UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,
Defendant

Civil Action No. 13-11292-DJC

REPLY OF DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC. TO PLAINTIFF'S OPPOSITION TO IBM'S MOTION FOR SUMMARY JUDGMENT

Defendant International Business Machines, Inc. ("IBM"), submits this Reply to Plaintiff Walter Tuvell's Opposition To IBM's Motion For Summary Judgment. IBM replies to demonstrate that there are no material facts in dispute in this matter, as Plaintiff admitted virtually all of IBM's facts not in dispute. IBM replies further to demonstrate that Plaintiff's Opposition ("Plf.'s Opp.") does not establish that he is a qualified handicapped person or that he was subjected to a hostile work environment or adverse action.

1. **IBM Is Entitled To Summary Judgment Because Plaintiff's Opposition Relies on Speculation Rather Than Fact And He Admits There Are No Material Facts In Dispute**

It is well settled that a plaintiff cannot avoid the entry of summary judgment merely by speculating that his treatment by his employer was based on impermissible considerations of handicap, age, gender, or other protected characteristic. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000) (party resisting summary judgment cannot rely on "conclusory allegations, improbable inferences, and unsupported speculation"). That is, however, precisely what Plaintiff has submitted to this Court. In his Opposition, Plaintiff continues to cite to a series of ordinary workplace interactions, but because he perceived the outcome of those interactions to be unfavorable to him – *i.e.*, not everyone agreed

with everything he said or did everything he wanted – he speculates that they must have been motivated by some kind of discriminatory animus. Even at this late stage of the litigation, however, Plaintiff remains hopelessly vague as to the nature of IBM's supposed discrimination, variously claiming that it was based upon age, gender, disability, retaliation, or "any combination thereof." Likewise, the factual basis for Plaintiff's discrimination/retaliation claims remains equally conclusory, resting on, *inter alia*, what he contends was IBM's "preexisting secret plan," which purportedly included assigning him "impossible tasks," "falsely accusing" him of violating an "inapplicable internal policy," as well as IBM's "refusal to appropriately act" on Plaintiff's "internal complaints of harassment." (Plf.'s Opp. at 2, 3). Such speculation is not admissible evidence, however, and is insufficient to defeat summary judgment.

That Plaintiff relies on speculation rather than fact in his effort to defeat IBM's motion for summary judgment is confirmed by his admission of essentially all of the material facts not in dispute claimed by IBM. In his response to the statement of facts, Plaintiff admitted 32 of the 81 facts outright and virtually admitted another 46 facts, attempting to overcome his admission of the latter group by saying a witness will not be believed, setting forth his opinion without citing to evidence or disputing a statement in a non-material way.[1]

Plaintiff attempted to mask the highly speculative nature of his case by proffering over 63 pages of what he contends are "disputed facts," but which are primarily argument and conclusory spin on the undisputed facts of record set forth in IBM's Statement of Material Facts.[2] Given the

[1] In reality, Plaintiff disputes only three of IBM's stated facts not in dispute and even those disputes are inconsequential. In paragraph 44, IBM stated that the first MTR on which Ms. Ross indicated a diagnosis of PTSD is the November MTR, which Plaintiff disputes only because he expanded the assertion to include anyone's mention of PTSD, citing his own earlier assertion of his condition. In paragraph 65, Plaintiff admits the testimony of the witness, taking issue only with the conclusion the witness claimed to have reached. In paragraph 75, Plaintiff disputes that the IBM Business Conduct Guidelines specifically address leave or that he was on Personal Leave of Absence. However, Plaintiff admitted in the FAC that the Business Conduct Guidelines preclude an employee from engaging in conflicting employment, disputing only that his employment was conflicting. FAC ¶¶ 134, 135.

