In The

United States Court of Appeals

for the

First Circuit

Case No. 15-1914

WALTER TUVELL,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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A. IBM'S BRIEF CONTRADICTS ITS EARLIER ADMISSION THAT TUVELL WAS A QUALIFIED DISABLED PERSON WITHOUT A REASONABLE ACCOMMODATION

In its brief, IBM argues that Tuvell was "not a qualified handicapped person, capable of performing the essential functions of his position or *any* position." IBM's Brief at 43 (emphasis in original). However, on January 24, 2012, IBM admitted, through counsel, that Tuvell was a qualified disabled person (without accommodation). A1184-A1185. Specifically, Larry Bliss, Counsel for IBM, wrote to Tuvell's counsel, "The ADA does not require IBM to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell's manager as a reasonable accommodation ***since Mr. Tuvell is capable of performing the job.***" A1184 (emphasis supplied). Since IBM also knew and has conceded that Tuvell was disabled, e.g., IBM's Brief at 16 & n.3, Tuvell has satisfied the two elements of the definition of a qualified disabled person, i.e., that he was disabled and capable of performing the essential functions of a job, either with or without reasonable accommodation. See Tuvell's Brief at 26.

IBM likely stated that Tuvell was capable of performing his job without an accommodation as part of its strategy to drag out the short term disability process until Tuvell's benefits were reduced to zero and continue to send the message that

the only way Tuvell would be allowed to return to work at IBM was to continue reporting to Feldman in his current position, all in the hopes that Tuvell would just resign, and IBM could avoid terminating his employment and increasing the chances that he could prevail in a lawsuit against it. See Quiles-Quiles v. Henderson, 439 F.3d 1, 6, n.4 (1st Cir. 2006) ("The jury reasonably could have inferred . . . that, instead of pursuing a formal termination, (the plaintiff's) supervisors engaged in a course of harassment to force him to relinquish his position.").

IBM should be estopped from arguing now that Tuvell was not capable of performing his job without an accommodation. See, e.g., Moran v. Gala, 66 Mass. App. Ct. 135, 139-42 (2006). In Moran, where an attorney had previously represented in a deed that a certain piece of real estate belonged to one property, the attorney and his wife were estopped from thereafter pursuing an adverse possession claim against the owners of that property, because doing so would "squarely contradict" the position the attorney had taken previously in writing. Id. This mirrors the instant case, and where Tuvell engaged counsel as he struggled in vain to prompt IBM to agree to transfer him to a new position and retained counsel for the expensive path of litigation, these detriments should prevent IBM from arguing now that he was not capable of performing his job without an accommodation. See id. at 140 (recognizing the "cost and trouble of this

litigation" in support of finding of estoppel); Frederick v. ConAgra, Inc., 713 F. Supp. 41, 45 (D. Mass. 2012) (listing elements of estoppel doctrine). Accordingly, this Court should rule that Tuvell has presented sufficient evidence for a jury to conclude that he was a qualified disabled person, which is relevant for his claims under Counts II and IV and some of his claims in Counts V and VI.

B. TUVELL HAS ALSO SHOWN HE WAS A QUALIFIED DISABLED PERSON WITH A REASONABLE ACCOMMODATION

Even if IBM could admit on January 24, 2012, that Tuvell was a qualified disabled person without a reasonable accommodation and now be entitled to argue that he was not a qualified disabled person without a reasonable accommodation, Tuvell has separately established that he was a qualified disabled person with a reasonable accommodation. See Tuvell's Brief at 26-30.

First, a jury could decide Tuvell was capable of returning to his job with a new supervisor. See Tuvell's Brief at 27-30. In IBM's attempt to defeat this path to qualified disabled person status, IBM argued generally that Tuvell was "totally impaired to work from August through at least December of 2011." IBM's Brief at 45.

There are two problems with this argument. For starters, Tuvell's December 19, 2011 MTR provided that the "modification that would be possible is a change of supervisor + setting," thus indicating that Tuvell was NOT totally impaired to

work. A461. Since the MTR provides that Tuvell was capable of performing his job with an accommodation, Tuvell has established that he was a qualified disabled person. The fact that previous MTRs indicated that Tuvell was totally disabled from his current position reporting to Feldman (without accommodation) does not prevent Tuvell from being a qualified disabled person. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 797-98, 802 (1999) (pursuit and receipt of Social Security Disability Insurance benefits with representation of "total disability" does not prevent recipient from pursuing ADA claim); Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 452 (2002) (pursuit and receipt of benefits on assertion of "total disability" does not prevent plaintiff from claiming he is qualified disabled person under 151B); Equal Employment Opportunity Commission Enforcement Guidance, No. 915.002, 1997 WL 33159167, at *17 (Feb. 12, 1997) ("[A]n individual who asserts that s/he is both 'totally disabled' and a 'qualified individual with a disability' has not necessarily made inconsistent representations.").

