ensure that all communications during the C&A are “on-the-record.”

Mr. Mandel responded that day by stating that he would arrange for a phone call, during which time Mr. Tuvell would have the opportunity to provide any additional information. (TUVELL 969)

On November 10, 2011, Mr. Tuvell responded to Mr. Mandel by stating that the November 9 letter from his attorney, Rob Mantell, explains Mr. Tuvell’s position. (TUVELL 969) Mr. Mandel responded by stating that he would call Mr. Tuvell on Thursday, November 17, and further stated that IBM does not discuss employee issues with third parties including attorneys. (TUVELL 968)

On November 15, 2011, Mr. Tuvell stated that he was available on that day, and also stated that he could not think of anything he would like to add that had not already been stated in writing. Nevertheless, he said that he would be happy to provide any additional information that Mr. Mandel might need. (TUVELL 968)

November 17, 2011 – *Mr. Tuvell’s “Interview” in Connection with the Investigation*

Mr. Tuvell describes the phone call that he had with Russell Mandel on November 17, 2011. (TUVELL 1238) He states that Mr. Mandel advised him that he had read the entire 400+-page complaint, and he reviewed the issues that were under investigation. He asked Mr. Tuvell if he had anything to add, to which Mr. Tuvell advised that he had additional complaints such as discrimination, retaliation, defamation, and the like. He claims that Mr. Mandel responded that he refused to investigate anything else because “nothing else was eligible for investigation by IBM.” (TUVELL 1238)

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<sup>25</sup> In a November 9, 2011 letter from you, as Mr. Tuvell’s attorney, to IBM, you specifically requested that IBM complete its investigation of the appeal. The letter states, “Mr. Tuvell is committed to cooperating with the investigation, and providing any necessary information. IBM should complete its investigation of its Appeal...” (TUVELL 967)

Mr. Mandel then discussed the findings on the issues he investigated.

November 21 – *Mr. Tuvell Seeks Mr. Feldman’s Help in Facilitating a Transfer*

In what appears to be an email from Mr. Tuvell to Mr. Feldman, in connection with STD check-in, Mr. Tuvell advised him of the extremely high levels of anxiety and fear he had in his prior position. For this reason, he states that he has pressed for a transfer as “some sort [of] reasonable accommodation.” He said that he appreciated Mr. Feldman’s suggestion to seek other opportunities on GOM, and he advised him that he found a position that he believed was appropriate and for which he applied. He stated, “I would appreciate it if you could be of assistance in helping my application succeed.” (TUVELL 1522)

November 25 – *Russell Mandel’s Report of Investigative Findings*

As noted above in regards to the September 15, 2011 report, after Mr. Tuvell appealed the finding of Ms. Due’s investigation, Russell Mandel conducted a follow up investigation. (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14) Russell Mandel reviewed Ms. Due’s findings. Following his review and additional investigation, he reached the same conclusion. He determined that Mr. Tuvell was treated fairly, and he advised Mr. Tuvell of his finding via a phone call on November 17, 2011 and a brief report, via email, on November 25, 2011. (TUVELL 1292)

His one-sentence finding was as follows:

As we discussed, I have investigated your concerns, and determined that management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you. While I know this is not the answer you had hoped, please accept my best wishes for the future.

November 28 – *Mr. Tuvell Applies for Software Developer Position*

On November 28, 2011, IBM acknowledged receiving Mr. Tuvell’s application for the position Software Developer SWG-0436579. (TUVELL 1521)

December 1 -- *Chris Kime Remarks About Mr. Tuvell’s Qualifications and Desires  
Phone Interview*

On December 1, 2011, Chris Kime emailed Mr. Tuvell indicating he wanted to talk on the phone about the open job requisition. He stated that he had reviewed Mr. Tuvell’s resume and has “little doubt that [he has] technical skills that we could use on the project. Of course, we need to make sure that you have an interest in the position and it seems like it would be a good fit.” (TUVELL 990)

That day, Mr. Tuvell responded that he was returning from STD and was ready, willing, and able to return to work. He stated that he had contemplated what he likes to do best, and he expressed

a desire to “get back into more of a development role. Scanning GOM turned up your opening, hence this inquiry.” He went on to explain why he had an interest in developing as opposed to performance. (TUVELL 991)

December 6 – *Badge Access*

On behalf of Mr. Tuvell, you emailed IBM on December 6, 2011, asking that IBM’s restriction on Mr. Tuvell accessing the workplace be released in general and also, in particular, in anticipation of Mr. Tuvell’s December 8, 2011 job interview. Counsel for IBM responded the same day by stating that Mr. Tuvell had badge access that should allow him to enter the main entrance of the Littleton site for his interview, and that it was never turned off. He described “some confusion” in this regard. (TUVELL 1000-01)

December 8 -- *Mr. Tuvell Interviewed for the Job*

Mr. Tuvell interviewed at the IBM Littleton facility with Harvey Harrison and Brian Doherty in connection with the job opening, and he reiterated his interest in the job. He wrote them an email thanking them for their time and stated, “You gave me quite a good picture of what you’re doing, and it feels very much like what I’d like/want to be doing. I feel comfortable with both of you, and I think I’d fit into the team well. I’m also pretty sure I could start adding value early -- I seem to have all the basics covered...” (TUVELL 1002)

December 12 -- *Chris Kime Responds Positively*

In an email dated December 12, 2011, Chris Kime thanked Mr. Tuvell for speaking with Harvey Harrison and Brian Doherty, and described the interview as “very positive.” He said that he would be following up with his management chain and keeping Mr. Tuvell posted with developments. (TUVELL 1003)

December 13 -- *Mr. Feldman Tells Mr. Kime that He Would Not Re-Hire Mr. Tuvell*

In an electronic communication, Mr. Kime sought information from Mr. Feldman about Mr. Tuvell. Mr. Feldman stated that his Personal Business Commitments “PBC” was delayed “because of the disability issue,” but Mr. Feldman said that he would rate Mr. Tuvell a “3” based on experience to date. He also volunteered, “If someone had (sic) were to ask me the question I always ask – ‘Would you hire him again?’ – the answer would be no.” (IBM 10412)

December 16 -- *Mr. Tuvell Updates Mr. Kime about Accomplishments*

On December 16, 2011, Mr. Tuvell emailed Mr. Kime, Mr. Harrison, and Mr. Doherty to advise that one of his pending patents was just awarded. (TUVELL 1006)

In a December 16, 2011 email from Mr. Feldman to Mr. Tuvell, he stated that there was no business need for him to have access to Netezza-specific systems while he was on STD and not working. He stated that his systems access would be restored if Mr. Tuvell returned to work in his prior role where systems access was warranted. (TUVELL 1523)

*January 3 -- Mr. Tuvell Updates Mr. Kime*

In a January 3, 2012 email to Mr. Kime, Mr. Harrison, and Mr. Doherty, Mr. Tuvell updated them on the QR Code Wikipedia project which he had mentioned to them. He stated that he looked forward to returning to work and anticipated that “the paperwork for transfer to your group can be signed-off and completed.” (TUVELL 1010)

*January 6 -- Walt Tuvell Rejected for Position*

In a January 6, 2012 email to Walter Tuvell, Chris Kime advised him that he was not selected for the transfer for which he applied. (TUVELL 1018) He praised Mr. Tuvell’s “impressive explanation of the [QRCode information] technology,” and stated this was “another demonstration of [his] deep technical skills and ability to produce solid documentation.”

With regard to the transfer, however, Mr. Kime stated that he discussed Mr. Tuvell’s situation with his up-line management and said that he could not move forward with taking Mr. Tuvell directly from being on short-term disability, as it would receive “very close scrutiny from the Operations people” in the organization. He further stated that there was a second concern about hiring him -- “about the work being to your liking and keeping you as a productive and satisfied member of the team.”

It is clear that Mr. Kime articulated two (2) reasons for rejecting Mr. Tuvell’s application for transfer. First, he said it would create problems from Operations people to take Mr. Tuvell from short-term disability. Second, he said there was concern about whether Mr. Tuvell would truly enjoy the work in the new position.

*January 10 -- Tuvell’s Attorney Questions Mr. Tuvell’s Rejection for Job Transfer*

In a January 10, 2012 email, you expressed “alarm and disappointment” at the fact that Mr. Tuvell’s application for the internal job posting was rejected due to his status of being on STD, and such medical leave was a reasonable accommodation for his handicap. (TUVELL 1016) You pointed out that IBM’s policies regard employees on STD as employees in good standing. You described IBM’s failure to hire as “plain retaliation” in violation of state and federal disability discrimination laws.

*January 11 -- Mr. Tuvell Claims Retaliation Again*

On January 11, 2012, Mr. Tuvell emailed Mr. Feldman and Diane Adams, advising that Mr. Kime’s rejection of his application for transfer based on the fact that he was on STD constitutes retaliation based on his requesting or utilizing the reasonable accommodation of medical leave. He asked for their help and options as to how he could return to work as a productive IBM employee. (TUVELL 1021)



January 16 -- *Mr. Feldman Offers Contradictory Reasons for Failure to Hire Mr. Tuvell*

On January 16, 2012, Mr. Feldman provided different and contradictory reasons as to why Mr. Tuvell was not hired for the position. He stated that he was not hired “because the team did not think [he was] the right fit for the position. HR reviewed the situation with the hiring manager to ensure that the decision was made for legitimate business reasons.” (TUVELL 1022) Mr. Feldman advised that he could continue to look for jobs on GOM, and HR could assist him.

January 18 -- *Mr. Tuvell Reiterates Discrimination and Retaliation Claim*

Mr. Tuvell, in a January 18, 2012 email to Mr. Feldman and Diane Adams, stated that the new reason of not being the “right fit” is vague and subjective. He also pointed out the reasons Chris Kime offered on January 6, which were contradictory. (TUVELL 1026) Mr. Tuvell questioned, “If I was not the right fit, at least from the perspective of the team, why was my situation elevated to up-line management?” Mr. Tuvell expressed that his status as a disabled person on medical leave is the true reason for the rejection. (TUVELL 1026) In his 2-page email, Mr. Tuvell asserted various examples of discriminatory and retaliatory treatment to which he had been subjected. (TUVELL 1026-27)

January 22 -- *Mr. Tuvell Files New Corporate Open Door Complaint/ Disability Discrimination*

In his Complaint, Mr. Tuvell explained that he is a person who had been on STD, and was seeking a transfer via the GOM process. This Complaint is the final one, as one was also submitted on January 20 (and prior Complaints were submitted prior to that as well). (TUVELL 1043) He stated that he applied for SWG-0436579, which had been posted since September 26 - - two (2) months prior to Mr. Tuvell applying for it. (TUVELL 1051) He explained the interview process. He explained that his first interview was with Mr. Kime and, after that went well, he interviewed with two (2) other people, Harvey Harrison and Brian Doherty. (TUVELL 1052) He described the discussions during the interview process.

Mr. Tuvell explicitly stated that the reason for his rejection -- that he availed himself of STD benefits -- constitutes discrimination based on his disability. (TUVELL 1057)

Mr. Tuvell also references Mr. Feldman’s second reason for his rejection, and characterized his reason as “incompatible” and “irreconcilable” with Mr. Kime’s reason.

January 24 -- *IBM States that Mr. Tuvell’s Latest Appeal is Under Review*

In a January 24, 2012 letter from IBM counsel Larry Bliss to you, with regard to Mr. Tuvell’s rejection from the internal position, Mr. Bliss acknowledges the following: “It is my understanding his latest appeal is under review.” (TUVELL 1188) Presumably this is in reference to the IBM internal complaint that Mr. Tuvell filed regarding the failure to transfer, which you provided to Mr. Bliss on January 23. (TUVELL 1189-90)

January 25 -- *IBM Acknowledges Mr. Tuvell's Application for the Position Software Developer*

IBM sent Mr. Tuvell an email indicating that it received his application for the Position Software Developer SWG-0456125. (TUVELL 1194)

February 1 – ***Russell Mandel's Investigative Report – Investigation #3***<sup>26</sup>

Mr. Mandel conducted an investigation regarding the company's decision not to select Mr. Tuvell for a position with Chris Kime's group in January of 2012. He concluded that the complaint lacked merit. By email dated February 14, 2012, he advised Mr. Tuvell of his finding and advised him that the hiring decision "was not because of a disability." (TUVELL 1211)

He prepared a report of investigative findings. (IBM 11026-27) In his February 1, 2012 report, Mr. Mandel framed the issue as a complaint by Mr. Tuvell that he was "unfairly denied an opportunity as a result of his being disabled." Significantly, no mention is made of Mr. Tuvell's claim of retaliation. No mention is made of any other issue about which Mr. Tuvell complained.

In connection with his investigation, Mr. Mandel interviewed Dan Feldman and Christopher Kime. Mr. Kime is the Application Development Manager out of Austin, Texas and the hiring manager for the GOM position. The question, as Mr. Mandel framed it, is as follows: "Was Mr. Tuvell rejected for a position because he was on Shortterm (sic) Disability?" Mr. Mandel found that Mr. Tuvell was not rejected because he was on short-term disability. He wrote that Mr. Kime states that he rejected Mr. Tuvell for the Software Developer position "because of feedback from Mr. Feldman that stated that Mr. Tuvell did not take management direction well and had trouble teaming with others." Parenthetically Mr. Mandel noted, "Mr. Feldman confirms that this is the feedback he provided Mr. Kime and is consistent with the findings of a previous investigation into Mr. Tuvell's performance done by the current investigator."

The company stated that Mr. Tuvell was not selected for the transfer position due to performance problems. Mr. Mandel explained that a decision to hire him for another position could not be made without a PBC (which is a Personal Business Commitment/Performance Evaluation). Mr. Mandel referenced "performance issues" that would "present a problem to [his] success" in the absence of a PBC.

Mr. Mandel further elaborated on alleged performance deficiencies of Mr. Tuvell in an email dated February 17, 2012. (TUVELL 1217) Mr. Mandel stated, "An essential component of any performance assessment includes the ability of the individual to work well with others." Mr. Mandel stated that Mr. Tuvell was unable to work cohesively with other team members. He referenced "unprofessional conduct" that Mr. Tuvell was cited for on July 5, 2011 as being an obstacle for him.

Mr. Mandel noted that Mr. Kime was not truthful or forthright in his rejection letter to Mr. Tuvell. In that letter, Mr. Kime stated that he could not hire Mr. Tuvell while on short-term

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<sup>26</sup> As per IBM's Supplemental Interrogatory Responses, #14, this is the third investigation conducted (one by Ms. Due and two by Mr. Mandel).

disability because it would “receive very close scrutiny from his organization’s operations people.” Mr. Tuvell noted that Mr. Kime should have been more direct with Mr. Tuvell on his reasons for not hiring him, and he stated that Mr. Kime “should be counseled on his error by his management.”

During litigation of this matter, I note that IBM now offers additional reasons why it failed to select Mr. Tuvell for the transfer. It stated as follows:

...[I]t was determined that he lacked the qualifications necessary for the role. The position was appropriate for someone who could work in a small team environment. That required working well with team members, working cooperatively in a subordinate role and taking direction as necessary from the leadership of the team. Interest in the job was believed to be a component of working successfully in a small team. Plaintiff emphasized that his interest was in a development role but the work to be done in the open position was more weighted towards supporting activities or test QA activities related to the support activities. That work did not appear to be in line with Plaintiff’s expressed preferences. Plaintiff also created the impression that he had a tendency to work well on his own and generate work product in an individual effort, which was not the skill set needed by our small team. Additionally, Plaintiff did not have experience in working directly with customers in a support role and he did not have specifically applicable technical skills regarding the actual product, the MQ product or the platform on which they were working.

(Further Supplemental Response of Defendant, International Business Machines, Inc. to Plaintiff’s First Set of Interrogatories dated May 13, 2014, Response #11)

Moreover, IBM stated, in Further Supplemental Answer to Interrogatory #11(c), that it relied upon Chris Kime’s interview of Mr. Tuvell, Mr. Kime’s discussions with his subordinates Harvey Harrison and Brian Doherty based upon their interviews with Mr. Tuvell, Mr. Kime’s discussions with Dan Feldman about Mr. Tuvell’s performance when he worked with Mr. Feldman, and Mr. Kime’s discussions with his up-line manager’s Arnand Mathieu and Gerry Reilly.

IBM further states that Russell Mandel is one of several people who has knowledge about the facts giving rise to the decision not to hire Mr. Tuvell for the position. (Further Supplemental Answer to Interrogatory #11(d))

February 7 -- *Mr. Tuvell Files LTD Application*

(TUVELL 1406)

***This application was denied.***

February 9 – *Mr. Tuvell Emails Mr. Mandel about the Open Position*

In an email to Mr. Mandel, Mr. Tuvell stated that he reapplied for the position to work under Chris Kime, and noted that the position is identical to the former opening (but with a new GOM number) that he was rejected for, but that Larry Bliss confirmed the position was still open. (TUVELL 1206) Further, he noted that, as of January 25, he was on unpaid leave and not STD (which was the reason he was rejected the first time). (TUVELL 1206)

*No response was ever given.*

February 14 -- *Mr. Mandel Rejects Mr. Tuvell's Complaint About Discriminatory Denial of Transfer*

In a two-paragraph email, Mr. Mandel advised Mr. Tuvell of the following:

I have looked into the complaint you made that you were denied an opportunity as a result of being disabled. Having done so, I can advise that the decision was not because of a disability.

(TUVELL 1213) He makes no mention of the February 1, 2012 written report.

He further stated that there was not a PBC for Mr. Tuvell to date. Without that, “it would be difficult to approve the decision to hire if that was the decision made. Since there was no PBC, there was a need to make an assessment of performance and based on that assessment, the conclusion was that the performance issues we discussed previously would present a problem to your success in the role to be filled.” (TUVELL 1213)

February 16 -- *Mr. Tuvell's Response*

Mr. Tuvell advised Mr. Mandel, in a February 16, 2012 email, that he had never been through the PBC process. He also stated that he did not understand what “performance issues” Mr. Mandel was referring to, and he referenced the only formal evaluation he received, which was dated February 22, 2011, and apparently showed no performance problems. (TUVELL 1212) Mr. Tuvell also referenced Dan Feldman’s June 30, 2011 statement, “You are not on a performance plan.”

February 17 -- *Mr. Mandel Offers Another Reason for Denial of Transfer*

In a February 17, 2012 email to Mr. Tuvell, Mr. Mandel responded to his inquiry about performance issues. Mr. Mandel wrote, “An essential component of any performance assessment includes the ability of the individual to work well with others. The performance issue you and I discussed previously is the inability to work cohesively with other members of a team. In addition to unprofessional conduct, for which you were cited on July 5, 2011, this issue was considered to be a potential obstacle to being successful in the role to be filled.” (TUVELL 1219-20)

Mr. Mandel mentions nothing about the “common practice” at IBM, which is to include certain language in warning letters of a serious nature that the employee is restricted in job movement for a specified period of time. (IBM 11163)

*February 22 -- Mr. Tuvell Asks Mr. Mandel for Status Update*

Mr. Tuvell sent an email on February 22, 2012 in follow up to the discrimination and retaliation complaints as well as reasonable accommodation issues raised in his internal Corporate Open Door submissions. He noted that he received no response to his email of the week prior, and asked if he would be receiving a decision on his latest C&A complaint, if he would get a decision on his application for the recent GOM that he applied for in Littleton, and asked about reasonable accommodation transfer. (TUVELL 1218)

*March 2 -- New Corporate Open Door Filing*

In his cover letter, Mr. Tuvell reiterates that Russell Mandel is conflicted out of responding to this complaint. He states, “[T]he investigation into this matter must be handled by someone other than you, since you are personally involved in serious wrongdoing, contrary to the interests of IBM.” (TUVELL 1230)

In this lengthy submission, Mr. Tuvell complains of many concerns. He characterizes Russell Mandel’s “investigation” as a “sham.” (TUVELL 1235) He reiterates his other concerns of defamation, discrimination, retaliation, failure to reasonably accommodate and the wrongful acts associated with the rejection of his transfer application to Chris Kime. (TUVELL 1235-36)

*March 2 -- Mr. Tuvell Files Addendum to Corporate Open Door Process*

In this submission, Mr. Tuvell provides details about his application for SWG-0456125. He states that he reapplied for the job on January 25 under a new ID number. (TUVELL 1388) Mr. Tuvell states that he was rejected from the old SWG on January 6 and on January 12, Chris Kime re-registered the position in GOM using the identical description but a new GOM ID number.

*March 6 – Mr. Tuvell Inquires about a Number of Issues, Such as System Access*

On March 6, 2012, Mr. Tuvell emailed Mr. Mandel about a number of issues. Mr. Tuvell references his third Open Door being about Mr. Mandel’s “own misdeeds.”

Mr. Tuvell denied misusing any IBM systems. He stated that he accessed IBM’s system to communicate his opposition to IBM’s illicit/illegal/discriminatory behavior/acts, which are legally protected. He stated that Mr. Mandel’s act of rescinding his LotusNotes access is retaliation.

Mr. Tuvell takes umbrage with Mr. Mandel’s statement that Mr. Tuvell lacks business necessity for using IBM systems. Mr. Tuvell states that he needs to communicate with Mr. Mandel about the ongoing investigation and with the company about reasonable accommodations for his

disability. He stated that he needed to communicate with company officials via email, as a record is needed, and Mr. Mandel's actions prohibited him from such communications.

Mr. Tuvell essentially asked Mr. Mandel to provide him with a copy of any IBM policy that states that systems access is rescinded when an employee is on an unpaid leave of absence. Mr. Tuvell stated that he is aware of no such policy.

Mr. Tuvell states that he submitted his third Open Door complaint on March 2 and looks forward to an investigation and resolution. He states that he would like to add Mr. Mandel's rescission of his systems access as an additional example of illegal discrimination/retaliation.

Mr. Tuvell stated that he would have to resort to using Internet email and not Notes email, due to Mr. Mandel's action. He provided a personal email address for continued communication with company officials. (TUVELL 1524-25)

March 9 -- *Mr. Tuvell Submits Addendum to Corporate Open Door*

Mr. Tuvell cites new facts, namely a new charge of discrimination and retaliation against Russell Mandel because of his "rescission of [his] electronic access to Notes and w3..." (TUVELL 1431)

March 13 – *Mr. Mandel's Explanation of Restricted Access*

On March 13, 2012, Mr. Mandel emailed Mr. Tuvell and stated the following:

On March 6, 2012, IBM restricted your access to IBM systems because you were causing disruption by failing to utilize the proper mechanism for raising concerns about HR related issues. It has come to our attention that you are now using a personal email address to engage in the same conduct. We have discussed on multiple occasions the need for you to direct your issues with IBM and IBM personnel to a limited distribution list, more specifically, to me.