[2] Plaintiff submitted 35 pages of responses to IBM's Statement of Facts, as well as his own 28 page Statement of Facts, both of which improperly contain conclusory argument and legal citations in violation of L.R. 56.1.

convoluted and argumentative nature of Plaintiff's recitation of events – in flagrant violation of Local Rule 56.1 – it is essential to return to the foundation of Plaintiff's claims, which is, quite simply, a workplace disagreement about work. Even a cursory review of Plaintiff's numerous, hyper-aggressive emails and his hundreds of pages of "Claims of Corporate and Legal Misconduct" reveal a wholly disproportionate reaction to two benign workplace interactions. (See, e.g. Plf. Ex. Nos. 53, 57-59, 61, 80, 83, 102, 104, 107). Plaintiff's response was so disproportionate that it caused his supervisor and at least one of his colleagues to report his alarming and irrational conduct to Human Resources out of concern for their safety. (Plf. Ex. Nos. 52, 50 (at 140), and 108). Plaintiff's inability to accept any constructive criticism led him to conclude that his IBM colleagues were involved in a conspiracy, which, *ipso facto*, must have been motivated by a discriminatory bias against him. At bottom, Plaintiff's claims must fail because he cannot demonstrate that any decision makers acted out of retaliatory or discriminatory animus, that he was subject to a hostile work environment or suffered adverse employment action, or that he was a qualified handicapped individual. Accordingly, summary judgment should enter for IBM.

2. Plaintiff Is Not A Qualified Handicapped Person And Has Not Demonstrated That A New Supervisor Or New Position Would Enable Him To Perform The Essential Functions of His Job.

As a preliminary matter, Plaintiff's entire case remains fundamentally flawed because Plaintiff is not a qualified handicapped individual within the meaning of the ADA and M.G.L. c. 151B, given that he was not capable of performing his job with or without a reasonable accommodation. Indeed, Plaintiff cannot dispute that his own medical providers described him as totally impaired from working: Plaintiff admits that the MTRs submitted by his social worker Stephanie Ross were accurate and that Ms. Ross "was concerned for his mental health stability and believed that just going into the building where he worked and seeing Mr. Feldman or Mr. Knabe could trigger his obsessive thoughts, depression, or other strong reactions." (PRSOF ¶ 46). Indeed,

the MTR submitted on December 16, 2011, described Plaintiff as "totally impaired for work," with *serious impairments* in getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, setting realistic goals and having good autonomous judgment. (PRSOF ¶ 48). As such, based upon his "total impairment," Plaintiff was not qualified for his or any other job, despite his insistence to the contrary. See Beal v. Board of Selectman, 646 N.E.2d 131, 136 (Mass. 1995)(plaintiff's own assertion that she could not return to work and doctor's statement of permanent disability supported employer's contention that she was unable to perform the essential functions of her job); August v. Offices Unlimited Inc., 981 F.2d 576 (1st Cir. 1992)(employee was not a qualified individual where assessment of "total disability" by psychiatrist rendered him "simply incapable of performing the essential functions of any job," including his own).

In the face of these admissions, Plaintiff argues that contemporaneously claiming that he was "totally disabled" on his IBM MTRs does not contradict his assertion in this lawsuit that he was capable of performing his job with a reasonable accommodation. (Plf.'s Opp. at 9). Plaintiff's position demonstrates a clear misunderstanding of the cases on which he relies. See Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001); Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997). In both Sullivan and Labonte, the courts expressly allow for an opportunity for employees to demonstrate why claims of total disability on *Social Security Disability applications* are distinguishable from claims to their employers that they are qualified handicapped individuals capable of performing their jobs with reasonable accommodation. Id. In contrast to the scenario addressed by the Sullivan and Labonte courts, Plaintiff certified that he was totally impaired from *performing this job for this employer*. (PRSOF ¶¶ 33, 35, 41, 47). Plaintiff offered no objective evidence to explain this contradiction, other than insisting that a new supervisor or a new job would

somehow eradicate all of the impairments listed on his MTRs. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 798 (1999) ("To survive a defendant's motion for summary judgment, [the plaintiff] must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'").