Also, this MTR was dated December 19, 2011. IBM is trying to divert the Court's attention from the conclusion from Tuvell's health care provider on that day – that he was capable of performing his job with an accommodation – by discussing communications and incidents from before December 19, 2011. IBM's Brief at 45. However, the critical facts here are that Tuvell was prevented from

returning to work under a different supervisor AFTER December 19, 2011, that he was denied the transfer to The 579 Position AFTER December 19, 2011, and that he was denied the transfer to The 125 Position AFTER December 19, 2011. A969, A1016-A1020.

This issue of timing is relevant to the second way that a jury could decide Tuvell was a qualified disabled person with an accommodation; namely, that he could perform his job after a transfer to The 579 Position or The 125 Position. Again, after Tuvell's health care provider informed IBM that the "modification that would be possible [for Tuvell] is a change of supervisor + setting," A461, and after the hiring manager for the transfer positions had been impressed by Tuvell's qualifications and Tuvell had performed well in the interviews, Tuvell's Brief at 15-16, IBM rejected Tuvell for the transfers. A969, A1016-A1020. In the meantime, IBM admitted on January 24, 2012, that Tuvell was capable of performing his current job. A1184. It defies logic to argue that Tuvell could simultaneously be capable of performing his current role but not be capable of performing the essential functions of a *different* position due to the responsibility of "getting along with others without behavioral extremes." IBM's Brief at 46. IBM should not be permitted to have it both ways.

Along these same lines, since IBM admitted on January 24, 2012, that Tuvell was capable of performing his current job, and since IBM repeatedly told

him during that time period that he could apply for a transfer to an open position elsewhere at IBM, it defies logic for IBM to argue now that Tuvell was not "capable of performing the essential functions of his position or *any* position." IBM's Brief at 43 (emphasis in original). Indeed, while Tuvell was still on leave at IBM, he *proved* that he was capable of performing the essential functions of a position by working at Imprivata, and now IBM is arguing he was incapable of doing so! A143.

Finally, regarding the evidence Tuvell has presented regarding his work at Imprivata that a jury could credit in its conclusion that Tuvell was a qualified disabled person, IBM alleges that Tuvell pointed "to no record evidence indicating that he 'worked at a high level for years' at another company." IBM's Brief at 46. However, Tuvell did point to such record evidence. On page 29 of his brief, he cited page 747 of the Joint Appendix for the point that he made on page 28 of his brief that he had worked at a high level for years at another company. Indeed, on page 747 of the Joint Appendix that he cited, Tuvell's affidavit indicates that since May 12, 2012," he had been "working at Imprivata, in a high level, technical capacity. I am able to perform these functions, despite my PTSD. I am able to perform such functions whenever I am not being harassed." A747. See Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 157 (1st Cir. 2009) (plaintiff raised genuine issue of material fact that she was qualified disabled person based

partly on how she worked following diagnosis of disability). Tuvell has established, or at least created a genuine issue of material fact, that he was capable of returning to his job with a new supervisor and/or to a position with a different setting and supervisor, such as The 579 Position or The 125 Position, and thus, that he was a qualified disabled person.

II. IBM'S OFFER OF "REASONABLE ACCOMMODATION" WAS NOT REASONABLE, AND IBM UNLAWFULLY REFUSED TUVELL'S REQUESTS FOR ALTERNATIVES THAT WERE REASONABLE ACCOMMODATIONS

IBM maintains that it was reasonable to offer Tuvell the chance to remain on unpaid leave until he could return to work under Feldman, the supervisor who exacerbated his PTSD, because if Tuvell was willing to return to that harassing environment, IBM would allow him to go to doctor's appointments and have performance reviews with someone other than Feldman. IBM's Brief at 47. By immersing Tuvell right back into a role with Feldman as his day-to-day supervisor, that arrangement would have been contrary to Tuvell's documented medical limitations. See Tuvell's Brief at 33-34. Because that arrangement was contrary to his documented medical limitations, it does not meet the definition of a "reasonable accommodation," which is a modification to the work environment that actually permits an employee to do his job. See Tuvell's Brief at 32.