As my previous notes to you stated, the concerns and appeals program is the clearly defined mechanism which allows you raise your concerns in an orderly way. I am your point of contact for the concerns and appeals process. IBM considers your continuous emailing of copies of your complaint and numerous addenda -- to dozens of people unrelated in any way to the concerns and appeal process -- disruptive to IBM's business.

If this conduct continues, you will be subject to discipline, up to and including termination.

(TUVELL 1526)

April 17 -- MetLife Denies LTD Application

May 8 – *Mr. Tuvell Submits Corporate Open Door Complaint*

In an email to Diane Adams, Mr. Tuvell states that he is submitting his “FOURTH Open Door C&A complaint,” in connection with the accusation that he breached IBM business conduct guidelines by working at EMC while, simultaneously, working for IBM and IBM’s repeated demands for information about outside employment. (TUVELL 1464-65)

**IV. THE COMPANY’S REPEATED REFUSAL TO ACT RESPONSIVELY TO THE WORKPLACE DISPUTE OR INSTITUTE INTERIM MEASURES TO PREVENT FURTHER ESCALATION OF THE DISPUTE WHILE MR. TUVELL’S COMPLAINT WAS PENDING WAS CONTRARY TO BEST PRACTICES**

The company failed to comply with best practices related to the handling Mr. Tuvell’s complaints as early as May 19, 2011, when the conflict with supervisor Fritz Knabe arose, and it escalated when it repeatedly failed to separate Mr. Tuvell from Dan Feldman, the person originally accused of discrimination and retaliatory conduct.

**A. The Company Failed to Intervene Early On to Mediate the Conflict Between Walter Tuvell and Fritz Knabe, Contrary to Best Practices**

As I reviewed the chronology of escalating hostility between Mr. Tuvell and IBM, I saw one resounding theme, again and again -- missed opportunity. I saw a talented employee, an employer with the resources to resolve the dispute, and a situation that spun out of control.

It didn’t have to happen that way. If IBM had applied best practices early on to prevent escalation, there is a distinct possibility that a stable working relationship between workers could have been restored. Even if that were not possible, the company’s early involvement would likely have stanch the increase in hostility and helped to ameliorate a tense situation.

Initially, the friction was limited to Mr. Tuvell, supervisor Fritz Knabe and manager Dan Feldman. Words were exchanged and tempers flared. The accusations seemingly went in several directions. Mr. Tuvell, at least, wanted to get back to work. Yet, as his repeated requests for resolution were ignored by the company, the dispute widened and the complaints grew in number.

In the early days of this dispute, when it pertained to a disagreement between Mr. Tuvell and Mr. Knabe, Mr. Tuvell wanted to clear the air. He made that desire known. On May 19, just one day after the precipitating event now known as the “Excel incident,” Mr. Tuvell reached out to his manager, Mr. Feldman, and asked for a 3-way meeting that would include Mr. Feldman, Mr. Tuvell and Mr. Knabe. Mr. Feldman refused.

Essentially, Mr. Tuvell asked Mr. Feldman to act as a mediator, and he shirked that duty.

Still hopeful, Mr. Tuvell asked again the next day; but, again, he received the same answer. According to Mr. Tuvell, he made a total of six (6) requests for a 3-way meeting. Mr. Feldman admits he refused to review or discuss the matter with Mr. Tuvell, and admits refusing 3-way meetings.<sup>27</sup> (IBM 8997) According to the September 15, 2011 report by investigator Russell Mandel, Mr. Feldman refused these requests for the following reason:

because he “wasn’t interested in mediating disputes but in building credibility by delivering results.”

(IBM 11152; IBM 8997) Mr. Tuvell reports that Mr. Feldman said that he was “only interested in the success of Wahoo.”

Next, Mr. Tuvell involved Human Resources. That is, Mr. Tuvell emailed HR representatives to advise them of his desire to participate in a 3-way meeting to resolve the recent dispute. He got the same response. HR thus refused Mr. Tuvell’s attempts to have this workplace conflict mediated by Mr. Feldman, HR or other appropriate person.

What Mr. Tuvell sought is commonplace in the workplace. In its “Introduction to Mediation Concepts” (2010), SHRM emphasizes a manager’s pivotal role in helping resolve workplace conflicts, adding that managers often act as mediators when informal workplace disputes arise between two or more employees. Likewise, in another recent article, “Conflict Resolution: Mediation: How Do We Mediate a “Cease Fire” Between Two Employees?” (August 2013), SHRM highlights mediation’s effectiveness as a conflict resolution process for many, if not all, workplace conflicts. SHRM notes that both parties must be ready to voluntarily participate in the mediation for it to be effective.

The purpose of mediation is to restore the workers to the status quo, prior the conflict. In “We Need to Talk: Ten Scenarios to Practice Handling Needed Conversations” (2008), SHRM states that a manager’s or supervisor’s role is to establish and maintain performance norms in the workplace. Best practices thus call for managers to quickly address issues as they occur rather than ignore them. Similarly, in “Conflict Resolution Training for Supervisors” (2008), SHRM emphasizes how supervisors can assist in resolving employee conflicts, stating:

Why should we get involved? It’s their problem, right? WRONG! Managers must learn to manage conflicts amongst their team members so that the business continues to run effectively and objectives are met.

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<sup>27</sup> Mr. Feldman apparently testified in his deposition that requests had been made and that he refused. I have not reviewed his deposition transcript.

Also, in a goodbye letter to colleagues from June 14, 2011, Mr. Tuvell stated that he repeatedly asked for a 3-way conversation to clear the air, but that had been refused. (IBM 8825)



The consequences are real. According to SHRM, unresolved conflict can lead to low morale, productivity and, in extreme cases, workplace violence. Even those employees not directly involved in an employee conflict may take sides or withdraw from the conflict, diverting focus from or leading to disengagement from work.

SHRM describes the first phase of mediation as “storytelling.” It calls this phase the “heart of mediation” and states it should not be rushed. The manager/mediator should, therefore, at a “3-way”, or “all-party” meeting:

Allow each party to tell his or her story of how and why the conflict started and persists. Be vigilant in enforcing the ground rule that when each employee tells the story, the other listens and does not interrupt, try to present conflicting information or attack on the other employee. Remember to stay the course in your neutral, impartial role.... Once storytelling has been successfully navigated, the soul of mediation can now shine: acknowledgement, collaborative brainstorming, problem-solving and resolution.

*See* SHRM “Conflict Resolution: Mediation: How do we mediate a ‘cease fire’ between two employees?” (August 2013).

In its article “Discipline: Conflict Resolution Rules and Steps” (April 2014), SHRM outlines similar ground rules to those articulated above, calling for managers to obtain agreement from all parties that they will:

- Work to resolve the conflict.
- Treat each other with respect.
- Be clear and truthful about what is really bothering them and what they want to change.
- Listen to other participants and make an effort to understand the views of others.
- Be willing to take responsibility for their behavior.
- Be willing to compromise.

The process is relatively straightforward, and the SHRM article outlines nine (9) key steps for a manager to follow in the conflict resolution process:

- 1) Arrange for all parties to confront the problem.
  - Select a time as soon as all parties have cooled down.
  - Meet at a place that is neutral for all parties.
- 2) Have all participants describe the conflict in clear terms and describe behaviors, feelings and desired changes.
  - Direct participants to use I, not you, and to focus on specific behaviors and problems, not on people.
- 3) Ask participants to restate what the others have said.

- 4) Summarize the conflict based on what you have heard and obtain agreement from participants.
- 5) Start brainstorming to find solutions.
  - Ask each participant to offer a solution.
  - List all of the options presented (either verbally or on flip chart).
  - Discuss all of the options in a positive manner.
  - Rule out any options that participants agree are unworkable.
- 6) Summarize all possible options for a solution.
- 7) Assign further analysis of each option to a participant.
- 8) Obtain agreement from all parties on next steps.
- 9) Close meeting by having participants shake hands, apologize and thank each other for working to resolve [the] conflict.

In this case, Mr. Tuvell made repeated requests for someone to step in and mediate. He acted responsibly. He acted purposefully. One email is particularly telling of Mr. Tuvell's sincerity. He sent an email to Kelli-ann McCabe in Human Resources with the subject "A request for help." The request was humble: "I would like to learn how I could have handled things better." (IBM 8832)

Despite his good intentions, and the fact that each request by Mr. Tuvell was an opportunity to resolve the dispute before it escalated, the company failed to accept his suggestion or offer a viable alternate suggestion. Each time his supervisor, and the company, refused to take part, that declined opportunity became a missed chance. And, with each missed chance at resolution, the hostility grew.

The company's failure to step in and encourage the 3-way meeting, or ensure that it or a similar mediation-type of meeting took place, was contrary to best practices. It is also somewhat hard to understand, given that this choice was also so evidently contrary to the best interests of everyone involved. The reality of workplace disputes is that employees are not productive if they are fighting rather than working. There were many moments in this chronology when action could have been taken pursuant to best practices to de-escalate the conflict, and there is no question that Mr. Feldman's position resulted in lost ground.

What happened here was relatively predictable. Rather than mediate the conflict, on June 10, 2011, the company made a decision that was quite decisive and harsh. That is, it determined that Mr. Tuvell should be involuntarily removed from his position. Mr. Tuvell was not simply removed from his job, he was demoted. He lost opportunity and prestige, and he explicitly characterized it as an adverse job action. He assumed the role that had been filled with someone with significantly less education and experience than him. While the reason for his demotion was not documented at the time, IBM has since stated that Mr. Tuvell was demoted because of his "inability to work effectively with Mr. Knabe." (May 11, 2012 position statement, Page 4)

In short, he was punished for his involvement in the conflict, and IBM’s only way of “fixing the problem” was to hope it would go away.

Mr. Tuvell was demoted, but he worked minimally and sporadically in the position. He became ill and then took a medical leave and received STD benefits. He never returned to work.<sup>28</sup>

*B. The Company Failed to Implement Interim Measures When Mr. Tuvell Claimed Discriminatory Treatment*

On June 15, 2011, Mr. Tuvell lodged his first email complaint during the period of formal HR involvement. In an email to Mr. Feldman and HR, Mr. Tuvell complained about the demotion, and asserted that it was due to his age, with tinges of gender and race discrimination and retaliation also mentioned. Mr. Tuvell made his first request to be separated from Mr. Feldman one day after filing his complaint. In an email to Diane Adams in HR, he described the environment as “hostile”. (IBM 8504-05) In an email to her colleague Ms. Due, Mr. Adams asked: “I don’t think we should be making any changes before this matter is looked into. Agreed?” (IBM 8504) Lisa Due agreed, stating that it was “too premature” to make any change. (IBM 8503) The company was wrong in thinking that it was “too premature” to make a change that would have allowed Mr. Tuvell to be separated from Mr. Feldman while an investigation of Mr. Tuvell’s complaint took place.

As a matter of best practices, interim measures are one of the first considerations for an employer preparing to investigate discrimination or other similar type of misconduct complaint. Interim measures are steps taken right away, before an investigation is fully underway. These measures are intended “stop the alleged conflict, protect those involved and begin investigations.” See SHRM “Investigations: How to Conduct an Investigation” (April 2013). The purpose is to build momentum in the direction of resolution, rather than propelling the parties into a cycle of escalation.

In “Conducting Workplace Investigations” (November 2011), SHRM underscores that a key tenet of a proper investigation is engaging in appropriate measures at the outset of the process to ensure the complainant does not experience any further harm:

As a general rule, any time an employee makes an informal or formal complaint to management, the employer should take immediate steps to begin an investigation, protect those involved from further disruption and ultimately attempt to resolve the alleged conflict.

In “Investigations: How to Conduct an Investigation” (April 2013), SHRM similarly emphasizes:

When an employee makes an informal or formal complaint, the employer should take immediate steps to stop the alleged conflict, protect those involved and begin investigations.

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<sup>28</sup> Just days after the demotion, on June 13, Mr. Feldman was actively trying to have Mr. Tuvell terminated. (IBM 8689) I am told that Mr. Feldman admitted at his deposition this was his state of mind and intention.

The SHRM article outlines the steps that “should be taken as soon as the employer receives a verbal or written complaint.” The second step articulated by SHRM pertains to interim measures:

Step 2: Provide interim protection

One of the first considerations may be the need to take immediate measures for the protection of the accuser or the alleged victim. Separating the alleged victim from the accused may be necessary to guard against continued harassment or retaliation. Actions such as a schedule change, transfer or leave of absence may be necessary; however, *employees should not be involuntarily transferred* or burdened. These types of actions could appear to be *retaliatory* and result in a retaliation claim. The employer and the accuser must work together to arrive at an amenable solution. Employers may wish to seek legal advice prior to making any decisions. (Emphasis added.)

SHRM’s article entitled “Investigations: THE ABC’s to Investigations” (July 2010) offers similar guidance on best practices, with a list of steps “designed to provide a guideline for conducting a fair and thorough investigation.” Here again, SHRM stresses interim measures as primary consideration once a complaint has been made:

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Put out the fire first. No decision has to be made now on discipline. Stabilize the workplace. The more severe the claim or emotions, the more care may be needed to keep employees separate and/or safe from any further threats, retaliation or harassment while you investigate.

Case by case decision to suspend employee during investigation. Warn about contact with other employees & consequences.

The Massachusetts Commission Against Discrimination (“MCAD”) emphasizes the vital role of interim measures pending an investigation to safeguard against continued harassment. MCAD’s Sexual Harassment in the Workplace Guidelines, which are equally applicable to other kinds of harassment and discrimination, explain that interim measures should “be carefully crafted to minimize the chance that the alleged harasser will either continue to harass the complainant or will retaliate against her.” The MCAD lists some factors that may be relevant when developing appropriate interim measures:

- the expressed wishes of the complainant;
- the nature and extent of the allegations;
- the personal safety of the complainant;
- the number of complainants;

- whether the alleged harassment is of an ongoing nature;
- the behavior of the alleged harasser; and
- whether the alleged harasser has an alleged or actual history of engaging in harassment.

Of course, “[t]he employer must also ensure that the measures themselves do not amount to retaliation against the complainant.” MCAD’s Sexual Harassment in the Workplace Guidelines. Further, interim measures should be monitored to ensure their efficacy and fairness.

\* \* \*

During the investigation, the employer has a duty to take the necessary steps to eliminate from the workplace the harassment about which the complainant has complained. The fact that it may be burdensome for the employer to take such action does not diminish this duty. The employer should monitor any interim measures that it takes throughout the investigation. Monitoring may include assessing whether the interim measures meet the goals of preventing ongoing harassment, protecting the safety of the parties and preventing retaliatory conduct.

So too, the EEOC makes clear, in its Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, 6/18/99, that interim measures are an important part of an effective investigative process:

### **Effective Investigative Process**

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. . . .

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It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

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Separating the complainant and the accused is an obvious and often the most effective step the employer can take. SHRM emphasizes that “[i]t may be necessary to separate the alleged victim from the accused to guard against continued harassment or retaliation.” *See* SHRM “How to Conduct an Investigation” (2010).

A separation can be accomplished in several different ways. This can be done by physically separating employees from working with each other or having any contact with each other. It can include temporary reassignment of one or both affected parties. The employer can place the accused employee on paid or unpaid suspension or leave of absence, pending the outcome of the investigation. If the complaining party leaves the workplace on his/her own volition and expresses a desire to stay away from the site until the situation can be resolved, then he/she should be placed on paid leave of absence pending the outcome of the investigation. Requiring the employee to use his/her vacation or accrued time off solely to escape his/her harasser is, however, never a valid response.

Interim measures should be neutral. As SHRM explains: “If the parties have to be separated, then the separation should not burden the employee who has complained of harassment; doing so puts the employer at risk of a claim of unlawful retaliation.” SHRM “Conducting Workplace Investigations” (November 2011). Neutral interim measures could include making scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

The goal of interim measures is simply to prevent any further inappropriate conduct from occurring. Significantly, the final determination of whether inappropriate conduct did occur is irrelevant to the employer’s duty to put in place interim measures upon receiving a complaint. IBM confounded the concepts of interim measures at the outset of the investigation, with remedial measures at the conclusion of the investigation.

In this case, Mr. Tuvell made multiple requests for interim measures, all to no avail. Mr. Tuvell reached out to the company for protection. He explained that he suffered from a disability which exacerbated his reaction to the workplace conflict. The company acknowledged that Mr. Tuvell’s manager was making matters worse by “sending inflammatory emails – taking the bread crumbs.”<sup>29</sup> (IBM 11137) In response, HR intervened to monitor his email communications with Mr. Tuvell. That certainly signals that HR sees the manager as engaging in problematic behaviors that are or have a tendency to exacerbate the already volatile situation.

No doubt it would have been best practice at this juncture to take action to separate Mr. Tuvell and Mr. Feldman, especially in view of the obvious and recognized hostility Mr. Feldman harbored. As noted above, “The more severe the claim or emotions, the more care may be needed to keep employees separate and/or safe from any further threats, retaliation or harassment while you investigate.” See SHRM “Investigations: The ABC’s to Investigations” (July 2010). A permanent demotion was not the answer.

I was particularly dismayed by the exchange between Ms. Adams and Ms. Due, determining that it was too soon to protect Mr. Tuvell from his perceived harasser. Interim measures are not “*premature*” at the initial stages of a dispute. In fact, it is at the initial states of a dispute that interim measures are *effective and necessary*.

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<sup>29</sup> In another document, HR again referred to Mr. Feldman’s engaging in inflammatory communications, where Diane Adams apparently stated, “Manager starts off with inflammatory statements.” (IBM 11041)

Mr. Tuvell's response shows an understanding of interim measures that seemed lost on the Human Resources professionals who were charged with putting them in place. He responded to the company's refusal to separate him from Mr. Feldman as follows: "IBM cannot comfortably support a policy of 'presumed non-abusive' in a case like this, because the consequences of being wrong are just too high." (TUVELL 738-39) He stated that Mr. Feldman was starting to set him up, and he asked them to remove all possibility of letting this happen.

Perhaps the company refused to take interim measures to punish Mr. Tuvell – forcing him to work in an untenable situation in the hopes that he would leave. Mr. Mandel's words of June 27, 2011 -- "No need to place him in another role. Like a tantrum for a 2 yr old, they will learn to do it again if you give in what they need. I prefer respect but fear is not a bad second choice" -- ring loudly. (IBM11143)

Assuming that the company was not intentionally seeking to deny Mr. Tuvell the protections of both its internal policies and employment laws relating to workplace conduct, the only explanation for the company's failure to consider interim measures was that it was confused about the difference between interim measures and remedial/corrective action and their proper use. It is surprising to me that a knowledgeable Human Resources professional could harbor such confusion.

The most salient difference between interim measures and remedial action relates to timing, *i.e.* when the employer implements them. Interim measures are taken once a complaint is made in order to protect the complainant pending the outcome of the investigation, while appropriate remedial action is reserved for the conclusion of a thorough investigation. Thus, interim measures are implemented *while* the investigation is ongoing, in order to stop any further harassment and to prevent retaliation pending the outcome of the investigation. Interim measures are put in place for a finite period of time while the investigation takes place and the investigator can determine if the complaint has merit.

Remedial measures, in contrast, take place *after* the investigation is complete and only when the investigator finds there was merit to the complaint and wrongdoing occurred. For example, the employer may decide to implement remedial measures focused on education, such as one-on-one sensitivity training, redistribution of the policy, and the like. Following an investigation that has revealed misconduct, employers may also consider corrective action such as discipline or termination. A reassignment or transfer of the accused might also be considered a corrective measure.

Interim and remedial measures both have the intended purpose of stopping further misconduct such as discriminatory treatment and retaliation, in order to effectuate policies and laws designed to maintain a workplace free from all forms of discrimination. Remedial measures, however, have the additional purpose of correcting the effects of misconduct revealed by the investigation, with the goal of putting the employee in the position he or she would have been in had the misconduct not occurred.<sup>30</sup> It is, therefore, remedial measures (not interim measures) that are

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<sup>30</sup> The EEOC gives examples of some types of remedial measures that can be taken to correct the effects of harassment:

properly reserved for implementation only after an investigation is complete and has uncovered wrongdoing.

The facts reveal that Mr. Tuvell continued to request, very pointedly, that the company take interim measures. A week after he lodged his first complaint and, simultaneously, sought interim measures, he asked again, on June 23, to be separated from Mr. Feldman. By this time Lisa Due had been assigned to investigate his complaint. Mr. Tuvell wrote to her, “I have *begged* HR to release [me] from the grasp of the likes of Dan [Feldman], yet I am still forced to be here, more vulnerable than ever, and tortured beyond my ability to stand it.” He asked if there was an opportunity to allow him not to work with his “tormentor” at that time. (TUVELL 666-67) (Emphasis supplied)

In considering the purpose of best practices, I think it is significant to note the change in Mr. Tuvell’s tone over time. In May and early June, Mr. Tuvell was reaching out to Mr. Feldman asking to talk. When Mr. Feldman refused, he turned to Ms. Adams and asked for “help.” He asked what he could do better next time. Now, he “begged” for help.

But as things ramped up, so did Mr. Tuvell’s rhetoric. This comes as no surprise - one of the primary purposes of interim measures is to prevent emotions from heightening. This was another opportunity for the company to stop the escalation. Once again, failing to appropriately apply the best practice of interim measures to a situation where something was so obviously called for, Ms. Due responded that to do anything would be “premature.” (TUVELL 667-68)

It was more than predictable that events would escalate. It was preordained.

Mr. Tuvell’s next request for interim measures came on June 28, 2011. The language he used once again illustrates why interim measures are a best practice. He was becoming increasingly frustrated and frightened by the company’s failure to step in to protect him from Mr. Feldman while the investigation was ongoing. In an email that day, he wrote that he has:

***BEGGED*** HR to get [him] away from [Mr. Feldman], as fast as possible, and I hereby repeat that plea. I do not trust you, and I fear you (i.e. do not

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- restoration of leave taken because of the harassment;
  - expungement of negative evaluation(s) in employee’s personnel file that arose from the harassment;
  - reinstatement;
  - apology by the harasser;
  - monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
  - correction of any other harm caused by the harassment (*e.g.*, compensation for losses).