Plaintiff also misstates the law when he argues that "reasonable accommodations are acts that permit an employee to perform the essential functions of a *desired* position." (Plf.'s Opp. at 6) (emphasis added). Rather, "a reasonable accommodation provided to an employee with a handicap is to allow her to perform the essential functions 'of the position involved,' . . . i.e., the plaintiff's original position." Cailler v. Care Alternatives of Massachusetts, LLC, 2012 U.S. Dist. LEXIS 39414 at *23 (D. Mass. Mar. 23, 2012)(emphasis added). Plaintiff was not, as he continues to believe, entitled to the position or supervisor of his choice merely because that was the only accommodation he would accept. Bryant v. Caritas Norwood Hospital, 345 F. Supp. 2d 155, 170 (D. Mass. 2004) (ADA "does not require the employer to grant its disabled employee's accommodation of choice, even if it is a reasonable one, and instead provides the employer with 'the ultimate discretion to choose between effective accommodations'").

Plaintiff argues that leave with no pay is not a reasonable accommodation, citing to 20 CFR 1630.2(o)(2) & (3). (Plf.'s Opp. at 6-7). As a preliminary matter, Plaintiff's leave became unpaid only after he received six months of short term disability benefits and his long term disability claim was denied by the insurer. Additionally, the regulation Plaintiff cites as support merely describes a variety of accommodations and says nothing about leave with or without pay.

More significantly, Plaintiff's argument fails because it was the only accommodation which was feasible at that point. While Plaintiff argues that he should have been afforded a new supervisor or a new position, he fails to demonstrate that either a transfer or a new supervisor would

have been reasonable accommodations that effectively addressed all of his stated impairments.[3] Importantly, "[o]ne element in the reasonableness equation is the likelihood of success," and at the same time Plaintiff insisted a new supervisor was the only accommodation that could enable his return to work, his medical limitations prevented him from, among other things, negotiating and compromising, managing conflicts with others, or having good autonomous judgment, all of which were essential functions of his and any other job that involved working with people. Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 91 (1st Cir. 2012); Evans v. Fed. Express Corp., 133 F.3d 137, 140 (1st Cir. 1998); Halpern v. Wake Forest Univ. Health Sciences., 669 F.3d 454, 465 (4th Cir. 2012)("[T]he indefinite duration and uncertain likelihood of success of [plaintiff]'s proposed accommodation renders it unreasonable."); Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202 (6th Cir. 2010)(holding proposed accommodation unreasonable where plaintiff failed to show how proposal would allow him to overcome a "key obstacle" to performing an essential function); Pesterfield v. Tennessee Valley Authority, 941 F.2d 437, 442 (6th Cir. 1991)(employee not a qualified handicapped person where he "presented himself as an individual incapable of performing the normal, interactive functions of his job and incapable of functioning if there was the slightest hint of criticism").

Plaintiff's failure to demonstrate that he would be able to successfully interact with a small group of individuals and appropriately deal with conflict and criticism – where the only change in his working conditions would be removal of a supervisor who did not harass Plaintiff or otherwise subject him to treatment outside of normal workplace interactions – dooms his assertion that he is a

[3] Nor does Plaintiff have support for this contention from the decisions he cites because in none of those cases did the plaintiffs certify to their employers that they were "totally impaired" from work. (Plf.'s Opp. at 7, n. 6). See Williams v. Philadelphia Housing Auth. Police Dept., 380 F.3d 751, 771-72 (3d Cir. 2004) (work restriction only foreclosed carrying firearms); Walters v. Mayo Clinic, 998 F. Supp. 2d 750, 764 (W.D. Wis. 2014) (employee could perform all job duties); Noon v. IBM, 2013 U.S. Dist. LEXIS 174172 (S.D.N.Y. Dec. 11, 2013) (employee with back problems not precluded from all work). Further, Plaintiff's assertion that IBM "forced" him to stay out of work also misstates the facts, which demonstrate that Plaintiff failed to seek appropriate psychiatric help or consider alternative reasonable accommodations that could have enabled his return, choosing instead to remain on medical leave. (PRSOF ¶¶ 38, 39, 67-69).

qualified individual who would have been capable of performing the essential functions of any job even with his requested accommodation.