Since IBM's offered "accommodation" was not a reasonable one under the circumstances, its reliance on cases where employers gave employees a choice between multiple reasonable accommodations is unpersuasive. See IBM's Brief at 48. Indeed, IBM advances no argument, nor could it, explaining how, in the face of Tuvell's documented medical limitations, requiring Tuvell to continue reporting to Feldman was a "reasonable accommodation." IBM has elsewhere recognized the crucial importance of offering an accommodation that is consistent with a disabled employee's medical limitations. See Noon v. IBM, No. 12 Civ. 4544(CM)(FM), 2013 WL 6504410, at *12 (S.D.N.Y. Dec. 11, 2013) (IBM argued that its proposed accommodations "were 'plainly reasonable' because they were consistent with Plaintiff's physical limitations."). Even if IBM's proposed accommodation *was* consistent with Tuvell's medical limitations, which of course it was not, it could still be found to be unreasonable by a jury, as the court held in Noon. Id. at *13. Certainly, then, where IBM's proposed accommodation was directly contrary to Tuvell's medical limitations, a jury could find it to be unreasonable.

Similarly, IBM's attempt to distinguish cases relied on by Tuvell holding that unpaid leave can fail to qualify as a reasonable accommodation, see Tuvell's Brief at 32-33, based on its notion that Tuvell was "totally impaired to work,"

IBM's Brief at 48, once again ignores the fact that Tuvell's MTR dated December 19, 2011, certified that he was not totally impaired to work. A461.

Regarding Tuvell's request for a new supervisor, IBM characterizes this as asking IBM to "find another job for an employee who is not qualified for the job he or she was doing." IBM's Brief at 49. However, IBM maintained that Tuvell was qualified for the job he was doing, A631, A1184, and Tuvell's request for a new supervisor was not a request for another job, it was a request for a new supervisor. Under the MCAD Guidelines, "modifying methods of supervision" can be a "reasonable accommodation." Addendum ("ADD") 38.

Cases cited in this context by IBM, see IBM's Brief at 49-50, are inapposite. August v. Offices Unlimited, Inc., 981 F.2d 576, 584 (1st Cir. 1992) turned on whether the plaintiff was a qualified disabled person, not on whether he was reasonably accommodated, and he never requested a new supervisor. The plaintiff in Cailler v. Care Alternatives of Massachusetts, LLC, No. 09-12040-DJC, 2012 WL 987320 (D. Mass. Mar. 23, 2012) also did not request a new supervisor. Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 385 (2nd Cir. 1996) is unpersuasive, because the employer there had offered other reasonable accommodations to the employee with a back injury, namely ergonomic furniture and the ability to move around and stretch periodically, thereby obviating the need to provide a new supervisor. Similarly, Weiler v. Household Finance Corp., 101

F.3d 519, 526 (7th Cir. 1996) is unpersuasive, because that employer had affirmatively "contacted (the employee) and offered her alternative available positions within her salary grade and invited her to interview for them," and since she refused to even interview for the transfers, the employer didn't need to also offer her a new supervisor.

These cases cannot trump Ralph v. Lucent Technologies, 135 F.3d 166, 171-72 (1st Cir. 1998), where this Court held that an employer had reasonably accommodated an employee with workplace-induced PTSD and depression by providing him with 52 weeks of paid leave and then changing his supervisor upon his return from leave. The Ralph Court went on to hold that the employer's duty to provide a reasonable accommodation continued even after having provided the reasonable accommodation of paid leave and a new supervisor. Id. at 167, 172 (claims under both 151B and the ADA). IBM's offer of unpaid leave and no new supervisor stands in stark contrast to that reasonable accommodation. A jury should be permitted to decide whether, under the circumstances, IBM's proposal or Tuvell's proposal was reasonable under Count II. See Tuvell's Brief at 30-35.

Likewise, a jury should be permitted to decide whether Tuvell's proposals to be transferred to The 579 Position and The 125 Position were reasonable accommodations that were unlawfully rejected under Count II and Count IV. See Tuvell's Brief at 35-38.

