UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES, INC., Defendant.	)	C. A. No. 13-cv-11292-DJC LEAVE TO FILE 25 PAGE BRIEF GRANTED BY ORDER OF FEBRUARY 5, 2015

PLAINTIFF WALTER TUVELL'S AMENDED MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PLAINTIFF WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT BASED ON DISABILTY, RETALIATION, AGE, OR A COMBINATION THEREOF

The harassment experienced by Plaintiff Walter Tuvell rises to the level of a hostile work environment. Def.'s Mem., at 19-20. Numerous courts have held that as few as three or four incidents may constitute severe or pervasive conduct sufficient to create a hostile work environment.[1] On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted to agents of IBM that Plaintiff reported suffering from Post-Traumatic Stress Disorder (PTSD), that Feldman considered Tuvell to be "irrational and potentially dangerous," and he petitioned IBM to fire Tuvell and disable his access to IBM buildings. Resp. DSOF25.[2] On June 20, 2011, Feldman again referred to Tuvell's diagnosis of PTSD and claimed that Tuvell was "potentially dangerous." Resp. DSOF25. However, Plaintiff did not engage in any threatening conduct. Id. These communications are direct evidence of animus against Plaintiff's PTSD.

[1] Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 16-17 (1st Cir. 1999) (three incidents of harassment demonstrate hostile work environment); Thomas O'Connor Constr., Inc. v. MCAD, 72 Mass. App. 549, 567 (2008) (four incidents are sufficient to generate liability for harassment); Gerald v. University of Puerto Rico, 707 F.3d 7, 22 (1st Cir. 2013) (three incidents); McAuliffe v. Suffolk Co. Sheriff's Dept., 1999 Mass. Comm. Discrim. Lexis 7, 15 (three incidents).

[2] Plaintiff shall hereinafter refer to Defendant's Statement of Facts as "DSOF", Plaintiff's statement of facts as "PSOF", and Plaintiff's Response to Defendant's Statement of Facts as "Resp. DSOF."

During this time and thereafter, Feldman and IBM engaged in a number of harassing acts, which in any combination constitutes a hostile work environment. Among them: (1) on May 8, 2011, Fritz Knabe, supervisor, falsely accused Plaintiff of failing to perform work, and Feldman failed to investigate (PSOF1,3,4,5); (2) on June 8, 2011, Knabe yelled at Plaintiff and falsely accused him of failing to provide work, and again Feldman refused to investigate and refused Plaintiff's request for a three-way meeting to clear the air (PSOF5,6,7); (3) Feldman demoted Plaintiff's level of work from that of a "Band 8" employee to that of a lesser "Band 7", and simultaneously he switched a much younger, much less qualified, Asian female, Sujatha Mizar, into Plaintiff's position (PSOF8-16); (4) Feldman required communications with Plaintiff be copied to HR, based on his past history of litigation and engaging in protected complaints about harassment (PSOF17-18); (5) Feldman disciplined Plaintiff for failing to provide a status update on the transition of his work to Sujatha Mizar, even though Mizar had already submitted the applicable joint report (PSOF19-22); (6) Feldman imposed on Tuvell the impossible task of piecing together, independently of Mizar and Feldman, on a single day's notice, a detailed day-by-day schedule for three weeks, reflecting his taking over of Mizar's four duties on his reassignment, which was unachievable given that Tuvell had no acquaintance of his four entirely new responsibilities in the transition, and Feldman refused to provide Tuvell an example of such a schedule (PSOF24-25);[3] (7) reflecting a preexisting secret plan to write up Tuvell for something, Feldman issued a Formal Written Warning with a threat of termination, because Tuvell wrote, "or if you're lazy you can just click this link;" (PSOF22, 25); (8) Feldman forbade Tuvell from spending pre-agreed time on his internal complaint of harassment, and then threatened Tuvell with termination when he said, "Now wait a minute, Dan." (PSOF27).

[3] Laster v. Kalamazoo, 746 F.3d 714, 732 (6th Cir. 2014) (heightened scrutiny may constitute a Title VII violation).

Plaintiff went out on short term disability (STD) due to severe PTSD symptoms caused by Feldman's harassment. PSOF28. While out on leave, the harassment continued, including: (9) refusal to appropriately act on Plaintiff's internal complaints of harassment while he was on medical leave, and delaying resolution by four and a half months; (PSOF29); (10) curtailing Tuvell's computer access based expressly on his being on medical leave (Resp. DSOF25); (11) curtailing Tuvell's use of the IBM email system because he forwarded his complaints of harassment and discrimination to others within IBM (Id.); (12) barring Tuvell from IBM facilities because he was out on disability leave (Id.); (13) counting as sick days Plaintiff's work at home (PSOF30); (14) denying Tuvell a transfer based on his being on STD (PSOF31, Resp. DSOF25); (15) threatening to fire Plaintiff for circulating his protected complaints of discrimination to certain IBM employees (PSOF48); (16) threatening to fire Plaintiff when he declined to reveal where he worked at a second job, and falsely accusing Plaintiff of violating an inapplicable internal policy (PSOF57; Resp. DSOF75; DSOF78); (17) consistently rejecting Plaintiff's requests for reasonable accommodation, which would have allowed Plaintiff to return to work and be paid (PSOF41,53, DSOF49, Resp. DSOF69). A reasonable jury could find that IBM's conduct could be severe or pervasive, such that a hostile work environment was created.

