

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES,  
INC.,

Defendant

Civil Action No. 13-11292-DJC

**PLAINTIFF'S RESPONSES TO DEFENDANT IBM'S  
STATEMENT OF MATERIAL FACTS**

Plaintiff hereby responds to the Statement of Material Facts submitted by Defendant International Business Machines, Inc. ("IBM"), with reference to Defendant's motion for summary judgment.

**BACKGROUND ON PLAINTIFF**

1. Plaintiff Walter Tuvell is a white male who was born in 1947. First Amended Complaint ("FAC") ¶ 1, attached to the Affidavit of Joan Ackerstein ("Ackerstein Aff.") as **Exhibit 41**.

Response: Admitted.

2. Plaintiff claims that he suffers from Post-Traumatic Stress Disorder ("PTSD"). Plaintiff's PTSD allegedly stems from an incident in the Spring of 1997, in which Plaintiff claims that he was offered a job with Microsoft Corporation, but Microsoft rescinded the offer after Plaintiff and his wife visited Seattle, Washington to meet with Microsoft employees. See Deposition of Walter Tuvell ("Pl. Dep."), Day 1, pp. 23-24, Ackerstein Aff., **Ex. 1**.

Response: Admitted.

3. Plaintiff described Microsoft's alleged treatment of him and his family as the equivalent of a physical "rape," recounting the situation in a complaint he submitted to Microsoft entitled, "Sleepless in Boston. How Microsoft Raped My Family While Recruiting Me, January 24 - April 20, 1997." Pl. Dep., Day 1, pp. 53-56; Ackerstein Aff., **Ex. 1**; King Dep., p. 101, Ex. 10; Ackerstein Aff., **Ex. 8, 31**. See also Walter Tuvell v. Microsoft Corporation, U.S.D.C., D. Mass., No. 97-12286-NG, and 99-11082-NG.

Response: Denied as to "equivalent." Rather, Plaintiff described what had happened as a "rape" because Microsoft had blamed his wife as the reason why it did not hire Plaintiff, and Plaintiff's wife was "devastated" by Microsoft's conduct as was Plaintiff. Tuvell Dep., at 54-55, 172, Exhibit 98. Plaintiff nowhere described what had happened as an equivalent to a physical rape. Id. The communication of Def.'s Exh. 31 refers to the "Webster's" definition of rape, which includes as a definition, "an outrageous violation." Webster's Third New International Dictionary, Unabridged. In an email of June 23, 2011, Tuvell wrote, "Yes, 'rape' isn't too strong a word, even though it's not the sexual kind," shows that Tuvell makes a clear distinction between physical rape, and an outrageous violation. Due Dep., at 200, Exhibit 50; Due Dep. Exh. 3, at TUVELL279, Exhibit 91.

#### **PLAINTIFF'S EMPLOYMENT WITH NETEZZA CORPORATION AND IBM**

4. On November 3, 2010, Plaintiff was hired by Netezza Corporation in the Performance Architecture Group, reporting directly to Daniel Feldman and reporting on a dotted line to Fritz Knabe. FAC ¶ 8.

Response: Admitted, except that his reporting relationship to Knabe commenced at some point after November 3, 2010. Tuvell Aff., ¶ 8, Exhibit 47.

5. In or around January of 2011, IBM acquired Netezza and Plaintiff, Mr. Feldman, and Mr. Knabe all became IBM employees. FAC ¶ 9; Deposition of Daniel Feldman (“Feldman Dep.”), pp. 11-14; Ackerstein Aff., **Ex. 6**.

Response: Admitted.

**PLAINTIFF’S CONFLICTS WITH MR. KNABE ON MAY 18 AND JUNE 8, 2011**

6. Until May 18, 2011, Plaintiff had no serious issues with either Mr. Feldman or Mr. Knabe. Pl. Dep., Day 1, pp. 144-45; Ackerstein Aff., **Ex. 1**.

Response: Admitted.

7. On or about May 18, 2011, Mr. Knabe advised Mr. Feldman that Plaintiff had failed to complete a work assignment in a timely fashion. Mr. Feldman relayed Mr. Knabe’s concern to Plaintiff, who described Mr. Knabe as a “liar.” FAC ¶ 14; Pl. Dep., Day 2, pp. 21-27, Ackerstein Aff., **Ex. 2**; Deposition of Frederick C. Knabe (“Knabe Dep.”), pp. 37-38, Ackerstein Aff., **Ex. 36**.

Response: First sentence is denied as it relies on the testimony of a biased witness that a jury is not required to believe. It is denied that Plaintiff called Knabe a liar on or about May 18, 2011, and such a statement is unsupported by Defendant’s materials, although Plaintiff did say that Knabe was lying about the incident when Plaintiff was deposed on June 24, 2014. Def.’s Exh. 2, at 27. At the time, on or about May 18, 2011, Plaintiff complained to Feldman that Knabe expected Plaintiff to be a “mind-reader.” Tuvell Aff., ¶ 9, Exhibit 47.

**MR. FELDMAN REASSIGNS PLAINTIFF TO A DIFFERENT PROJECT BECAUSE OF PLAINTIFF’S DIFFICULTY WORKING WITH MR. KNABE**

8. On June 8, 2011, Mr. Knabe asked Plaintiff about an outstanding work assignment in front of other employees and, according to Plaintiff’s colleague Steve Lubars, who witnessed the incident, in the ensuing discussion voices were raised by both Plaintiff and Mr.

Knabe. FAC ¶ 15; Pl. Dep., Day 1, pp. 148-153, Ackerstein Aff., **Ex. 1**; Deposition of Lisa Due (“Due Dep.”), pp. 141-142; Ackerstein Aff., **Ex. 9**.

Response: Admitted.

9. On June 9, 2011, Mr. Knabe told Mr. Feldman that he did not think he could have a good working relationship with Plaintiff. On June 10, 2011, Mr. Feldman advised Plaintiff that he did not believe that Mr. Knabe and Plaintiff could continue working effectively together on the Wahoo project that Mr. Knabe was managing. FAC ¶ 17; Feldman Dep., pp. 51-53, 57-59, Ex. 9, Ackerstein Aff., **Ex. 6, 18**.

Response: First sentence is denied as it relies on the testimony of a biased witness that a jury is not required to believe. The rest is admitted.

10. Therefore, Mr. Feldman assigned Plaintiff to a different project in place of another employee, Sujatha Mizar, and in turn assigned Ms. Mizar to work with Mr. Knabe on the Wahoo project. The switch did not result in any change in Plaintiff’s pay or rank. FAC ¶¶ 17, 18; Feldman Dep., pp. 57-59, Ex. 9, Ackerstein Aff., **Ex. 6, 18**.

Response: Admitted with respect to everything but the word “Therefore”, which carries a connotation of causation. Instead, the reasons for the demotion or reassignment are alleged to be gender and/or age discrimination, emanating from Mr. Knabe, Mr. Feldman, or a combination of both. 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. Mr. 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 Mr. Feldman, and IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; PSOF11. Mr. 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, resulting in public humiliation, lower prestige, a lower level of assignment, lowered opportunity for future job prospects, and a disadvantageous change in work location. PSOF8, 12, 14-16. Mr. Feldman assigned Mr. Tuvell to switch roles with Ms. Sujatha Mizar, a less qualified female of East Asian heritage. PSOF8. Mr. Tuvell was decades older than Ms. Mizar, who was well under forty, and he had decades more relevant experience for the position. PSOF8. Ms. 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 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 Mr. 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. A prima facie case, as well as the fact that one or more reasons given by IBM are pretextual, generates an inference of discrimination to be resolved by the jury. Lipchitz, 434 Mass. at 501, 506-507.

Another, competing justification given by IBM for the demotion arises in part over Plaintiff's alleged failure to produce Excel graphics, as allegedly required by Mr. Knabe. Def.'s Mem., at 4; PSOF2. However, that justification was clearly pretextual, as Mr. Tuvell was never asked to produce Excel graphics. PSOF1. Moreover, the justification was absurd, because Mr. Feldman and Mr. Knabe knew that Mr. Feldman did not use Excel, and therefore logically would never have asked him to complete such an assignment. PSOF 3. Finally, Defendant's

descriptions of the May 18 incident as “failure to produce” are shifting and inconsistent with other occasions where IBM describes Plaintiff’s alleged misconduct as working “too slowly.” PSOF4. Changing justifications may be determined by a reasonable jury to be pretextual justifications. Velez v. Therrmo King, Inc., 585 F.3d 441, 449 (1<sup>st</sup> Cir. 2009).