IBM acknowledges on page 51 of its brief that a transfer to an open position may be a reasonable accommodation under the ADA. E.g., Montemerlo v. Goffstown Sch. Dist., SAU #19, No. 12-CV-13-PB, 2013 WL 5504141, at *6 (D. N.H. Oct. 4, 2013) (summary judgment denied for employer on reasonable accommodation claim where jury could find that plaintiff was qualified to transfer to open 4th-grade teaching position). See also Tuvell's Brief at 35-38. Meanwhile, neither of the First Circuit cases cited by IBM in this context, see IBM's Brief at 51-52, involved an employee seeking a transfer as a reasonable accommodation. See Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012) (no liability for employer that raised the possibility of transferring the plaintiff, who declined to pursue a transfer); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 260, 262 (1st Cir. 2001) (no liability for employer where plaintiff had not sufficiently requested an accommodation).

IBM relies on the Jones and Reed cases to argue simply that transferring Tuvell to The 579 Position or The 125 Position were not reasonable accommodations based on IBM's conclusion that Tuvell was not a qualified disabled person. Id. at 51-53. IBM tries to hang its hat on Tuvell not being able to perform the essential functions of his job after a transfer because IBM had determined that he had not been subjected to discrimination or harassment in his previous setting. Id. at 52. IBM is grasping at straws here. Its biased, incomplete,

self-serving "investigations" surely cannot serve as the gospel on this topic. Attorney Moore's expert report dissects the numerous inadequacies of those "investigations" across 38 pages, A1365-A1402, providing plenty of support for the conclusion that the result of IBM's "investigations" does not dictate whether Tuvell could perform the essential functions of his job after a transfer.

The climax of IBM's argument in this section was that IBM's "decision to accommodate Tuvell by holding his position open for him is not the equivalent of a health care provider – or IBM – determining that Tuvell was actually capable of returning to work." IBM's Brief at 53. Once again, IBM misses the mark completely, because Tuvell's health care provider, e.g., A461, and IBM, A631, A1184, *both* determined Tuvell was capable of returning to work. As a result, a reasonable jury could find that Tuvell was a qualified disabled person capable of performing The 579 Position or The 125 Position, see discussion of qualified disabled person status supra at 1-7 as well as Tuvell's Brief at 26-29 and 35-38, and thus, that they were reasonable accommodations that IBM failed to provide, which supports liability under Count II and Count IV.

III. IBM'S UNLAWFUL REJECTIONS OF TUVELL'S TWO APPLICATIONS FOR JOB TRANSFER ALSO CONSTITUTED DISABILITY DISCRIMINATION AND RETALIATION

One of the ways IBM unlawfully discriminated against Tuvell because of his disability and retaliated against him because of his protected activities under the

ADA and Chapter 151B was by denying his applications to obtain open positions at IBM. As discussed supra at 1-7 and in his first Brief at 26-29, Tuvell was a qualified disabled person, and he was specifically qualified for the transfer to The 579 Position and The 125 Position, as discussed in his first Brief at 35-38.

The first failure to transfer Tuvell – to The 579 Position – was an adverse employment action, because instead of permitting Tuvell to resume work and be paid his normal salary for his work, the failure to transfer Tuvell returned him to a status of being on short term disability leave ("STD") with a reduced income. See Tuvell's Brief at 39-40. See also Noon, 2013 WL 6504410, at *6, *8 (IBM's "failure to rehire" employee on disability leave to a different position within IBM could be found by jury to be an adverse employment action). The second failure to transfer Tuvell – to The 125 Position – was also an adverse employment action, because the very next day after the second denial of transfer, Tuvell's STD benefits ran out, and he was transitioned to unpaid leave. See Tuvell's Brief at 39-40. Tuvell was thus left with a job that provided no income, as opposed to a job that would have provided him a regular income and allowed him to resume his career.

The District Court's conclusion that these denials were not adverse employment actions was based on the erroneous rationale that Tuvell's material terms, conditions, and privileges of employment, including his salary, "remained unchanged." ADD 22. The two denials of transfer caused Tuvell's income to drop

to zero. See Tuvell's Brief at 39-40.[1] This Court should reverse and hold that the denials of transfers were adverse employment actions, which is relevant for Tuvell's claims that the denials of transfers constituted unlawful discrimination as well as unlawful retaliation under Count V.