II. PLAINTIFF SUFFERED A NUMBER OF ADVERSE ACTIONS

In addition to constituting a link in a chain of harassment constituting an unlawful hostile work environment, a number of the actions just enumerated are sufficient, in and of themselves, or in combination, to constitute tangible adverse actions, such that they "well might have dissuaded a reasonable worker from" engaging in protected activities, such as opposing discrimination or unlawful retaliation. Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2415 (2006).

Access Truncated: IBM's curtailment of Tuvell's access to IBM's buildings, computer networks, and email systems with which he could communicate with coworkers was an adverse action, and indeed, interfered with his ability to enter an IBM building to interview for a job (though Plaintiff surmounted that difficulty). Resp. DSOF53; Billings v. Town of Grafton, 515 F.3d 39, 54 n.13 (1st Cir. 2008) (combination of slights may together rise to the level of an adverse action, including barring access to selectman's office). Courts have held such denials of access to be adverse actions, even when access is only denied during non-work hours. Dahms v. Cognex Corp., 14 Mass. L. Rep. 193 (2001), 2001 Mass. Super. Lexis 581, at 5-6, 11.

Discipline: The August 3, 2011 formal warning letter, with the threat to discharge, may constitute an adverse action, based on its falsity. Def.'s Exh. 11; Alvarez v. Lowell, 2011 Mass. App. Unpub. Lexis 1332, at 8 n.3; Ritchie v. Department of State Police, 60 Mass. App. 655, 665 (2004) (false reprimands and evaluations are adverse actions for purposes of a Rule 12 motion); Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 97 (1st Cir. 2006).

Demotion: The reassignment of Tuvell from doing the highest level work within the Performance Architecture group to the lowest could be considered an adverse action by a reasonable jury, and where Tuvell, a Band 8 employee, was thereafter responsible for work that had been performed by a Band 7 employee. PSOF8,12. Due acknowledged the reassignment to be to a "lesser role." PSOF12. Tuvell was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower level work. PSOF14. The change also constituted a "public humiliation." PSOF14. IBM's own policies considers an "undesirable reassignment" to be a tangible adverse employment action. PSOF15. Finally the reassignment meant change of worksite to Marlborough from (mostly) Cambridge, which Tuvell regarded as a preferable location, and an increase in commuting

distance of thirty miles each direction. PSOF16; Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405, 2416 (2006) (reassignment of job functions are adverse, even if they fell within the worker's pre-existing job description).

Denial of Transfer: The rejections of Tuvell's applications for transfer, on January 6, 2012 and thereafter, were adverse actions, under both c. 151B and the ADA. Tuvell was medically incapable due to his PTSD of continuing to serve in his then current position under Feldman, and at the time of his application for the transfer he had been on short term disability for months, and was exhausting his benefits. Resp. DSOF50, 69; PSOF41. He was already on 2/3 compensation, and within three weeks of the January 6, 2012 rejection, he was placed on completely unpaid leave. PSOF41. Transfer was identified as one of the only avenues that would successfully accommodate Tuvell, and allow him to continue working at IBM and earning a living. Resp. DSOF50, 69. The denial of the transfer directly inflicted financial harm on Plaintiff, because IBM reduced and eventually stopped paying him while on leave, because he was not medically able to continue in active service under Feldman. Id.; PSOF 41. Therefore, many cases support the proposition that the rejection of the transfer was an adverse action.[4,5]

II. PLAINTIFF WAS NOT PROVIDED REASONABLE ACCOMMODATION

A genuine issue of material fact exists as to whether Defendant adequately offered or provided reasonable accommodation. The "accommodation" offered by IBM, to continue an unpaid medical leave indefinitely until Plaintiff was able to return to work under Feldman, was inadequate for two reasons. See Def.'s Mem., at 8-9; Resp. DSOF50, 69; PSOF41. First, the

[4] Lewis v. City of Chicago, 496 F.3d 645, 655 (7th Cir. 2007) (refusal to transfer away from harasser is an adverse action); Taylor v. Roche, 196 Fed. Appx. 799, 803 (11th Cir. 2006) (same); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (denial of hardship transfer could be an adverse action).

[5] On December 1, 2011, Plaintiff accurately indicated to Kime that he had a "clean bill of health," as he had no medical limitations prevented him from working under Kime. Def.'s Exhs. 12, 27, 28 & 29; Resp. DSOF 50, 69.

indefinitely long, uncompensated leave that IBM proposed is not a valid, effective or acceptable reasonable accommodation, for there were acceptable options that would have returned Plaintiff to work immediately, and accorded him equal career opportunities. Second, the requirement that Tuvell return to working below Feldman was contrary to Tuvell's medical limitations.