IBM’s other justification for the demotion was an incident on June 8, 2011 in which IBM falsely claims that “Mr. Knabe asked Plaintiff about another work assignment, and during that discussion both Mr. Knabe and Plaintiff raised their voices.” Def.’s Mem., at 4. In actuality, Mr. 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 Mr. Feldman failed to take action to resolve any alleged difficulties involving Knabe and Tuvell. PSOF59. For example, Mr. Feldman refused to investigate, and refused to respond to Mr. Tuvell’s repeated inquiries for more detail concerning his alleged misconduct. Id. Mr. Feldman repeatedly denied Mr. Tuvell’s requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Id. While Mr. Feldman claimed to have rejected that option of a meeting as it would create an unhealthy “habit,” he had conducted such a meeting just months before, in March 2011, concerning a different issue. Id. Rather, a reasonable jury could find that Feldman was not proactive in resolving the underlying issues, because he realized that the grievances against Plaintiff were pretextual and there was no actual merit to them.

Plaintiff was treated worse than similarly situated individual who were outside of relevant protected categories. Mr. Knabe, who was not disabled, acknowledged yelling at Plaintiff, and yet he did not get reassigned or disciplined, whereas Plaintiff was disciplined for far more innocuous, indeed completely faultless, 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 or counselled. PSOF19-22, 26.

Just three days after to the demotion, on June 13, 2011, Mr. Feldman, the decision-maker with respect to the demotion, had written an email claiming Plaintiff to be “irrational and potentially dangerous” in conjunction with his PTSD, relying solely on stereotyping and stigmatization of PTSD, and advocated barring Plaintiff from the workplace and firing him. DSOF25. There is much additional direct evidence demonstrating discriminatory animus with respect to Plaintiff’s handicap, as described above. Resp. DSOF25.

11. Plaintiff claims that Mr. Knabe’s decision to complain to Mr. Feldman about Plaintiff’s work on May 18, 2011, constituted discrimination against Plaintiff based on his age, sex, and race because he believes Mr. Knabe was lying about Plaintiff’s work, which meant that “something bigger” was “at play” and “it had to be illegal.” Pl. Dep. Day 2, pp. 27-28, Ackerstein Aff., **Ex. 2.**

Response: Admitted.

12. Plaintiff claims that Mr. Feldman’s decision to have him and Ms. Mizar switch project responsibilities constituted discrimination based on Plaintiff’s disability, age, sex, and race because Plaintiff believes that Ms. Mizar, who is Asian, female, and younger than Plaintiff, is “far less qualified” than him. FAC ¶ 18, 19; Pl. Dep., Day 2, pp. 152-156, Ackerstein Aff., **Ex. 2.**

Response: Admitted.

13. At the time, Plaintiff contended that he instead should have been replaced with a colleague (Ashish Deb), who was male, over 40, and Asian. King Dep., Ex. 9, Ackerstein Aff., **Ex. 30.**

Response: It is denied that Plaintiff contended that he should have been replaced by Ashish Deb, and Defendant's materials do not support the matter asserted. Plaintiff does not contend he "should have been replaced" by anyone. Instead, Plaintiff was making the point that if the demotion was truly non-discriminatory, and not merely an effort to elevate a younger, less qualified female to a higher level position, it would have made much more sense to replace Tuvell with Ashish Deb, who has a PhD, and because "the work Ashish is doing is much more compatible with my background than Sujatha [Mizar]'s work is." Def.'s Exh. 30, at IBM4672. Thus, Plaintiff was not saying that he should have been replaced by Mr. Deb. He is saying that eschewing the obvious choice of Deb highlights the fact that the job action was a pretext to elevate the less-qualified, younger female. Id.

14. On June 14, 2011, Mr. Feldman sent both Plaintiff and Ms. Mizar an email asking that they submit a daily report on their transition work. While Ms. Mizar submitted a transition report to Mr. Feldman that day, Plaintiff did not. The next day, June 15, 2011, Mr. Feldman sent Plaintiff an email reiterating his request for a daily report and clarifying that he required a report from both Plaintiff and Ms. Mizar. FAC ¶ 22; Feldman Dep., pp. 92-92, Ex. 13-15, Ackerstein Aff., **Ex. 6, 19, 20, 21**.

Response: The first sentence is denied to the extent that it implies that Plaintiff and Mizar were to submit separate reports. Def.'s Exh. 19, at TUVELL267. The email, addressed to "Sujatha and Walt" jointly, asks for a brief email detailing the transition, whereby each would trade job duties. Id. The email nowhere states that the transition updates need to be separate. Id. The second sentence is denied, as Mizar submitted an update describing the activities of both, intended to be joint, which she submitted to Feldman and Tuvell, and which further stated, "Walt



– please feel free to add anything I might have forgotten. Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43. The third sentence is admitted.

15. In response, on June 15, 2011, Plaintiff sent several emails to Mr. Feldman, and Human Resources Specialists Kelli-ann McCabe and Diane Adams, complaining that Mr. Feldman’s request that Plaintiff file a daily report constituted “blatant” and “snide harassment/retaliation,” even though Mr. Feldman was also requiring Ms. Mizar to complete such a report. FAC ¶ 23; Feldman Dep., pp. 84-89, Ex. 13-15, Ackerstein Aff., **Ex. 6, 19, 20, 21**.

Response: Denied. Plaintiff sent a number of emails on June 15, 2011, but only one complained of “blatant” and “snide harassment/retaliation.” Def.’s Exh. 19, at TUVELL265. It is further denied that the complaint about harassment and retaliation of June 15, 2011 related solely to the warning to Plaintiff for not submitting a separate status report that simply mimicked the one submitted by Mizar (see Resp. to Def.’s SOF 14. (“I’ll give you a status report. It is identical to Sujatha’s.” Def.’s Exh. 19, at TUVELL265). Instead, Plaintiff also alleged in this email that he was being harassed and retaliated against, based on the fact that the reasons given for the “transition” were “false grounds,” that Feldman refused to engage in meetings to try to resolve any differences that Knabe might have had with Tuvell, and that replacing Tuvell with a younger, female employee with qualifications far inferior to his constituted a prima face case of discrimination based upon age and sex. Id., at TUVELL265-266.

16. On June 16, 2011, Plaintiff sent several emails to Ms. Adams and Ms. McCabe complaining of harassment by Mr. Feldman based on Mr. Feldman’s decision to change his assignment and his request that Plaintiff submit weekly reports, and told Ms. Adams and Ms. McCabe that he believed it was infeasible for him to work with Mr. Feldman. FAC ¶¶ 24, 25; Due Tr. pp. 33-35, Ex. 1, Ackerstein Aff., **Ex. 9, 33**.

Response: Admitted, except that it is denied that Plaintiff complained about submitting weekly reports, and nothing in the materials cited by Defendant supports such assertion.

**IBM CONDUCTS INVESTIGATION INTO PLAINTIFF'S WORK SITUATION**

17. On June 16, 2011, Ms. Adams forwarded an email from Plaintiff stating that he could not work with Mr. Feldman to Lisa Due, a Senior Case Manager in IBM's Human Resources Department. Ms. Due conducted an investigation by interviewing five individuals, including Plaintiff, who described his experience with Mr. Feldman and Mr. Knabe as the equivalent of "torture" and "rape". After completing her investigation, Ms. Due concluded that Plaintiff's concerns were unsupported. Due Dep., pp. 33-37, 75, 114. Ex. 1, 3, Ackerstein Aff., **Ex. 9, 33, 34.**

Response: Admitted, except denied as to the final sentence, with respect to Ms. Due's conclusions. Ms. Due is an interested party who remains employed by IBM, and receives her only paycheck from IBM, and who has been alleged to have engaged in wrongdoing in the instant case. Due Dep., at 201-202, Exhibit 50, Verified Complaint, ¶ 32, 196-198, Exhibit 42, and a jury would be free on that basis to reject her testimony. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Due confirmed Tuvell's complaint that Knabe raised his voice at Tuvell. Due Dep., at 141-142. Circumstantial evidence undercuts the "concluded" assertion, as Due failed to generate a report giving factual support for her alleged "conclusions," even though a full report would usually be generated under the circumstances. Due Dep. Exh. 12, at IBM8283, Exhibit 76; Due Dep., at 72-74, 76, 164-165, Exhibit 50. Due's statement to Tuvell merely states, without revealing the materials of her investigation or the rationale by which she "concluded" anything therefrom, that she completed her investigation "and found that there was

insufficient factual information to support your allegations.” Def.’s Exh. 35. Furthermore, Due’s report indicates that she only investigated Plaintiff’s “concerns raised regarding your treatment by your manager Mr. Daniel Feldman,” and thus, a reasonable jury could conclude that she failed completely in investigating Plaintiff’s complaints relating to Mr. Knabe’s conduct. Def.’s Exh. 35; Feldman Dep. Exh. 13, Exhibit 15 (raising complaints about Mr. Knabe), Due Dep., at 39-42, Exhibit 50.

