

In The  
**United States Court Of Appeals**  
For The  
**First Circuit**

---

Case No. 15-1914

---

WALTER TUVELL,

*Plaintiff-Appellant,*

v.

INTERNATIONAL BUSINESS MACHINES,

*Defendant-Appellee.*

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

---

**PETITION FOR REHEARING, ANNOTATED**

---

WALTER E. TUVELL, *PRO SE*  
836 Main St.  
Reading, Massachusetts 01867  
(781) 944-3617 (h); (781) 475-7254 (c)  
walt.tuvell@gmail.com

# TABLE OF CONTENTS

PREFACE.....	iii
AUTHORITY.....	iv
REASONS WHY REHEARING SHOULD BE ALLOWED.....	v
QUESTIONS PRESENTED.....	vi
RELIEF SOUGHT.....	vii
CASES CITED.....	viii
CERTIFICATE OF COMPLIANCE.....	ix
CERTIFICATE OF SERVICE.....	x
ARGUMENT.....	1
Introduction.....	1
Summary Judgment Standard Of Review (SJSOR).....	1
PSOF (Plaintiff’s Statement Of Facts).....	2
PSOF-Exclusion.....	3
PSOF-Exclusion With Particularity.....	7
Prototype: Excel Graphics.....	7
Three-Way Meeting; Yelling; Demotion/Reassignment.....	9
QDI: MTR; STD; “Totally Disabled”; And All That.....	11
QDI-Exclusion With Particularity.....	15
Conclusion.....	15
ENDNOTES.....	a

## **PREFACE**

In the matter of Tuvell v. IBM, this is a petition for rehearing of the appellate panel's *per curiam* opinion issued on May 13, 2016, which affirmed the district court's opinion (Memorandum and Order, Dkt. 94, dated Jul. 6, 2015, filed Jul. 7, 2015).

## AUTHORITY

This is a dual-purpose<sup>1,†</sup> petition, authorized by FRAP (Federal Rules of Appellate Procedure) 35 and 40.

---

† Superscript *numbers* refer to *endnotes* (not footnotes), which exist only in the *Annotated* version of this *Petition for Rehearing*; they, and *all references* to them in the non-*Annotated* version of the *Petition*, are to be *ignored*. The endnotes constitute *optional supplementary material* to the *Petition* (the FRAP neither requires nor forbids such supplementary material; a reviewing tribunal may consult it at their discretion). The endnotes are suitable for readers who seek *enhanced* understanding of details or nuance upon a deep reading. *Some* of the endnotes *may*: (i) refer to certain facts not contained in the technical “record” forwarded to the appellate panel (though all such facts exist, and could be presented upon request); or (ii) contain offers of proof, or of theories of law, which may not currently be fully fleshed out fully. But all that’s okay, because the endnotes are *optional* in the sense that they *aren’t necessary to make our case at summary judgment stage anyway* (by the “light burden” tenet of the standard of review; see the section on *Summary Judgment Standard Of Review (SJSOR)*, below). The endnotes are indicators of the *depth* of the *Tuvell* case (“enough evidence,” colloquially speaking, but *only colloquially* speaking, not strictly speaking in the sense of the SJSOR). Indeed, they more generally highlight why **employment cases are disfavored for summary judgment dismissal** before they’ve been allowed to fully develop: **“A trial court must be cautious about granting summary judgment to an employer when ... [the employer’s] intent [state of mind] is at issue”** (*Gallo*, p. 1224, emphasis added). **“[C]lever men discriminate in clever ways, and where there is smoke there is fire”** (Hon. Denny Chin, U.S. Circuit Judge for the 2nd Cir., *Summary Judgment in Employment Discrimination Cases: A Judge’s Perspective*, 57 N.Y.L. Sch. L. Rev. 671 (2012–2013), p. 680, internal references omitted). (As optional material, present only in the *Annotated* version, the endnotes do not participate in this *Petition’s* restrictions on word-count/type-density/page-length.)