As for the remaining elements of Tuvell's claims in Count V,[2] there is extensive direct and circumstantial evidence that the denials of transfers were unlawfully discriminatory and/or retaliatory. See Tuvell's Brief at 39-47. The District Court avoided an analysis of all this evidence in this context by wrongly holding that Tuvell was not a qualified disabled person and that the denials of transfers were not adverse actions. ADD 20-22. As a result, the District Court never discussed any alleged legitimate, nondiscriminatory reason for the denials of transfers.[3] If it had, it would have had to address the fact that on January 6, 2012, Kime communicated the following as the primary reason for the denial of transfer: "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

[1] IBM also wrongly asserts that this was not an infliction of economic harm. See IBM's Brief at 57.

[2] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count V, see IBM's Brief at 43, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

[3] It only did so for the termination. ADD 22.

disability – this will receive very close scrutiny from the operations people in the organization." See Tuvell's Brief at 40. This direct evidence of discriminatory animus and causation is just one example of the many pieces of evidence[4] that support a finding of liability under Count V. See Tuvell's Brief at 39-47.

IV. TUVELL'S SEVENTEEN (17) EXAMPLES OF HARASSING CONDUCT SHOULD BE CONSIDERED BY A JURY ON THE HOSTILE WORK ENVIRONMENT CLAIM, AS EVEN IBM HAS NO ANSWER FOR THEM

Tuvell cites seventeen (17) examples of conduct that a reasonable jury could find helped create and foster a hostile work environment based on his disability, his complaints of discrimination, or a combination thereof. See Tuvell's Brief at 47-51.[5] In its two-paragraph section defending against this argument for liability under Count VII, IBM does not mention any of those seventeen (17) examples of harassing conduct. See IBM's Brief at 62-63. All it does is refer to its discussion of some of this conduct in its previous section on "Tangible Acts." See id. at 63.

[4] These numerous pieces of evidence discussed by Tuvell in his first brief are not "groundless speculation" and were not asserted "vaguely," as alleged in conclusory fashion by IBM, see IBM's Brief at 58, as it discussed the denial of transfers without any explanation, not surprisingly, of how Kime's written communication on January 6, 2012, denying the first transfer was anything other than direct evidence of discrimination. See id. at 57-58.

[5] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under Count VII, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See, e.g., Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir. 2005).

However, in that previous section on "Tangible Acts," IBM only addresses five of the seventeen (17) examples of harassing conduct. See id. at 60-62. The ones that it did discuss are sufficient to support a finding of a hostile work environment, and the ones it failed to address, such as Tuvell being subjected to defamation by his supervisor multiple times, being demoted, being denied a job transfer specifically because he was on disability leave, and being threatened with termination for seeking to draft a complaint of discrimination, are also sufficiently severe and/or pervasive to support a finding of a hostile work environment. See Tuvell's Brief at 47-51; Quiles-Quiles, 439 F.3d at 7-9 (reinstating jury verdict on disability harassment and retaliation claims and describing evidence that supported both claims, such as supervisors "frequently mentioning the disability in the course of their actions").

These seventeen (17) examples of harassing conduct were far more than just "trivial annoyances," as argued by IBM, see IBM's Brief at 62, and the plaintiff's "hostile work environment claim [that] necessarily rest[ed] on three discrete verbal exchanges taking place over the course of a period spanning more than eight months" in Alvarado v. Donahoe, 687 F.3d 453, 462 (1st Cir. 2012), even if it included "taunting and mocking comments," pales in comparison to Tuvell's hostile work environment claim. A reasonable jury could find that Tuvell's seventeen (17) examples of harassing conduct were more analogous to the hostile

work environment in Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005), where the plaintiff was "subjected to a steady stream of abuse," "falsely accused of misconduct," and subjected to "work sabotage, exclusion, [and] denial of support."

Like IBM, the District Court completely overlooked almost all of the seventeen (17) examples of harassing conduct discussed in Tuvell's Brief at 47-51, choosing only to mention two and erroneously referring to the rest, including defamation, being denied a job transfer specifically because he was on disability leave, and being threatened with termination for seeking to draft a complaint of discrimination, as "regular business practices and policies." ADD 25. A jury should be permitted to evaluate Count VII, as "[T]he hostile environment question[] is . . . to be resolved by the trier of fact on the basis of inferences drawn from a broad array of circumstantial and often conflicting evidence." Quiles-Quiles, 439 F.3d at 8.