18. Based on Ms. Due’s findings, IBM determined that moving Plaintiff to another supervisor was not warranted. Due Tr. pp. 146-147; Ackerstein Aff., Ex. 9.

Response: Denied that the move was deemed “not warranted.” The cited transcript reflects a conversation between Ms. Due and Mr. Mandel, in which they discussed the fact that there was “no need” to move Tuvell to another role. Due Dep., at 146-147, Exhibit 50. A reasonable jury could disbelieve that statement, because at the same time, Mr. Mandel acknowledged the fact that Feldman was having a “tantrum,” and that Mandel stated, “I prefer respect but fear is not a bad second choice.” Due Dep. Exh. 21, at IBM11054, Exhibit 108; Due Dep., at 142, 147, Exhibit 50. A jury could also disbelieve Ms. Due’s statement as Ms. Due is an interested party who remains employed by IBM, and receives her only paycheck from IBM, and who has been alleged to have engaged in wrongdoing in the instant case. Due Dep., at 201-202, Exhibit 50, Verified Complaint, ¶ 32, 196-198, Exhibit 42, and a jury would be free on that basis to reject her testimony. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a “jury is not required to believe”). According to Due, her investigation was initiated based on Feldman’s complaint about Tuvell, and not Tuvell’s complaint about Feldman. Due Dep., at 62-65, 70-71, 144, Exhibit 50; Due Dep. Exh. 2, at IBM8832, Exhibit 52. Due’s alleged conclusion about not transferring Tuvell did not take into

account his various requests for reasonable accommodation based on handicap. Due Dep., at 55, Exhibit 50.

19. On June 29, 2011, Ms. Due sent Plaintiff an email informing him of the results of her investigation, and advised him of his appeal rights if he was dissatisfied with Ms. Due's findings. FAC ¶ 32; Due Dep., Ex. 12; Ackerstein Aff., **Ex. 35**.

Response: Admitted.

**PLAINTIFF RECEIVES A WARNING FOR INAPPROPRIATE COMMUNICATIONS WITH HIS COLLEAGUES**

20. In early July of 2010, Plaintiff went on medical leave for an elective cosmetic surgery on his eye-lids, and then took a vacation before returning to work in early August of 2011. Pl. Dep. Day 1, p. 36; Ackerstein, Aff., **Ex. 1**.

Response: Admitted.

21. On July 11, 2011, Mr. Feldman informed Plaintiff that Plaintiff's communication style in a July 6, 2011 email to Mr. Feldman and another colleague, Garth Dickie, was "the sort of thing you want to avoid." FAC ¶ 44; Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

Response: Admitted.

22. Initially, Plaintiff sent an email to Mr. Feldman and Mr. Dickie apologizing for his use of language that could have been interpreted as offensive. Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

Response: Admitted that an apology was sent by Tuvell, but denied as to acknowledging that his statement could have been interpreted as offensive. The statement alleged to be offensive by IBM is "if you're lazy you can just click this link." Def.'s Exh. 22, at IBM10504. Tuvell never acknowledged that this statement could have been interpreted as offensive. Rather, Tuvell's

apology email states, “My use of the word “lazy” in this context was intended to be jocular . . . and never in my wildest dreams did I ever think it could/would be interpreted as offensive.”

Def.’s Exh. 22, at IBM10502.

23. On July 20, 2011, Plaintiff sent Mr. Feldman and Mr. Dickie another email, retracting his earlier apology because he had concluded that “no apology was necessary” for the July 6, 2011 email. FAC ¶ 45; Feldman Dep., pp. 118-124, Ex. 25; Ackerstein Aff., **Ex. 6, 22**.

Response: Admitted, except that Plaintiff did not “retract his earlier apology.” Instead, Plaintiff apologized for the apology, along with presenting an emoticon smiley face. Def.’s Exh. 22, at IBM10505.

24. On August 3, 2011, shortly after Plaintiff returned from medical leave, Mr. Feldman met with him to discuss his pending and future work assignments and to discuss Plaintiff’s recent behavior, which Mr. Feldman characterized as inappropriate. FAC ¶¶ 46, 47.

Response: Admitted, with the limitation that the “recent behavior” of Tuvell refers only to his statement, “if you’re lazy you can just click this link.” Def.’s Exh. 22, at IBM10504; Verified Complaint, ¶ 47, Exhibit 42.

25. During the August 3, 2011 meeting, Mr. Feldman also gave Plaintiff a Warning Letter for his disruptive conduct, including Plaintiff’s July 2011 emails to Mr. Feldman and Mr. Dickie. FAC ¶ 48; Pl. Dep., Day 1, Ex. 9; Ackerstein Aff., **Ex. 11**. Plaintiff received no further discipline in connection with that matter.

Response: It is admitted that on August 3, 2011, Mr. Feldman gave plaintiff the warning letter provided as Def.’s Exh. 11. It is denied that the warning is (even notionally) based on “Plaintiff’s July 2011 emails,” as the warning letter itself refers only to a single email, the July 20, 2011 email, upon which it is purportedly based. Def.’s Exh. 11. It is admitted that Mr.

Tuvell was never again formally disciplined (notionally) based on his July 20, 2011 email. Furthermore, to the extent that the statement of fact purports to identify the true motive for which the warning letter was issued, that statement of fact is disputed, as Plaintiff alleges that the true motive was retaliation for his Complaints about discrimination and his handicap.

Threat of termination for innocuous behavior demonstrates discriminatory and/or retaliatory animus: On July 6, 2011, Plaintiff wrote to coworkers, “if you’re lazy you can just click this link.” Verified Complaint, ¶ 44, Exhibit 42. On July 11, 2011, Mr. Feldman asserted that this innocent use of the word “lazy” was inappropriate. Verified Complaint, ¶ 44, Exhibit 42. Plaintiff initially apologized for this remark. Id. ¶ 45, Exhibit 42. On July 20, 2011, Plaintiff realized that his statement was in no way disrespectful, and he apologized for his earlier apology, as it had the effect of misleadingly implying that he had done something wrong. Id., ¶ 45, Exhibit 42. Plaintiff’s July 20, 2011 email was compelled by IBM policies, which requires the correction of misleading communications, whether his own or Mr. Feldman’s. Mandel Dep. Exh. 43, at IBM2367, Exhibit 103; Mandel Dep., at 160-161, Exhibit 55. The July 20, 2011 email, in which Plaintiff properly and politely apologized for his own earlier apology, newly seen to be inappropriate, along with presenting an emoticon smiley face indicating politeness (Def.’s Exh. 22, at IBM10505), thus actively accorded with IBM policy, and hence is not a colorable basis for a formal warning letter and threat of “immediate dismissal.” Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 576-577 (6<sup>th</sup> Cir. 2003) (*en banc*) (“the reasonableness of a business decision is critical in determining whether the proffered judgment was the employer’s actual motivation”).

Further Evidence of Retaliation: As of June 16, 2011, and indeed, earlier than that, Lisa Due and Feldman knew that Tuvell was engaging in protected complaints of discrimination and

retaliation. Due Dep., at 35, Exhibit 50. As early as June 30, 2011, Mr. Feldman and Ms. Due were planning on providing Mr. Tuvell with a warning letter, and indeed, were trading drafts of the letter, long before the July 20, 2011 email on which the warning was purportedly based. Feldman Dep. Exh. 17, at IBM7800-7804, Exhibit 109; Feldman Dep., at 98-99, Exhibit 43. Tuvell's internal complaints of discrimination and retaliation were discussed by the decision-makers when Tuvell's application for internal transfer was denied, indicating that the consideration was a factor in the rejection. Kime Dep. Exh. 9, Exhibit 73, Kime Dep., at 109-110, 120-121, Exhibit 65. Clearly, Feldman and Kime 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 and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints, claimed that the following passage provided by Tuvell in support of one such complaint, was "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.

Due Dep., at 38-40, 198-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. 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." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM has asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." IBM Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never

identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82; Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. 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." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of



harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence that handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having Post Traumatic Stress Disorder (PTSD), considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50; Feldman Dep., at 91, Exhibit 43; See also Due Dep., at 140, Exhibit 50 (urging care when walking to car). At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer, based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. 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." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system, given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit

74; Tuvell Aff., ¶ 29, Exhibit 47. Indeed, IBM curtailed Plaintiff's access to computer systems for the express purpose of undermining Mr. Tuvell's access to the reasonable accommodation of working at home and away from the direct supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. 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." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. 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. It is easy to return access once you return from STD [short term disability]." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy ("While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee." Tuvell Aff., ¶ 14, Exhibit 47).