3. Plaintiff Was Not Subjected to a Hostile Work Environment.

In his Opposition, Plaintiff continues to insist that he endured a hostile work environment based on what he characterizes as "harassing acts" by Mr. Feldman and other IBM personnel. (Plf.'s Opp. at 2-3). The fundamental problem for Plaintiff is that the acts he describes, even if credited, fall far short of creating a hostile work environment as a matter of law. In considering a hostile work environment claim, courts must examine "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Danco v. Walmart Stores, Inc., 178 F.3d 8, 16-17 (1st Cir. 1999)(affirming jury verdict of racially hostile work environment where the plaintiff was subjected to racial slurs, racist graffiti, was physically assaulted, and verbally threatened). Any fair reading of the undisputed facts of this case demonstrates that the alleged incidents Plaintiff has characterized as "harassment" do not meet the hostile work environment standard set forth in Danco.[4]

While Plaintiff plainly took personal offense to job-related criticism and personnel decisions, as evidenced by his voluminous, incendiary email communications with various IBM personnel (at one point copying dozens of people, including IBM's CEO), his personal sensitivity falls far short of establishing a claim for hostile work environment. See Suarez v. Pueblo Int'l Inc., 229 F.3d 49, 54 (1st Cir. 2000)("[t]he workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world."). In fact, the incidents of

[4] The investigations of Plaintiff's complaints demonstrate the absence of conduct rising to the level of a hostile work environment. See Lisa Due's notes of her 2011 investigation, Plf. Ex. No. 49. Mr. Mandel's investigation, set forth in his 19- page report based on interviews of nine individuals, including Plaintiff's co-workers, confirms the same. IBM's Response to Plaintiff's Statement of Facts ¶ 80, Ackerstein Supp. Aff. Ex. 118.

"harassment" cited by Plaintiff were merely run-of-the-mill workplace interactions which would not have been objectively offensive to anyone with even marginally thick skin, and Plaintiff's subjective perception that such interactions were "severe and pervasive" is simply not enough to support a claim for hostile work environment. See Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678 (1993)("To constitute actionable harassment, the claimed conduct must be both objectively and subjectively offensive.").

Indeed, the cases Plaintiff cites to support his position are revealing by comparison, in that those cases involved racial slurs, vulgar sex harassment, and physical assaults. See Thomas O'Connor Constr., Inc. v. MCAD, 72 Mass. App. 549, 567 (2008)(affirming MCAD decision finding hostile work environment based on race where African American employee endured "repeated, offensive, racist remarks . . . [which] intimidated, humiliated, and stigmatized" the plaintiff); Gerald v. University of Puerto Rico, 707 F.3d 7, 22 (1st Cir. 2013)(finding both subjectively and objectively offensive conduct that included unwelcome come-ons, lewd remarks, and physically threatening incident involving unwelcome fondling); Danco, 178 F.3d 8. In contrast to the cases on which he relies, Plaintiff was never exposed to offensive utterances implicating a protected category, physical threats or violence, or any incident that comes close to the level of severity alleged by the employees in those cases. The fact that Plaintiff has analogized his experience at IBM to situations such as these is telling, in that it demonstrates the wide gulf between his subjective view and what is objectively offensive.[5] Simply put, Plaintiff has not established that he was subject to a hostile work environment as a matter of law.

4. None of the Actions Listed By Plaintiff Constitute Adverse Employment Action.

Nor has Plaintiff demonstrated that he suffered any material effects on the "working terms conditions, or privileges" of his employment, and therefore his adverse employment action claim

[5] By way of example only, Plaintiff insists that his supervisor's "picky requirements reflect . . . 'blatant harassment/retaliation.'" PSOF ¶ 23.

must also fail. See Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 157 (1st Cir. 2009)(an adverse action must be a "material disadvantage[] in respect to salary, grade, or other objective terms and conditions of employment"); King v. Boston, 71 Mass. App. Ct. 460, 468 (2008)(plaintiff must suffer "real harm" and "subjective feelings of disappointment will not suffice").