See EEOC: Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, 6/18/99.



feel safe around you), for good/rational reasons correctly/truthfully stated...” (TUVELL 672-73) (Emphasis supplied)

“I’ve been forced to continue working for Dan [Feldman] and I despise every moment of it. I CONSIDER IT RETALIATION. My health (both physical and mental) is suffering, as I have duly informed all of you.” (TUVELL 673)

I note, too, that Mr. Tuvell was not imagining things: Dan Feldman admittedly was trying to have him fired.

The company’s refusal, again, to provide Mr. Tuvell relief is particularly surprising, in view of Mr. Tuvell’s assertion that failure to protect him was retaliation. Ms. Due, as the investigator reviewing his complaint, hearing his charges that his demotion was discriminatory, should have been on high alert for signs of retaliation. Her failure to recognize the possible ramifications of ignoring Mr. Tuvell suggests that she may not have been sufficiently trained or experienced, though I offer no opinion on that matter at this time.

On June 29, 2011, Ms. Due found that Mr. Tuvell’s claims were not supported by sufficient evidence. Mr. Tuvell immediately appealed. With the dispute ongoing, the company was still under a duty to protect Mr. Tuvell from harassment, discrimination and retaliation.

At every stage, I submit that the company had a duty to consider whether interim measures were necessary, and it failed to discharge its duty every time.

On July 1, 2011, Mr. Tuvell had a conversation with Russell Mandel, who had been assigned to review Ms. Due’s investigation. Mr. Tuvell expressed his belief that he was being subject to retaliation by Mr. Feldman. In a July 5, 2011 email to Mr. Mandel, Mr. Tuvell stated that he wanted to reiterate what had been discussed days earlier: “I requested to be removed from my hostile work environment (according to my perception), but you explained to me that it is ‘impossible’ (i.e. not within IBM policy) for that to happen at this time (if ever). I will abide by that decision to the best of my ability, but I reiterate it will be hard for me to do so, and that I continue working under these conditions only under the most strenuous protest.” (TUVELL 719) Later that day, Mr. Tuvell reiterated his request. (TUVELL 679)

This was another opportunity for a trained and seasoned HR professional to make the right call and implement interim measures. Unfortunately, that did not happen. Mr. Mandel responded much in the same way Lisa Due did, by stating: “[W]e have not concluded that you are indeed working in an inappropriate work environment and I’m still looking into your issues.” (TUVELL 719-20) Like Ms. Due, Mr. Mandel was under the mistaken impression that nothing could or should be done until the company made a definitive finding that wrongdoing had occurred. Again, this demonstrates a clear lack of knowledge of the meaning and application of best practices as they relate to workplace investigations and interim measures.

It is true that the company’s Harassment and Inappropriate Behavior policy contemplates the “transfer [of] the offender to another department or location. [And, if] requested by the victim,

he or she may be transferred to another department or location.” (TUVELL 66) However, IBM confuses the timing. These are remedial measures to be considered after the completion of the investigation and a determination of wrongdoing. Mr. Mandel, like Ms. Due, failed to grasp this important concept.

In his August 18, 2011 Corporate Open Door complaint, Mr. Tuvell made another request for interim measures. At this point, the company – at the highest levels -- was clearly on notice that Mr. Tuvell was raising claims of discrimination and retaliation. It is beyond dispute that an employer should take steps to protect an employee who has complained of discrimination from further illegal conduct – *before it happens*. But the company continued to miss opportunities to do this, and the hostility continued to escalate.

On August 30, 2011, Mr. Tuvell made another request for interim relief. In an email inquiring about the status of his Corporate Open Door complaint, he wrote that he had “many, many times demanded to be removed from Dan [Feldman]’s ‘leadership’ (if you can call it that), but to date have been blindly/unthinkingly refused (sometimes explicitly, sometimes implicitly).” (TUVELL 1519) He reiterated his request in September.

The record is abundantly clear – Mr. Tuvell made repeated requests to his manager, HR professionals and corporate executives to implement remedial measures. The response, when there was one, was that it was premature as the investigation was not complete. As exhaustively stated above, that is an incorrect response, and the company thus failed to follow best practices for considering and implementing interim measures.

The company’s failure to apply best practices in its initial response to the first dispute plays a central role in this saga. In the employer-employee relationship, the parties do not have equal power. The employer is the party with the power. That power can be used to build positive relationships and resolve disputes when they occur. IBM did not do that here. Instead, IBM used its power to deny Mr. Tuvell interim relief when he was begging for help, believing in good faith to be the victim of discrimination and retaliation. This was diametrically opposed to best practices.

**V. THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES OF ITS INTERNAL POLICIES IN SELECTING RUSSELL MANDEL AS INVESTIGATOR**

The goal of an investigation is to find the facts and reach a reasoned and fair resolution to the complaint. An investigation is a means of eradicating any complained-of harassment, discrimination, and/or retaliation so that the employer can maintain (or re-build) a productive work environment free of illegal conduct. A meaningful investigation is one that is transparent, impartial and even-handed.

The investigator spearheads the investigative process. The investigator must gather and be aware of all applicable policies and procedures so that they can be applied consistently and impartially. Additionally at the outset, all involved parties must have faith in the integrity of the investigative process. Drawing from the complaint, the investigator will define the scope of the investigation,

which may expand as the investigation proceeds. The investigator will determine what documents are relevant to the investigation, including policies, procedures, personnel documents, and documents containing potential evidence. The investigator will identify witnesses to be interviewed and will define the lines of inquiry. The investigator will also be the primary person communicating with the complainant and the accused. The investigator will maintain confidentiality and should know what information may be shared with whom. The investigator will conduct the interviews, weigh the evidence and draw the conclusions. In short, the investigator is both judge and jury.

Accordingly, the employer must choose the investigator with great care. Like an effective judge, the investigator must know which policies and practices to apply and must have the ability to apply them fairly. To accomplish this, the investigator must be trained, experienced and knowledgeable. Like an effective jury, the investigator must weigh all relevant evidence in a principled and unemotional manner. To carry out this responsibility, the investigator must be impartial and neutral.

In SHRM's How-To Guide entitled "Investigations: How to Conduct an Investigation" (April 2013), SHRM emphasizes the importance of selecting an appropriate investigator. SHRM outlines the key qualities an investigator should possess:

- An ability to investigate objectively.
- To have no stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.
- To be in a position to maintain confidentiality, be respected within the organization (because his or her conclusions will be used to make a determination), have the ability to act as a credible witness and, if internal, have the likelihood of continued employment with the company.

Selecting an investigator with the appropriate training and knowledge means selecting an investigator who knows the rules that apply during the course of the investigation – those "rules" include company policies, investigative best practices, and relevant laws defining the types of conduct that are unlawful. In "How to Avoid Botched Investigations" (August 2012), SHRM emphasizes the risk of choosing an investigator who lacks the necessary training, experience, and

impartiality to handle the matter under investigation, such as an investigator who lacks the skills, training or ability to perform the task well or otherwise be unable to follow appropriate federal and state laws as well as best practices and internal guidelines.

What is more, the employer must select an investigator with the ability and skill to accurately assess the scope of the complaint. Understanding the scope of the complaint is a necessary first step that must be taken so that the investigator may then identify the relevant evidence. In turn, reviewing all of the relevant evidence is a prerequisite for reaching a reasoned and fair decision.

Not only must the investigator have the skills to identify the relevant evidence but, further, the investigator must have the ability to weigh that relevant evidence in a principled, unbiased and unemotional manner. In “Guiding Principles for Conducting Workplace Investigations,” (1<sup>st</sup> revision, July 2013), the Association of Workplace Investigators (“AWI”) states that the “investigator should be impartial, objective, and possess the necessary skills and time to conduct the investigation.” (Principle No. 2) The Guiding Principles articulate numerous factors that should be considered when selecting an investigator, including, “... the investigator should be someone who is in fact, and *who is perceived by the participants to be*, impartial[.]” (Emphasis supplied) Perception is as important as reality in investigator selection.

Accordingly, it is axiomatic that the investigator cannot be a party to the complaint or a witness in the investigation. “Obviously, someone who has a vested interest in the outcome of the investigation is a poor choice.” See SHRM “Proper Workplace Investigations” (May 2011). “Some investigators are simply too close to the situation and can’t be objective. If they’re friends with—or have coached or worked closely with—the person being investigated, they might have a personal stake in the outcome.” See SHRM “How to Avoid Botched Investigations” (August 2012).

It is critical that the “employer . . . ensure that both the accused and the accuser(s) have no credible reason to believe that the investigator cannot carry out his or her responsibilities in a fair and objective manner.” See “Legal Risks Associated with Conducting Improper Investigations” (AWI Quarterly, Vol. 3, No. 1, Jan. 2012) (Julie A. Moore) (citing *McLaughlin v. National Grid USA*, 2010 WL 137814 (D. Mass. 2010)). If the process is actually unfair or one-sided, or if one party perceives the process as biased, the decision will carry no weight and the goal of finality will not be achieved. Therefore, it is essential that the investigator be free of “preconceived notions as to who was at fault, and that he or she treats all parties involved -- the complainant, alleged wrongdoer and all witnesses -- fairly and with respect.” See SHRM “Proper Workplace Investigations” (May 2011).

In some situations, an outside investigator may be a more appropriate choice than an internal or in-house investigator. In the “Legal Risks Associated with Conducting Improper Investigations” article cited above, I highlight the *McLaughlin* case to illustrate the legal consequences that can occur when an employer fails to investigate or fails to *properly* investigate a discrimination complaint using the right investigator. The article states, “We see from the case law that investigations can be attacked in myriad ways. Though the courts do not expect investigations to be perfect, they must be reasonable and unbiased or they can form the basis for liability.”

Even IBM's Human Resource professional Lisa Due, the initial investigator, recognized that neutrality and lack of bias are important. In her interview notes, she stated that John Metzger was told to "stay neutral, he is the 'go to guy' as dan (sic) is embedded in the fray." (IBM 11134)

IBM maintains policies about investigations that underscore its commitment to responding to complaints properly, and this begins with its commitment to objectivity – inextricably tied to the choice of investigator. In its Concerns and Appeals Program, IBM explains its Open Door policy:

The Open Door process reviews actions or inactions by management which [are] directly related to and affect an employee. All issues, except policy decisions and operational business issues, are eligible for review under this process. . . .The intent of the process is to ensure an objective and thorough review of the issues. The process will not make legal determinations. It will, however, determine whether the employee was treated fairly.

(TUVELL 2560)

The investigator assigned to investigate the Open Door has one "primary responsibility," which is "to provide an objective and through review of the issues." The investigator's job is to ensure "an equitable result for the employee making the appeal."

The company failed to comply with best practices when it selected Russ Mandel to review Ms. Due's investigation, and to investigate each Open Door complaint that followed, because he was not impartial. Four reasons support this conclusion: (1) he reviewed and sanctioned the initial investigation and, thus, was not independent; (2) he was a person accused of engaging in wrongdoing; (3) he lacked the knowledge or capability to apply best practices and company polices to ensure a fair and neutral process; and (4) Mr. Tuvell expressed his lack of confidence in Mr. Mandel's ability to act free of bias and repeatedly protested Mr. Mandel's role as investigator.

A. *Mr. Mandel Reviewed and Sanctioned Ms. Due's Investigation, Thus Destroying Any Independence*

In Lisa Due's notes, she indicated that she met with or interviewed Mr. Mandel on June 27, 2011. (IBM 11143) Her notes state as follows:

Rules of court of law don't exactly apply to the business environment.  
One of the things that differentiates IBM from others is this organization that investigates appeals.

Manager is treating different than everyone else...making sure you are doing your job.

Think being too nice to the manager, from complex case perspective.  
Employee didn't bring the complaint.

Tell the ee: manager/hr communicated complain re; weather [SIC]  
tmistreated, [SIC] find no reason to conclude that.

Now up to manager to manage the employee. Then turn it over to  
HR/manage as [SIC] performance.

No need to place him in another role. Like a tantrum for a 2 yr old, they  
will learn to do it again if you give in what they need.

I prefer respect but fear is not a bad second choice.

For whatever reason, Ms. Due and Mr. Mandel met, and Ms. Due took notes of the information that Mr. Mandel provided. Consequently, Mr. Mandel had a hand in the outcome of Ms. Due's investigation. Indeed, as an email from Lisa Due and Kelli-ann McCabe on June 29 makes clear, Mr. Mandel was familiar with the evidence Ms. Due considered and the conclusions reached: "Typically, Russ [Mandel] would review what I have done and then get back to the employee. ***In this matter, I already ran the case by Russ. He may have all the information he needs or contact me to fill in gaps.*** Then he will close with the employee." (Emphasis added) (IBM 8474)

Subsequently, in an August 18, 2011 email to a corporate executive, Lynea St. Pier, Ms. Due confirms that Mr. Mandel was involved in her investigation and approved her findings. (IBM 8904) She wrote, "Just a heads up that you may be or have gotten a case in regards to Walter Tuvell (his latest was a 100 page letter to SJP and others)... So you know, Mr. Tuvell did not agree with my findings (***approved by Legal and Russ***)... I would be happy, thrilled even, to fill you in on the details. Just ping me!" (Emphasis added)

I note that, in his September 15, 2011 report, Mr. Mandel states: "This investigator became involved because Mr. Tuvell escalated the finding of Ms. Due's investigation." (IBM 11147) This is not true, as Mr. Mandel was clearly involved before Ms. Due made her findings. The company's failure to ascertain Mr. Mandel's involvement in Ms. Due's deliberative process indicates that the company failed to comply with best practices when it selected him to review her findings.

Mr. Mandel was assigned to be the investigator and take a fresh look at Ms. Due's findings. The Open Door policy is an appeal process that is designed for an aggrieved employee to have a member of management review a finding that he/she wants independently reviewed – not rubber stamped. To be "objective," as the policy states, the person involved in the appeal naturally cannot have been involved in the underlying decision.

As explained above, it is my opinion that IBM did not follow best practices to ensure that the investigation was independent and valid, because Mr. Mandel was assigned as the investigator

after having been directly involved in Lisa Due's finding that Mr. Tuvell subsequently challenged, on appeal, as being incorrect.

*B. Mr. Mandel Was a Person Accused of Engaging in Wrongdoing*

The company also failed to comply with best practices when it appointed Mr. Mandel to investigate Mr. Tuvell's Open Door complaints because Mr. Mandel was one of the persons whom Mr. Tuvell accused of wrongdoing.

The Open Door policy, under which Mr. Tuvell's August 18, 2011 and subsequent appeals and complaints were expressly filed (specifically, he invoked the Corporate Open Door option), requires that such complaint will be reviewed by someone who was not involved in the dispute at issue. However, as Mr. Tuvell's communications made clear, Mr. Mandel was a central figure named in his Open Door complaints, including each and every addendum. This disqualified him from acting as the impartial investigator, in both reality and perception.

Mr. Tuvell framed his initial Open Door filing as a complaint about a "Premeditated conspiracy of defamation, deceit/fraud and IIED (intentional infliction of emotional distress), with the aim of coercing me to resign -- or alternatively to fabricate false 'evidence against me' leading to 'dismissal for cause' -- all motivated by age discrimination. Said conspiracy against me (and presumably many other employees) has been secretly sponsored/supported by IBM at corporate level for years, in the sense of systemic, widespread coordination involving management/HR/Legal." (TUVELL 468) This is the first reference to Mr. Mandel as a person accused – he is part of HR.

More directly, on August 18, 2011, Mr. Tuvell asserted, "Thus I claim the whole C&A process in general, and Lisa Due and *Russell Mandel* in particular, knowingly foster[ed] a fraudulent and abusive hostile work environment." (TUVELL 609) (Emphasis added) Given these allegations, however speculative (though specifics were adduced too, and were the very reason I'm told that Mr. Tuvell chose the Corporate Open Door option), it was completely inappropriate to assign Mr. Mandel to spearhead an investigation which necessarily required an investigation of his *own conduct*.

On August 28, 2011, in an email to corporate executives, Mr. Tuvell again pointed out that Mr. Mandel was a party complained-of, and, therefore, could not investigate it. (TUVELL 744) Mr. Tuvell made it abundantly clear that Mr. Mandel was not an appropriate choice of an investigator, as he was specifically a "named party to the wrongdoing." He asked for an "independent body" to step in to investigate.

In an addendum to his complaint filed on August 28, in connection with the Corporate Open Door process, Mr. Tuvell added another claim involving Mr. Mandel. That is, Mr. Tuvell asserted that the company's delay in investigating his complaint, and even responding promptly to its submission, was based on his STD status – disability. (TUVELL 753) Indeed, *it was Mr. Mandel* himself who informed Mr. Tuvell that he would not be contacting Mr. Tuvell to investigate his complaints because he was on STD leave. Again, Mr. Mandel was the alleged wrongdoer and, yet, the company failed to appoint another investigator to the matter.

Shortly thereafter, Mr. Tuvell again pointed out that Mr. Mandel was involved in the complained-of conduct and, therefore, could not impartially investigate it. He stated as follows:

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email (“no third-part[y] complaints” and “STD/leave disqualification from due process”), Russell Mandel has proven he is not qualified to hear my case, so somebody else needs to be appointed. But there is even an over-riding reason Russell cannot be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in “blackballing me,” and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: “The investigator, however, *must not* have been involved in the issue being investigated and, in IBM’s opinion, is sufficiently removed organizationally from the employee to provide objectivity.” (Emphasis added)

(TUVELL 1519)

Mr. Tuvell’s September 4, 2011 addendum to the Corporate Open Door also names Mr. Mandel, focusing on Mr. Mandel’s refusal to handle Mr. Tuvell’s appeal because Mr. Tuvell was on a leave of absence.

In addition, Mr. Tuvell complains about the company’s failure to take interim measures to separate him from his supervisor, Dan Feldman, who Mr. Tuvell complained about, while the investigation was ongoing. Mr. Mandel was involved in or was the sole decision maker in this regard. (TUVELL 719-20)

Additionally, following Mr. Mandel’s decision to cut off Mr. Tuvell’s access to the Netezza systems and company buildings, Mr. Tuvell complained that this was harassing and retaliatory. (TUVELL 867)

On September 21, 2011 Mr. Tuvell again attempted to use the Corporate Open Door process to seek a neutral review of the process and, specifically, evade Mr. Mandel’s involvement. (TUVELL 892) On that day, Mr. Tuvell sent an email to Richard Kaplan, Corporate Trust & Compliance Officer, with a subject line “There is a cancer growing on IBM.” He provided some background and relevant documentation, and explained that Mr. Mandel was the investigator but he was not handling the matter properly and was not to be trusted. (TUVELL 892) Again, the company failed to take appropriate action and, instead, it was Mr. Mandel who responded to Mr. Tuvell, stating that the complaint that he directed to Mr. Kaplan had been forwarded to him for handling. (TUVELL 892-93)

More allegations against Mr. Mandel followed. Mr. Tuvell named Mr. Mandel as a party in his September 22, 2011 addendum, citing Mr. Mandel’s actions in revoking his IBM badge, physical access to IBM buildings, denying him access to Netezza VPN and delaying the process. (TUVELL 883) Once again, in an October 22, 2011 email, Mr. Tuvell reiterated his



discrimination/retaliation complaints involving Mr. Mandel: “All of the retaliation by you/HR/Legal is of course in the context of my original complaint about age/sex/racial discrimination, which you/HR/Legal of course are trained to know about...” (TUVELL 918) The November 3, 2011 addendum also names Mr. Mandel as a party to the harassment, retaliation and discrimination by which he claimed he was victimized. (TUVELL 929, 930, 933-34, 936)

Mr. Tuvell made it abundantly clear in his complaints that Mr. Mandel’s conduct was directly in question and should have been investigated.<sup>31</sup> He directly alleged that Mr. Mandel was a wrongdoer. Thus the company’s appointment of Mr. Mandel to investigate these complaints – and keep him in that position as time went on -- was contrary to best practices and its own policies. It defies reason to think that Mr. Mandel could impartially review grievances that were lodged against him. What is even more surprising is that the company had ample opportunity to reassign Mr. Tuvell’s complaints to another investigator, as the allegations continued to mount and it was known that Mr. Mandel’s actions were the source of many of Mr. Tuvell’s complaints.

I was struck by the similarity between this situation and *McLaughlin v. National Grid USA*, which illustrates the legal risks when an employer fails to investigate or fails to *properly* investigate a discrimination complaint using the right investigator. See “Legal Risks Associated with Conducting Improper Investigations.” (AWI Quarterly, Vol. 3, No. 1, Jan. 2012) (Julie A. Moore) In *McLaughlin v. National Grid USA*, the Court reasoned:

A jury might reasonably infer that an investigation was not independent or valid if it were conducted by a person who participated in one of the challenged decisions.

As I noted in my analysis of that case in the AWI peer-reviewed publication, the plaintiff argued that the investigation was “fraudulent,” that the investigator was “incompetent,” and that the investigator’s role in the investigation was “the equivalent of demanding that [he] find himself guilty of discriminatory activities.” Calling it a “ruse,” the plaintiff criticized National Grid for failing to expend the “time, manpower, or risk of an adverse finding that a legitimate investigation would have entailed.”

As explained above, it is my opinion that IBM did not follow best practices or its own policy to ensure that the investigation was independent and valid because Mr. Mandel was accused of wrongdoing and, thus, was one of the subjects of his own investigation.

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<sup>31</sup> In his January 22, 2012 “New Complaint,” Mr. Tuvell claims that the failure to provide him the transfer was a failure to reasonably accommodate him under the ADA. Mr. Mandel was charged with investigating that complaint. I am told that Kathleen Dean, IBM’s Health Services Advisor, testified at her deposition that Mr. Mandel was involved in the reasonable accommodation discussions, including at least one meeting that occurred on September 8, 2011. (IBM 3464-3465) Once again, this is an example of Mr. Mandel charged with investigating his own misconduct.