26. On August 11, 2011, Plaintiff advised Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") leave due to a "sudden condition" and Ms. Dean responded by providing him with information concerning how to apply for STD leave. On August 15, Plaintiff informed Mr. Feldman that he was taking sick days until his request for short term disability was acted on. FAC ¶¶ 53, 54; Dean Dep., pp. 48-49, Ex. 3; Ackerstein Aff., **Ex. 5, 15**.

Response: Admitted.

27. On or about August 18, 2011, Plaintiff submitted an Open Door complaint, which is an internal IBM mechanism by which an employee can raise a concern and request an

investigation. Plaintiff's Open Door complaint was titled "Claims of Corporate and Legal Misconduct" and was submitted in two parts; the first part of the Complaint was 129 pages long and titled "Acts of Fritz Knabe," the second part of the Complaint was 153 pages long and titled "Acts of Dan Feldman." Due Dep., p. 76; Ackerstein Aff., **Ex. 9**.

Response: Denied that the Complaint was a mere "Open Door" complaint. In actuality, it was a "Corporate Open Door Complaint." Verified Complaint, ¶ 57, Exhibit 42. To the extent that the statement of fact implies that Mr. Tuvell "wrote" 282 pages, such assertion is denied. The first part of the complaint contains 22 pages of narrative written by Mr. Tuvell, plus 107 pages of subsidiary materials, including copies of supporting documentation. Tuvell Aff., ¶ 12, Exhibit 47. The second part of the complaint contains 31 pages of narrative written by Mr. Tuvell, plus an additional 122 pages subsidiary materials. Tuvell Aff., ¶ 12, Exhibit 47.

28. Plaintiff estimated that he spent over 22 hours per day on these documents over the course of 2-3 weeks, and has spent at least 10 hours per week on his claims in this case ever since. Pl. Dep., Day 1, pp. 28-29; Ackerstein Aff., **Ex. 1**.

Response: Admitted, except it is denied that Plaintiff has spent 10 hours a week on his lawsuit since the date of the deposition to the present date. Defendant has no support for any assertion of Plaintiff's time commitment occurring after the date of Mr. Tuvell's May 16, 2014 deposition. Def.'s Exh. 1, at 1.

29. Russell Mandel, the Program Director for IBM's Concerns and Appeals, investigated Plaintiff's first Open Door complaint. On or around September 15, 2011, Mr. Mandel issued a 19-page report based on his interviews of nine people, including Plaintiff. The report concluded that Plaintiff was not subjected to any adverse or unfair employment actions. Deposition of Russell Mandel ("Mandel Dep."), p. 92; Ackerstein Aff., **Ex. 10**.

Response: It is denied that on September 15, 2011, that Mr. Mandel “issued” a report. Rather, he simply created a version of a draft report on that date. Def.’s Exh. 10, at 92. To the extent that the word “issued” implies that such report was provided to Plaintiff, that is denied, and is not supported by the Defendant’s record cite. Instead, on August 25, 2011, Plaintiff complained that IBM’s refusal to finalize its investigation of the First Corporate Open Door Complaint pending his return to work constituted harassment. Verified Complaint, ¶ 58, 59, Exhibit 42. Plaintiff complained again about IBM’s failure to complete the investigation again on October 19, 2011. Verified Complaint, ¶ 18, Exhibit 42. Plaintiff was first verbally informed of the negative results of Mr. Mandel’s “investigation” on November 17, 2011, approximately four and a half months after his investigation was initiated. Verified Complaint, ¶¶ 33, 81, Exhibit 42. On November 25, 2011, Mr. Mandel only provided Mr. Tuvell with a one paragraph response to Mr. Tuvell’s complaint. Verified Complaint, ¶ 84, Exhibit 42. The assertion about what the report concluded and the number of people “interviewed” is denied, as Defendant has failed to support that statement with any cite to the record.

30. During Plaintiff’s medical leave, on or around November 9, 2011, Plaintiff’s counsel wrote Mr. Mandel a letter identifying Plaintiff’s PTSD as a disability and requesting, as a reasonable accommodation, that Plaintiff report to a supervisor other than Mr. Feldman. FAC ¶ 80.

Response: Admitted.

31. On November 23, 2011, IBM informed Plaintiff that it did not consider changing his management team to be a reasonable accommodation, but that it was receptive to hearing Plaintiff’s proposals about restructuring his work as a possible accommodation and, further, that

he was free to look for vacant positions using IBM's Global Opportunity Marketplace ("GOM").  
Feldman Dep., p. 150, Ex. 31; Ackerstein Aff., **Ex. 6, 23.**

Response: Admitted.

**PLAINTIFF IS GRANTED A SHORT TERM DISABILITY LEAVE BY IBM**

32. On or about August 15, 2011, Plaintiff provided a Medical Treatment Report ("MTR") to Ms. Dean, which indicated that Plaintiff suffered from a sleep disorder and stress reaction and that he was totally impaired for work. FAC ¶ 55; Deposition of Victoria Vazquez ("Vazquez Dep."), pp. 128-132 Ex. 2; Ackerstein Aff., **Ex. 37, 38.**

Response: Admitted.

33. The August 15, 2011 MTR indicated that Plaintiff suffered severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities, and that Plaintiff suffered serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment. Vazquez Dep., Ex. 2; Ackerstein Aff., **Ex. 38.**

Response: Admitted.

34. On or about August 17, 2011, IBM approved Plaintiff's STD leave as a reasonable accommodation. FAC ¶ 56.

Response: Admitted.

35. Plaintiff submitted another MTR dated September 9, 2011, which again indicated that he was totally impaired for work. Vazquez Dep., pp. 132-134, Ex. 3; Ackerstein Aff., **Ex. 37, 39.**

Response: Admitted.

36. After receiving the September 9, 2011 MTR, Ms. Dean emailed Plaintiff and informed him that because the MTR indicated a Sleep Disorder and Acute Stress Reaction, it would have to be completed by a specialist, not his family physician (in Plaintiff's case, a nurse practitioner). In response, Plaintiff sent Ms. Dean three emails within 24 hours, challenging her request that his MTR be completed by a specialist. Ms. Dean informed Plaintiff that she would accept the September MTR by his physician for one month while she consulted with IBM's physician about Plaintiff's questions. Deposition of Kathleen Dean ("Dean Dep."), p. 83-84, Ex. 7; Ackerstein Aff., **Ex. 5, 16**.

Response: Denied as to "challenged her request that his MTR be completed by a specialist." Ms. Dean's email required Mr. Tuvell's next MTR be completed "by a specialist not your family physician" and encourages Mr. Tuvell to have his "psychotherapist" fill out the form. Def.'s Exh. 16, at IBM3483. Mr. Tuvell at first misconstrued Ms. Due's characterization of the requirement, but later understood that he was being asked to provide an MTR from the person from whom he was receiving "psychotherapy," that is, the licensed social worker that he had been seeing. Def.'s Exh. 16, at IBM3483. Based on this revised understanding, Mr. Tuvell agreed to "schedule a session with my LSW, and consult with her about this matter, and ask her to submit an MTR to you." Def.'s Exh. 16, at IBM3480. The last sentence is admitted.

37. Ms. Dean subsequently contacted Dr. Stewart Snyder, the Physician Program Manager of IBM's Integrated Health Services, who explained that IBM's process for psychological disorders required an MTR form to be completed by a psychiatrist if an employee is out for 6-8 weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." Dean Dep., pp. 83-84, Ex. 7; Ackerstein Aff., **Ex. 5, 16**.

Response: Admitted.

38. Ms. Dean conveyed Dr. Snyder's explanation to Plaintiff and informed him that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR if he was not able to return to work in the next month. Dean Dep., Ex. 9; Ackerstein Aff., Ex. 17.

Response: Admitted.

39. Plaintiff responded to Ms. Dean's request for proper medical certification by insisting that there was nothing a psychiatrist could do to help him because there was nothing wrong with him and characterized the Short Term Disability process as intentionally psychologically abusive. Dean Dep., Ex. 9; Ackerstein Aff., Ex. 17.

Response: It is denied that Mr. Tuvell indicated that there is nothing wrong with him, given the context of the statement that "The ONLY reason I'm out on STD is that I am being SUBJECTED TO ABUSE AT WORK." Def.'s Exh. 17, at IBM3468. Mr. Tuvell states that there is "NOTHING 'WRONG' WITH ME", with the word "wrong" in quotes, as he is indicating that his medical leave is due to the harassment that he is receiving from a third party, and that but for that harassment, he would be able to work. Id. It is also denied that Plaintiff characterized his short term disability leave as abusive. Rather, Plaintiff's point was that IBM's failure to progress his complaints of discrimination and retaliation, while he was on leave, was abusive. Id. Plaintiff wrote, "the corrupt C&A program refuses to process ('discuss') my case until AFTER I return to the abusive workplace. The reason this is corrupt is that the C&A program itself says the C&A process is open to people on STD leave, yet Russell Mandel refuses to progress my C&A complaint for the very reason that I [am] on STD leave. This is intentionally psychologically abusive." Id.