## REASONS WHY REHEARING SHOULD BE ALLOWED

Rehearing should be allowed because this *Petition* raises issues of *mistakes*<sup>‡</sup>

satisfying the following required criteria (underlined) of FRAP rules:

- (A) Panel rehearing (FRAP 40)<sup>2</sup> — The panel has overlooked or misapprehended several points of (procedural and/or substantive) law or fact,<sup>3</sup> resultantly causing great harm to Tuvell (throwing the case into confusion and destroying it).
- (B) *En banc* rehearing (FRAP 35)<sup>4</sup> — The panel’s decision conflicts with certain decisions of the United States Supreme Court and the First Circuit Court of Appeals,<sup>5</sup> as well as other Circuit Courts of Appeals,<sup>6</sup> and also applicable holdings of the Supreme Judicial Court of Massachusetts (SJC)<sup>7</sup> (see *CASES CITED*, below).<sup>8</sup> Too, the questions in (A) are of exceptional importance.

According to these FRAP rules, it is our burden here to point out how “*mis-*  
*takes were made by the courts*” (of the two types listed, (A) and (B)) — i.e., that  
“*the courts’ (joint) opinion was wrongly decided*” — and *not* to “re-argue the case-  
in-chief on the merits.” To do the latter would be wastefully duplicative, because  
those case-in-chief materials are already readily available to the courts.

---

‡ As mentioned in the remarks at the beginning of the *QUESTIONS PRESENTED* section, below, the mistakes we identify herein first appeared in the opinion of the district court. The question may be asked: Why didn’t we raise these district court mistakes already in our Appellate briefs (principal and reply) we presented to the appellate panel? The answer is that it was *inappropriate (not ripe)* to do so, by rule. The panel’s review of the district court’s opinion is *de novo*: the panel looks at appellant’s case-in-chief with fresh eyes, and comes to its own independent determination, owing no deference to the district court’s opinion; raising issues of *mistake* by the district court would be out-of-bounds for that inquiry. It is only here, at rehearing level, that issues of *mistake* are in order (FRAP 35, 40). Since the panel *adopted* the district court’s opinion, any mistakes at the district level are equally attributable to the appellate level, so are appropriate here.

## QUESTIONS PRESENTED

Throughout, we speak of “the courts” to refer indiscriminately to both district court and appellate panel for this case. Similarly, when there is no need to distinguish the opinions of the two courts, we just say “the (joint) opinion” (abbreviated “op.”) to refer to both indiscriminately. No confusion results thereby, since the appellate court adopted the district court’s opinion without reservation (saying “the district court got it right”), so both courts can justifiably be assigned coequal, joint ownership.

- (A) Were the courts’ opinions rightly decided?  
*[Suggested answer: No.]*
- (B) At summary judgment, are the courts bound by the summary judgment standard of review (as promulgated by, e.g., *Sensing v. Outback Steakhouse*)?  
*[Suggested answer: Yes.]*
- (C) At summary judgment, are the courts required to accurately consider all documents properly submitted by the parties pursuant to FRCP (Federal Rules of Civil Procedure) 56 and LR (Local Rule) 56.1?  
*[Suggested answer: Yes.]*
- (D) Must the courts observe Supreme Court precedent for its cases cited herein?  
*[Suggested answer: Yes.]*
- (E) Should the courts observe the precedent of the First Circuit, the other federal Circuits, and the Massachusetts Supreme Judicial Court (SJC), for their cases cited herein?  
*[Suggested answer: Yes.]*

## **RELIEF SOUGHT**

- (A) Correction (vacation) of the appellate panel’s opinion.
- (B) Correction (reversal) of the district court’s opinion.
- (C) Remand to district court for further proceedings.
- (D) Costs and fees to the extent applicable.

## CASES CITED

- (A) *Bulwer v. Mt. Auburn Hospital*, SJC-11875 (Mass. SJC, 2016); slip op., p. 19.
- (B) *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006, unanimous); pp. 57, 69, 71, 80.
- (C) *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999, unanimous); pp. 802–803.
- (D) *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219 (2d Cir., 1994); p. 1224. [Cited only in a footnote.]
- (E) *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir., 2001); pp. 1139–1140.
- (F) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000, unanimous); p. 147.
- (G) *Sensing v. Outback Steakhouse of Florida, LLC*, 575 F.3d 145 (1st Cir., 2009); § II(A), pp. 152–153.
- (H) *Tolan v. Cotton*, 572 U.S. \_\_\_ (2014, *per curiam*); p. 1. [Cited only in an end-note.]