C. *The Company Failed To Comply With Best Practices When It Selected Mr. Mandel as Investigator Because He Lacked Knowledge and Capability to Apply Best Practices and Company Policies That Were in Place to Ensure Neutrality and a Fair Process*

Throughout the investigation, Mr. Mandel repeatedly failed to comply with best practices and misapplied or misinterpreted company policy in a way that was prejudicial to Mr. Tuvell. His failure to understand the policies at issue, or his unwillingness to apply them fairly to Mr. Tuvell, adds support to my conclusion that he was not a thoroughly trained, skilled and competent investigator – and, therefore, an inappropriate choice for handling Mr. Tuvell’s complaints. It is my opinion that the company failed to comply with best practices when it assigned him to investigate Mr. Tuvell’s complaints.

1. *Not Understanding Third Party Complaints*

One example of Mr. Mandel’s failure to understand, or failure to evenly apply, company policies is his instruction to Mr. Tuvell that the company does not accept “third party” complaints. This came in response to Mr. Tuvell’s report of what he believed to be a potentially discriminatory statement in an email written by a colleague, Gordon Booman: “I think the regression test you describe is Amal’s raison d’être...No?” Mr. Tuvell reported this statement to Mr. Mandel pursuant to the company’s policy, which instructs employees to “immediately report” any “unlawful or unethical situation.” Mr. Tuvell believed that Mr. Booman’s statement might constitute discrimination based on race, color, religion, national origin, or other protected category, based upon the company’s demonstrated propensity in this case to interpret language in a literal manner . (TUVELL 444) Mr. Mandel responded,

IBM does not accept third-party employee complaints. If [co-worker] Mr. Haldar has a complaint about his treatment, he should complain using the C&A process.

(TUVELL 442)

It is well settled that an employer *is* legally obligated to take all reported harassment and discrimination seriously, and to investigate such complaints. As SHRM notes in “Expert Provides Guidance on Investigation Dilemmas” (March 2010), “‘Courts give us some guidance on what needs to be investigated,’ ...such as allegations of harassment, discrimination, theft, substance abuse, violence, Internet/e-mail usage, insubordination, ethics and financial issues.” The reporter of the discrimination is irrelevant – the employer is on notice and must respond.

In its own policies, IBM expresses its commitment to investigate complaints of discrimination (to include harassment and retaliation) regardless of the source. For example, in its Business Conduct Guidelines, under section 2.1 “Raising Concerns and Reporting Violations,” IBM states, “If you know of, or have good reason to suspect, an unlawful or unethical situation or believe you are the victim of prohibited workplace conduct, immediately report the matter through any of IBM’s Communication Channels.” (IBM 2361) The company refers to the Open

Door policy contained in its Concerns & Appeals programs. Workplace discrimination and harassment are specifically included in describing the types of misconduct that should be reported. (IBM 2363)

As a high-ranking HR official, Mr. Mandel knew or should have known that an employer's acceptance of third-party complaints is completely consistent with best practices, state and federal authorities, and IBM's own policy, as quoted above. The MCAD, for example, states in its Sexual Harassment in the Workplace Guidelines: "Any employee who receives a complaint of sexual harassment or is made aware of any sexually harassing behavior, should immediately report it to the designated person(s) and/or the designated department." Employers need to be aware of any type of discrimination in the workplace, and it should take all reports seriously regardless of the source.

I note that, in the Business Conduct Guidelines, under section 3.5, IBM states, "Never make misrepresentations or dishonest statements to anyone. . . . Reporting inaccurate or incomplete information, or reporting information in a way that is intended to mislead or misinform those who receive it, is strictly prohibited and could lead to serious consequences." (IBM 2367). Thus, to the extent that Mr. Mandel's representation to Mr. Tuvell that IBM does not accept third-party employee was inaccurate or incomplete, or reported in a way intended to mislead or misinform Mr. Tuvell, Mr. Mandel acted contrary to IBM's policies.

I am told that Lisa Due, who apparently has received training from Mr. Mandel, testified in her deposition that IBM accepts and investigates third party complaints of possible discrimination.

## 2. *Failing to Interview Mr. Tuvell While He Was on STD*

Another example of Mr. Mandel's failure to properly apply company policy is his response to Mr. Tuvell's August 18th Open Door complaint. On August 25,<sup>32</sup> Mr. Mandel responded to Mr. Tuvell's Open Door filing on behalf of the company. He wrote: "I do not plan on discussing your concerns directly with you until you return from Short Term Disability, so you may concentrate on your health improving." (TUVELL 745) Mr. Mandel's decision in this regard indicates that he was not fully apprised of the company's Open Door policy, which is expressly available to all employees, including those who are on short-term disability.

The Open Door policy specifically states, under its Employee Eligibility section (2.1), that "All regular full-time and part-time employees, supplemental employees, employees on a leave of absence... are eligible to use the Open Door process." (TUVELL 2561)

Mr. Tuvell protested this decision, to no avail. On August 30, Mr. Mandel reiterated his position in another email, stating: "I am simply not going to discuss with you the concerns you raised while you were out on STD since you are not supposed to be working during this time." He also advised Mr. Tuvell that he was working on the investigation, but just would not be speaking directly with Mr. Tuvell while he was out on leave.

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<sup>32</sup> The policy states that the company will normally respond within two (2) days. Mr. Mandel claims that the delay in responding to Mr. Tuvell was due to Mr. Mandel's vacation. Ordinarily, it is best practice to assign someone to handle complaints when the assigned individual is on vacation.

Mr. Tuvell continued to object to Mr. Mandel's misapplication of the Open Door policy. On September 4, he filed an addendum to his Open Door complaint, focusing on this issue. In it, Mr. Tuvell emphasized that the Corporate Open Door has been "the main audience for [his] Complaint all along," and he reiterated his distrust for Human Resources "for very good reasons." He states that the C&A policy explicitly states that employees "on leave" are fully eligible to participate in the C&A process.

Mr. Tuvell wrote to Mr. Mandel about this issue again on October 18, but it was not until November 7, 2011 that Mr. Mandel finally reached out to Mr. Tuvell with an offer to interview him. Mr. Mandel only then indicated that he would like Mr. Tuvell's input so that he could complete his investigation. (TUVELL 962) It is to be noted that Mr. Mandel had already completed all his other interviews, and even formulated the conclusions of his investigations, by September 15.

### 3. *Failing to Appreciate the Timeliness Requirement in the Policy*

Mr. Mandel's nearly three-month refusal to work with Mr. Tuvell to resolve the complaint was contrary to the Open Door policy itself, which pledges that complaints will be handled "in a timely fashion," which usually means "30-60 business days." (TUVELL 2561) Mr. Tuvell made his desire to resolve the matter expeditiously quite plain, explaining in an email to Mr. Mandel that his disability was related to the unresolved complaint. Mr. Tuvell vociferously repeated that he was ready, willing and able to do his part to reach a prompt resolution. The fact that he was on STD did not bar him from doing this, as he was well enough to communicate with the company during his absence and, in fact, made great efforts to do so.

One of the hallmarks of an effective investigation is promptness, and the delay Mr. Mandel caused flies in the face of this premise. As well-trained and knowledgeable investigators know, "an employer should be able to demonstrate that it took reasonable steps to begin and complete an investigation as quickly as practicable after learning of a complaint." See *Workplace Investigations: Understanding Standard Practice*, by Michael A. Robbins and Julie B. Yanow,<sup>33</sup> CA Labor & Employment Bulletin (June 2010). To be sure, "promptness" is determined on a case-by-case basis, as warranted by the facts. But here, the fact is that Mr. Mandel's justification for the delay was not warranted by the policies or circumstances at issue.

### 4. *Chastising Him For Availing Himself of the Corporate Open Door Process*

Another example of Mr. Mandel's failure to apply company policies fairly and properly is apparent in an August 30, 2011 email, in which Mr. Mandel instructs Mr. Tuvell to communicate his concerns about the investigative process "through the appropriate IBM channels." He did not mean the various avenues available in IBM's C&A process. Rather, he stated that Mr. Tuvell should be communicating with him "alone" since he was the investigator. In fact, he told Mr. Tuvell that he was "disturbing senior IBM executives" who were not involved in the process. He

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<sup>33</sup> Mr. Robbins is President of AWI, and Ms. Yanow is a member of the Board of Directors.

directed him to stop sending any emails, directly or with a “cc,” to the senior executives. (TUVELL 1518)

It is important to note that Mr. Mandel’s email was written in response to Mr. Tuvell’s August 30, 2011 communication to the company’s corporate office, regarding the company’s response to his Corporate Open Door complaint. Mr. Tuvell was eligible to use this process because it is open to all regular and part-time employees, *including employees on a leave of absence*. In accordance with the policy, Mr. Tuvell had given management an opportunity to resolve his concern. His correspondence on August 30 was pursuant to the policy direction that, if the employee has given management an opportunity to resolve the complaint and is unsatisfied, the employee must contact the next level of management or the first level of management *not involved in the issue*.

Obviously, Mr. Mandel *was* involved in the issue. Consequently, under the Open Door policy, Mr. Mandel should not have been the person assigned to handle the matter. Additionally, the policy *explicitly* states that IBM has Open Doors to the corporate office. The corporate office includes senior executives. The policy says that concerns directed to the corporate office will be acknowledged by the Corporate Employee Relations Special Programs staff.

In short, Mr. Tuvell was doing exactly what the policy instructed. He was communicating “through the appropriate IBM channels,” as set forth in the company policy. Mr. Mandel’s response, that Mr. Tuvell should not be contacting the corporate office, is directly contrary to the policy.<sup>34</sup>

A trained investigator is well aware of the risks associated with limiting an individual’s ability to use complaint mechanisms that are available pursuant to policy. Inconsistent application of policies can easily be seen as retaliatory, especially where the employee is complaining about discrimination (including retaliation), as Mr. Tuvell was doing. Mr. Mandel’s failure to understand this elementary principle is a sure sign that he was a poor choice of investigator.

In fact, in “Don’t Let Dormant Policies Lie” (July 2007), SHRM notes, “Inconsistent enforcement of company policies is practically an invitation for claims of discrimination under state and federal anti-bias laws.” Discussing this principle, SHRM cites *EEOC v. Kohler Co.*, 335 F.3d 766 (8th Cir. 2003), where evidence that the employer inconsistently enforced its policies to the detriment of the employee supported the jury’s finding that the employer retaliated against the employee for filing a claim of discrimination.

##### 5. *Denying Mr. Tuvell Access to Company Systems*

What is more, this was not the only action Mr. Mandel took to restrict Mr. Tuvell’s access to the company’s official complaint mechanisms. In September, Mr. Tuvell’s access to the company’s Netezza VPN via Juniper Network Connect system in Marlboro was cut off. (TUVELL 860-61) In an email to Mr. Mandel, Mr. Tuvell stated that he could not log in to Netezza and asked if he was being blacklisted. (TUVELL 860) Mr. Mandel responded that Mr. Tuvell had no need to

<sup>34</sup> I note that the company changed this policy in 2012, limiting the ability of employees to reach out to the corporate office. But this exchange took place in 2011. The policy language quoted above, therefore, was applicable.

access heritage Netezza systems while he was out on STD. (TUVELL 860) Thereafter, Mr. Mandel further cut off Mr. Tuvell's electronic access by eliminating his access to LotusNotes and w3, which affected Mr. Tuvell's access to IBM worldwide. (TUVELL 1432-1433) This was one of the many complaints that Mr. Tuvell lodged through the Open Door and that was not investigated, as discussed elsewhere in the report.

The point here is that Mr. Mandel exhibited yet another failure to correctly apply company policy to Mr. Tuvell. Mr. Tuvell expressly *did* have a need – and a right – to use the company's official channels of communication. In fact, the company's policy dealing with discrimination issues expressly state that the Corporate Door is open and that one channel of communication available to all employees is "Lotus Notes" – the same program Mr. Tuvell was no longer able to use.

In addition, Mr. Mandel had a hand in disallowing Mr. Tuvell's IBM badge to allow him access to IBM buildings. (TUVELL 883)

My opinion is further buttressed by IBM's own policy language:

Threats or acts of retaliation or retribution by any manager or other supervisory personnel against employees *for use of IBM's communications channels* or appeals process will not be tolerated by the company; such conduct, when determined to have occurred, will result in discipline.

One of the most important tasks for a trained investigator is to communicate that retaliation is absolutely prohibited. Mr. Mandel, in direct contradiction of company policy and the prohibition on retaliation, prohibited Mr. Tuvell from using IBM's communication channels – including restricting his ability to walk in the front door of the company buildings. This is a plain violation of company policy and further indication that he should not have acted as investigator in this case.

6. *IBM Knew or Should Have Known that Mr. Mandel Had a History of Failing to Conduct Prompt or Neutral Investigations, Contrary to Policy*

There may be circumstances where an employer unwittingly engages an apparently well-credentialed investigator,<sup>35</sup> who turns out to be a sham. This is not one of those cases. Mr. Mandel apparently had a history of conducting investigations that were not prompt and that were one-sided investigations. In 2011 and 2012, when the Tuvell investigation was underway, IBM knew or should have known about this history.

Indeed, when Mr. Tuvell filed his complaint, the company had all the information necessary to be aware that Mr. Mandel was not an investigator who conducted prompt or neutral investigations. On or around June 13, 2008, IBM assigned Mr. Mandel to investigate a

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<sup>35</sup> I have no knowledge of Mr. Mandel's training, education or experience in HR or conducting investigations and, therefore, cannot comment on his qualifications at this time.

complaint by then IBM employee James Castelluccio of age discrimination. Mr. Mandel did not conclude that investigation and inform Mr. Castelluccio of the finding until August 11, 2009 -- *over one year later*. This could hardly be considered prompt.

With regard to neutrality, an investigation that fails to include an in-person or telephonic interview with the complaining party (irrespective of the documentation provided by him/her) defies what can properly be considered as neutral. The Tuvell investigation was concluded prior to December 23, 2013, which is the date that the United States District Court for the District of Connecticut issued an order precluding the admission of Mr. Mandel's Open Door investigation report in Mr. Castelluccio's case. Even without the direct benefit of that order, IBM had all the information it needed to be reach the same conclusion the Court reached:

Although the open door investigation purports to have determined whether Mr. Castelluccio was treated fairly, it represents only the findings and conclusions of IBM, as opposed to Mr. Castelluccio's account of the circumstances surrounding his termination. This was not an investigation conducted by a neutral party; rather, one conducted by Mr. Mandel, who selected whom to interview and what evidence to consider.

*Castelluccio v. Int'l Bus. Machines Corp.*, 3:09CV1145 TPS, 2013 WL 6842895 (D. Conn. Dec. 23, 2013)

Apparently, it was Mr. Mandel's practice to conduct investigations without ascertaining the complainant's side of the story, which is contrary to best practices and policy. In Section 2.7 of the Open Door policy, entitled "The Investigation," the policy states that "the investigator should interview both the employee initiating the Open Door and his/her management." (TUVELL 2562) A review of the Castelluccio investigative file would have illustrated that Mr. Mandel made his decision in that case without the benefit of Mr. Castelluccio's input. So, it should have come as no surprise to IBM when the same thing happened to Mr. Tuvell. And indeed, the same thing did happen. Time and again, Mr. Mandel interfered with Mr. Tuvell's right to communicate with the company and to participate in the investigation. This right was provided to Mr. Tuvell and other IBM employees by the company's own policies. Mr. Mandel had an obligation to uphold those policies, and to apply them fairly, in the course of his investigation.

Here, the documentation speaks volumes -- Mr. Mandel's report was final long before he even offered to open a dialogue with Mr. Tuvell. Moreover, although Mr. Mandel's September 15, 2011 report indicates that Mr. Tuvell had been interviewed in connection with it, he did not in fact invite Mr. Tuvell for an interview until November 7, 2011. In an email that day to Mr. Tuvell, Mr. Mandel extended the opportunity to meet, "in case you have anything to add to the various Lotus Notes I have received from you."

Here, the obvious warrants special emphasis: Mr. Mandel did not extend this "opportunity" until *after* he had finalized his written report on September 15, a report in which he states that he "had" interviewed Mr. Tuvell. Mr. Mandel's only verbal interaction with Mr. Tuvell at that point was on July 1, wherein I am told that Mr. Mandel began to appreciate the complexity of it.

At that point, according to Mr. Tuvell, the two agreed that Mr. Tuvell would provide a “long-form” complaint before the two met again.

It appears that in this case, as in the *Castelluccio* matter, Mr. Mandel failed to take seriously his obligation to consider the complainant’s side of the story and otherwise give the complainant a voice.

7. *Failing to Treat the Complaining Party and Accused Equally*

I also note another instance where Mr. Mandel failed to abide by policy and give Mr. Tuvell a fair opportunity to participate in the investigation – and to treat all persons involved in that process in a uniform manner. It is evident that Mr. Mandel provided Dan Feldman with the opportunity to review his September 15, 2011 report of the investigation and make corrections. (IBM 10268-69, 10274-75) Mr. Tuvell had no such opportunity.

In concluding that the company failed to follow best practices in selecting Mr. Mandel as an investigator, I considered AWI’s “Guiding Principles for Conducting Workplace Investigations,” (1<sup>st</sup> revision, July 2013), which states:

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer’s policies, standards, ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent and to reach reasoned conclusions based on the information gathered.

It is my opinion that the company failed to comply with best practices when it selected Mr. Mandel as investigator. Mr. Mandel had a history of failing to comply with best practices and policies when conducting investigations. It is in large part due to Mr. Mandel’s role in this investigation that Mr. Tuvell was not afforded a fair and impartial process.

*D. The Company Failed to Comply with Best Practices Because it Insisted on Using Mr. Mandel as an Investigator Notwithstanding Mr. Tuvell’s Clear Assertion That He Did Not Have Faith in the Integrity of Any Process Spearheaded by Mr. Mandel*

Not only must an investigator have the actual ability to be impartial but, in addition, the investigator must be perceived by the parties as impartial and unbiased for the investigation process to be considered fair and impartial.

In its prefatory statement to its “Guiding Principles for Conducting Workplace Investigations,” (1<sup>st</sup> revision, July 2013), the Association of Workplace Investigators (“AWI”) states:

An impartial investigation is generally conducted so that an employer can determine what occurred when there are contested allegations affecting the workplace that involve a potential violation of the employer’s policies, standards,



ethics, or the law. The point of an impartial investigation is to provide a fair and impartial process for the complainant and respondent and to reach reasoned conclusions based on the information gathered.

This best practice is drawn from one of the fundamental premises of due process. That is, an adjudicatory process, formal or informal, is only effective if the parties who are subject to that process believe it is fair.

Mr. Mandel's involvement in the complained-of events, and his failure to fairly apply policies and best practices during his investigation, was not lost on Mr. Tuvell. In fact, Mr. Tuvell vehemently petitioned for a different investigator, over and over. Mr. Tuvell clearly stated that he did not believe that the processes offered to him were fair. In turn, the company should have responded.

In fact, the *reason* Mr. Tuvell initiated the Corporate Open Door complaint, as opposed to a "regular" Open Door, was that he did not believe Mr. Mandel could provide a fair and impartial review of Ms. Due's decision. It appears that one event that contributed to Mr. Tuvell's conclusion early on was Mr. Mandel's refusal to accept his third party complaint related to Gordon Booman's email. Mr. Tuvell asserted Mr. Mandel's refusal to accept that complaint meant one of two things: either he did not know that he was required to do so under the applicable policy, or, he was not applying that policy fairly to Mr. Tuvell. In either case, Mr. Tuvell pointed out to the company that Mr. Mandel was "corrupt," "incompetent," and "unqualified to be the head of C&A."

Mr. Tuvell's words were clear and unambiguous. He considered Mr. Mandel to be tainted and lacking in objectivity due to the various words and actions that he personally heard and to which he was otherwise privy. He had no confidence in Mr. Mandel from that point forward. (TUVELL 619) It is difficult to reconcile the company's decision to direct Mr. Tuvell's Corporate Open Door complaints to Mr. Mandel with the fact that these complaints were so clearly triggered by Mr. Tuvell's lack of faith in Mr. Mandel. Mr. Tuvell reiterated his vote of no confidence in Mr. Mandel's neutrality as a decision maker again and again yet, with each new complaint, IBM continued to maintain Mr. Mandel's assignment as the investigator.

For example, on August 25 when Mr. Tuvell first learned that his request for a neutral review through the Open Door procedure led right back to Mr. Mandel, he responded as follows:

This is ABSOLUTELY UNACCEPTABLE. The very REASON I'm on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse (IIED) that is being heaped upon me by Dan Feldman, *and yourself*, and everybody else who has touched this case to date. And you know it. The ONLY way for me to recover sufficiently to return to work from STD is to settle this case. Properly and correctly.

(TUVELL 744-45)

Again, on August 18, Mr. Tuvell made it known that he did not believe the Mr. Mandel was an appropriate person to provide him with a fair and impartial process:

To all concerned: I have pointed out (rightly) that twice by his written falsehoods in email (“no third-part[y] complaints” and “STD/leave disqualification from due process”), Russell Mandel has proven he is not qualified to hear my case, so somebody else needs to be appointed. But there is even an over-riding reason Russell cannot be assigned to this case: Because I have accused HR and C&A (in the form of Diane Adams and Lisa Due) of corruption and conspiratorial involvement in “blackballing me,” and those are close colleagues of Russell, therefore the following clause of C&A (p. 6) applies: “The investigator, however, must not have been involved in the issue being investigated and, in IBM’s opinion, is sufficiently removed organizationally from the employee to provide objectivity.”

(TUVELL 1519)

To be sure, the company’s failure to follow best practices clearly resulted in escalation of the dispute. Mr. Tuvell perceived the company’s decision to hand over his Open Door complaint to Mr. Mandel as a further act of hostility. Further, Mr. Tuvell communicated this perception to the company. His communication should have triggered, at a minimum, a re-evaluation of Mr. Mandel’s role as investigator. It did not.

Mr. Tuvell went down many different roads looking for a process that he perceived as fair. Unfortunately, each road led to Mr. Mandel, the perceived source of unfairness. Indeed, with each decision Mr. Mandel made that impacted the investigation, Mr. Tuvell communicated to the company his perception that the decision was tainted by Mr. Mandel’s role in the complaint and, therefore, constituted retaliation. Tracking the history of Mr. Tuvell’s complaint reveals a pattern: action by Mr. Mandel, followed by Mr. Tuvell’s objection to Mr. Mandel’s role as investigator, leading to an escalation of the dispute.