The harassment that Plaintiff experienced at the hands of Feldman triggered serious symptoms of PTSD. PSOF28; Def.'s Exh. 26-28. In order to remain a productive employee of IBM, Plaintiff medically required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Feldman. PSOF60-63. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." DSOF49. Plaintiff on many occasions informed IBM that he could no longer work in any capacity with Feldman, for medical reasons, and requested that Plaintiff be accorded a new supervisor, or a transfer to a different position. PSOF60-63. IBM repeatedly rejected Plaintiff's requests. PSOF64. Beginning on or about August 11, 2011, Tuvell went onto medical leave, and ultimately his pay was lowered, and eventually completely curtailed, until he was terminated more than eight months later. Resp. DSOF 50, 69; PSOF28, 32, 41. As will be shown, the accommodation suggested by IBM could be found by a jury to be unreasonable and inadequate.

A. LEAVE WITH NO PAY IS NOT A REASONABLE ACCOMMODATION

It is not a reasonable accommodation to exclude Plaintiff from the workplace indefinitely, and pay him nothing, when other reasonable accommodations are available that would permit him to fully participate in the workplace. Resp. DSOF 50, 69; PSOF28, 32, 41; 29 C.F.R. 1630.2(o)(2)&(3). Reasonable accommodations are acts that permit an employee to perform the essential functions of a desired position, or enable the disabled to "enjoy equal

benefits and privileges of employment as are enjoyed by employees without disabilities." Id.; MCAD Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B (1998), at 26 (same standard). A reasonable accommodation is a "change in the work environment . . . that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. 1630.2(o). The accommodation must allow the employee an opportunity for an equal level of achievement, opportunity and participation. 29 C.F.R. Pt. 1630, @ 1630.9; Keil v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999).

As numerous cases have held, a reasonable jury could find that forcing Plaintiff to stay out of work, without compensation, when transfer to gainful employment under a different supervisor is an available option, fails to satisfy IBM's legal obligations to provide a reasonable accommodation.[6] While Plaintiff's initial medical leave may be termed a reasonable accommodation, in response to his major, immediate symptoms, eventually the extended, indefinite and uncompensated medical leave ceased being reasonable, when acceptable alternatives for gainful employment were available.[7] Resp. DSOF50, 69; PSOF41.

B. REQUIRING PLAINTIFF TO WORK UNDER CONDITIONS CONTRARY TO HIS MEDICAL LIMITATIONS IS NOT REASONABLE

Defendant's proposed accommodation of forced leave until he could return to work under Feldman is not reasonable, given that continued working with Feldman was directly contrary to Plaintiff's medical limitation. Resp. DSOF68. IBM submitted its proposal after Tuvell's health care provider certified on December 19, 2011, that "the only modification that would be possible

[6] Williams v. Phila. Housing Auth. Police Dept., 380 F.3d 751, 771-772 (3rd Cir. 2004); Noon v. IBM, 2013 U.S. Dist. Lexis 174172 (E.D.N.Y), at 35; Walters v. Mayo Clinic, 998 F. Supp. 2d 750, 764 (W.D. Wisc. 2014) (leave not sufficient where other accommodations available).

[7] Just because an employer has attempted one type of accommodation does not divest it of its responsibility to provide another, if the first attempt is not effective. Ralph v. Lucent Technologies, 135 F.3d 166, 172 (1st Cir. 1998); Smith v. Bell Atlantic, 63 Mass. App. 702, 721 (2005).

[to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. On other occasions, Tuvell informed IBM that he was medically incapable of returning to work under Feldman, and described his symptoms. PSOF60-63; Resp. DSOF69. IBM's proposals were not reasonable accommodations, because they were contrary to Tuvell's medical limitations.

Defendant argues that Plaintiff failed to engage in an interactive process, because Plaintiff rejected Defendant's proposal of continuing to report to Feldman on a day-to-day basis. Def.'s Mem., at 13-14. A reasonable jury would easily find this assertion to be false. Plaintiff rejected the proposal by precisely pointing out that it was contrary to Plaintiff's medical limitations as documented by his health care provider, and was contrary to his own reports about what triggers his medical condition. PSOF63. Tuvell was free to reject proposals inconsistent with his medical limitations, where he had identified a number of effective accommodations. PSOF63. When Tuvell expressly declined IBM's proposal for this reason, IBM failed to continue the dialog with any other proposals for accommodation. PSOF63. Even after Defendant IBM's contemptible recalcitrance, Plaintiff continued to invite the interactive process and to seek input from IBM about options for returning him to work. PSOF65. A reasonable jury could find that it was IBM and not Tuvell, who abandoned the interactive process. PSOF65.

Defendant argues that Plaintiff failed to engage in an interactive process, in that he failed to obtain treatment from someone other than a nurse practitioner. Def.'s Mem., at 13-14. In actuality, Plaintiff was treated by Stephanie Ross, LICSW (not a nurse practitioner), who had treated him for 18 years, over 250 visits, and who was very qualified and experienced in treating victims of trauma. PSOF66-69. IBM interviewed Ross with Plaintiff's consent, and IBM accepted her medical documentation without issue. DSOF40; PSOF70.

III. PLAINTIFF WAS A QUALIFIED, HANDICAPPED INDIVIDUAL

A reasonable jury could find Tuvell, a long time sufferer of PTSD, to be a qualified handicapped individual.[8] Defendant argues that Plaintiff was not qualified, because his initial medical documentation indicated that he was "totally incapacitated." Def.'s Mem., at 7. Actually, Plaintiff took the position that he was medically able to perform work for IBM if he was provided the reasonable accommodation of a different supervisor, or a transfer to a new position away from Feldman. Resp. DSOF 69; DSOF 30. The availability of at least two possible reasonably accommodations distinguishes the "total disability" defense.