40. Given Plaintiff's resistance to seeing a psychiatrist, Ms. Dean ultimately informed him that IBM would accept a completed MTR from the Licensed Social Worker ("LSW") who treated him. Snyder Dep., pp. 79-84, Ex. 6; Ackerstein Aff., **Ex. 4, 14**.

Response: The phrase "resistance to seeing a psychiatrist" is denied, as Plaintiff understood that his treatment by a licensed social worker to be consistent with Ms. Dean's request. See Resp. DSOF36. The rest of this statement is admitted.

41. Plaintiff subsequently provided IBM with MTRs completed by Stephanie Ross, the LSW he was seeing, for October and November of 2011, all stating that Plaintiff was totally impaired for work. FAC ¶ 65; Deposition of Stephanie Ross ("Ross Dep."), pp. 70-80, Ex. 4, 5; Ackerstein Dep., **Ex. 7, 26, 27**.

Response: Admitted, except that Ms. Ross's title should be "LICSW".

42. The October MTR completed by Ms. Ross indicated that Plaintiff suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety." Ms. Ross also rated Plaintiff as having serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising. Ross Dep., pp. 73-74, Ex. 4; Ackerstein Aff., **Ex. 7, 26**.

Response: Admitted.

43. In or around that time, Plaintiff was in close proximity to IBM on a weekend and stopped at a gas station with his wife and daughter and proceeded to "blow up" and hit the dashboard, the interior of the roof of the car and door frame as hard as he could and then yelled as loud as he could for as long as he could, describing himself as "full-blown crazy" because he



was “triggered by being that close to [IBM] and that gas station.” Pl. Dep., Day 2, pp. 127-128; Ackerstein Aff., **Ex. 2**.

Response: It is denied that Mr. Tuvell’s episode was triggered by being close to “IBM” (and indeed IBM misquotes the deposition. Def.’s Exh. 2, at 128. Rather, the deposition states that “I was triggered by being that close to Netezza and that gas station.” Id. Therefore, the trigger was the specific IBM/Netezza facility in Marlborough, and not to IBM buildings in general. Id.

44. The MTR completed by Ms. Ross in November identified for the first time PTSD as Plaintiff’s purported diagnosis, and indicated that Plaintiff was still totally impaired for work. The MTR also indicated that Plaintiff continued to have serious impairment with respect to getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities, and continued to have serious impairment as well with respect to managing conflict with others, negotiating, compromise, setting realistic goals, and having good autonomous judgment. Ross Dep., pp. 75-77, Ex. 5; Ackerstein Aff., **Ex. 7, 27**.

Response: Denied that the November 2011 MTR was the first time Ms. Ross “identified” PTSD as Plaintiff’s diagnosis. Rather, Defendant was told of Plaintiff’s PTSD diagnosis as early as May 26, 2011. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43; PSOF10. The rest is admitted.

45. Ms. Ross testified during her deposition that, at the time she completed the MTR, in November 2011, “any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Plaintiff] was triggered into a state that involved hyper-reactivity, hyper-arousal. He was in a state of very

difficult insomnia. He was pressured in his communication style. He had a significant amount of obsessive thinking. He was flooded.” Ross Dep., p. 79; Ackerstein Aff., **Ex. 7**.

Response: Admitted.

46. Ms. Ross further testified that, at the time, she 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. Ross Dep., p. 80; Ackerstein Aff., **Ex. 7**.

Response: Admitted.

47. Plaintiff provided another MTR on December 16, 2011, again completed by Ms. Ross, which stated that Plaintiff was “unable to return to previous setting with current supervisor and setting – PTSD symptoms exacerbate immediately” and continued to rate him “totally impaired for work,” adding “for current job assignment.” FAC ¶ 96; Ross Dep., pp. 86-89, Ex. 6; Ackerstein Aff., **Ex. 7, 28**.

Response: Admitted.

48. In the December 16 MTR, Ms. Ross indicated that Plaintiff had serious impairment with respect to 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, and setting realistic goals and having good autonomous judgment. Ross Dep., Ex. 6; Ackerstein Aff., **Ex. 28**.

Response: Admitted.

49. Ms. Ross did not affirmatively check off the section of the MTR that asked if the employee could work with temporary modifications but did write that “only modification that would be possible is a change of supervisor and setting.” This was the first time Plaintiff

submitted forms from a health care provider specifically requesting a change in supervisor as an accommodation. Ross Dep., Ex. 6; Ackerstein Aff., **Ex. 28**.

Response: Admitted, but pointing out that the MTR form itself, by its own terms, prevented Ms. Ross from checking “yes” to the identified section, based on her assessment of “total impairment.” Def.’s Exh. 28. IBM’s form itself precludes a health care provider from identifying a reasonable accommodation (or workplace modification that would permit return to work), to the extent that disabled worker at issue is deemed totally impaired for work. Id.

50. Ms. Ross testified that it was only “possible” that a new supervisor and setting would enable Plaintiff’s return to work. Ross. Dep., p. 88; Ackerstein Aff., **Ex. 7**.

Response: Denied, as to “only ‘possible’”. Ms. Ross answered, “It would be possible,” to the question of, “but you thought if he had a different supervisor and a different setting, it would be feasible.” Def.’s Exh. 7, at 88. Ms. Ross’ statement is thus more affirmative than the one asserted in Defendant’s version. Indeed, elsewhere she wrote, “in a new setting with different people it was possible that Mr. Tuvell could function quite well and attend his work. This is not at all unusual with clients with this primary diagnosis.” Def.’s Exh. 29, at 3.

51. For his part, Plaintiff could not and did not identify anyone who could serve as his manager in place of Mr. Feldman. Pl. Dep., Day 2, pp. 97-98; Ackerstein Aff., **Ex. 2**.

Response: Admitted.

52. In or around that time, Ms. Ross explained that Plaintiff was “unable to drive within a 50 mile radius – 20 mile radius of where he worked for a period of time without becoming hysterical,” a description she included in Plaintiff’s appeal of the denial of long term disability benefits from MetLife, specifically writing that Plaintiff’s “symptoms would return if [he] had to drive near the facility, and he would have to pull over and manage intense anxiety

symptoms and emotional overwhelm.” Ross Dep., pp. 143, 146-148, Ex. 28; Ackerstein Aff., **Ex. 7, 29.**

Response: Denied as to “In or around that time,” which is unsupported by the record. Admitted as to the rest. Further clarifying, that the term “would” applied to symptoms that appeared in the past, and is not describing the future. Def.’s Exh. 29, at 3.

53. While Plaintiff was on medical leave, IBM restricted Plaintiff’s VPN access to IBM’s internet and Plaintiff’s access to IBM facilities for the pendency of his leave given IBM’s position that because Plaintiff was on STD leave and not working, there was no need for access to those systems. FAC ¶¶ 62, 66, 95; Feldman Dep., p. 158, Ex. 37; Ackerstein Aff., **Ex. 6, 24.**

Response: It is admitted that Plaintiff was denied VPN access and access to IBM facilities while he was on medical leave. It is denied that Plaintiff’s medical condition required that his access be restricted, or that the medical leave, and the fact that he was not working, were the only reasons for such curtailment. For example, when Mr. Feldman was on short term disability, his access to computer systems were not curtailed. Feldman Dep., at 134, Exhibit 43. Moreover, when Plaintiff had surgery in July 2011, his access to computer systems, and his entitlement to enter IBM buildings was not changed. Tuvell Aff., ¶ 25, Exhibit 47. IBM policy with respect to its “Short-Term Disability Income Plan” states that “While you’re receiving benefits under the IBM Short-Term Disability Income Plan, you’re considered an active employee”, and active employees do not have their access curtailed. Tuvell Aff., ¶ 14, 25, Exhibit 47. Moreover, during the time of his medical leave, Mr. Tuvell was seeking a transfer at IBM, and actively interviewed at IBM’s Littleton facility in December, 2011. Tuvell Dep., at 215-216, 220-221, 224, Exhibit 98. The curtailment of Mr. Tuvell’s privileges temporarily prevented him from entering the facility for the purpose of his interview. Tuvell Dep., at 217-218, Exhibit 98.