For example:

- On August 25, 2011, Mr. Mandel advised Mr. Tuvell: “I do not plan on discussing your concerns directly with you until you return from Short Term Disability[.]” (TUVELL 745)

This led to an escalation of the dispute:

- On August 28, 2011, Mr. Tuvell communicated to the company his belief that the delay in investigating his complaint was based on his STD status - - disability. He alerted the company to his perception that this inaction violated IBM’s policy of “prompt” action in response to employee problems, constituted a hostile workplace because of his disability (which

was the reason for his STD status), and constituted “illegal (ADA) disability discrimination (because of STD status).” (TUVELL 753)

Here again, Mr. Tuvell’s communication should have triggered, at a minimum, a re-evaluation of Mr. Mandel’s appropriateness as investigator. It did not. And, within days, the pattern repeated again:

- On August 30, Mr. Mandel advised Mr. Tuvell: “I am simply not going to discuss with you the concerns you raised while you were out on STD since you are not supposed to be working during this time.” Mr. Mandel also instructed Mr. Tuvell not to contact the corporate offices, notwithstanding the Open Door policy language upon which Mr. Tuvell relied.

In response,

- On August 31, Mr. Tuvell objected to Mr. Mandel’s position as investigator: “Concerning your personal involvement in the investigation: My objection to this has already been stated in multiple places, with reasons (another one of which occurs in this very note of yours, see next paragraph), and I hereby reassert my position.” (TUVELL 821)

Mr. Tuvell’s communication should have triggered, at a minimum, a re-evaluation of Mr. Mandel’s role. But the company failed to comply with best practices and, as a result, the dispute escalated further:

- On September 4, 2011, Mr. Tuvell sent another appeal through the Corporate Open Door process, objecting to Mr. Mandel’s refusal to handle his appeal because he was on a leave of absence.

It is best practice for an employer to respond when the accused or the accuser indicates a belief that the process is unfair. The goal of this best practice is not to appease employees or to give them control over the process. Rather, the underlying rationale is that providing employees with a grievance process that they perceive to be fair is essential to the effectiveness of that process. When the parties know they have been heard, the decision will have weight: “Information gathered in response to an even-handed and impartial investigation will not only yield the best information and evidence, but it will also enhance both the investigator’s and the employer’s credibility.” *See* SHRM “Conducting Workplace Investigations” (November 2011).

By failing at every turn to listen to Mr. Tuvell’s complaint, conduct an impartial investigation, and take appropriate action, the company fueled Mr. Tuvell’s growing concerns that he was being subjected to retaliatory treatment for having lodged his complaint. In PretiFlaherty’s Employment Law Update “Retaliation in Discrimination Matters: A View From the MCAD” (November 13, 2013), Former MCAD Commissioner Walter Sullivan writes:

Having spent seven years as Commissioner of the Massachusetts Commission Against Discrimination, I have come to the realization that the charge of

retaliation can lead to big and perceived problems for an employer. I am only going to discuss two of [the] ways that retaliation can impact an employer. The first relates to an employee who brings a sincere claim of discrimination, harassment or failure to accommodate to the employer's attention... An employer who is confronted with a claim of discrimination, harassment or failure to provide a reasonable accommodation by an employee **should listen to the employee's complaint, conduct a prompt impartial investigation, and take appropriate action.** Following these three steps should reduce the chance of a claim of discrimination and retaliation being filed, and, if filed, increases the chances the charge of retaliation will also be dismissed.

(Emphasis supplied) See <http://pretiemployment.blogspot.com/2013/11/retaliation-in-discrimination-matters.html>.

Here, the company was well aware that the only process it afforded Mr. Tuvell was a process he deemed to be unfair. Yet IBM failed to even acknowledge this point. This flies in the face of best practices.

The selection of Mr. Mandel to investigate Mr. Tuvell's complaints created a stalemate. It was an impasse that could have been broken if the company had appropriately responded to Mr. Tuvell's expressed concerns that the deck was stacked against him. But the company missed opportunity after opportunity to respond to Mr. Tuvell's perception of unfairness. With each missed opportunity, the dispute escalated. The company's selection of Mr. Mandel as investigator was contrary to best practices and IBM's own policies – completely unreasonable in the context of work place investigations.

**VI. THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES AND ITS OWN POLICY BY NEGLECTING TO INVESTIGATE ALL COMPLAINTS OF DISCRIMINATION AND RETALIATION AND, FURTHER, BY FAILING TO THOROUGHLY INVESTIGATE WHEN IT DID**

Best practices and IBM's policies called for the company to conduct a prompt, thorough and impartial investigation of each and every one of Mr. Tuvell's claims of employment discrimination— both those involving allegations of discrimination and those alleging other types of discriminatory conduct such as retaliation. In this case, *no investigation whatsoever* was conducted into the vast majority of Mr. Tuvell's claims. In other instances, only wholly inadequate, perfunctory steps were done to investigate. As explained below, IBM's "investigations" were flawed in virtually every respect, contrary to its policies and best practices.

Immediately upon receiving a complaint, an employer should assess whether the complaint alleges a violation of law or policy. Obviously, this requires the employer to identify the legal or policy issues in question. Identifying the relevant legal and policy principles is essential because these principles provide the framework for the investigation that will follow. See AWI's Guiding Principle No. 1.

A related consideration is whether the complainant is in a protected category. *See* AWI’s Guiding Principle No. 1. If the complainant is in a protected category, the employer is on notice that the investigation may require it to consider whether the complained-of conduct was motivated by the complainant’s protected status. To that end, it is best practice to select an investigator who has the knowledge and skill to recognize when a complaint includes claims of discrimination. It is axiomatic that an employer’s obligation to investigate alleged workplace misconduct properly extends to all forms of employment discrimination, which may include alleged harassment and/or other forms of discriminatory conduct that may violate company policy and/or the law.<sup>36</sup>

The EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (1999), underscores that harassment claims are a type of discrimination claim, where the alleged harassing conduct is based on a category protected by law under anti-discrimination statutes (“Harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes.”) *See* <http://www.eeoc.gov/policy/docs/race-color.html#VA2>.

*The EEOC goes on to state, in its “Questions and Answers About Race and Color Discrimination in Employment” (May 2006):*

### COMPLAINTS OF DISCRIMINATION

#### **What should an employer do when someone has complained about race/color discrimination?**

Employers should investigate and seek to resolve any complaint of discrimination by an applicant or employee. Employers should remember that, in all cases, it is unlawful to retaliate against a worker who complains of discrimination or participates in an investigation of discrimination.

(Emphasis in original) *See* [http://www.eeoc.gov/policy/docs/qanda\\_race\\_color.html](http://www.eeoc.gov/policy/docs/qanda_race_color.html)

Likewise, the EEOC emphasizes an employer’s duty to investigate complaints of discrimination in its “Questions and Answers About National Origin Discrimination” (December 2002):

#### **What should an employer do when someone has complained about national origin discrimination?**

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<sup>36</sup> This is because sexual and other forms of harassment are a form of employment discrimination actionable under anti-discrimination laws, as made clear by the United States Supreme Court in cases such as *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor “discriminate[s]” on the basis of sex;” “courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”)

Employers should investigate and seek to resolve any complaint of discrimination by a worker. Employers should remember that in all cases, it is unlawful to retaliate against a worker who makes a complaint of discrimination in the workplace.

(Emphasis in original)

See <http://www.eeoc.gov/policy/docs/qanda-nationalorigin.htm>

As applied to this case, I am told that Lisa Due testified in her deposition that she is fully aware of IBM's duty to fully investigate and remediate all complaints of discrimination, which is consistent with IBM's policies.

In the "About Your Job" June 2009 policies, IBM outlines its harassment, EEO, and workplace diversity policies. (TUVELL 5881) The company maintains a policy entitled "Equal Opportunity." In this policy, the company states that discrimination and harassment based on gender, disability, age, race, and other protected characteristics are not allowed in all terms and conditions of employment, which includes transfers, promotions, hiring, firing, etc. Any employee who believes he/she has been a victim of any violation of IBM's equal opportunity policies is advised to talk to a manager or bring the complaint through any of IBM's communication channels. The investigation that IBM is committed to undertaking is outlined in its "Harassment and Inappropriate Behavior" policy. Communication channels include the C&A process.

Given the potential legal ramifications of failing to address complaints that include discrimination, harassment or retaliation, the importance of correctly defining the scope of the investigation cannot be over-emphasized. As explained further below:

One of the investigator's key jobs will be to make sure that he or she understands the scope of the investigation. This can be done in several ways. Generally, a conversation with the person requesting the investigation will give the investigator an idea of the matters to be included. Additionally, at the outset of the investigation the investigator should review any relevant threshold documents. Generally, this can include a written complaint, if there is one, relevant company policies and documents from personnel files, among other things.

*See Workplace Investigations: Understanding Standard Practice,* by Michael A. Robbins and Julie B. Yanow, CA Labor & Employment Bulletin (June 2010).

With a solid understanding of the issues to be investigated, the employer should engage in taking appropriate steps in furtherance of an effective investigation and preparing a strategy. *See AWI Guiding Principle No. 4.* This requires the employer to consider what documents should be obtained, including emails, policies and procedures. Another important initial determination is who will be interviewed, in what order and for what purpose. General lines of inquiry should also be outlined in advance before interviews begin, as it is crucial to ensure that all the

important questions are asked and that information critical to the resolution of the dispute is obtained.

Following best practices in planning the investigation will prepare the investigator to gather the relevant evidence. Failure to do this planning will impact the investigation itself. Indeed AWI's Guiding Principle No. 7 explains the seemingly obvious principle that, "[t]he investigator should gather relevant evidence;" however, if the scope of the investigation has not been properly determined, or if effective lines of questioning were not developed, the investigator could easily overlook relevant evidence.

Documenting the investigation is another crucial step. *See* AWI Guiding Principle No. 9. The purpose of documenting each step of an investigation is to "create a reliable record of the evidence the investigator relied upon in reaching findings."

Once interviews have been conducted and relevant evidence obtained, the investigator must make credibility determinations as necessary. When there are conflicting versions of the same event, or shifting explanations for a manager's decision, the investigator will have to weigh each party's credibility.<sup>37</sup>

Turning to investigative findings, it is well settled that "[a]n investigator's findings should be consistent with the scope of the investigation as defined by the employer." This best practice harkens back to the investigation planning, where the investigator must identify and define the scope of the investigation. As AWI explains, "In many workplace investigations, the appropriate standard of evidence will be 'the preponderance of the evidence' standard; namely, whether after weighing all of the evidence, it is more likely than not that the alleged conduct occurred." *See* AWI Guiding Principle No. 10.

Finally, AWI's Guiding Principle No. 11 addresses the elements of a written report. A report should include a statement of the scope and issues. The investigative process should be explained, and the evidence relied upon by the investigator should be discussed. The report should identify the policies at issue, the evidentiary standard used, and a statement of the findings and conclusions.

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<sup>37</sup> Some guidelines for credibility assessments include:

1. Inherent plausibility: Is the testimony believable on its face? Does it make sense?
2. Demeanor: Did the person seem to be telling the truth or lying?
3. Motive to falsify: Did the person have a reason to lie?
4. Corroboration: is there witness testimony (such as testimony by eye-witnesses, people who saw the person after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
5. Past record: did the alleged [wrongdoer] have a history of similar behavior in the past?

"Workplace Investigations: Understanding Standard Practice," by Michael A. Robbins and Julie B. Yanow,<sup>37</sup> CA Labor & Employment Bulletin (June 2010).

I reviewed the steps taken to address Mr. Tuvell’s many complaints. First, the company failed to properly address and investigate Mr. Tuvell’s claims of discriminatory and retaliatory treatment in each and every instance. Further, I found that the company did not follow best practices for thorough investigations with regard to the areas it did investigate, particularly on drawing and reporting conclusions.

C. *The Company Failed to Follow Best Practices and Its Internal Policies in that It Did Not Acknowledge and Investigate Mr. Tuvell’s Discrimination and Retaliation Claims*

I analyzed the three investigations the company undertook: (1) Lisa Due’s investigation and June 30, 2011 report (“Due investigation”); (2) Mr. Mandel’s review and Open Door investigation, and September 15, 2011 report (Mandel Investigation #1); and (3) Mr. Mandel’s investigation of Mr. Tuvell’s failure to hire claim, and February 1, 2012 report (Mandel Investigation #2). The complaints leading to each of these investigations unequivocally raised claims of discrimination and retaliation. Further, the company identified the three foregoing investigations as investigations they conducted, specifically, into discrimination and retaliation. (Supplemental Responses of the Company to Plaintiff’s First Set of Interrogatories, dated November 13, 2013, #14)

My analysis of the complaints and conclusions indicate quite clearly that IBM failed to investigate (or thoroughly investigate), document or report Mr. Tuvell’s discrimination and harassment claims. Throughout his submissions, he raised discrimination based on age, gender, race, and disability. Indeed, with regard to the June 10, 2011 demotion, he even used the word “adverse action,” clearly invoking the employer’s duty to investigate, analyze and make a determination as to whether this adverse action was taken on the basis of any articulated protected category. It did not.

He also claimed retaliation many times, in many ways. As a few examples, he alleged that the company retaliated by refusing to remove him from Dan Feldman’s direct supervision, by cutting off his access to company systems, and by cutting off his badge access so he could not even enter the buildings. But the company never investigated, documented or reported on these claims.

The investigations did not reach even the minimal standards of thoroughness. The proper questions were not asked and the relevant evidence was not gathered. The company’s reports are incomplete, at best, as they fail to take into account conflicting evidence and contain no conclusions on the issues clearly raised.

4. *Lisa Due, Investigation #1, and June 29, 2011 Report*

Mr. Tuvell undeniably raised discrimination in his first complaint to the company and, undeniably, the company failed to address it. This failure meant that relevant evidence went ignored. It also meant that potentially discriminatory conduct went unabated and unremediated.

Mr. Tuvell made his claim of discrimination explicitly in his June 15, 2011 email to Dan Feldman, Kelli-ann McCabe, and Diane Adams. In that writing, he expresses his opinion that his



demotion was due to gender and age, with tentative hints of race discrimination and retaliation. He states that Sujatha Mizar, who replaced him, lacked the educational degrees and relevant work experience that he had, and thus had inferior qualifications. He expressly pointed out that Ms. Mizar was someone of a different gender and one who is much younger than him. He stated that the adverse job action created a “prima facie case (and even stronger) for discrimination on the grounds of both age and sex...” (TUVELL 265-266)

It appears the scope of Ms. Due’s investigation consisted of three (3) issues: Whether Mr. Tuvell was “defamed” in connection with the Excel graphics issue, whether he was demoted because of it, and whether he acted inappropriately by taking papers from Dan Feldman and becoming angry about it. Significantly, the scope *did not* include the discrimination or retaliation claims that Mr. Tuvell raised – and it should have.

Failure to investigate Mr. Tuvell’s claim that the demotion was discriminatory undermines the validity of this investigation, especially where he inarguably identified it as such as early as June 10, 2011. This triggered the company’s legal duty to assess the conduct in light of the law. Not only that, but Mr. Tuvell directly pointed the company to its own policy identifying actions like this as potentially discriminatory acts. In his June 10 email, he wrote that he considered the transfer a “demotion” specifically because IBM considers an “undesirable reassignment” to be a tangible adverse employment action, according to its “Harassment and Inappropriate Behavior” policy. (TUVELL 66)

With this information, best practices for conducting investigations required Ms. Due to refer to that policy, carefully examining it. *See* AWI’s Guiding Principle No. 1. I see no evidence in her notes that she did examine the policy but, if she did, she entirely failed to collect the evidence necessary to make a determination under the applicable standards.

Mr. Tuvell identified the kinds of evidence that would be relevant, in his June 15, 2011 email describing why he believed the demotion to be discriminatory. He explained that he was replaced with an employee who lacked the educational degrees and relevant work experience that he had and, thus, had inferior qualifications. He expressly pointed out that Ms. Mizar was someone of a different gender and one who is much younger than him. He explicitly stated that the company could have replaced him “with another person in his group (Ashish Deb), who also has a PhD, is male, and is over 40.” He stated that replacing him with Mr. Deb would have made more sense from a business standpoint because the work Mr. Deb was doing was more compatible with Mr. Tuvell’s background. He expressly stated that the adverse job action created a “prima facie case (and even stronger) for discrimination on the grounds of both age and sex...”

To the extent Ms. Due did collect evidence about the adverse action, though undocumented, she apparently did not analyze, and certainly did not report, that evidence. Her notes leave the question of discrimination hanging. I learned that when Ms. Due interviewed John Metzger, Mr. Feldman’s supervisors, the questions were framed: “*Is the move to Michael’s team a demotion? Did he discuss with Walt? Preferred by Walt?*” (IBM 11133) It was also acknowledged that Sujatha Mizar was “*not as senior skilled.*” (IBM 11138-39) (Emphasis added)

Although she noted this evidence, Ms. Due seemingly never ascertained its relevance and never applied the evidence to the question at hand. Moreover, she failed entirely to take the next step, that is, to ask and answer whether the reasons for the adverse action were discriminatory reasons.

Further, Ms. Due did not use the evidence she did gather to reach reliable and consistent conclusions. For example, Ms. Due apparently testified in her deposition that she reviewed Mr. Knabe's email in which he acknowledged raising his voice to Tuvell. Instead, she also apparently acknowledged that she relied on a report from another witness, Mr. Lubars, to conclude that Mr. Knabe did *not* raise his voice. This is quite difficult to reconcile with her further deposition testimony, when she apparently admitted that, when she interviewed Mr. Knabe, he confirmed that he raised his voice corroborating his own previous email. Finally, while it appears that Ms. Due may have also admitted at her deposition that, in the end, she did conclude that Mr. Knabe raised his voice, she also testified that she does not recall reporting this conclusion to anyone.

Ms. Due begins her June 29, 2011 email/ report by stating, "As you know, I was asked to conduct an investigation into concerns raised regarding your treatment by your manager, Mr. Daniel Feldman. I have completed my investigation and found that there was insufficient factual information to support your allegations." (IBM 8283) In the conclusion, Ms. Due indicates that there was "not really anything for defamation," and performance management needed to take place, there was no problem, and Mr. Tuvell was free to look for another position if he did not want to be in his existing role. (IBM 11145)

I was advised that Ms. Due testified at her deposition that she admitted recognizing, but failing to investigate, Mr. Tuvell's claims of discrimination and, further, did not seek to determine whether Mr. Feldman had a history of engaging in inappropriate comments based on age or gender or had a history of engaging in age or gender discrimination. This admission confounds me, as Mr. Tuvell very clearly and unequivocally claimed "discrimination" in his many complaints.

Accordingly, it is clear that Ms. Due acted in violation of company policy and best practices by failing to investigate the discrimination complaints.

##### 5. *Mr. Mandel, Investigation #2, and September 15, 2011 Report*

Mr. Tuvell appealed Ms. Due's findings pursuant to the Open Door policy in the Concerns & Appeals process, by approaching Russell Mandel, the presumed independent investigator who would review the first investigation that was undertaken to determine if the right result was reached. As Mr. Tuvell expressed, he believed her conclusion was "utterly wrong," and he looked forward to an appellate review. As explained below, that did not happen.

Early on, on July 1, 2011, an approximately twenty-five (25) minute telephone call took place between Mr. Mandel and Mr. Tuvell. This was Mr. Tuvell's first opportunity to tell his story directly to Mr. Mandel. Had there been any question whatsoever as to whether discrimination was on the table – and there should have been no question -- Mr. Tuvell made it clear to Mr. Mandel what was at issue. In a follow up email of the same date, he stated:

I'm a man, far over 40, Caucasian. Sujatha [Mizar] is a woman, far under 40. Sujatha is also well-known to be very much under-qualified compared to me. (For example, I have a PhD, she doesn't, not to mention my decades of much more relevant experience). This amounts to a prima facie case for discrimination on the bases of age, sex and race. This is especially so since Dan [Feldman] has refused to state to me any reason whatsoever (much less coherent/truthful) for the demotion.

(TUVELL 718) What is more, as early as July 1, Mr. Tuvell explicitly told Mr. Mandel that he perceived Dan Feldman's conduct to be retaliatory.

Mr. Mandel did not pursue the claims of discrimination or retaliation in any of his investigations and, worse, he took no steps to prevent the complaint from escalating – and it did. Indeed, Mr. Mandel played a central role in the evolution of the complaint to include additional claims of retaliation and discrimination. For example, the July 6 so-called “Lazy” email, (IBM 11162), which resulted in a counseling email from Mr. Feldman to Mr. Tuvell, should have made it absolutely clear to Mr. Mandel that continued interaction between Mr. Tuvell and Mr. Feldman would be the source of further complaints. Mr. Tuvell advised Mr. Mandel that he perceived Dan Feldman's conduct in that incident to be continued retaliation. But Mr. Mandel did nothing. And again, when Mr. Tuvell was disciplined on August 3, 2011, he advised Mr. Mandel that he perceived this as further retaliation by Mr. Feldman. But Mr. Mandel, again, did nothing; and again, the complaints from Mr. Tuvell grew.

Indeed, Mr. Mandel not only failed to fulfill his investigative charter, but his unresponsiveness predictably had a snowballing effect on the original complaint, causing it to grow exponentially. After the July 6 and August 3, 2011 interactions between Mr. Tuvell and Feldman, and Mr. Tuvell's repeated but unheeded requests to be removed from Mr. Feldman's direct line of command, Mr. Tuvell's health deteriorated. On August 15, 2011, IBM approved his request for STD leave.

And so there began a new chapter in the complaints of discrimination and retaliation; this time, to include disability. Like the last chapter, this one also went unheeded by the company officials charged with investigating it.

Having no faith in Mr. Mandel, on August 18, 2011, Mr. Tuvell attempted to escalate his complaints, from the company's regular Open Door process to its Corporate Open Door process, which policy specifically allowed for. In this new complaint, Mr. Tuvell explicitly repeated his claims of discrimination and retaliation, and expressed that Russell Mandel could not neutrally review his concerns of age, gender, and possibly race discrimination and retaliation. Although the policy allowed for the removal of a complaint to be reviewed by the corporate office, Mr. Tuvell was not allowed to invoke this process -- his August 18 complaint *about* Mr. Mandel was referred to Mr. Mandel for processing.