V. IN ADDITION TO THE DENIALS OF TRANSFERS AND TUVELL'S TERMINATION, OTHER ADVERSE ACTIONS SUPPORT LIABILITY UNDER COUNT VI

The District Court's conclusion that none of the seventeen (17) actions enumerated in support of Tuvell's hostile work environment claim constitute adverse employment actions for purposes of Tuvell's discrimination and retaliation claims in Count VI, ADD 23-24, was reversible error. See Tuvell's Brief at 51-

56.[6] For example, the District Court referred to Tuvell's demotion as an "inter-group transfer" that did not result "in any change to Tuvell's pay or his rank within the company." ADD 24. However, the demotion in fact lowered Tuvell from a Band 8 position to a Band 7 position, which IBM acknowledged to be a "lesser role." See Tuvell's Brief at 53. A reasonable jury could find that this diminution in rank, along with the other evidence marshaled by Tuvell regarding the demotion, see Tuvell's Brief at 53, meant that the demotion was an adverse employment action under the standard for a discrimination claim as well as the more lenient standard for a retaliation claim. See Tuvell's Brief at 51-53. See also Noon, 2013 WL 6504410, at *7 (a transfer that is a "setback to (one's) career . . . is an adverse employment action within the meaning of the ADA."). IBM does nothing to challenge this conclusion, as it failed even to mention the demotion, let along the diminution in rank from Band 8 to Band 7, in its discussion of Count VI. See IBM's Brief at 60-62.

The evidence supporting a finding of IBM's disability discrimination is plentiful. See, e.g., Tuvell's Brief at 40-47. Furthermore, the evidence supporting a finding of IBM's disability discrimination in relation to the demotion in

[6] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count VI, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

particular is plentiful, see Tuvell's Brief at 53-56, and the District Court thus erred by granting summary judgment on Count VI.

VI. TUVELL'S TERMINATION WAS ALSO DISCRIMINATORY AND/OR RETALIATORY

Tuvell has presented sufficient evidence for a jury to conclude that the alleged justification for his termination was a pretext for discrimination and/or retaliation, thereby supporting liability again under Count VI. See Tuvell's Brief at 56-58.[7] On May 11, 2012, IBM communicated its need to confirm that Tuvell was not working for a competitor. See Tuvell's Brief at 58. Tuvell communicated his willingness to satisfy that need by submitting information about his employment to a confidential, trusted third party who could confirm to IBM that he was not working in a competitive capacity. See Tuvell's Brief at 58. A reasonable jury could find that when IBM rejected Tuvell's offer, it was not motivated solely to learn where Tuvell was working, and that its decision to terminate Tuvell's employment instead of accepting his offer that would have allowed it to receive the assurance it sought was tainted by discriminatory and/or retaliatory motives. See Tuvell's Brief at 56-58.

[7] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count VI, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

VII. IBM ADMITTED THAT IT FAILED TO INVESTIGATE ONE OF TUVELL'S COMPLAINTS OF DISCRIMINATION AND SHOULD BE LIABLE UNDER COUNT VIII

IBM argues that no independent claim of failure to investigate exists absent underlying proof of discrimination, but none of the cases it cited involve claims under the ADA and Chapter 151B, and in the only case it cited where the plaintiff argued that the employer failed to perform *any* investigation in response to a particular complaint, the Second Circuit held, "We do not mean to suggest that failure to investigate a complaint cannot ever be considered an adverse employment action for purposes of a retaliation claim." Fincher v. Depository Trust and Clearing Corp., 604 F.3d 712, 722 (2nd Cir. 2010).

IBM also argues that it "conducted appropriate, good faith investigations," and that Tuvell "has offered no evidence that such investigations did not take place." See IBM's Brief at 68. This is false. On March 2, 2012, Tuvell filed a Corporate Open Door Complaint alleging discrimination, retaliation, and unlawful failure to reasonably accommodate him. A1252-A1258. See also Tuvell's Brief at 61. Mandel, the employee in charge of IBM's investigations into Tuvell's complaints of discrimination and retaliation, admitted that he never even opened an investigation into Tuvell's Complaint dated March 2, 2012. A920. See also Tuvell's Brief at 61-62. Then, on March 13, 2012, Mandel *threatened Tuvell with termination if he continued emailing his complaints of discrimination to others*.