Massachusetts and Federal law confirms that employees may be considered qualified handicap individuals, even if they claim "total disability" on medical documentation, so long as they claim that they can return to work with reasonable accommodation. Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997). The evidence demonstrates that Tuvell could continue working at IBM, if only he was provided with reasonable accommodation.

Ross's December 19, 2011 Medical Treatment Form states that "the only modification that would be possible [to return Plaintiff to work] is a change of supervisor and setting." Def.'s Exh. 28. On January 23, 2012, Ross stated that while she advised Tuvell "not to return to specific job environment," that "Patient has good functioning in the absence of trauma related stimuli." PSOF71. On January 31, 2012, Ross reiterated that "the only course to recovery for Tuvell required a reassignment by the company." PSOF71. On September 28, 2012, Ross stated, "in a new setting with different people it was possible that Tuvell could function quite well and attend his work." PSOF71; see Cargill v. Harvard University, 60 Mass. App. 585, 603

[8] Defendant does not challenge that Tuvell had PTSD, and does not challenge Tuvell's status as a handicapped person entitled to protection under the ADA and c. 151B. Def.'s Mem., at 4 n.3.

(2004) (plaintiff's burden is merely to show that a reasonable accommodation is "possible"); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985).

Ross, a highly qualified social worker with many years of experience working with trauma victims, testified that she believed that Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. PSOF66-69, 71.[9] In December 2011, Tuvell went to IBM's Littleton facility in order to interview for a transfer that he affirmatively pursued, and was not triggered by the interview or other efforts to pursue a transfer. PSOF73.[10] Since leaving IBM, Plaintiff has been able to work for years at a high level, thereby demonstrating the effectiveness that reasonable accommodation would have had. PSOF90. Because Tuvell took the position that he could return to work at IBM with reasonable accommodation, he was a qualified handicapped person.

IV. PLAINTIFF'S REQUEST FOR A NEW SUPERVISOR WAS A VALID REQUEST FOR REASONABLE ACCOMMODATION

Plaintiff sought at least two accommodations that would satisfy the medical limitations placed on him: stay in the same position working under a different supervisor, or transfer to a new position working under a different supervisor. PSOF60-63; DSOF49. Looking solely to the first request, for a new supervisor in the same position, Defendant is incorrect when it states that a request for a different supervisor is unreasonable. Def.'s Mem., at 10-11. In actuality, transfer to a different supervisor, depending on the facts, may be a valid reasonable accommodation.

---

[9] Ross reported that Tuvell was very positive when interviewing for a new position at IBM, and that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. PSOF71. While IBM asserts that Tuvell could not be in the vicinity of "IBM" without "engaging in violent outbursts," this statement is false. Resp. DSOF43.

[10] Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. PSOF74. Tuvell's was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. PSOF74. Tuvell's many communications with Kime concerning the position were "cordial and professional." PSOF74.

Ralph v. Lucent Technologies, 135 F.3d 166, 171-172 (1st Cir. 1998) (employer changed supervisors as a reasonable accommodation); Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-123 (2nd Cir. 1999) (change of supervisor may be reasonable accommodation).

In this case, change of reporting relationship to a different supervisor is reasonable under the facts. IBM's own policies embrace the notion of transferring a supervisor when there has been harassment and misconduct. PSOF75. Plaintiff had amply reported that Feldman had been harassing Plaintiff, and consequently, a change of supervisor is reasonable as it is absolutely consistent with IBM's promulgated policy. PSOF75. Moreover, Plaintiff has medical documentation that required him to report to a different person. DSOF49. In fact, IBM takes the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." PSOF75. Therefore, a genuine issue of fact exists as to whether Plaintiff's request to report to a different supervisor was a viable request for reasonable accommodation.

IV. PLAINTIFF SOUGHT REASSIGNMENT TO A VACANT POSITION, FOR WHICH HE WAS QUALIFIED

The ADA requires employers to reassign employees to a vacant position, to reasonably accommodate their handicaps. 42 U.S.C. § 12111(9)(B). If the employee is qualified, he or she must be transferred to a vacant, appropriate position, if required as a reasonable accommodation. Duvall v. Georgia-Pacific Consumer Prods., L.P., 607 F.3d 1255, 1260 (10th Cir. 2010). There is no need for the employee to prove that he or she is the "best" qualified applicant to obtain the reassignment. EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Section on Reassignment. Rather the Plaintiff need only show himself to be **minimally qualified** in order to establish entitlement to reassignment.