In conjunction with the August 18 Corporate Open Door complaint, Mr. Tuvell also sought review of his claims at that time via the company's Confidentially Speaking process. Contrary to that policy, too, no one connected with that program responded. Indeed, at no time did the company even acknowledge the filing of the Confidentially Speaking complaint, which no doubt was received. (IBM 8905).

Mr. Mandel's response to the escalation of the original complaint, once again, had a snowballing effect. Mr. Mandel advised Mr. Tuvell that he would not be working with him to resolve the complaints until Mr. Tuvell returned from STD. Mr. Tuvell perceived this as a failure to "promptly" address his complaints as required by the policy, as well as an adverse action based on his disability and retaliation. In short, he considered it to be further discrimination and further retaliation.

Mr. Mandel's ensuing "investigation" caused the complaint to grow further still. Mr. Mandel cut off Mr. Tuvell's access to part of the company's computer system;<sup>38</sup> Mr. Tuvell perceived this as retaliation and he informed the company of it in a September 4 addendum to his complaint. Mr. Mandel apparently also had a hand in the decision to cut off Mr. Tuvell's badge access to the IBM physical properties; Mr. Tuvell perceived this as additional retaliation, and so advised the company and Mr. Mandel on September 14.

Mr. Mandel responded to the Corporate Open Door complaints in a report, seemingly distributed to no one else, dated September 15, 2011. In it, he implicitly acknowledged that age discrimination and retaliation were issues. He acknowledged that Mr. Tuvell complained that IBM wanted to terminate him because he was "too old." He referenced Mr. Tuvell's claim that he was "the oldest employee at Netezza." He referenced Mr. Tuvell's claim that, because of his age, Mr. Knabe and Mr. Feldman treated him unfairly and demoted him.

Although he apparently recognized the claims of discrimination, Mr. Mandel failed to consider or analyze them. For example, it appears that he failed to consider Mr. Tuvell's qualifications in comparison to those of Sujatha Mizar, who replaced him, or their relative age and gender. Nor did he determine whether Mr. Feldman had a history of engaging in inappropriate comments based on age or gender or had a history of engaging in age or gender discrimination. Thus while acknowledging the claim of age discrimination, clearly, Mr. Mandel did not investigate it or offer a conclusion as to its merits.

In addition, Mr. Mandel acknowledged that Mr. Tuvell complained that he was retaliated against for complaining about age discrimination and other improper treatment. His report addressed the question of whether Mr. Tuvell was unfairly asked to provide a project plan for his last three weeks prior to his leave, and unfairly given a warning letter. He acknowledged that Mr. Tuvell claimed Mr. Feldman threatened him and improperly disciplined him with a warning letter. He acknowledged that Mr. Tuvell complained that Lisa Due engaged in the cover up of Mr. Feldman's and Mr. Knabe's actions by her conclusion that insufficient facts supported Mr. Tuvell's claims.

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<sup>38</sup> I am told that others may have been involved as well.

Once again, Mr. Mandel saw some of the facts that should have triggered an analysis of the retaliation claims, but he failed to conduct that analysis. That is, when he examined the questions of unfairness, Mr. Mandel did not collect evidence necessary to determine whether the alleged unfair decisions were in response to Mr. Tuvell's earlier complaints of discrimination. Without investigating this question, he could not properly assess whether the decisions were unfair in a *discriminatory* or *retaliatory* manner. Therefore, Mr. Mandel's September 15 conclusion that no unfairness occurred failed to satisfy the company's obligation to investigate.

Further, the September 15, 2011 report did not even contemplate the additional claims of discrimination and retaliation that Mr. Tuvell added on during Mr. Mandel's own investigation. Mr. Mandel did not assess *his own decision* to wait until Mr. Tuvell returned from STD to investigate was retaliatory. He did not assess whether *he violated* any of the company's policies relative to STD or FMLA or the ADA/M.G.L. ch. 151B (on disability accommodation and leave of absence). He did not gather evidence pertaining to whether *his own decision* was based on Mr. Tuvell's disability, perceived disability or STD or FMLA status.

Mr. Mandel's September 15, 2011 conclusions were drawn without interviewing Mr. Tuvell, as required under the company's C&A policy. He also did not convey his findings to Mr. Tuvell at that time, presumably waiting for Mr. Tuvell to return from STD. As a result, the complaints continued to compound. On September 22, for example, Mr. Tuvell dubbed the interference with his ability to access company buildings as "anti-ADA" behavior, emphasizing once again his claims of retaliation and discrimination.

In a further complaint on November 3, 2011, Mr. Tuvell could not have more clearly asserted his claim that he was being subjected to age, gender, sex, race and disability discrimination and harassment while he was on STD leave. He called it "unrelenting, unrepentant retaliation" which began "immediately after, and precisely because of, the filing of [his] discrimination-rooted C&A complaint." (TUVELL 934) He further stated that he "emphatically raised to everyone's attention the discriminatory nature of [his] complaint, emphasizing front-and-center that discrimination was a foundation centerpiece of [his] Theory of the Case." (TUVELL 936) He again reiterated that Mr. Mandel's refusal to process his C&A complaint while he was on leave amounts to discriminatory and retaliatory treatment. (TUVELL 936)

Despite the fact that his lengthy report was already written and finalized – and dated September 15, 2011 -- Mr. Mandel didn't offer to interview Mr. Tuvell until November 7, and in a November 17, 2011 telephone call purported to do that. At that time, Mr. Mandel reviewed the issues under investigation and asked Mr. Tuvell if he had anything to add. Mr. Tuvell did have something to add – "dozens and dozens," I am told he said, particularly his additional complaints of discrimination and retaliation. According to Mr. Tuvell, Mr. Mandel responded that he refused to investigate anything else because "nothing else was eligible for investigation by IBM." (TUVELL 1238) This refusal was contrary to best practice and company policy, which both mandate investigating any and all claims of discrimination and retaliation.

The findings Mr. Mandel shared with Mr. Tuvell were unchanged by the events occurring between September 15 and November 17, 2011. The report was already inadequate to address the complaints that had been raised as of September 15, as discussed above. And it did not even

attempt to address the additional claims that were raised between that date and the time when the decision was conveyed to Mr. Tuvell.

Turning to Mr. Mandel's November 25, 2011 one-sentence finding of his review of Ms. Due's investigation, that report was similarly non-responsive. It in no way addressed Mr. Tuvell's claims of retaliation and discrimination. In fact, this investigation led to nothing more than a blanket adoption of Mr. Due's factual findings, which indisputably did not include any examination or analysis of discrimination or retaliation:

As we discussed, I have investigated your concerns, and determined that management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you. While I know this is not the answer you had hoped, please accept my best wishes for the future.

(TUVELL 1292) Mr. Mandel apparently did not consider, because Ms. Due did not consider, whether the June 10 adverse action was discrimination based on age, gender or possibly race.

In sum, Mr. Mandel's investigations were insufficient to satisfy the company's obligation to investigate discrimination and retaliation. He rubber-stamped Ms. Due's findings, which failed to address discrimination or retaliation. His September 15, 2011 report on his Open Door investigation revealed that he did not investigate discrimination based on age, gender, sex, disability or race, in any way. Nor did he investigate or make any findings on any of Mr. Tuvell's claims of retaliation. Specifically with regard to his failure to address retaliation, I am again struck by the impact the company's choice of Mr. Mandel to investigate the Corporate Open Door complaints had on the overall investigation. In fact, the evolution of the Open Door complaints to include additional claims of retaliation and discrimination can be directly attributed to Mr. Mandel's role as the investigator.

6. *Mr. Mandel, Investigation #3, and February 1, 2012 Report*

On January 22, 2012, Mr. Tuvell filed another Open Door complaint, alleging that he was subjected to disability discrimination, including a denial of reasonable accommodation, and retaliation when the company failed to hire him for the Software Engineer position he applied for, posted as SWG-0436579. (TUVELL 1051) Mr. Tuvell explicitly claimed that the stated reason for his rejection -- that he availed himself of STD benefits -- constituted discrimination based on his disability and was retaliatory. (TUVELL 1057) The email from Mr. Kime stating this as the primary reason was clear evidence that should have been examined.

Further, Mr. Tuvell alleged that the company ran afoul of the ADA, citing that “reassignment to a vacant position” is a form of accommodation specifically contemplated under that statute. (IBM 1103-1105) He goes on to state that he is “qualified” for the position. He even points out language from the EEOC’s Enforcement Guidance on the ADA that it is the employer’s – not the employee’s– responsibility to notify an employee with a disability about vacant positions that may be appropriate.

Mr. Mandel’s February 1, 2012 report framed the issue as a complaint by Mr. Tuvell that he was “unfairly denied an opportunity as a result of his being disabled.” Significantly, no mention is made of Mr. Tuvell’s claim of retaliation. No mention is made of any other issue about which Mr. Tuvell complained, such as the denial of reasonable accommodation.<sup>39</sup> (IBM 11026-27)

On February 9, 2012, Mr. Tuvell contacted Mr. Mandel, stating that he had reapplied for the position to work under Chris Kime, hiring manager for the position, and noted that the position had been reposted and was identical to the former opening for which he was rejected. (TUVELL 1206) Further, he noted that, as of January 25, he was on unpaid leave and not STD (which was the reason he was rejected the first time). (TUVELL 1206) Mr. Mandel did not respond.

Mr. Tuvell received feedback in the form of a 2-paragraph email on February 14, 2012, wherein Mr. Mandel advised Mr. Tuvell of the following:

I have looked into the complaint you made that you were denied an opportunity as a result of being disabled. Having done so, I can advise that the decision was not because of a disability.

(TUVELL 1213) He makes no mention of the February 1, 2012 written report. It is unknown if Mr. Mandel looked into Mr. Tuvell’s rejection for the first or second posting or both.

*D. The Company’s Failure to Apply Best Practices With Regard to Mr. Tuvell’s Claim of Disability Discrimination and Retaliation Meant that the Complaints Were Not Fully Investigated, the Relevant Evidence Was Not Gathered, and the Conclusions Reached Were Not Based on Credible Evidence Analyzed for Factual and Logical Consistency*

In my opinion, the company’s failure to comply with best practices and its own policy was egregious with regard to the third investigation – the only one that did purport to investigate discriminatory treatment. This investigation, conducted by Mr. Mandel, addressed Mr. Tuvell’s assertion that the company discriminated against him on the basis of disability/STD and failed to accommodate him when it denied his application for a transfer to be a Software Engineer for Chris Kime’s team.

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<sup>39</sup> See also FN 31 regarding Mr. Mandel’s involvement in the reasonable accommodation discussions, which also should have disqualified Mr. Mandel from investigating this decision, as he participated in its making.

Analyzing each step taken, it is clear that IBM ran afoul of expectations in the following ways:

- Mr. Mandel failed to accurately define the scope of the investigation;
- Mr. Mandel was an inappropriate investigator;
- Mr. Mandel did not consider all of the relevant evidence;
- Mr. Mandel did not adequately weight the evidence, assess credibility and reconcile inconsistencies; and
- Mr. Mandel's conclusion was factually and logically untenable.

I started by defining the scope of the investigation (AWI Guiding Principle No. 3), with reference to Mr. Tuvell's January 22, 2012 Corporate Open Door complaint. In it, he states that he is a person who had been on STD, and was seeking a transfer via the GOM process. He stated that he applied for SWG-0436579, which had already been posted for two months, since September 26. (TUVELL 1051) He explained the process, saying that his first interview was with Mr. Kime and, after that went well, he interviewed with two (2) other people, Harvey Harrison and Brian Doherty. (TUVELL 1052) He described the discussions during the interview process. He concluded by explicitly stating that the reason for his rejection -- that he availed himself of STD benefits -- constitutes discrimination based on his disability. (TUVELL 1057) Further, he advised that he received additional feedback from Dan Feldman as to why he was rejected, and he characterized this reason as "incompatible" and "irreconcilable" with the first reason, given Mr. Kime. He also stated that the denial was a failure to reasonably accommodate him.

Therefore, the scope of the complaint should have consisted of four parts: (1) did Mr. Kime deny Mr. Tuvell's application for the transfer due to his disability/STD? (2) was Mr. Feldman's second reason "incompatible" and "irreconcilable" with Mr. Kime's reason for the denial?(3) was this disability discrimination because of a failure to accommodate? and (4) if Mr. Tuvell was denied based on disability, was this retaliation for availing himself of STD?

I compared this to the scope of Mr. Mandel's investigation. The question, as Mr. Mandel framed it, was as follows: "Was Mr. Tuvell rejected for a position because he was on Shortterm (sic) Disability?" There was no mention of retaliation or failure to accommodate. Here, Mr. Mandel failed to comply with best practices because he failed to enter into the investigation with as solid understanding of the issues to be investigated. *See* AWI Guiding Principle No. 3.

Next, I assessed what documents, pursuant to best practices, might be relevant to the questions of whether the denial was related to disability, whether Mr. Feldman's reason was inconsistent with Mr. Kime's, and whether the decision was retaliatory. *See* AWI Guiding Principle No. 4. To define what evidence would be relevant, it is best practice to consider what is actually in dispute. Here, the dispute related to the reason Mr. Tuvell was denied transfer. Thus, the investigator should have considered who, within the organization, would be a possible witness regarding



whether the denial was based on disability, the compatibility of Mr. Feldman's and Mr. Kime's reasons, and the issue of retaliation.

Mr. Mandel did not apply best practices here, it appears, since the evidence he considered was limited to interviews with Mr. Feldman and Mr. Kime. Query whether Mr. Mandel explored whether Mr. Feldman had an ulterior motive for giving Mr. Kime a negative reference on Mr. Tuvell, as he indisputably was aware of his PTSD and was gunning for his termination shortly after learning it. (IBM 8689) What is clear is that Mr. Mandel certainly did not apply company policy, which required him to interview Mr. Tuvell. The Concerns & Appeals Process, section 2.7, states "the investigator should interview both the employee initiating the Open Door and his /her management." (TUVELL 2557-67) Nor did he did not interview anyone else "who may have relevant first-hand knowledge of the facts and circumstances...." as required by the policy.

Mr. Mandel also apparently failed to consider the nature of the allegations; it is best practice to consider this to properly identify the relevant evidence. Applying that best practice, Mr. Mandel should have reviewed policies and practices relating to job transfers, as well as any policies and practices which might restrict an employee's ability to transfer. And, he should have reviewed all information relating specifically to Mr. Tuvell's eligibility to transfer. Moreover, he should have reviewed policies relating to employees with disabilities and reasonable accommodation.

I looked at the voluminous trail of documents to ascertain what might be relevant and, therefore, what a neutral investigator should have considered. In doing so, I found evidence that is critical to understanding the company's practices relative to when employee misconduct reaches the level where the ability to transfer is limited. This evidence was relevant to the reason Mr. Tuvell was denied transfer, as well as to the validity of Mr. Feldman's statements in this regard and, in turn, Mr. Mandel's conclusions. Evidence relating to these issues existed but Mr. Mandel failed to consider it.<sup>40</sup>

IBM's position is most interesting -- while alleging that the transfer did not happen because Mr. Tuvell's interactions with others made him unqualified, Mr. Tuvell was nonetheless invited back to continue to work with Dan Feldman. Either IBM somehow thought Mr. Tuvell was qualified to continue working under Mr. Feldman, despite his alleged misconduct and irrespective of Mr. Tuvell's PTSD being continuing triggered under Mr. Feldman, or it was keeping him under Mr. Feldman to punish him or force him to leave. (IBM 11143) The important thing is that IBM avoided an obvious possible accommodation -- the transfer.

Turning to the evidence that Mr. Mandel should have considered begins with IBM's policy on restrictions on employees' ability to transfer. Mr. Mandel failed to consider the company's

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<sup>40</sup> Once again, the reason Mr. Mandel failed to consider the relevant evidence can be traced to the company's faulty decision to appoint him to investigate this claim in the first place. Much of the relevant evidence was in the possession of Ms. Due and Mr. Mandel. Indeed, a great deal of it is actually contained within Mr. Mandel's own September 15, 2011 report from the second investigation. It is quite significant that, here again, Mr. Mandel had critical information and, as such, he was a witness. Obviously, he did not interview himself. The company's failure to comply with best practices regarding selection of the investigator meant that, here again, the investigation was far from complete, thorough or impartial.

practice for limiting transfers, which was *contained in his own report*. In the September 15, 2011 report, Mr. Mandel explains:

It is common practice in IBM to provide warning letters when employees exhibit this type of behavior. In more serious cases warning letters include restrictions such as no salary increase, no promotions and no job movement unless in the best interest of the company for a specified period of time, as well as impact on salary, PBC assessments, etc.

(IBM 11163) Accordingly, in “more serious cases” of employee misconduct, the company can issue “warning letters [to] *include restrictions* such as . . . *no job movement* unless in the best interest of the company for a specified period of time[.]” (Emphasis supplied) Mr. Mandel neglected to consider this evidence.

Additionally, Mr. Mandel overlooked relevant evidence pertaining to how this practice was applied to Mr. Tuvell. There were several sources of evidence on this issue.

First, there is email correspondence between Mr. Feldman and Mr. Tuvell on July 6, 2011 establishing that, as of that date, there were no conditions on Mr. Tuvell’s ability to transfer to a different job. Mr. Feldman referred to three “behavior issues” he had discussed with Mr. Tuvell, in particular:

Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes)

Conduct in the workplace that creates, encourages or permits and inappropriate work environment;

Failure to follow management direction (for example refusing to develop a plan for how you would spend your time prior to your medical leave).

(TUVELL 000310)

Mr. Tuvell responded with follow up questions about this conduct. Mr. Feldman then explained that the purpose of the communication was “*in no way*” to discipline Mr. Tuvell but, rather, to clarify expectations so that discipline would not later be necessary:

The point of bringing these expectations to your attention verbally was to ensure that you are aware that they are fundamental conditions of employment for all IBM employees. I sent them to you in writing at your request. Doing so is in no way an accusation that you have violated them. As I understand it, this is the process that we would follow with an employee who appeared to need education about these issues. If you are unsure about what

any of them mean, I am happy to discuss this with you and, I believe, our HR professional would be happy to do so, too.

(TUVELL 000309)

Therefore, to the extent Mr. Mandel relied on Mr. Tuvell's conduct through July 6, 2011 to reach the conclusion that the transfer was properly denied, this reliance was misplaced. The record is clear -- as of July 6, 2011, no conditions whatsoever were placed on Mr. Tuvell's ability to transfer.

The second piece of relevant evidence pertaining to any prior conditions limiting Mr. Tuvell's ability to transfer within the company is the August 3, 2011 formal warning letter. That letter states that Mr. Tuvell has violated the requirement of "[p]roper workplace behavior;" specifically,

- Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes); specifically, your email of 20 July 2011 addressed to Garth Dickie and me
- Conduct in the workplace that creates, encourages or permits and inappropriate work environment;

The letter goes on to state:

The following applies to you as a condition of your continued employment at IBM:

Immediately cease engaging in the behavior outlined above and any behavior or actions which are, or could be interpreted as, inappropriate, unprofessional or otherwise violating company policy, such as the Business Conduct Guidelines;

Read the IBM Business Conduct Guidelines and certify that you understand these guidelines and agree to abide by them. You must confirm this to me in a LotusNote within five business days of the date of this letter; approved time off for medical leave and vacation will not be counted as business days for the purposes of such confirmation.

Provide status updates and work deliverables as requested by your management.

The letter closes by explaining that future violations of any condition of employment may lead to immediate dismissal without benefit of a further warning. (TUVELL 000315)

Therefore, to the extent Mr. Mandel’s conclusion that the transfer was properly denied relied on Mr. Tuvell’s conduct through August 3, 2011, this reliance was misplaced. As of August 3, 2011, the company had placed explicit conditions on Mr. Tuvell’s continued employment, but it had not limited or conditioned his ability to transfer to a different job.

The third piece of relevant evidence pertaining to conditions limiting Mr. Tuvell’s ability to transfer within the company is Mr. Mandel’s own September 15, 2011 report. In this report, Mr. Mandel refers to the August 3, 2011 letter cited above and, specifically, calls it a formal “Warning Letter *Without Restrictions*.”<sup>41</sup> (IBM 11163) (Emphasis supplied)

Reading this evidence together, as Mr. Mandel should have but failed not do, three (3) facts are crystal clear:

1. Mr. Tuvell was not disciplined as a result of the July 6, 2011 email.
2. The company’s practice pertaining to warning letters, “[i]n more serious cases,” is to explicitly include restrictions. Those restrictions may include limits on salary increase, promotions and “*job movement unless in the best interest of the company for a specified period of time.*” The restrictions may also impact on salary, PBC assessments or other things.
3. Mr. Tuvell’s August 3 warning was a “Warning Letter *Without Restrictions.*” As such, although the company has a practice of placing such restrictions on employees in more serious cases, it chose not to place any restrictions on Mr. Tuvell.

These facts can lead to only one conclusion: as of August 3, 2011, Mr. Tuvell was free to transfer to another position within IBM.

Mr. Mandel also overlooked additional relevant evidence pertaining to the company’s stated position on Mr. Tuvell’s ability to transfer within the company. This evidence was contained in Ms. Due’s investigation and Mr. Mandel’s review of that investigation, as well as various emails.

First, at the end of her investigation, Lisa Due advised Mr. Tuvell that he was free to apply for other positions within IBM, and she referenced the Global Opportunity Marketplace (“GOM”) job system and provided him with the website address. (IBM 8283)

Second, manager John Metzger recognized that Dan Feldman and Walt Tuvell did not work well together and said there may be an opportunity for Mr. Tuvell to work with another manager. (IBM 11133) In fact, in email dated June 29, 2011 from Mr. Tuvell to John Metzger and others,

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<sup>41</sup> I am told that Mr. Feldman testified in his deposition that, at IBM, there are two kinds of warning letters, and that the one he gave Mr. Tuvell on August 3, 2011 did not have the effect of precluding a transfer. I am told that he testified that this is the type of letter that HR suggested, and that he did not advocate for the restrictive type at the time.

Mr. Tuvell expressly asked Mr. Metzger for help in finding a job at Netezza. Mr. Metzger never responded that Mr. Tuvell was ineligible.

