

STATEMENT OF THE CASE

Factual Background

A very concise/partial *outline* of the underlying facts suffices in this place, noting this Petition is concerned with *procedural* (not fact-intensive) issues. *Details* of plaintiff's case-in-chief are not found here-with (by the nature of this Petition), but can be gleaned from: (i) *Plaintiff's Statement of Facts* (PSOF = ReqApx ¶48–84); (ii) the *PSOF-Exclusion Table* (*Abridged* ¶29 *infra*; *Unabridged* ReqApx ¶86–90).

Walter Tuvell is a white male U.S. citizen, a mathematician (B.S. MIT, PhD U. of Chicago) spending his working life as a computer scientist (technical software professional). He was working at Netezza Corp. (Marlboro, Mass.) when it was acquired by IBM on January 1, 2011.⁸ Tuvell's job title was Performance Architect, under the organizational supervision of Dan Feldman, but reporting on a day-to-day operating basis ("dotted-line," "matrix model") to another supervisor, Fritz Knabe, at a satellite office (Cambridge, Mass.), working on a next-generation database-warehouse project, code-named "Wahoo."⁹

Tuvell had no history of friction with anyone at Netezza/IBM, when "out-of-the-blue" on May 18, Knabe "informed" Feldman privately that Tuvell had failed to deliver certain Excel graphics that Knabe

8 • All dates are in 2011 unless expressly stated otherwise.

9 • Projects at pre-IBM Netezza were customarily code-named after species of fish.

had instructed/ordered Tuvell to produce. That was a *whole-cloth lie*: Knabe never broached anything like any such task to Tuvell, at any time, ever. It would have been “impossible” for Knabe to do so — since **Knabe *knew well* that Tuvell didn’t use Microsoft software of any kind (such as Excel).** Tuvell instead used *exclusively* the Linux “operating system,” and its “open-source” software applications; this was quite well-known to everyone Tuvell worked with. Feldman confronted Tuvell with Knabe’s accusation later that same day, “siding” with Knabe — even though **Feldman *also knew well* that Tuvell used only Linux-based tools.**¹⁰

Instantly, Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of PTSD, stemming from an abusive/bullying/defamatory workplace incident he’d experienced more than a decade previously while at another employer, but which was since in remission (“passive”/“dormant” phase). Knabe/Feldman’s accusation immediately caused/“triggered” Tuvell to reexperience an acute/“active” PTSD “flashback”/relapse. From that moment, Tuvell struggled mightily under the resurgence of his PTSD. Tuvell hid his anguish from Feldman as best he could that day, but he did

10 • For “(pretext-based) proof” of Knabe/Feldman’s dishonesty concerning the Excel graphics episode, see ¶30f44 *infra* — noting, however, that such proof is not necessary at summary judgment stage. Instead, the judge **must** reflexively/automatically (with no more than *de minimus* plausibility of proof) *credit/believe* Tuvell’s side of story (“nonmovant-trumps-movant” and “light-burden” tenets of the SJTOR, see ¶17 *infra*).

firmly deny Knabe's charge. The next day, Tuvell proposed a three-way meeting, so that the three men could "clear the air" (determine what had really happened — potentially/hopefully just a miscommunication), and avoid its happening again.

Tuvell's (~half-dozen) requests for three-way meeting went *unheeded*,¹¹ prompting Tuvell to explicitly reveal his PTSD affliction to Feldman on May 26, citing it as the reason he sought the three-way meeting "reasonable accommodation."¹² At that exact point, IBM was *aware* of Tuvell's ADA-protected disability. Feldman nonetheless continued to deny all requests for three-way-meeting (or to suggest any other means of accommodation), causing continued decline in Tuvell's psychological state.

On June 8, Knabe attacked Tuvell with *another whole-cloth lie* — this time, about Tuvell's not timely completing a certain task, even though Knabe *knew* (thanks to *daily* "stand-up" meetings) that Tuvell was on-schedule with all his deliverables¹³ — by *falsely yelling loudly* at Tuvell in the presence of other Wahoo team-members in Cambridge.

11 • The desired meeting never did materialize.

12 • Tuvell did not use the language "ADA" or "reasonable accommodation" until later, noting that the ADA does not require the use of such "*magic words*" at any time. *EEOC Guidance: Reasonable Accommodation* (excerpted extensively at PetAdd ¶6–9 = ReqApx ¶106–109).

13 • (i) Tuvell *had* completed his task due *that day*. (ii) The task Knabe *yelled about* wasn't due for *another ten days* (and Tuvell did deliver it two days later, *more than a week early*).

Knabe “informed” Feldman, and on June 10 Feldman peremptorily demoted¹⁴ Tuvell to a much less desirable position — “switching” him with another employee, less-qualified and lower-ranked — giving for “reason” that Tuvell and Knabe could not work together (but not holding Knabe accountable for his then-known-false actions). Tuvell protested, and immediately informed Feldman that he intended to **escalate the matter to HR (Human Resources)**, which he did do later that same day.

And that’s when things *really* “went south.”

When Tuvell met with the HR representative on June 13, she asked him *why* he thought Knabe and Feldman would act the way they did. Tuvell said he didn’t know why, but based on the fact that Feldman/Knabe displayed no interest whatever in resolving the situation (“stone-walling” even the simple/obvious proposal for three-way meeting), Tuvell surmised that “something illegal must be at the root of things,”¹⁵ and that he suspected *age discrimination*¹⁶ might be the motivating factor. That *discrimi-*

14 • IBM prefers euphemistic language such as “transfer/reassignment;” but we rather agree with J. Alito’s candid characterization: “demotion” (¶35 *infra*).