Contrary to Defendant's argument (Def.'s Mem., at 12-13), there is ample evidence to conclude that Plaintiff was qualified (minimally and much more) for the position for which he applied, SWG-0436579 (hereinafter, the "position"), in IBM's Littleton office. PSOF33. The position was open, and Tuvell applied for it on November 28, 2011. PSOF33. The Plaintiff met all of the "minimal qualifications" listed in the job requisition, including advanced academic degree, fluency in English, and he exceeded the amount of required experience with "C" programming language and software design, by decades. PSOF34, 35, 11. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. Id.[11]

IBM now claims that Tuvell was not qualified, because he was more interested in "development work" than the position entailed. Def.'s Mem., at 12-13. That assertion is false. Tuvell specifically asserted to Kime, prior to the rejection, that he understood what the position entailed, and that he would be very happy to perform in that position. PSOF38 ("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"). Thus, Plaintiff adequately expressed an interest in the work, to meet the standard for "minimal qualification" under the reasonable accommodation burden. Moreover, a jury could find that Tuvell's alleged interest in development work to be a pretextual justification, since

[11] Kime, as of 2010 was Development and Solutions Manager, and he acted as Hiring Manager for the position, and he drafted the posting himself. PSOF36. Kime reviewed Tuvell's resumes, and concluded they had had "little doubt that you [Tuvell] have technical skills that we could use on the project." Id. On or about December 1, 2011, Kime interviewed Tuvell by phone, which screened Tuvell's background and qualifications. Id. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team. Id. As a result of the interview, Kime asked his support lead, and also the next most senior member, of the Littleton team to interview Tuvell. Id. Tuvell's was interviewed by these other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive." PSOF37. Kime acknowledged that the interviews with his own management team did not exclude Tuvell as a candidate. Id. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." Id. Kime considered Tuvell's technical knowledge and ability to be a strength. Id. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for the position. Id. Kime believed Tuvell had "deep technical skills and ability to produce solid documentation." Id. Consequently, a jury could reasonably find that Plaintiff met the minimal qualifications for the position.

Kime authored the posting, wherein he formally designated the position as "Software Developer," and he described the position as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." PSOF39. Therefore, a jury could find that Kime's asserted reason for lack of qualification is pretextual, as well as irrelevant to the concept of "minimal qualification."

IBM next claims that Tuvell was not qualified, because he had demonstrated difficulty working with team members, based on the input of Feldman. PSOF40. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." Id. Feldman verbally rated Tuvell a "3", which represents a low ranking, but above those facing termination. Id. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." Id. As of December 13, 2011, Kime no longer considered hiring Tuvell for the position. Id. On January 6, 2012, Kime formally rejected Tuvell for the position, stating as reasons primarily the difficulties inherent in "taking you directly from being on short term disability," and secondarily "concern about the work being to your liking." Id.

The concerns about working with the team do not demonstrate lack of minimal qualification as a matter of law. Feldman's rating of "3", even if discriminatory or retaliatory, reflects a rating consistent with continued employment. Id. Furthermore, this reason is pretextual in that it was not mentioned in Kime's formal January 6, 2012 explanation for the reasons for rejection. Id.; Def.'s Exh. 13. Moreover, Plaintiff's continued minimal qualification with respect to his ability to get along with others is demonstrated by Defendant's continuing offer to employ Plaintiff in his then-current position, so long as he was supervised by Feldman.

DSOF67, 69. Finally, the fact that Plaintiff is unable to get along with people who are harassing him, based on the negative evaluation proffered by the primary harasser (and one who has directly expressed animus against Plaintiff based on PTSD), cannot be considered a disqualification as a matter of law, and such circular reasoning is pretext.

VI. PLAINTIFF TRANSFER WAS REJECTED BECAUSE OF HIS DISABILITY (AND/OR HIS TAKING REASONABLE ACCOMMODATON) OR RETALIATION

Tuvell alleges that he was denied a transfer to a Software Developer position based on retaliation, and/or based on his handicap or availment of reasonable accommodation. Tuvell has satisfied his prima facie burdens to demonstrate that the rejection of his application for the position was due to retaliation, handicap, or his availment of reasonable accommodation based on that handicap. Plaintiff was handicapped in that he had PTSD (a fact IBM does not challenge). Def.'s Mem., at 4 n.3. It is unquestioned that just prior to his rejection for transfer, Plaintiff had engaged in protected conduct by complaining about unlawful harassment and discrimination, and failure to reasonably accommodate his handicap. PSOF76. As established above, Plaintiff was qualified for the transfer, exceeding by decades the experience and credentials required of the position. Supra at 12. As shown above, the rejection was an adverse employment action. Supra at 5. The final element of the prima facie case is satisfied by the fact that after rejecting Tuvell, IBM held the position open (and indeed reposted it after rejecting Tuvell), and continued seeking a candidate to fill it. PSOF42; Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003).

Tuvell satisfies the final element of the prima facie case, because after he was rejected, the position remained open, with IBM continuing to seek applicants. PSOF42. After Kime decided to not hire Tuvell, and after the posting lapsed, Kime re-posted the identical position for the new year to seek new candidates. PSOF42. The reposted position also lapsed without being

filled. PSOF42. In addition, the rejection took place in close temporal proximity, well within three months, to a number of Tuvell's protected oppositions to unlawful conduct and requests for reasonable accommodation. PSOF76.[12]

Moreover, there was ample direct evidence that Tuvell's handicap was the primary factor in the rejection. On January 6, 2012, Kime gave as the following the primary reason for the rejection: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." DSOF31. This is direct evidence of discriminatory animus, as Defendant acknowledges that Tuvell was on short term disability for the purposes of accommodating his disability. Def.'s Mem., at 8.