Third, Dan Feldman apparently suggested, in November 2011 and again in January 2012, that Mr. Tuvell explore opportunities on GOM. (TUVELL 1522, 1022)

Fourth, on November 25, 2011, Mr. Mandel himself indicated his approval of Ms. Due’s suggestion that Mr. Tuvell should consider transferring when he fully endorsed Ms. Due’s findings and conclusions. (TUVELL 1292)

At no time did Lisa Due, John Metzger, Dan Feldman or Russell Mandel retract the encouragement given to Mr. Tuvell about transferring. At no time did anyone inform Mr. Tuvell that his ability to transfer had been limited or restricted in any way. The company consistently took the position that a transfer was desirable.

This evidence was absolutely critical to a reliable consideration of the reasons the company later advanced for denying Mr. Tuvell’s transfer. Mr. Tuvell’s complaint, alleging that denial of the transfer was discriminatory and retaliatory, explicitly required Mr. Mandel to weigh the company’s shifting reasons for denial. Mr. Tuvell’s complaint was based on the very first reason he was given; this related to Chris Kime’s statement that he discussed Mr. Tuvell’s situation with his up-line management and said that he could not move forward with taking Mr. Tuvell directly from being on short-term disability, as it would receive “very close scrutiny from the Operations people” in the organization. Chris Kime further stated that there was a second concern about hiring him -- “about the work being to your liking and keeping you as a productive and satisfied member of the team.” (TUVELL 1018)

This decision came on January 6, 2012. After Mr. Tuvell challenged this decision and asserted that an adverse job action based on his STD status was discriminatory, potentially on the basis of disability, perceived disability, STD status, FMLA status, among other things, the company gave other reasons:

<b>Date</b>	<b>Witness</b>	<b>Explanation</b>
Jan. 16, 2012	Dan Feldman	He stated that he was not hired “because the team did not think [he was] the right fit for the position. HR reviewed the situation with the hiring manager to ensure that the decision was made for legitimate business reasons.” (TUVELL 1022)
Feb. 1, 2012	Russell Mandel	Mr. Mandel found that Mr. Tuvell was not rejected because he was on short-term disability. He wrote that Mr. Kime stated that he rejected Mr. Tuvell for the Software Developer position “because of feedback from Mr. Feldman that stated that Mr. Tuvell did not take management direction well and had trouble teaming with others.” Parenthetically Mr. Mandel noted, “Mr. Feldman confirms that this is the feedback he provided Mr. Kime and is consistent with the findings of a previous investigation into Mr. Tuvell’s performance done by

		the current investigator.” (IBM 11026-27) Further, Mr. Mandel noted “unprofessional conduct” that Mr. Tuvell was cited for on July 5, 2011 was an obstacle for him.
Feb. 1, 2012	Russell Mandel	Mr. Mandel explained that a decision to hire Mr. Tuvell for another position could not be made without a PBC (Personal Business Commitment, an element of Performance Evaluation management). (IBM 11026-27)
Feb. 17, 2012	Russell Mandel	“The performance issue you and I discussed previously is the inability to work cohesively with other members of a team. In addition to unprofessional conduct, for which you were cited on July 5, 2011, this issue was considered to be a potential obstacle to being successful in the role to be filled.” (TUVELL 1217; 1219-20)

Ultimately, Mr. Mandel concluded that the denial was not discriminatory because it was actually due to the performance issues, including “...unprofessional conduct, for which [he was] cited on July 5, 2011[.]”

Mr. Mandel made this decision without the benefit of, or in defiance, the relevant available evidence. In particular, he apparently did not consider Mr. Feldman’s July 6, 2011 communications with Mr. Tuvell, relating to the July 5 event. The email record from that day, discussed in detail above, clearly shows that none of the behavior at issue violated the company’s policies relating to:

Unprofessional, disrespectful, demeaning, disruptive, offensive, or rude actions or comments (verbally or via notes)

Conduct in the workplace that creates, encourages or permits and inappropriate work environment;

Failure to follow management direction (for example refusing to develop a plan for how you would spend your time prior to your medical leave).

(TUVELL 000310) Indeed, Mr. Feldman explained explicitly that Mr. Tuvell’s behavior on July 5 *did not* violate the company’s policies.

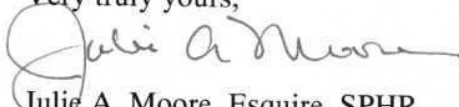
Consequently, Mr. Mandel’s decision on February 17, 2012 was not thorough, because he did not account for this first-hand evidence that made his own conclusion unsupported by the evidence. It also appears that Mr. Mandel failed to consider that Mr. Tuvell’s ability to transfer was not limited by the company at any time. Finally, it appears that Mr. Mandel entirely overlooked the fact that the company consistently encouraged Mr. Tuvell to transfer, through

Ms. Due, Mr. Feldman, Mr. Metzger and even Mr. Mandel himself. It is my understanding that, even in her deposition, Mr. Due described the desire to have Mr. Tuvell transferred as "genuine."

Mr. Mandel did not accurately define the scope of the investigation; did not consider all of the relevant evidence; did not adequately weigh the evidence; and did not assess credibility and reconcile inconsistencies. As a result, it is my opinion that Mr. Mandel's conclusion was factually and logically untenable, running afoul of best practices and IBM's policy. My conclusion that Mr. Mandel did not conduct a thorough investigation is intertwined with my earlier finding that the company failed to apply best practices when it selected Mr. Mandel to investigate these complaints.

Please let me know if I can provide additional information to you.

Very truly yours,



Julie A. Moore, Esquire, SPHR

# Exhibit 116





**Employment  
Practices Group**

*Defining workplace rights*

By Electronic and U.S. Mail

October 6, 2014

Robert S. Mantell  
Rodgers, Powers & Schwartz LLP  
111 Devonshire Street, 4<sup>th</sup> Floor  
Boston, MA 02109

Re: *Walt Tuvell v. International Business Machines, Inc.*  
*Docket Number C.A. No. 13-cv-11292-DJC*

Dear Mr. Mantell:

This report supplements the May 30, 2014 expert opinion report (“Report”) submitted in the above matter.

Since May 30<sup>th</sup>, I received additional documents that should be included in the listing contained on Pages 9-10 of the Report to include the following: Lisa Due deposition with exhibits, Russell Mandel deposition with exhibits, various documents produced by IBM relating to training (IBM 011375-011459).

*Opinion (1) A. Failure to Mediate the Conflict with a Three-Way Meeting (Report pp. 46- 50)*

At his deposition, Mr. Mandel opined that Mr. Tuvell’s request for a 3-way meeting with Mr. Knabe and Mr. Feldman was not an unreasonable request. (Mandel Depo., p. 33) Indeed, the facts reveal that Mr. Tuvell, Mr. Feldman and Mr. Knabe had a three-way meeting just a short time before the June 2011 incident. (Tuvell Depo. Vol. II, p 156; TUVELL000512 (“We need to have another 3-way talk”); TUVELL000475 n. 26<sup>1</sup>) Accordingly, precedent exists for such meetings. These facts further buttress my opinion in this section.

No IBM policy exists to forbid three-way meetings. (Due Depo., p. 49)

*Opinion (1) B. Failure to Implement Interim Measures (Report pp. 50-57)*

At his deposition, Mr. Mandel offered a different reason as to why no interim measures were taken after Mr. Tuvell’s first complaint. He testified: “Because it’s standard procedure in IBM

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<sup>1</sup>Mr. Tuvell wrote, “It was the success of this three-way meeting that gave me some confidence that subsequent three-way meetings could be instrumental in resolving issues between myself and Fritz.”

that you're not supposed to retaliate or discriminate." (Mandel Depo., pp. 175-77) This explanation defies the reason for interim measures – to protect the complaining party so that no further harm can befall him or her. Employees are not supposed to discriminate or retaliate but, unfortunately, it happens. Employees must still be reminded of it and trained on it, among other things, and employers are obligated to appropriately respond to it. Among the responses to consider is the implementation of interim measures, which IBM failed to consider in this case.

Opinion (2) Mr. Mandel as Investigator (Report pp. 57-60)

I explained in the Report that an employer should carefully select the investigator in a particular case. I learned from Mr. Mandel's deposition testimony that *he* made the unilateral decision to be the investigator with no input from anyone else at the company. That is, he testified that he assigned himself the investigation into Mr. Tuvell's complaints. (Mandel Depo., p. 145) He was the decision-maker as to whether the appeal should or should not go to him. (Mandel Depo., p. 61) This is problematic where, as here, he is someone accused of lacking independence and, further, he is named as one of the wrongdoers.

Mr. Mandel testified that he told Mr. Tuvell that he is the "final escalation point within IBM regarding complaints." (Mandel Depo., p. 64) On its face, this is problematic – and it's incorrect. If a complaint involves Mr. Mandel or if otherwise there exists a conflict of interest or reason why Mr. Mandel should not be involved in the investigation, he clearly should not be the final escalation point. Further, he was wrong. The Corporate office was above him, and that is precisely where Mr. Tuvell directed his appeal, only to have it bounced back to Mr. Mandel for handling, much to his dismay.

Another issue relating to bias of Mr. Mandel is important to point out. Ms. Due testified that the company was aware, as of June 2011, that Mr. Feldman was "very concerned about being sued" and it was discussed that Mr. Tuvell had sued an employer previously. (Due Depo., pp. 122-25) Indeed, Ms. Adams in HR was the source of the information about Mr. Tuvell's alleged prior litigation. (Due Depo., p. 122) As the documents indicate, Ms. Due and Mr. Mandel clearly communicated at length about Mr. Tuvell's situation, and Mr. Mandel testified that he had read *all* of Mr. Mandel's complaint submissions.<sup>2</sup> (Mandel Depo., pp. 58, 73) For these reasons, Mr. Mandel surely was aware of Mr. Tuvell's alleged history and Mr. Feldman's concern. Consequently, Mr. Mandel, as a present, long-term (since 1977) IBM employee, had every reason to protect the company and find that no unlawful conduct took place, thus exonerating IBM rather than determining that Mr. Tuvell was treated fairly. In other words, if Mr. Tuvell

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<sup>2</sup> Included in those submissions were two documents where Mr. Tuvell referenced prior litigation in which he was involved. The first document is TUVELL625 ("I did mention to you once that I'd been involved in a case of workplace harassment/defamation once before, through absolutely no fault of my own, extremely similar to the one that has now been inflicted upon me. . . . [This was mentioned] as a point of information that 'I know what I'm talking about', or as you said to me, 'you've seen this movie before' . . . "you asked if it happened in court (it didn't, it was an arbitration in a hotel room), if it was against an individual or a company (it was the company), and whether I won redress or not (yes I did). . . . And at the same time you told me about your experience of suing somebody. . . ). A second document is TUVELL663 ("you pretended I had done something wrong by having mentioned to you, 3 weeks earlier. . . that I'd been involved in a lawsuit (at the arbitration level) involving defamation. . . ).

might sue IBM at the conclusion of the investigation, then Mr. Mandel had a motive to conclude that Mr. Tuvell's complaints were unfounded.

*Opinion (2) A. Mr. Mandel's Involvement in Ms. Due's Investigation (Report pp. 60-62)*

Ms. Due's testimony at her deposition is relevant to this section.

Ms. Due testified that, in her investigation, she did not "interview" Mr. Mandel. Rather, she had a "briefing" with him. (Due Depo., p. 143) They had a discussion. (Due Depo., p. 143) During that briefing, Ms. Due and Mr. Mandel discussed that there was no need to place Mr. Tuvell in another role. (Due Depo., p. 146) Another time, Ms. Due was asked about Mr. Mandel's review of the case, and she responded, "I -- he should -- he had -- I briefed him on it. So not a full, you know, discussion. A briefing." (Due Depo., p. 172)

Despite her testimony that she and Mr. Mandel failed to have a "full" discussion about it, Ms. Due nevertheless had written, "Mr. Mandel may have all the information he needs," in the context of avoiding a full investigation upon appeal, and she referenced information provided in the discussion that they had (referencing Exhibit 13; IBM008474). (Due Depo., p. 172)

As noted in the Report at p. 61, in Ms. Due's August 18, 2011 note to Lynea St. Pier, Program Manager, Ms. Due wrote, "So you know, Mr. Tuvell did not agree with my findings approved by legal and Russ, then went out on STD." (Due Depo., p. 181; Due Exhibit 15) In her deposition testimony, however, Ms. Due backed away from that writing by saying, instead, that her findings were "approved by legal. I had briefed Russ..." (Due Depo., p. 182)

Significantly, Ms. Due testified that, on June 27, Mr. Mandel instructed her to contact Mr. Tuvell and tell him that, based on her investigation, she had no reason to conclude that he had been mistreated. (Due Depo., p. 145) Presumably this is an explanation of Ms. Due's note of her "briefing" with Mr. Mandel, which reads, "Tell the ee: manager/hr communicated complain (sic) re; (sic) weather (sic) tmistreated (sic), find no reason to conclude that."<sup>3</sup> (IBM011054)

My conclusion that Mr. Mandel failed to be independent and unbiased as the appeal investigator is further buttressed by this additional testimony. His role as appeal investigator was tainted, thus rendering him a patently inappropriate choice to take a fresh look at the complaints. His involvement was contrary to best practices, IBM policies, and IBM's training materials (as described below).

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<sup>3</sup> Another example of the accuracy of those notes relates to Mr. Mandel's comments about fear. At his deposition, Mr. Mandel, when reviewing Lisa Due's notes of her meeting with him on June 27, 2011, admitted that it is possible that he said, "I prefer respect but fear is not a bad second choice." (Mandel Depo., p. 37; IBM 011054; Due Depo., Exhibit 21) He further testified that his mother used to say that expression to him. (Mandel Depo., p. 37)

Opinion (2) B. Mr. Mandel Was Disqualified From Investigating Because He Was Accused of Wrongdoing (Report pp. 62-65)

Mr. Mandel acknowledged in his deposition that it is not standard practice for a person to investigate allegations of impropriety lodged against him or her. (Mandel Depo., p. 64) He said that it was “unclear” whether an IBM policy exists suggesting that a third-party should investigate when the assigned/contemplated investigator is also the person accused of improper conduct. (Mandel Depo., pp. 64-65)

Indeed, Mr. Mandel testified that he had no discussions with anyone as to whether it would be appropriate for him to investigate Mr. Tuvell’s Corporate Open Door filing. (Mandel Depo., pp. 69-70) He took no action at any point to determine whether someone else should investigate Mr. Tuvell’s complaint. (Mandel Depo., p. 70)

This testimony further buttresses my opinions in this section. Additionally, Mr. Mandel’s obvious conflicts run afoul of IBM’s training materials, explained fully below. That is, the training documents state that one of the “key responsibilities” is the company’s obligation to “determine the most appropriate Concerns and Appeals channel to resolve the appeal request.” (IBM 011380) IBM is acknowledging that there must be the right person and process in place for the proper handling of critical issues such as allegations of discrimination. If no proper investigator could be found in-house, it was incumbent upon the company, consistent with its Corporate Open Door process, to bring in the proper outside investigator. In Mr. Tuvell’s case, the retention of an independent investigator was the only reasonable choice under the circumstances for the company to discharge its obligation to fully and fairly investigate the complaints of discrimination and retaliation.

Opinion (2) C.1 IBM Accepting Third Party Complaints (Report pp. 65-66)

In my Report, I cited Mr. Mandel’s statement that IBM does not accept third party reports. At his deposition, Mr. Mandel reiterated this blanket statement, and further stated that such policy is not in writing. (Mandel Depo., p. 55) Rather, he explained that it is a “fairly standard process” within IBM. (Mandel Depo., p. 55)

Yet when you offered an example about an employee complaining about a racist comment that was made by Employee A to Employee B, Mr. Mandel testified that the company *would* look into it. (Mandel Depo., p. 56) I find this perplexing, as he seemed to clearly understand the meaning of “third party complaint”, and admitted that third party complaints would be investigated.

Lisa Due testified that IBM does, indeed, accept and process third party complaints. (Due Depo., pp. 187-88) In fact, they could be escalated to her level depending on the situation. (Due Depo., pp. 187-88) The matter would go into the Integrated Services Team (“IST”), and a Case Manager would be assigned to do the investigation. (Due Depo., p. 189)

Moreover, IBM’s training materials encourage investigators to ascertain information from complaining parties about whether others may also be victims of unlawful conduct. In one of the

training documents, IBM states that the investigator should ask the complaining party if he or she believes that others have also been victimized by discrimination or retaliation and, if yes, the details of when and where. (IBM 011394) If the complaining party identified other victims, that would be considered a third-party complaint, triggering the company's duty to respond.

Regardless of whether a complaint is initiated by a first party or a third party, the fact remains that IBM's policies prohibit illegal discrimination and harassment. To the extent IBM is aware of illegal discrimination and harassment, it is required to remediate it. Therefore, whether a complaint is labeled a first-party or third-party complaint is immaterial.

*Opinion (2) C.3 Mr. Mandel's Failure to Appreciate the Timeliness Requirements of IBM's Policies (p. 67)*

To add to this section regarding time limits, I note that Mr. Mandel failed to appreciate IBM's policy that it will acknowledge complaints within two (2) business days. (Report, p. 6) Mr. Mandel testified at his deposition that no policy existed about acknowledging a complaint. (Mandel Depo., p. 57) Rather, he said it was only IBM's "practice" to try to get back to the employee within two (2) business days to advise that the company was aware of the complaint. (Mandel Depo., p. 57)

This testimony further buttresses my earlier opinion that Mr. Mandel lacks an appreciation for an employer's duty to be prompt and, further, to know and abide by internal policies that set forth specific deadlines.

*Opinion (2) C.5 Mr. Mandel's Denial of Mr. Tuvell's Access to Company Systems (Report pp. 68-69)*

I add in this section testimony from Mr. Mandel that IBM maintains no policy requiring access to IBM computer systems to be curtailed while someone is out of short-term disability leave. (Mandel Depo., p. 76) This fact further buttresses my opinion in this section.

*Opinion (2) C.6 Mr. Mandel's History of Failing to Conduct Prompt or Neutral Investigations (Report pp. 69-71)*

In the Report, I referenced litigation involving James Castelluccio and Mr. Mandel's improper handling of that investigation, as per the presiding federal court judge. One issue that I emphasized was that Mr. Mandel's investigation commenced on June 13, 2008, and Mr. Mandel failed to complete his investigative report until August 11, 2009 – about fourteen (14) months later. I opined that the Castelluccio investigation was not prompt, and that lack of adherence to policy and best practices should have alerted IBM that Mr. Mandel was not an appropriate investigator given his history.

Though the court decision said the date of the investigative report was August 11, 2009, I have since reviewed the Complaint filed in the United States District Court for the District of Connecticut. I learned that the report was dated August 11, 2008 – not 2009. According to the Complaint, the two-month investigation was concluded about five (5) weeks after Mr.

Castelluccio had left IBM and the finding was relayed in a two-sentence letter addressed to Mr. Castelluccio.

I note that IBM was on notice early on that Mr. Castelluccio challenged the termination decision, claiming it to be discriminatory. He filed a Charge of Discrimination with the New York State Division of Human Rights on November 17, 2008. His Complaint in federal court was filed on July 21, 2009. In paragraph 45 of the Complaint, Mr. Castelluccio criticized the Open Door Investigation and the determination that he had been treated “fairly” with respect to his termination.

While Mr. Mandel testified that he could not recall whether he was deposed in that case or what it was about, (Mandel Depo., pp. 8, 10-11), he was on the witness list and was expected to testify at trial, according to the Parties’ Joint Trial Memorandum.

Given that this matter was pending in litigation for close to three (3) years before Mr. Tuvell filed his internal complaint, IBM should have carefully scrutinized its Open Door practices, Mr. Mandel as an investigator particularly, and its termination decisions in light of complaints of discrimination.

*Opinion (2) C.7 Mr. Mandel’s Failure to Treat the Parties Equally (Report pp. 71-75)*

In my Report, I cited an instance where Mr. Mandel failed to abide by policy by not giving Mr. Tuvell a fair opportunity to participate in the investigation – and did not treat all persons involved in that process in a uniform manner. More specifically, I noted that Mr. Mandel provided Dan Feldman with the opportunity to review his September 15, 2011 report of the investigation and make corrections to it, if necessary. (IBM 10268-69, 10274-75) Mr. Tuvell had no such opportunity.

In his deposition, Mr. Mandel testified that, similarly, he provided Fritz Knabe with a draft of the chronology that was contained in the report to review. (Mandel Depo., p. 87) Mr. Mandel did not extend the same opportunity to Mr. Tuvell. (Mandel Depo., p. 91)

This is another important example of Mr. Mandel failing to afford similar treatment to all parties involved, contrary to best practices.

*Opinion (3) A. 1 Ms. Due’s Role and Her June 2011 Investigation (Report pp. 79-81)*

I learned from Ms. Due’s testimony that she spoke to Mr. Tuvell by phone (not in person) in June of 2011. (Due Depo., p. 45) Conducting telephonic interviews is contrary to best practices when investigating a complainant in a harassment, discrimination or retaliation investigation, absent rare circumstances. Whenever feasible, interviews should be conducted in person, which greatly helps credibility determinations in the often “word on word” situations. While I understand that Ms. Due’s office was in New York, it would be a relatively easy trip to Massachusetts to meet with the relevant parties, particularly given that the case was “complex” and involved allegations of illegal conduct.

An issue of bias came to my attention when reviewing Ms. Due's testimony. That is, Ms. Due testified that she was aware, as of June 2011, that Mr. Feldman was "very concerned about being sued." (Due Depo., pp. 123-25) Additionally, she learned from Ms. Adams that Mr. Tuvell had threatened a lawsuit before. (Due Depo., p. 122) Given Ms. Due's knowledge at the time, Ms. Due, an IBM employee since 1997 who has moved up the ranks over the years, had every reason to protect the company and find that no unlawful conduct took place, thus exonerating IBM rather than determining that Mr. Tuvell was treated fairly. In other words, if Mr. Tuvell might sue IBM at the conclusion of the investigation, then Ms. Due had a motive to conclude that Mr. Tuvell's complaints were unfounded.

On a separate issue, Ms. Due testified that an investigation can be initiated by means of a "consultation[] for complex cases on behalf of HR and line management..." (Due Depo., p. 62) She denies that the investigation she conducted into Mr. Tuvell's complaint was an Open Door investigation. (Due Depo., pp. 72-74) Interestingly, Mr. Mandel wrote "?" when she characterized in a writing that her investigation was a "consult to the HR and line management team" as opposed to "an employee appeal." (Due Depo. Exhibit 22) This signals to me that Mr. Mandel disagreed with her characterization or, at least, questioned it and sought an explanation.