Moreover, even though he was on medical leave, Mr. Tuvell was capable of and attempting to perform productive work for IBM. Tuvell Dep., at 228, Exhibit 98; Tuvell Aff., ¶ 29, Exhibit 47. Mr. Tuvell sought to work from home, as he was capable of doing, so long as he did not have to deal with harassers, such as Mr. Feldman. Tuvell Dep., at 231-232, Exhibit 98. However, he was actively prevented from doing so, and the evidence shows that Mr. Tuvell's access to computer systems were rescinded for the purpose of undermining one of his requests for reasonable accommodation. Indeed, on August 22, 2011, Mr. Feldman observed that Mr. Tuvell had continued to perform work while on leave, and urged IBM that Mr. Tuvell be prohibited from doing so, because

if we don't continue to notify him that he can't work during his leave then we are allowing Walt to create a track record of IBM using work product created by him while on leave and from home to establish a prima facie basis for a claim of accommodation – that is, he can do his work from home and without significant managerial supervision and so he should be allowed to. My personal preference is to suspend all of Walt's access to systems on the heritage Netezza network during his leave.

Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. Mr. Feldman was the instigator of the recessions (Feldman Dep., at 130-133, Exhibit 43), and he had long advocated for curtailing Plaintiff's access to IBM premises and computer systems on account of Plaintiff's diagnosis of PTSD. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43; Due Dep., at 135-136, Exhibit 50. There is much further evidence that the recession of access was based on handicap discrimination and/or retaliation. Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints, claimed that the following passage provided by Tuvell in support of one such complaint, was "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.

Due Dep., at 38-40, 198-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. 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." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff 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." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81-82; Mandel Dep., at 156-157, Exhibit 55. 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. Verified Complaint, ¶ 46, Exhibit 42. 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." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence of handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having PTSD, considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50; Feldman Dep., at 91, Exhibit 43; See also Due Dep., at 140, Exhibit 50 (urging care when walking to car). At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer,

based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. 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.” Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff’s access to Lotus Notes (the IBM email system, given that “you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application.” Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. Indeed, IBM expressly curtailed access to computer systems for the express purpose of sabotaging Mr. Tuvell’s access to the reasonable accommodation of working at home and away from the direct supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. 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.” Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. 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. It is easy to return access once you return from STD [short term disability].” Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy (“While you’re receiving benefits under the IBM Short-Term Disability Income Plan, you’re considered an active employee.” Tuvell Aff., ¶ 14, Exhibit 47).



54. During this time, Plaintiff also continued emailing complaints using IBM's Lotus Notes to Human Resources and other IBM employees and executives, including the CEO of IBM. IBM subsequently restricted Plaintiff's access to Lotus Notes and IBM's internal corporate network based on his misuse of those systems. FAC ¶¶ 123, 125.

Response: The first sentence is admitted. The second sentence is admitted except for the phrase, "misuse of those systems," which is denied. There is no record citation that Plaintiff in fact misused the systems. The emails that Plaintiff submitted at this time were complaints of retaliation, discrimination and failure to accommodate, which were protected under the ADA and c. 151B, and he had every right under the law to forward those complaints to those who he thought could help. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'").

55. Plaintiff exhausted his STD leave on January 25, 2012, at which time he remained out of work on an approved, unpaid medical leave. FAC ¶ 110.

Response: Admitted.

56. On or around April 25, 2012, IBM learned that Met Life denied Plaintiff's claim for Long Term Disability benefits and informed Plaintiff that they would continue to accommodate him by granting him unpaid leave while he appealed the denial of Long Term Disability benefits. FAC ¶ 132.

Response: Admitted.

**PLAINTIFF'S APPLICATION FOR ANOTHER POSITION WITH IBM**

57. On December 8, 2011, Plaintiff was interviewed for an open position he had applied for through IBM's Global Opportunity Marketplace ("GOM") with Christopher Kime, one of the decision-makers tasked with filling the position. Prior to the interview, Plaintiff advised Mr. Kime that he had a "completely clean bill of health" and was "symptom free," notwithstanding the fact that Ms. Ross submitted MTRs which described him as "totally impaired" for work in both November and December of 2011. Deposition of Christopher Kime ("Kime Dep."), pp. 58-59, Ex. 3; Ackerstein Aff., **Ex. 3, 12**; Ross Dep., Ex. 5, 6; Ackerstein Aff., **Ex. 27, 28**.

Response: Admitted.

58. Mr. Kime, for his part, had no knowledge of Plaintiff's medical condition nor did he make any inquiry into the circumstances surrounding Plaintiff's STD leave. Kime Dep., p. 60; Ackerstein Aff., **Ex. 3**.

Response: Denied. Mr. Kime had express knowledge of Plaintiff STD leave. Def.'s Exh. 3, at 60. The statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

59. After the interview, Mr. Kime informed Plaintiff that he had to discuss the interview with his management team and that he would keep Plaintiff posted on any developments. FAC ¶¶ 85, 88, 93, 94.

Response: Admitted.

60. While considering Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance review history but was unable to find anything on IBM's internal website and therefore reached out to Mr. Feldman, who explained that Plaintiff's leave had prevented Mr. Feldman from providing Plaintiff with a performance review. Kime Dep., p. 114; Ackerstein Aff., **Ex. 3**.

Response: Denied. The cited page does not support the statement asserted. Moreover, the statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

61. When Mr. Kime asked him about Plaintiff's performance, Mr. Feldman informed him that Plaintiff had the technical skills for his position but had difficulties working with other people in his group and had been moved from one team to another and still had not found a role that appeared to work for him and the team. Kime Dep., pp. 98-100, 111-112; Ackerstein Aff., **Ex. 3**.

Response: Denied. The statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097,

2110 (2000) (court must disregard evidence that a “jury is not required to believe”). Mr. Kime’s testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being “direct”), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

62. Mr. Kime testified that at no point during his telephone conversation with Mr. Feldman did Mr. Feldman mention that Plaintiff had filed any internal complaints with IBM regarding harassment or discrimination and that he was not aware of Plaintiff’s complaints at that time. Kime Dep., pp. 115-116; Ackerstein Aff., **Ex. 3**.

Response: Denied. For example, long before the January 2012 rejection, on December 15, 2011, when Feldman was continuing his attempts to undermine Mr. Tuvell’s candidacy, Messrs. Feldman and Kime conversed, and both noted that IBM’s HR and Legal team were involved (which reflected IBM’s response to Plaintiff’s complaints of discrimination, harassment and retaliation). Kime Dep. Exh. 9, Exhibit 73; Kime Dep., at 121, Exhibit 65 (Kime wrote, “I do not envy you having to deal with HR and lawyers at this point”). Such discussion is only relevant if the underlying complaints were discussed. Id. Furthermore, the statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a “jury is not required to believe”). Mr. Kime’s testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being “direct”), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

63. Mr. Kime was not aware at the onset of the interviewing process that the fact that Plaintiff was on STD leave would prevent him from providing a performance review, known as a PBC, to present to his management chain for a discussion on Plaintiff's qualifications. Kime Dep., p. 128; Ackerstein Aff., **Ex. 3**.

Response: Denied. The statement is supported only by Mr. Kime, an interested witness who is a current employee, a twenty-one year veteran of Defendant, and who has been accused of participating in an illegal rejection, and as such, his testimony may be disbelieved by a jury. Kime Dep., at 161, Exhibit 65. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe"). Mr. Kime's testimony may also be rejected as he has acknowledged lying to Plaintiff (or not being "direct"), about the reason for rejecting Plaintiff for the Software Developer position. Kime Dep., at 152-155, Exhibit 65.

64. On January 6, 2012, Mr. Kime emailed Plaintiff to tell him that he would not be offering him the open position. Mr. Kime testified that he could not move forward with taking Plaintiff directly from short term disability leave based on the difficulty of assessing his work performance without any PBC. Mr. Kime also explained to Plaintiff that "[g]iven the current needs of our group there is also concern about the work being to your liking and keeping you as a productive and satisfied member of the team." FAC ¶¶ 97-98; Kime Dep., p. 128, Ex. 11; Ackerstein Aff., **Ex. 3, 13**.

Response: The first and third sentence are admitted. The second sentence is denied as it is unsupported by the record cited.

65. Mr. Kime testified that he concluded that Plaintiff was not an appropriate candidate for the position because Plaintiff appeared to be interested in development work, while

the position involved software maintenance for a mature product and involved working in a very small team environment and Mr. Kime was concerned about Plaintiff's ability to succeed in such an environment. As such, Mr. Kime concluded that Plaintiff would not be a good fit for the position. Kime Dep., pp. 142-145; Ackerstein Aff., **Ex. 3**.