Plaintiff identified the restriction of access to IBM's network and facilities while on leave, his reassignment to a different project within Mr. Feldman's group, his failure to get a job with Mr. Kime's group, and his receipt of a warning from Mr. Feldman as adverse employment actions. (Plf.'s Opp. at. 4-5). None of the alleged incidents rise to the level of an adverse employment action as a matter of law. As for IBM's restriction of access to its network and facilities, it is not disputed that Plaintiff was on a leave of absence at the time and "totally incapacitated to work," and therefore there was no business reason for him to access IBM's premises or network. (IBM SOF, ¶¶ 53-54); compare Dahms v. Cognex Corp., 14 Mass. L. Rep. 193 (2001)(plaintiff's claim that she experienced several adverse actions after rejecting a supervisor's sexual advance, including restricted access to her building *while she was an active employee*, was enough to survive summary judgment). As for the reassignment of his job responsibilities on one particular project to Ms. Mizar, Plaintiff failed to offer any objective evidence that the re-assignment had any tangible impact on the material conditions of his employment. Indeed, Plaintiff admitted that his move to a different project did not result in any change in his rank or pay. (Plf.'s Opp. at 4-5). Finally, the warning letter that Mr. Feldman issued to Plaintiff did not affect the terms and conditions of Plaintiff's employment, and simply set forth IBM's expectations for him going forward. (IBM SOF

¶ 25). Accordingly, because Plaintiff has not identified any adverse employment actions to which he was subjected, summary judgment must enter for IBM.[6]

5. IBM Did Not Violate The ADA When It Failed to Transfer Plaintiff to a Different Position

Plaintiff does not dispute IBM's citation to the Supreme Judicial Court's ruling that assignment to a new position is not a "reasonable accommodation" under c. 151B. (IBM Memo. at 11). Rather, in his opposition, Plaintiff disputes only IBM's position on federal law, contending that the ADA required that he be transferred to a vacant position (Plf.'s Opp. at 11-13). Plaintiff's argument fails because he ignores the very premise he cites, which is that a transfer may be required only where the employee is "qualified." The fact is that no court has held that an employer is required to relocate an employee to an open position if that employee is not capable of performing the essential functions of the position. Jones v. Nationwide Life Ins. Co., 696 F.2d 78, 91 (1st Cir. 2012) (accommodation not reasonable where employee cannot demonstrate it would enable him to perform the essential functions of job); Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 24 (EEOC Notice No. 915.002) ("An employee must be 'qualified' for the new position."). In this case, the serious impairments which Plaintiff's health care providers described on the MTR's they submitted, such as the inability to get along with others without behavioral extremes, to interact and actively participate in group activities, to manage conflicts with others, to set realistic goals, and to have

[6] While Plaintiff's termination was an adverse employment action, Plaintiff has not proffered any evidence that it resulted for any reason other than IBM's stated reason, which is that Plaintiff refused to tell IBM whether he was working for a competitor. Plaintiff argues that this is pretext and states that his current employer is not a competitor, submitting in support a screen shot of a webpage from 2009 stating that the two companies have a "strategic provisioning partnership." PSOF ¶ 91. As explained in IBM's Business Conduct Guidelines, with which Plaintiff was undisputedly well-versed, an employee "may not, without IBM's consent, work for an organization that markets products or services in competition with IBM's current or potential product or service offerings." IBM's Response to Plaintiff's Statement of Facts ¶ 91, Ackerstein Supp. Aff. Ex. 117. The Business Conduct Guidelines further explain that "organizations have multiple relationships with IBM. An IBM Business Partner may be both a client and a competitor," and therefore IBM employees are obligated to consult with IBM to determine whether their activities "will compete with any of IBM's actual or potential business." Id. Plaintiff was terminated because he was obligated but refused to consult with IBM to determine whether his employment would compete with IBM's actual or potential business, in direct violation of IBM's policies, and Plaintiff not provided any evidence to the contrary. Id.

good autonomous judgment, precluded Plaintiff from being a qualified handicapped individual with respect to the position he sought.

6. Conclusion.

For the foregoing reasons, as well as the reasons in IBM's initial supporting Memorandum, IBM respectfully submits that its motion for summary judgment should be granted and that judgment should enter for IBM on the complaint in its entirety.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that on March 2, 2015, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/Matthew A. Porter
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