To the contrary, the documents produced in discovery seem to indicate that Ms. Due understood herself to be acting within the rubric of the Open Door process. In this particular case, a note was sent in to IST. (Due Depo., p. 62) She testified that Dan Feldman was the first Line Manager, and John Metzger was the second Line Manager. (Due Depo., p. 62) Involving both the first and second Line Managers is consistent with the Open Door process. (Report, p. 6)

Ms. Due testified that Mr. Tuvell filed complaints initiating the June 2011 investigation. (Due Depo., p. 61) Additionally, she testified that Mr. Feldman's complaints prompted Diane Adams in HR to initiate the investigation. (Due Depo., pp. 63-64, 71) Included in Due Deposition Exhibit 2, IBM 006621, is an email from IST to Ms. Due on June 19, 2011 that states, "Hi Lisa. I created a space holder and CMO for this case." (Due Depo., p. 66) A "CMO," Ms. Due explained, is the Case Management Organizer, which is a database. (Due Depo., p. 67) Ms. Due explained that she is a Case Manager, and is assigned cases. Each case has a number. Becky Torres opened up a case number as a placeholder, and Ms. Due put her notes, using that number, into the database. (Due Depo., p. 67) Ms. Due subsequently sent an email on June 20, 2011 to IST Case Management. (Due Depo., p. 68) Diane Adams completed a standard form and sent it to IST Case Management ID (referring to Pages 8831-8832 of Exhibit 2). (Due Depo., p. 71) This is the form that was placed in the CMO initiating the investigation. (Due Depo., p. 71) Again, this process and terminology is consistent with the Open Door process.<sup>4</sup>

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<sup>4</sup> Ms. Due testified, however, that Mr. Tuvell's June 2011 complaint was *not* an Open Door investigation. (Due Depo., p. 73) An Open Door is when an employee has a concern, and factual evidence exists to launch a full investigation where interviews are conducted, a report is written, and a verbal closeout is provided to the employee. (Due Depo., p. 76) Mr. Tuvell's case was different, she said, because it came into the Integrated Services Team ID from Ms. Adams in HR and not from Mr. Tuvell. (Due Depo., p. 76) This contradicts her deposition testimony where she testified Mr. Tuvell filed complaints which initiated the June 2011 investigation. (Due Depo., p. 61)

Ms. Due testified that a report at the end of an Open Door investigation would have been more substantive than what she prepared in this case. (Due Depo., p. 169)

It is also significant to point out that Ms. Due tries to distance herself from saying that the Tuvell investigation that she conducted was pursuant to the company's Open Door policy because a manager, and not Mr. Tuvell (though her testimony is inconsistent here), brought Mr. Tuvell's concerns to her attention. I reiterate what was cited elsewhere in this report, which is that Ms. Due acknowledges company policy and best practices about the duty to respond to third-party complaints. It is irrelevant whether Mr. Tuvell or a manager, in this case allegedly Mr. Feldman, raised concerns. The fact remains that the company became aware that Mr. Tuvell felt that he was the victim of discriminatory behavior, thus triggering its duty to investigate pursuant to policy and best practices.

In her June 2011 investigation, Ms. Due testified that she understood that Mr. Tuvell was complaining of age and gender discrimination (as well as harassment and retaliation). (Due Depo. pp. 35, 40, 42) Moreover, as of June 23, 2011, Ms. Due testified that she understood that Mr. Tuvell was claiming to be the victim of discrimination on the basis of disability (referencing Mr. Tuvell's June 23 email, Exhibit 3) as well. (Due Depo., p. 86) Further, she admittedly understood that employers have a legal obligation to fully and fairly investigate all claims of discrimination. (Due Depo., p. 29)

Nevertheless, Ms. Due failed to include the discrimination issues in the scope of her investigation and failed to make any findings whatsoever related to the discrimination claims.<sup>5</sup> (See Report, pp. 14-16, 18, 79-81) She did make findings relating to Mr. Tuvell's claim that he was demoted. (Due Depo., p. 169) The findings, however, are silent as to whether the demotion was discriminatory, as Mr. Tuvell had alleged.

Significantly, Mr. Tuvell alleged that his former supervisor, Mr. Feldman, was a discriminator and the person responsible for the demotion. During her investigation of Mr. Tuvell in June 2011, Ms. Due testified that she did not recall that Mr. Feldman had been advocating for Mr. Tuvell's termination. (Due Depo., pp. 175-76) In reviewing Exhibit 9, which is an email from Mr. Feldman expressing that Mr. Tuvell should be terminated, Ms. Due stated, "I would think it's important" to the investigation. (Due Depo., p. 174) More explicitly, Ms. Due testified, "It would be important to review this as part of an investigation." (Due Depo., p. 175) Moreover, Ms. Due testified that she also did not know that, during the investigation, Mr. Feldman had advocated for rescinding Mr. Tuvell's access to IBM buildings. (Due Depo., p. 176)

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<sup>5</sup> While she testified that she considered the age and gender discrimination claims as part of her investigation, (Due Depo., pp. 42-43), it appears that she took no action *to actually investigate* those claims. That is, she failed to examine the qualifications of the woman who replaced Mr. Tuvell, nor did she explore whether Mr. Feldman made any age- or gender-related comments, had a history of engaging in sexist behavior, or had a history of discriminating against others on the basis of age. (Due Depo., pp. 43-44)

Similarly, Ms. Due did not speak to Mr. Feldman about Mr. Tuvell's PTSD nor did she make any inquiry regarding the PTSD. (Due Depo., p. 87) She initiated no inquiries with any medical person concerning Mr. Tuvell's medical condition. (Due Depo., p. 87) Rather, she asked Ms. Adams to get the Nurse Case Manager's contact information to provide to Mr. Tuvell. (Due Depo., pp. 86-87)



Another flaw in the investigation relates to findings with regard to Mr. Tuvell and his interaction with Fritz Knabe. (Report, p. 81)<sup>6</sup> Ms. Due's deposition testimony further underscores the deficiencies in her report findings regarding whether Mr. Knabe raised his voice when speaking to Mr. Tuvell one day. She testified that she knew that Mr. Knabe apologized to Mr. Tuvell for raising his voice, stating, "I'm sorry for the embarrassment and anger I provoked when raising my voice." (Due Depo., pp. 108-09) Nevertheless, despite this admission, Ms. Due testified that she *did not* conclude that Mr. Knabe raised his voice because another witness to the conversation, Mr. Lubars, stated that he did not. (Due Depo., p. 111)

After she read her own notes, however, Ms. Due later testified that Mr. Knabe stated in his interview, "Both raised voices and not considered yelling." (Due Depo., pp. 140-41) Mr. Knabe reported that neither he nor Mr. Tuvell was "yelling." (Due Depo., p. 141) She then testified that she *did* conclude that Mr. Knabe raised his voice to Mr. Tuvell. (Due Depo., p. 141)

It should be noted that Mr. Knabe was not disciplined, and Ms. Due does not recall reporting to anyone that Mr. Knabe raised his voice. (Due Depo., p. 142)

### *Training Materials*

In addition to violating best practices and company policy, as I opined in the Report, Ms. Due's actions and inaction also run afoul of the company's training materials. In 2008, Ms. Due became a Senior Case Manager responsible for conducting investigations, "disciplinary actions as a result of internal audits, investigations of Concerns and Appeals." (Due Depo., p. 22) Among other things, she was responsible for handling complaints of discrimination and harassment. (Due Depo., p. 23) In that capacity, she received training on an annual basis on equal opportunity diversity through an online tutorial from IBM. (Due Depo., pp. 14-15, 23-24) She also received internal training from subject matter experts on conducting investigations. (Due Depo., pp. 14-15, 24) Carolyn Austin, Cathy Travers and Russell Mandel provided such training. (Due Depo., pp. 24-25) She received written materials related to conducting investigations, and they are contained on the internal database.<sup>7</sup> (Due Depo., p. 25)

The company produced training materials subsequent to Ms. Due's deposition which, I understand, constitute the training documents that Ms. Due referenced. The materials produced appear to apply both to Open Door, or first level investigations, and appeals, which are called Concerns and Appeals. I lack clarity as to precisely what the training documents apply to, and no IBM representative has been deposed to date with respect to their meaning. For this reason, if

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<sup>6</sup> I found another document where Ms. Due improperly characterized what she heard from the witness interviews. In a July 5, 2011 email to Mr. Mandel, Ms. Due incorrectly described the alleged yelling/voice raising incident between Mr. Tuvell and Mr. Knabe. While she states that a co-worker denied that Mr. Knabe yelled or even raised his voice, she makes no mention whatsoever of Mr. Knabe's *admission* that he raised his voice and acted inappropriately. (Due Deposition Exhibit 23; IBM 011193)

<sup>7</sup> Ms. Due had no formal education in Human Resources. She graduated from Fordham University in 1987 with a Bachelor of Arts degree in Theater Arts and Psychology. (Due Depo., p. 10) Her first position at IBM in 1997 was that of as a Human Resources Generalist. (Due Depo., p. 13)

additional information becomes available to me on this topic, I reserve the right to supplement or revise, as needed, my opinions here.

*Training Materials: the Investigative Process*

Among the training materials is a January 2011 PowerPoint training is entitled, “Concerns and Appeals Re-Engineering and Transformation.” In addition to covering the appeals process, the training documents also address Open Door investigations. (See, for example, IBM011380) Some aspects of the investigative process were changing while others were not. A number of changes were explained, including a single point of entry for all appeal requests, a new tiered approach in documenting an investigation based on risk level, and new templates to use for expanded investigations on issues to include harassment, discrimination and retaliation, among others. What remains unchanged was the integrity of the Open Door process; “thorough, complete and impartial investigations; Confidentially Speaking investigations, the review of investigative findings prior to communicating the outcome; and case manager judgment and decision making.” (IBM 011378)

The materials detail the Open Door process, stating that it should be an “objective and thorough review of the issues.” (IBM 011444)

The materials specifically state that employees on a leave of absence are eligible to use the Open Door process, consistent with policies. (IBM 011444)

In considering an appeal, the case managers are directed to reach out to the complaining party within two (2) business days to acknowledge receipt. That can be accomplished either by a phone call or an email. (IBM 011431) Questionnaires should be sent when the claim involves a PBC appeal. (IBM 011431-432)

In the training, IBM includes an investigative process flow chart and reiterates IBM’s commitment to conducting a “complete, thorough, impartial investigation.” (IBM 011389) IBM outlines criteria for vetting issues and determining next steps. Among the “key responsibilities” are the company’s obligation to “determine the most appropriate Concerns and Appeals channel to resolve the appeal request.” (IBM 011380) Further, IBM cautions that its policies and practices must be applied in a consistent manner. All decisions must be appropriate and executed in a way “that is fair for IBM and its employees.” (IBM 011380)

IBM explained that it was shifting from a “one size fits all” approach for investigations and moving toward an approach “that assess the level of risk to IBM.” (IBM 011382)

Simultaneously, IBM emphasized that the quality and thoroughness of the investigation must not be impacted. (IBM 011382) IBM recognizes that “complex investigations” must be “consistently documented to further reduce IBM legal exposure.” (IBM 011382)

IBM defines the following types of misconduct as “moderate/high risk” investigations: inappropriate behavior, discrimination, bullying, and harassment. (IBM 011384)

Significantly, IBM states that investigations will be classified as either “Standard” or “Expanded.” (IBM 011384) In investigations of harassment, discrimination, or retaliation, the investigator must document the investigation utilized in the Expanded report form and follow the review/approval matrix. (IBM 011389) All of the steps from start to finish are articulated. (IBM 011389) I have seen no evidence in the case that Mr. Tuvell’s investigation was classified one way or the other. I saw evidence that Mr. Mandel (as well as Ms. Due) referred to it as “complex,” (IBM011054; Due Depo., p. 62) but I’m unsure how that terminology relates to the training materials. If the investigators failed to characterize the investigations as “Standard” or “Expanded,” it demonstrates that IBM failed to follow its articulated procedure here.

I also reviewed written materials entitled “Global Open Door Transformation Project Work stream (sic) #2 -- Recommended Templates for Complex Investigations.” (IBM 011392) This 7-page document relates to allegations of discrimination or retaliation. (IBM 011392-98) Investigators are cautioned that, before beginning an investigation, they must familiarize themselves with the Open Door policy, legislation, and the employer-employee relationships at issue. The investigators are advised to “promptly” establish and maintain contact with the complaining party.<sup>8</sup> (IBM 011392) Investigators are told to maintain objectivity by focusing only on the facts. (IBM 011392)

The suggestions on conducting interviews are consistent, generally, with best practices. For example, investigators are directed to prepare a core set of questions in advance of the investigation. (IBM 011393) It is unknown if Ms. Due (or Mr. Mandel) prepared questions; I have not seen any. Significantly, investigators are directed to advise all interviewees that retaliation is not tolerated and any possible retaliatory acts should be reported immediately. (IBM 011393)

Guidance is given pertaining to the questioning of the complaining party about alleged discrimination or retaliation. Investigators are told to probe and “press for details and specifics,” such as where and when did the discrimination or retaliation occur, and the investigator is told to get a description of each alleged activity and the identity of who was present. (IBM 011394) Investigators are encouraged to ask, “What exactly was said? Who said it? To whom was it said? Is there any documentation available related to the alleged act?” (IBM 011394) The investigator should ask if the complaining party believes that others have also been victimized by discrimination or retaliation and, if yes, the details of when and where. (IBM 011394)

The person alleged to have engaged in the discriminatory behavior should be questioned extensively as well. (IBM 011395)

Analyzing information gathered is crucial. The investigator is directed to gather all pertinent data and conduct all interviews, and then analyze the data to assess the facts and reach an appropriate conclusion. (IBM 011396) The investigator should consider whether the alleged incident was unfair or unreasonable and, further, should conclude whether a breach of IBM’s discrimination policy occurred. (IBM 011397) The investigator should assess “if a breach of any of the strands of discrimination law has occurred.” (IBM 011397)

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<sup>8</sup> As stated in the Report, Mr. Mandel failed to maintain contact with Mr. Tuvell when Mr. Tuvell was out on STD.

In the section regarding retaliation, IBM makes clear that “denial of promotions or job assignments” and “less favorable job or territory assignments” are examples of adverse actions that could be considered retaliatory. (IBM 011398) Further, “negative references” is also considered to be an adverse action.

#### *Training Materials: Reports*

A new report format was rolled out using Excel. (IBM 011378) New templates were included for claims involving harassment, discrimination, and retaliation. (IBM 011378) Using an example of an employee in a protected category (sexual orientation) where it was found that comments in a performance appraisal were retaliatory, IBM explained that an IBM investigator should utilize the Expanded report format and the “Aligning Review/Approval Requirement.” (IBM 011385) The reports I have reviewed do not appear to be in this format.

The training references a “PBC Questionnaire” model that was introduced in 2010. (IBM 011386) I have not seen this Questionnaire produced and, therefore, cannot comment on it.

For the “Expanded” investigation, which indisputably applies to claims involving harassment, discrimination, and retaliation, IBM directs investigators to utilize a “Global Template Design.” (IBM 011386) The following must be included:

- Global guidance on techniques for general interviewing
- Topic-specific recommended questions to ask the complaining party, person accused, and witnesses
- Topic-specific recommended questions and directions on analyzing the information collected
- Review and approval steps
- Topic-specific resources and references

(IBM 011386)

#### *Training Materials: Audit and Oversight*

The new process seemingly implements quality assurance and oversight to the process. I note that “CM&A<sup>9</sup> Quality Insurance (sic) Review & Approvals” is listed as a step. (IBM 011388) I see no evidence that such review was done in Mr. Tuvell’s case. I saw reference in Ms. Due’s notes that “typically” Mr. Mandel would review her findings or report. (IBM 0110544) However, in this case, she felt there was no need as, “In this matter, I already ran the case by Russ [Mandel]. (IBM 0110544)

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<sup>9</sup> Case Management & Appeals

IBM also contemplates “audit readiness.” (IBM 011388) I see no evidence that the investigation in Mr. Tuvell’s case was audited by anyone.

*Opinion (3) A.2 Mr. Mandel’s Investigation #2 (Report pp. 81-85)*

In this section, I refer to and incorporate the materials outlined above in “Opinion (3) A. 1 Ms. Due’s Role and Her June 2011 Investigation (Report pp. 79-81)” as it relates to the training materials and Mr. Mandel’s failure to comply with them.

In the Report, I relayed that Mr. Mandel’s September 15, 2011 conclusions were drawn without interviewing Mr. Tuvell, as required under the company’s C&A policy. I also noted that Mr. Mandel offered to interview Mr. Tuvell on November 7<sup>th</sup>, after the report was written on September 15<sup>th</sup>.

In his deposition, Mr. Mandel was asked about the November 17<sup>th</sup> phone conversation that he had with Mr. Tuvell prior to releasing his report. (Mandel Depo., pp. 88-89) He did not advocate for characterizing the call as an “interview,” which would have been consistent with IBM policy. Instead, he testified, “So you could either count it as an interview or not count it as an interview depending on your point of view.” (Mandel Depo., p. 89)

Additionally, Mr. Mandel provided further testimony relating to this investigation that buttresses the opinions expressed in the Report. In his deposition, Mr. Mandel admitted that Mr. Tuvell claimed to have been the victim of discrimination and retaliation. (Mandel Depo., p. 97) Despite knowing this, Mr. Mandel failed to investigate Mr. Tuvell’s transfer to Ms. Mizer’s job function, and never made a determination as to whether that switch was appropriate. (Mandel Depo., p. 26) Also, he failed to inquire of Mr. Feldman as to whether he made any comments based on age or gender in the workplace. (Mandel Depo., p. 97) He also never inquired as to whether Mr. Feldman made any comments that might indicate handicap discrimination. (Mandel Depo., pp. 97-98) He never inquired as to whether Mr. Feldman engaged in any retaliatory behavior. (Mandel Depo., p. 98) He does not recall specifically coaching Mr. Feldman about avoiding retaliatory action against Mr. Tuvell. (Mandel Depo., p. 149) Failure to protect against retaliation runs contrary to IBM’s training materials. (IBM 011393)

*Opinion (3) A.3 Mr. Mandel’s Investigation #3 (Report pp. 85-86)*

In this section, I refer to and incorporate the materials outlined above in “Opinion (3) A. 1 Ms. Due’s Role and Her June 2011 Investigation (Report pp. 79-81)” as it relates to the training materials and Mr. Mandel’s failure to comply with them.

Mr. Mandel’s deposition testimony further corroborated the opinions expressed in the Report. That is, Mr. Mandel testified that he did not investigate whether Mr. Tuvell was rejected for the position based on retaliation. (Mandel Depo., p. 147) Similarly, he did not investigate whether Mr. Tuvell was rejected in violation of IBM’s obligation to provide reasonable accommodation. (Mandel Depo., p. 147)

(4) **THE COMPANY FAILED TO COMPLY WITH BEST PRACTICES OR ITS OWN POLICY WHEN IT ALLOWED MS. DUE TO REVIEW MR. MANDEL'S DRAFT APPEAL FINDINGS BEFORE HE FINALIZED THEM**

When I submitted my Report, I opined that Mr. Mandel's involvement in Ms. Due's investigation was wholly inappropriate. At the time, I had no idea that *Ms. Due* was subsequently involved in *Mr. Mandel's investigation*. Again, that is totally inappropriate and violates best practices, IBM policies, and IBM training materials.

In her deposition, Ms. Due testified that Mr. Mandel forwarded her a draft of his report for her review prior to finalizing it. (Due Depo., pp. 189-90) She further testified that it was "usual" for her to give input into the appeal of her own decision. (Due Depo., p. 190) She said that she was to review the draft decision only to ensure that the facts were accurate. (Due Depo., p. 190)

A review of the email at issue, (Due Depo. Exhibit 22, IBM011116), reveals that Ms. Due did not merely review the draft report for factual accuracy. Rather, she offered additional points "for [his] consideration." (IBM011116) It appears that she offered about fourteen (14) additions, changes or clarifications to his draft report. For example, she encouraged him to add that Mr. Tuvell was the "performance lead" on the Knabe project, and she thought it important to show that it was Mr. Tuvell's "responsibility to be proactive and not reactive." (IBM011116) She also encouraged him to retain language in the draft report, implying that Mr. Mandel embedded thoughts or questions into the draft report to which Ms. Due responded. For example, she wrote, "May 17-18, on this entry, I do think it is important to keep the part in about the non-standard environment b/c that is why Tuvell had ... ." (IBM011116) In that same paragraph, she also wrote, "Also, important tis to keep in the part about how a lower banded ee was able to create things ... ." (IBM011116)

Ms. Due suggested that Mr. Mandel add to the report that the difference between a band 7 and band 8 is "only a 1 band difference." (IBM011116)

Ms. Due suggested that Mr. Mandel point out and "include a note that it is not 'illegal' for a client to give feedback to a manager in the IBM workplace[.]" (IBM011116)

She also suggested that Mr. Mandel "add a note that a manager can reassign any employee at any time without it having to be adverse job impact[.]" (IBM011116)

She suggested that Mr. Mandel add, in his June 27 entry, that Mr. Tuvell said that Mr. Feldman singled him out by asking him to do a project plan, and she also suggested that Mr. Mandel move his entry on the topic from July 6 to June 27. (IBM011116)

The above are just a few examples of the detailed feedback that Ms. Due provided. It was more than just a review for factual accuracy. Rather, she provided substantive input on the report.

I would welcome the opportunity to see the draft that was attached to Mr. Mandel's September 6, 2011 email. (Due Depo. Exhibit 22; IBM011117). I note that the email says that "attachment

“Tuvell Report.doc” deleted by Lisa Due/Somers/IBM.” I reserve the right to supplement this report if that document is produced.

Ms. Due’s involvement in Mr. Mandel’s appeal destroys the independence and objectivity of it. I liken this to the First Circuit reviewing a lower court summary judgment order and sending for review its draft decision to the Federal Court judge who authored the original summary judgment order on appeal. It’s patently wrong and against IBM policies and training as well as best practices.

Thank you, and please let me know if you obtain additional information that may be relevant.

Very truly yours,



Julie A. Moore, Esquire, SPHR