Response: The first sentence is admitted, solely to the extent that it accurately reflects what Mr. Kime testified to, but is denied to the extent that the statement purports to accurately reflect what Mr. Kime concluded. The second sentence is denied. On January 6, 2012, Mr. Kime wrote Mr. Tuvell an email, which explained the reasons for the rejection. Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. Mr. Kime wrote that the primary reason for the rejection was "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." Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. While Mr. Kime alleges that he was concerned about Mr. Tuvell's interest in the position, that is contrary to the communication he received from Plaintiff, which stated, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." Kime Dep. Exh. 6, at 1, Exhibit 70; Kime Dep., at 73-74, Exhibit 65. Mr. Kime's assertion that the position was not sufficiently developmental enough to hold Mr. Tuvell's interest is shown to be pretextual by the fact that job description, drafted by Kime, 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." Kime Dep. Exh. 12, at 1, Exhibit 68; Kime Dep., at 28, 32-33, Exhibit 65. The assertion is likewise shown to be pretextual, as Mr. Tuvell's consideration as a candidate was rejected immediately upon Mr. Kime's discussion with

Mr. Feldman, and that discussion did not touch upon Mr. Tuvell's alleged exclusive interest in developmental work. Kime Dep., at 118-119, Exhibit 65; Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. Pretext is further established by the fact that Mr. Tuvell's alleged non-interest in work was not mentioned at all in IBM's February 14, 2012 explanation for the rejection, which vaguely mentioned "performance issues." Mandel Dep. Exh. 30, at TUVEL1213, Exhibit 112; Mandel Dep., at 150, Exhibit 55. Furthermore, there was much direct evidence that Plaintiff was subject to retaliatory and discriminatory animus.

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

Due Dep., at 38-40, 198-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. 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." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff 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." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task (for none exists) that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination,

retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 ("CP calls the President of R's parent company to protest religious discrimination by R. CP's protest constitutes 'opposition'"). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82; Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. 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." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In response to one of Tuvell's protected complaints of harassment, Feldman stated, "assertions of bad faith . . . are inconsistent with success." TUVELL284, 286, Exhibit 83; Resp. to Pl.'s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.



There is also ample evidence that handicap discrimination was the cause. On June 13, 2011, Plaintiff's supervisor, Dan Feldman, noted that Plaintiff had reported having PTSD, considered Tuvell to be "irrational and potentially dangerous," and thereby petitioned IBM to disable Tuvell's access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110, Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell's diagnosis of PTSD and complained that Tuvell was "potentially dangerous." Due Dep., at 135-136, Exhibit 50; Feldman Dep., at 91, Exhibit 43; See also Due Dep., at 140, Exhibit 50 (urging care when walking to car). At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer, based expressly on his availment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. 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." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system, given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. IBM curtailed Plaintiff's access to computer systems for the express purpose of sabotaging Mr. Tuvell's access to the reasonable accommodation of working at home and away from the direct

supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. 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." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. 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. It is easy to return access once you return from STD [short term disability]." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy ("While you're receiving benefits under the IBM Short-Term Disability Income Plan, you're considered an active employee." Tuvell Aff., ¶ 14, Exhibit 47).

66. On January 11, 2012, Plaintiff emailed Mr. Feldman and accused him of retaliation based on his failure to receive an offer for the position with Mr. Kime in Littleton and asked Mr. Feldman to provide him with other ideas for a reasonable accommodation. FAC ¶ 100.

Response: It is denied that the January 11, 2012 email accused Mr. Feldman of retaliation, and there is no record support for this assertion. In actuality, Plaintiff accused IBM of retaliation. Feldman Dep. Exh. 38, at 1039-1040, Exhibit 93; Feldman Dep., at 158-159, Exhibit 43. The rest of the statement is admitted.

67. Mr. Feldman responded to Plaintiff's request by offering a variety of accommodations, including having someone other than Mr. Feldman provide Plaintiff with performance feedback, allowing Plaintiff to leave work as necessary to attend any doctor's

appointments, and ongoing access to GOM to look for open positions under a different supervisor. FAC ¶ 105.

Response: It is denied that Mr. Feldman's proposals were authentic "accommodations," as they were contrary to documented medical limitations of Mr. Tuvell that were reported to Defendant. The proposals were suggested by IBM only after Tuvell's health care provider certified on December 19, 2011, that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. Defendant fails to address how its proposal, which was contrary to Plaintiff's medical limitations, could be construed as an accommodation, much less a reasonable one. It is admitted that the various proposals were communicated to Plaintiff.

68. Plaintiff rejected all of Mr. Feldman's proposed accommodations and, on January 23, 2012, Plaintiff's counsel requested as a reasonable accommodation that IBM transfer Plaintiff to the position in Littleton with Mr. Kime, for which he had previously applied and been rejected, and which had been reposted after the first posting for the position expired. FAC ¶¶ 106, 108.

Response: Admitted, although it is denied that Mr. Feldman's proposals were "accommodations." Resp. DSOF67.

69. IBM subsequently denied Plaintiff's request for reassignment, stating its belief that Plaintiff was capable of performing his current position under Mr. Feldman and again proposing alternative accommodations, including receiving feedback from a different manager. FAC ¶ 109.

Response: Admitted, except that it is denied that Defendant at that point believed that Plaintiff was capable of performing his current position under Mr. Feldman. At that point, IBM

had received documentation from Plaintiff's medical provider that that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. Tuvell additionally indicated that he was medically unable to work under Feldman or any similar harasser many times, including on January 18, 2012, when he wrote, "[b]ased on my handicap of PTSD and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with you [Feldman] or under you." TUVELL1027, Exhibit 113, Def.'s Further Resp. to Req. for Adm. 69, Exhibit 87. See also PSOF60-63. Consequently, a jury would be free to reject IBM's self-serving assertion of "belief" that Tuvell was medically capable of returning to work under Mr. Feldman. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe").

70. Plaintiff independently applied for the reposted position with Mr. Kime on January 25, 2012, but was not considered for the position for the same reasons he had not been selected for the identical, previously-posted position. FAC ¶ 112; Kime Dep., pp. 150-151; Ackerstein Aff., **Ex. 3**.

Response: Admitted, with the proviso that the reasons Mr. Tuvell was rejected for the earlier position was based on handicap, his availment of reasonable accommodation, and retaliation.

Resp. DSOF65.

71. On February 15, 2012, John Metzger, Mr. Feldman's supervisor, wrote to Plaintiff directly and offered him as an accommodation the possibility of receiving his performance evaluations from Mr. Metzger directly, instead of Mr. Feldman. FAC ¶ 117.

Response: It is admitted that the proposal was communicated to Plaintiff on February 15, 2012. It is denied that the proposal constituted an authentic "accommodation," reasonable or

otherwise, because the proposal was inconsistent with Mr. Tuvell's medical limitations as was reported to IBM directly by Mr. Tuvell and by Mr. Tuvell's medical provider. At that point, IBM had received documentation from Plaintiff's medical provider that that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and setting." Def.'s Exh. 28. Tuvell additionally indicated that he was medically unable to work under Feldman many times, including on January 18, 2012, when he wrote, "[b]ased on my handicap of PTSD and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with you [Feldman] or under you." TUVELL1027, Exhibit 113, Def.'s Further Resp. to Req. for Adm. 69, Exhibit 87. Consequently, a jury would be free to reject IBM's self-serving assertion of "belief" that Tuvell was medically capable of returning to work under Mr. Feldman. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000) (court must disregard evidence that a "jury is not required to believe").

72. The next day, February 16, 2012, Plaintiff rejected Mr. Metzger's proposed accommodation, claiming that he was medically incapable of returning to work under Mr. Feldman and opting instead to remain out on medical leave. FAC ¶ 118.

Response: Admitted, except as to the point where it is claimed that Plaintiff "opted" to remain out on medical leave. The statement is unsupported by the citation, and wrongly implies that there was a medically feasible alternative to leave, which there was not. Def.'s Exh. 28; TUVELL1027, Exhibit 113, Def.'s Further Resp. to Req. for Adm. 69, Exhibit 87. After February 16, 2012, it is admitted that Plaintiff remained out on medical leave.

**PLAINTIFF'S NEW EMPLOYMENT AND TERMINATION FROM IBM**

73. While Plaintiff was communicating with Mr. Feldman and Mr. Metzger about potential accommodations, Plaintiff was also interviewing for a full-time job with Imprivata, from whom he received an offer of employment on February 28, 2012, and for whom he began working on March 12, 2012, while still on medical leave from IBM. Plaintiff did not disclose this to IBM. Pl. Dep., Day 1, pp. 95-97, 102-103; Ackerstein Aff., **Ex. 1**.

Response: Admitted, except the portion that says “while,” which implies that the interview process was directly contemporaneous with the unspecified communications with Mr. Feldman and Mr. Metzger. The record citation does not support the assertion.

74. On May 7, 2012, while Plaintiff was still out on leave, Ms. Adams wrote Plaintiff asking him to confirm that he was not working for EMC Corporation while on medical leave from his employment with IBM. Plaintiff responded by accusing IBM of defamation and asking for evidence that he was violating IBM’s Guidelines. FAC ¶¶ 134, 135.