15 • This is a legitimate/protected pretext-based inference; see ¶33f51 *infra*.

16 • During the course of events as they emerged (as related in this section, and *infra*), plaintiff was unable to uncover solid/direct *evidence* of *age-based discrimination* (which is why that charge was later dropped). On the other hand, very obvious *retaliation* (for complaining of discrimination in the first place)[†] did arise immediately, soon followed by a plentiful abundance of

*nation complaint was protected by law, of course.*¹⁷

It would take us too far afield at this point (the factual details being unnecessary for this Petition) to even *list* here the *dozens* of “bad things” that happened to Tuvell from that point forward.¹⁸ Suffice it to say that at every juncture, Tuvell took the right/appropriate steps to “clear his name,” according to IBM’s published policies/programs/procedures/practices (e.g., invoking IBM’s formal internal dispute resolution [IDR] process, called “[Corporate] Open Door Concerns & Appeals (C&A),” for which he produced a valuable/detailed/voluminous report to aid IBM’s investigation). Nonetheless, he was treated to an unrelenting stream of discriminatory/retaliatory acts, from every IBM representative/agent who “touched” his case. Whatever was the animus for the

direct PTSD-disability-based discrimination and retaliation, which is what now forms the heart of the case. {†· A charge of retaliation remains viable even in the absence of underlying substantive discrimination (see ¶11f17 infra, and PetAdd ¶6 = ReqApx ¶106) — provided the retaliated-upon discrimination charge was made on reasonable grounds (as it was, because Tuvell was the oldest technical employee at Netezza, to his knowledge), and in good faith (as it was, namely pretext-based inference, see ¶8f10, ¶10f15 supra and ¶30f44, ¶33f51 infra).}

17 · *EEOC Compliance Manual* §8-II(B)(2) ¶8-4–8-5 (excerpted extensively at PetAdd ¶5–6 = ReqApx ¶105–106), emphasis added: “Complaining to anyone about *alleged* [it does not have to be *proven*, to judge or jury] discrimination against oneself or others ... constitute[s] [protected] ‘opposition’.”

18 · For a rough/summary grasp of events (with only tagline names, *sans* explanation) see the *PSOF-Exclusion Table (Abridged* ¶29 *infra*; *Unabridged* ReqApx ¶86–90).

Excel graphics episode, the resulting upshot was that after Tuvell revealed his PTSD and complained of discrimination/retaliation, the environment devolved into a steady torrent of abusive harassment.

IBM continued to refuse ADA “interactive dialogue/process” and “reasonable accommodation”. On August 15, unable to endure more health-wise, Tuvell took short-term disability (STD) leave. The one-and-only condition Tuvell required for resuming his job was cessation of PTSD-exacerbating psychological abuse, i.e., removal from Feldman’s health-harming hostile management. Absent rehabilitation/removal/transfer of Feldman, Tuvell *twice* applied for transfer to a known open/funded position for which he qualified; IBM officially recognizes/supports that solution, and the ADA even *requires* it.¹⁹

But IBM refused transfer, “stone-walling” to the bitter end. Unable to return to IBM because of IBM’s refusal to accommodate his PTSD, Tuvell was *forced by economic necessity* to find stop-gap employment at another software company (Imprivata, beginning on March 12, 2012), thinking it would be a “temporary gig” until IBM finally “wised up” and “did the right thing,” returning him to his desired job (or alternatively approving the transfer he sought) at IBM. They never did; Tuvell never returned from his STD leave. On May 17, 2012, IBM terminated Tuvell on

19 • *EEOC Guidance: Reasonable Accommodation*, at *Reassignment* (excerpted extensively at PetAdd ¶8 = ReqApx ¶108), emphasis added: “Reassignment[transfer] is the [only] *reasonable accommodation* of **last resort** and **is required ...**”

an absurd and “trumped-up” (and illegal)²⁰ charge.

(And that’s the Truth.)

Proceedings At MCAD/State/District Levels

MCAD — Tuvell filed a charge with the Mass. Commission Against Discrimination (MCAD, the state’s EEOC Fair Employment Practices Agency) on March 12, 2012. An additional charge was filed on September 18, 2012. Tuvell requested a “Right to Sue” letter from the EEOC on February 11, 2013, which was granted on February 19, 2013.

State — Civil suit was filed at Middlesex County (Mass.) Superior Court on April 23, 2013. IBM removed the case to the federal courts (D. Mass., Boston) on May 30, 2013.

District — Litigation activity on interrogatories/admissions/discovery/depositions then commenced/progressed/concluded. IBM moved for **summary judgment** dismissal on December 15, 2014. Seven special summary judgment documents were filed, December 15, 2014 – March 2, 2015 (DSOF+DMemo+RespDSOF+PSOF+PMemo+RepPMemo+RespDSOF; see the section on *Plaintiff’s Statement Of Facts (PSOF)*, ¶20 *infra*). The district court granted dismissal, entering its opinion on July 7, 2015 (Op = ReqApx ¶4–38), and judgment on July 8, 2015 (ReqApx ¶44–45).

20 • Discussed at PetAdd ¶19–20 = ReqApx ¶119–120.