A925, A1129. See also Tuvell's Brief at 57. This evidence supports a finding of liability under the ADA and Sections 4(4) (retaliation), 4(4A) (interference)[8], and 4(16) (disability discrimination) of Chapter 151B. College-Town v. MCAD, 400 Mass. 156, 167-68 (1987). See Tuvell's Brief at 59-62.

In College-Town, the Supreme Judicial Court (the "SJC") held:

> The hearing commissioner also found that [the employer] discriminated against [the plaintiff] in violation of *G. L. c. 151B, ß 4*, by failing to take adequate steps to remedy the situation once [the plaintiff] complained of [a supervisor's] harassment. . . . In this case, the hearing commissioner found that [the employer] did not conduct a fair or thorough investigation of [the plaintiff's] **allegation** of sexual harassment. The hearing commissioner concluded that the investigation was "deferential and inadequate." The commissioner's conclusion was supported by substantial evidence, and there was no error of law.

400 Mass. at 167-68 (emphasis supplied). The SJC did not condition its holding on discrimination having been proven. Indeed, it discussed the employer's obligation to investigate the "allegation" of harassment. Id. at 167. Further, the dissent states, "Although the commission is critical of the employer's investigation, there was no corroboration of the employee's complaints on the record before it . . . . The employer was, therefore, faced with the problem of resolving a credibility contest between a recently hired employee and a

[8] To the extent IBM argues that Tuvell must be a qualified disabled person for his claims under G.L. ch. 151B, § 4(4) and 4(4A) in Count VIII, see IBM's Brief at 55, Tuvell denies that that is a required element of those claims. See G.L. ch. 151B, § 4(4) and 4(4A) (both protect any "person").

comparatively senior supervisor." Id. at 174. This indicates that the majority concluded the opposite, namely, that an employer could be held liable for failing to conduct a proper investigation when the question of liability at the time was unclear. See id. at 167-68.

If this Court held otherwise, it would create an untenable framework with extremely perverse incentives. Specifically, an employer in receipt of a good faith complaint of discrimination could fail to even investigate the complaint, and it would avoid liability as long as a court later granted it summary judgment or a fact finder later determined that there had not been any discrimination. Indeed, the legality of an employer's decision not to investigate a good faith claim of discrimination would depend not on the circumstances at the time the complaint was made and what was known by the employer, it would depend on what happened in litigation years later. In this case, that would mean that the propriety of IBM's decision not to investigate Tuvell's March 2, 2012 complaint at all would depend on what evidence Tuvell uncovered himself during litigation in the three years, four months, and five days that passed between the day he submitted his complaint and the day the District Court ruled against him. A1252, ADD28.

Surely the Massachusetts legislature did not intend for employers to be encouraged to duck their heads in the sand in this fashion. If an employer does not investigate a good faith complaint of discrimination at the time it is made, it will

not know if one of its employees is violating the law by acting in a discriminatory manner. It will put the onus on plaintiffs to go fight court battles for years to try and prove that discrimination occurred, thereby occupying the court system's resources, while an employer sits idly by with its fingers crossed, gambling that a fact finder will later conclude that it was not required to perform any investigation whatsoever in response to a good faith complaint years before.

None of the cases cited by IBM in this context was from a Massachusetts state appellate court, see IBM's Brief at 67-68, and given the rationale just described, this Court should not disturb the holding of College-Town. Instead, this Court should hold that IBM's failure to perform any investigation of Tuvell's March 2, 2012 complaint was a per se violation of Section 4(4A) of Chapter 151B, and that a jury could find that IBM's conduct in response to Tuvell's complaints of discrimination also violated the ADA and Sections 4(4) and 4(16) of Chapter 151B.

CONCLUSION

For the aforestated reasons, as well as the reasons discussed in Tuvell's first Brief, Tuvell respectfully requests that this Court reverse the entry of summary judgment and remand the case for trial. Tuvell also requests that he be awarded attorney's fees and costs.

Respectfully submitted,

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By his Attorney

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirement, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(a)(B) because this brief contains 5,650 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Andrew P. Hanson
Andrew P. Hanson, Esq.

Dated: February 16, 2016

CERTIFICATE OF FILING AND SERVICE

I, Elissa Matias, hereby certify pursuant to Fed. R. App. P. 25(d) that, on February 16, 2016, the foregoing Reply Brief for Plaintiff-Appellant was filed through the CM/ECF system and served electronically on the individuals listed below:

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