Response: Admitted, except that Plaintiff’s response was not directed towards the request for confirmation about working at EMC, but instead was directed at the unfounded assertion that he was violating IBM Guidelines, and threatening him with termination. Verified Complaint, ¶¶ 134, 135, Exhibit 42.

75. IBM’s Business Conduct Guidelines require employees on leave to inform IBM if they begin working for another company so IBM can run a conflict check and ensure that the company is not a competitor. FAC ¶ 140.

Response: Denied. The record citation fails to support this statement, entirely, and IBM was and is unable to identify any policy containing such a requirement for individuals on short term disability leave. IBM’s Personal Leave of Absence (PLOA) Policy was inapplicable to Mr. Tuvell, as he was not on personal leave, and was rather on medical leave. Verified Complaint, ¶

140, Exhibit 42. Plaintiff explained why the PLOA policy was inapplicable to him, and provided IBM with a screen shot of its own policy statements, which distinguished personal leaves from medical leaves, and established different sections for access policies relating to each.

TUVELL1468, 1474, Exhibit 88; Tuvell Aff., ¶ 16, Exhibit 47.

76. In response, Ms. Adams wrote to Plaintiff that his LinkedIn page listed EMC as his current employer and asked him to confirm that he was not currently working for EMC.

FAC ¶ 136.

Response: Admitted.

77. Plaintiff responded by informing Ms. Adams that he was not employed by EMC, and that by continuing to ask him if he was, Ms. Adams was harassing and defaming him. Ms. Adams responded by thanking Plaintiff for his response and asked Plaintiff to advise where he has been working during his leave. Plaintiff responded to Ms. Adams's request by telling her that he was in compliance with his contractual obligations and refusing to provide her with the name of the company he began working for while on unpaid leave from IBM. When Ms. Adams responded to Plaintiff that IBM's Personal Leave of Absence Policy required him to tell IBM if he was working while on leave, Plaintiff accused Ms. Adams of retaliation and harassment and continued to refuse to provide the name of his new employer. FAC ¶¶ 139 – 141.

Response: Admitted, except it is denied that IBM's Personal Leave of Absence (PLOA) Policy was applicable to Mr. Tuvell, as he was not on personal leave, and was rather on medical leave. Verified Complaint, ¶ 140, Exhibit 42. Plaintiff explained why the PLOA policy was inapplicable to him, and provided IBM with a screen shot of its own policy statements, which distinguished personal leaves from medical leaves, and established different sections for access policies relating to each. TUVELL1468, 1474, Exhibit 88; Tuvell Aff., ¶ 16, Exhibit 47.

78. On May 15, 2012, Ms. Adams informed Plaintiff that he had to identify the company he was working for by 5:00 PM the following day or IBM would be forced to terminate his employment. FAC ¶ 142.

Response: It is admitted that on May 15, 2012, Ms. Adams wrote to Plaintiff stating, “Please advise IBM where you currently are working by 5pm tomorrow.” TUVELL1482, Exhibit 89; Def.’s Further Resp. to Req. for Adm. 97, Exhibit 87. It is denied that IBM would be forced to terminate Mr. Tuvell based on non-compliance, and it is denied that Mr. Tuvell was told that IBM would be forced to fire him based on non-compliance. Id. The Defendant’s statement is unsupported by the record cite, and is contradicted by the actual communication which Plaintiff hereby attaches. Id.

79. Plaintiff continued to refuse to provide IBM with the name of the company he was working for while on medical leave and, on May 17, 2012, Plaintiff’s employment from IBM was terminated based on his refusal to advise IBM of where he was working, despite repeated requests that he do so. FAC ¶¶ 143, 145; Feldman Dep., Ex. 44; Ackerstein Aff., **Ex. 25**.

Response: Admitted, except that the asserted reason for the termination is denied. In actuality, Plaintiff was terminated not for failing to identify his other employer, but instead based on retaliation and handicap discrimination, and/or for availing himself of reasonable accommodation. 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 there was no competition. Verified Complaint, ¶ 141, Exhibit 42; TUVELL1468-1469, Exhibit 88;



Tuvell Aff., ¶ 11, Exhibit 47. 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. Verified Complaint, ¶ 145, Exhibit 42. The termination occurred within days of Tuvell engaging in protected conduct. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. ¶ 95, Exhibit 87.

There is an enormous amount of additional evidence that the termination was based on retaliation. Defendant, on numerous occasions, expressed animus based on Plaintiff's protected complaints of discrimination and harassment. Lisa Due, an IBM Senior Case manager, who investigated some of Plaintiff's internal complaints of discrimination claimed that the following passage provided by Tuvell in support of one such complaint, was "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.

Due Dep., at 199-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. 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." Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. 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." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's

access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶ 122, 123, Exhibit 42; Mandel Dep. Exh. 34, at 5-6, Exhibit 104; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47; Mandel Dep., at 150-154, Exhibit 55; Tuvell Aff., ¶ 10, Exhibit 47; EEOC Compliance Manual, Section 8: Retaliation, 5/20/98, at 8-II(B)(2) & Example 1 (“CP calls the President of R’s parent company to protest religious discrimination by R. CP’s protest constitutes ‘opposition’”). On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which again, is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82; Mandel Dep., at 156-157, Exhibit 55. On August 3, 2011, Plaintiff was prohibited from using a reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42. 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.” Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.’s Request for Adm. 1, Exhibit 56. In response to one of Tuvell’s protected complaints of harassment, Feldman stated, “assertions of bad faith . . . are inconsistent with success.” TUVELL284, 286, Exhibit 83; Resp. to Pl.’s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

There is also ample evidence that handicap discrimination was the cause. On June 13, 2011, Plaintiff’s supervisor, Dan Feldman, noted that Plaintiff had reported having PTSD,

considered Tuvell to be “irrational and potentially dangerous,” and thereby petitioned IBM to disable Tuvell’s access to IBM buildings and terminate him. Feldman Dep. Exh. 11, Exhibit 110; Feldman Dep., at 75-76, Exhibit 43. On June 20, 2011, Feldman referred to Tuvell’s diagnosis of PTSD and complained that Tuvell was “potentially dangerous.” Due Dep., at 135-136, Exhibit 50. At the time of these complaints, and indeed, throughout his employment at IBM, Plaintiff had engaged in no colorably threatening conduct (Verified Complaint, ¶ 11, Exhibit 42; Due Dep., at 89-90, Exhibit 50), and so the June 13 and 20 communications are direct evidence of animus (stereotyping and stigmatization) against Plaintiff on the basis of his diagnosis of PTSD. On January 6, 2012, Plaintiff was rejected for a transfer, based expressly on his avilment of short term disability as a reasonable accommodation. Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. 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.” Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 132-133, Exhibit 65. IBM curtailed Plaintiff’s access to Lotus Notes (the IBM email system, given that “you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application.” Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. IBM curtailed Plaintiff’s access to computer systems for the express purpose of sabotaging Mr. Tuvell’s access to the reasonable accommodation of working at home and away from the direct supervision of Mr. Feldman. Feldman Dep. Exh. 26, at IBM9628, Exhibit 111; Feldman Dep., at 128-129, Exhibit 43. 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.” Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. 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. It is easy to return access once you return from STD [short term disability].” Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75, Mandel Dep., at 80-81, Exhibit 55. These acts based on STD status were not only illegal, they were contrary to well-established IBM policy (“While you’re receiving benefits under the IBM Short-Term Disability Income Plan, you’re considered an active employee.” Tuvell Aff., ¶ 14, Exhibit 47).

80. IBM later learned that Plaintiff interviewed for a job with Imprivata, which develops and sells software products, in January of 2012, received an offer of employment on February 28, 2012, and began working for Imprivata on March 12, 2012, while still on medical leave from IBM. Pl. Tr. Day 1, pp. 95-97, 111; Ackerstein Aff., **Ex. 1**.

Response: Admitted.

81. Plaintiff’s salary at Imprivata is greater than what he was earning at IBM. Plaintiff is claiming lost wages of \$21,510. Pl. Dep., Day 1, pp. 97-102; Ackerstein Aff. 1; Plaintiff’s Automatic Disclosures, Ackerstein Aff., **Ex. 40**.

Response: Admitted.

Plaintiff Walter Tuvell,  
By his attorneys,

/s/ Robert S. Mantell  
Robert S. Mantell (BBO #559715)  
RODGERS, POWERS & SCHWARTZ LLP  
111 Devonshire St.  
4<sup>th</sup> Floor  
Boston, MA 02109  
(617) 742-7010  
RMantell@TheEmploymentLawyers.com

**CERTIFICATE OF SERVICE**

This is to certify that on February 12, 2015, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Robert S. Mantell  
Robert S. Mantell