Defendant now claims that the STD justification was a lie, and that, a different reason, Tuvell's past inability to work with his harassers, is the true reason for the rejection. PSOF43. A jury would be free to reject this second explanation as pretextual, as it is inconsistent with the reasons given to Tuvell at the time of the rejection. Compare Def.'s Exh. 13.[13] However, even if it were true, the evidence shows that Kime relied on the negative evaluation of Feldman, and that Feldman explicitly and discriminatorily wanted to fire Tuvell, as early as June 13, 2011, because of Tuvell's diagnosis of PTSD. PSOF25 31. Kime acknowledges that Feldman's input was

[12] Jones v. Walgreen Co., 679 F.3d 9, 21 (1st Cir. 2012) (three and a half month gap between protected conduct and adverse action may raise an inference of retaliation); Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39 50 (1st Cir. 2010) (three months between protected act and termination may raise inference of retaliation); Ritchie v. Dept. of State Police, 60 Mass. App. 655, 666 (2004).

[13] See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 431-432 (1st Cir. 2000) (pretext established where reasons given for employment action during litigation differ from reasons given at the time of the action); NLRB v. Hotel Employees, 446 F.3d 200, 208 (1st Cir. 2006) (same); Carrion v. Hashem, 2014 Mass. App. Unpub. Lexis 151.

significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman, sufficient to establish the "cat's paw" theory. PSOF31.[14]

Pretext, and the reasonable jury's inference of discriminatory animus arising therefrom, is further established by the fact that Defendant now claims the rejection was based on Tuvell's alleged disinterest in the work. Def.'s Mem., at 12. This is shown to be pretextual, given that, after he was fully informed of the nature of the job, Tuvell wrote to Kime, "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." DSOF38. Defendant's next assertion, that the position did not entail development work (Def.'s Mem., at 12-13), is shown to be pretextual by the actual job description, which was drafted by Kime, and which formally designated the position as "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." DSOF39.

There is additional evidence of handicap animus. IBM curtailed Plaintiff's access to IBM's email system, because "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." PSOF45. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." PSOF45. Even though Plaintiff made it clear that he would be medically unable to return to work until the investigation was properly completed (PSOF28), IBM refused to complete the investigation until four and a half months after it commenced.

[14] Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-9 (1st Cir. 1999) (where a non-discriminatory employee makes a rejection based on an evaluation conducted by someone motivated by discriminatory animus, the employer is liable for discriminatory motives of the evaluator); Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 570 (1981); Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011).

PSOF32. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [due to STD leave]. It is easy to return access once you return from STD." PSOF45.

The prima facie case, and the proof of pretext via false and changing justifications for the rejection, likewise support Plaintiff's claim based on retaliation. However, Plaintiff also has ample direct evidence of retaliatory animus to support his retaliation claim. The record indicates that Feldman and Kime were discussing Plaintiff's protected internal complaints of discrimination, at the precise moment when the rejection was decided. After the two spoke verbally, Kime wrote to Feldman, stating "I do not envy you having to deal with HR and lawyers at this point." PSOF44. That is, the two discussed Tuvell's internal complaints of discrimination, which were pending at that point, and were considered a negative factor. Id.

Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination, claimed that the following protected sentences provided by Tuvell in support of one such complaint, were "inappropriate":

> [H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

PSOF46. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much", as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe." PSOF46. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." PSOF46. Yet, IBM has

never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id.; Buckner v. Lew, 2014 WL 1118428 (E.D.N.C. 2014) (employer's assertion that Plaintiff's work would suffer due to his lodging of EEO complaint).

In March 2012, IBM curtailed Plaintiff's access to IBM emails systems, and later threatened Plaintiff with termination, precisely because Plaintiff had forwarded his protected complaints to others at IBM. PSOF47, 48; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 (protest to company President is protected).

On August 3, 2011, Plaintiff was prohibited from using a previously-agreed reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. PSOF49. Also, on August 3, 2011, Plaintiff was given a formal discipline, with threat of termination, for innocently penning the innocuous phrase "if you're lazy you can just click this link"; meanwhile, Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Tuvell. PSOF50. Further direct expression of retaliatory animus occurred on June 12, 2011, when Feldman, Tuvell's direct supervisor, told Tuvell that he was required to copy HR in all written and verbal communications with Feldman, based on "your history of suing when you feel you've been wronged." PSOF51. In response to one of Tuvell's protected complaints of harassment, Feldman threatened, "assertions of bad faith . . . are inconsistent with success." PSOF52. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based directly on that complaint. PSOF52. Thus, there is sufficient evidence for a reasonable jury to conclude that Plaintiff was rejected for the transfer based on handicap discrimination, his availment of reasonable accommodation, and/or retaliation.

VII. THE TERMINATION WAS DISCRIMINATORY AND/OR RETALIATORY

There is sufficient evidence that Plaintiff's May 17, 2012 termination (DSOF79) was based on retaliation and/or handicap discrimination. On January 25, 2012, after exhausting all of his STD benefits, and with no indication that he would be provided with reasonable accommodation, IBM transitioned Tuvell to unpaid leave. PSOF53. In March 2012, without any salary coming in, out of economic necessity Tuvell obtained another job. DSOF73.

There is a prima facie case that Plaintiff was terminated based on handicap discrimination and/or retaliation. At the time of discharge, Plaintiff was handicapped (PTSD), and his handicap was known to Defendant. Def.'s Mem., at 4 n.3; Resp. DSOF25. Plaintiff had lodged repeated, recent protected complaints of discrimination and retaliation. PSOF55. There is sufficient evidence that Plaintiff was qualified for the position, as Defendant kept offering to reinstate him to that position once he returned from sick leave, and that work had previously been performed by a more junior level employee with fewer qualifications. DSOF10; PSOF8, 12. The May 17, 2012 termination was an adverse action. DSOF79. The final element of the prima facie case is established because Defendant attempted to fill Plaintiff's position. PSOF54. The final element of the prima facie retaliation case is established because the termination occurred within days of Plaintiff's making protected complaints about unlawful harassment and retaliation. PSOF55.

In addition, there is evidence of pretext specific to the termination. On May 7, 2012, IBM wrote to Tuvell, stating that it believed Tuvell to be working for EMC, a competitor, and threatening termination. PSOF56. On May 8, 2012, Tuvell denied working for EMC. Id. Tuvell explained that he does not wish to inform IBM where he was working, as he feared a retaliatory response. Id. On May 11, 2012, IBM demanded to know where Tuvell is working, citing an inapplicable policy, and its need to confirm that Tuvell is not working for a competitor. PSOF57; Resp. DSOF75. On May 15, 2011, IBM demanded to know Tuvell's employer,

purportedly based on its duty to confirm that Tuvell is not working for a competitor. Id. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. Id. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2014. Id. The evidence of pretext, along with the prima facie case, establishes an inference of discriminatory or retaliatory motive sufficient to reach the jury.[15]

In addition, the direct evidence of animus based on handicap and retaliation described above at Supra 14-18 applies equally here, and establishes a genuine issue of material fact that Plaintiff's termination was based on handicap discrimination and/or retaliation for complaining of discrimination and/or seeking or availing himself of reasonable accommodation.

VIII. DEMOTION WAS BASED ON AGE, HANDICAP, RACE AND/OR GENDER

There is sufficient evidence that Plaintiff's demotion of June 10, 2011 was based on his age and/or gender. A prima facie case of age, race, handicap and/or gender discrimination is established by the following. Plaintiff is a white, male individual who was born in 1947, and who suffers from PTSD. DSOF1, 9; Def.'s Mem. at 4 n.3. Feldman was aware of Plaintiff's PTSD at least as early as May 26, 2011. PSOF10. Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Feldman, and

[15] Lipchitz v. Raytheon Co., 434 Mass. 493, 501, 506-7 (2001) (showing that one or more articulated reasons are false generates inference of discrimination); Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000).

IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; PSOF11. Feldman regarded Plaintiff's work in the Performance Architecture area as competent and his interactions with others to be professional. PSOF11. On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned from performing the highest level work within the Performance Architecture Group to the lowest. PSOF8; Supra 4-5. Feldman assigned Tuvell to switch roles with Sujatha Mizar, a less qualified female of East Asian heritage. PSOF8. Tuvell was decades older that Mizar, who was well under forty, and he had decades more relevant experience for the position. PSOF8. Mizar had no Ph.D. PSOF8. Such evidence constitute a prima facie case of discrimination based on age, race, gender and handicap.

IBM takes the position that the June 10, 2011 demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Knabe." PSOF58. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." PSOF58. Evidence of pretext generates an inference of discrimination to be resolved by the jury. Lipchitz, 434 Mass. at 501, 506-507.

IBM also justified the demotion based on Plaintiff's alleged failure to produce Excel graphics, as required by Knabe. Def.'s Mem., at 4; PSOF2. However, that justification is pretextual, as Tuvell was never asked to produce Excel graphics. PSOF1. Moreover, Feldman and Knabe both knew that Feldman did not use Excel, so could not have logically asked him to complete such an assignment. PSOF3. Finally, Defendant's descriptions of the Excel incident are inconsistent, as IBM elsewhere described as Plaintiff performing his work "too slowly," as opposed to not providing the work at all. PSOF4; Velez v. Thrermo King, Inc., 585 F.3d 441, 449 (1st Cir. 2009) (pretext based on changing explanations).

IBM's other justification for the demotion was an incident on June 8, 2011 in which IBM claims that "Knabe asked Plaintiff about another work assignment, and during that discussion both Knabe and Plaintiff raised their voices." Def.'s Mem., at 4. In actuality, Knabe yelled at Plaintiff and with knowing falsity, accused him of not producing work. PSOF8.

Further evidence that these conflicts were ginned up, and pretextual, was shown by the fact that Feldman failed to take any action to resolve any of the difficulties involving Knabe and Tuvell. PSOF59. For example, Feldman refused to investigate, and refused to respond to Tuvell's repeated inquiries for more detail concerning his alleged misconduct. Id. Feldman repeatedly denied Tuvell's requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Id. While Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had convened just such a three-way meeting in March 2011, concerning a different issue. Id. A reasonable jury could find that Feldman was not proactive in resolving the underlying issues, because he realized that the grievances against Plaintiff had no actual merit. Just three days after to the demotion, on June 13, 2011, Feldman, the decision-maker with respect to the demotion, had written a letter claiming Plaintiff to be "irrational and potentially dangerous" in conjunction with his PTSD, and advocated barring Plaintiff from the workplace and firing him. DSOF25. There is much other direct evidence demonstrating discriminatory animus with respect to Plaintiff's handicap, as described above. Supra 15-17.[16] Thus, there is ample evidence that the demotion was based on age, gender, handicap, and/or race.

IX. IBM'S INVESTIGATIONS WERE UNLAWFUL AND/OR INADEQUATE

A reasonable jury could find that IBM's investigations of Plaintiff's complaints of discrimination were inadequate, delayed, biased and unlawful. An inadequate response to an

[16] Plaintiff was treated worse than similarly situated individuals who were outside of relevant protected categories. Knabe, who was not disabled, acknowledged yelling at Plaintiff, and yet he did not get

internal complaint "could itself foster a hostile environment and so give rise to liability therefor." Lightbody v. Wal-Mart Stores East, L.P., 2014 U.S. Dist. Lexis 148134 (D. Mass.), at 11. Also, a failure to properly investigate, in addition to supporting a hostile work environment claim, may form an independent basis for liability. College-Town v. MCAD, 400 Mass. 156, 167-168 (1987); Kenney v. R&R Corp., 20 MDLR 29, 31 (1998).

Lisa Due conducted the initial investigation in June 2011. DSOF17. When conducting that investigation, Due knew Plaintiff to be alleging that Feldman and/or Knabe to have discriminated against him on the basis of age and/or gender when he was required to switch job functions with Mizar. PSOF82. Yet Due did not explore the qualifications of Mizar as part of her investigation, nor did she explore whether Feldman or Knabe had a history of engaging in sexist or ageist behavior or comments in the workplace. PSOF83. Due did nothing to inquire of Feldman about his attitudes towards Plaintiff's PTSD. PSOF83. Prior to Due's completion of the investigation, she met with Mandel, who instructed her to inform Plaintiff that Due had no reason to conclude that Plaintiff had been mistreated. PSOF83. In addition to never seriously investigating Tuvell's complaints of discrimination, Due also never investigated whether Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. PSOF84.

Plaintiff appealed Due's conclusion to Russell Mandel. DSOF19; PSOF85. However, Mandel was biased as an appeal investigator, because he had already instructed Due how to respond with respect to her initial investigation. PSOF83. Moreover, Mandel was an inappropriate investigator under IBM's own conflict-of-interest policy, as he, personally, had been accused by Plaintiff of wrongdoing and discrimination, based on his failure to advance the

---

reassigned or disciplined, whereas Plaintiff was disciplined for innocuous comments. PSOF50; DSOF22, 25. Plaintiff was disciplined for missing a transition status update, but when the younger, female, Mizar missed an update, she was not disciplined. PSOF19-22, 26.

investigation during the pendency of Plaintiff's disability leave, and his false assertions to Plaintiff about IBM's practice of investigating third party complaints. PSOF77, 78, 79.

In August 2011, Mandel repeatedly, and over Plaintiff's objections, refused to advance the investigation because Plaintiff was on medical leave. PSOF28, 86. Mandel informed Plaintiff of the negative conclusion of his investigation on November 17, 2011, 19 weeks after the investigation had been requested. PSOF32; Resp. DSOF29. Given that IBM takes the position that Mandel completed his investigation already by September 15, 2011 (DSOF19), with no explanation for the additional two month delay in informing Plaintiff of the result, a jury could conclude that that IBM intentionally used the delay to keep Plaintiff out of the workplace.

Mandel's investigation was biased and one-sided, as Knabe and Feldman, but not Plaintiff, were accorded the opportunity to review Mandel's draft conclusions, and offer suggestions. PSOF87. Though Mandel understood that Plaintiff's complaint included the allegations that his demotion was discriminatory and/or retaliatory, Mandel never investigated whether that demotion was appropriate, and he failed to inquire as to whether Feldman exhibited any animus based on handicap and/or retaliation. PSOF88. Mandel's conclusions did not address Plaintiff's allegations of wrongdoing against Knabe or Mandel. PSOF3, 80.

On January 22, 2012, Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Plaintiff a requested transfer based on retaliation and in violation of the obligation to reasonably accommodate. PSOF89. Mandel, the investigator, never looked into whether the rejection was based on retaliation or was in violation of IBM's duty to reasonably accommodate the Plaintiff. PSOF89. On March 2, 2011, Plaintiff filed a third Corporate Open Door Complaint, alleging that Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. PSOF81. Mand+el never opened up an investigation to

respond to this Complaint, and there was no formal response. PSOF81. For these and for many other reasons (see Exhibits 115 & 116), A reasonable jury could conclude that IBM's investigation and response to Plaintiff's complaints were inadequate.

CONCLUSION

For the aforestated reasons, Plaintiff respectfully requests that IBM's motion for summary judgment be denied in its entirety.

Respectfully submitted,

The Plaintiff, by his Attorney

/s/ Robert S. Mantell

Robert S. Mantell
BBO# 559715
Rodgers, Powers & Schwartz LLP
111 Devonshire Street, 4th Floor
Boston, MA 02109
(617) 742-7010
RMantell@TheemploymentLawyers.com

RULE 5.2 CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 12, 2015.

/s/ Robert S. Mantell