## CERTIFICATE OF COMPLIANCE

- (A) This brief complies with the **type-volume limitation** of FRAP 32(a)(7)(B), because the *ARGUMENT* section of the brief (which *excludes* the front-matter part of the brief exempted by FRAP 32(a)(7)(B)(iii), and the optional appendix of endnotes, discussed in fn. † in the *AUTHORITY* section, above) contains less than 3,500 words. (Even *including* all those exempted parts, the *total* number of words in the *entire* document is less than 9,000 words.) The brief also complies with the additional **page-length limitations** of FRAP 35(b)(2) and 40(b), because it (the *ARGUMENT* section) does not exceed 15 pages.
- (B) This brief complies with the **typeface requirements** of FRAP 315.42(a)(5) and the **type style requirements** of FRAP 32(a)(6), because this brief has been prepared using Linux Fedora LibreOffice 5.0.6.2 Writer, in proportionally spaced 14-point regular Times New Roman font, double-spaced between lines (with acceptable coordinated variations for title page, headings, footnotes and endnotes, lists, displayed quotations, emphasis, etc.). The brief is published electronically in PDF format, with black print on white background, with page size 8½"-by-11", and 1" margins on all sides (with page number footers in the bottom margin, as is allowable). When printed, the brief is intended to be rendered on unglazed white paper.

*Signed:*                    /s/ Walter E. Tuvell

*Dated:*                    June 15, 2016

## CERTIFICATE OF SERVICE

I hereby certify that I filed this document electronically via the First Circuit's CM/ECF system, on Jun. 15, 2016. It will be served electronically via CM/ECF to all counsel of record and other registered participants of the Court's CM/ECF system. I hereby certify that paper copies will be sent to all participants not registered in CM/ECF.

*Signed:*                    /s/ Walter E. Tuvell

*Dated:*                    June 15, 2016

UNFILED

# ARGUMENT

## Introduction

The courts' errors are categorized into two general (intertwined)<sup>9</sup> classes:

(A) “**PSOF-Exclusion**” errors.

(B) “**QDI-Exclusion**” errors.

We first discuss PSOF-exclusion, which is deeply rooted in the *summary judgment standard of review*. Our analysis must begin there.

## Summary Judgment Standard Of Review (SJSOR)

This case is currently in the posture of appellate review over IBM's motion for *summary judgment*. As such, the **SJSOR** (Summary Judgment Standard of Review) governs the proceedings, both at district court (upon initial review) and at appellate panel (upon independent non-deferential plenary *de novo* review). We argue that, while the courts *paid lip service* to the SJSOR (op., pp. 1–2), they **utterly failed to observe** that standard, resulting in a wrongful decision.

The SJSOR, as promulgated by, e.g., *Sensing* (§ II(A), pp. 152–153) and its many parents, siblings and progeny, **strictly mandates the duties** incumbent upon any tribunal reviewing summary judgment. We formulate the SJSOR as a rubric of six (6) **core tenets**:<sup>10</sup>

- (A) **All Issues** — *All* (not just “some”) *issues*, especially *disputed genuine issues of material fact* (“**DFs**”),<sup>11</sup> **must** be considered (“admitted into discussion”).
- (B) **Whole Record** — The *entire* (not just “part” of the) *record as a whole, concerning each and every issue*, **must** be considered.
- (C) **In Context** — Issues **must** be considered *in the context* of the record-as-a-whole (as opposed to “out-of-context line-by-line isolation”).<sup>12</sup>
- (D) **Non-Movant Trumps Movant** — Issues **must** be *construed* in the *light most favorable* to, and *credit awarded* to, *non-movant* (not to movant).
- (E) **All Inferences** — *All* (not just “some”) *reasonable inferences* from these tenets **must** also be *favorably interpreted* and *credited* to *non-movant*.<sup>13</sup>
- (F) **Light Burden** — Non-movant bears only the *light burden* of *mere production* of facts; he *need* offer *only de minimus* (i.e., non-conclusory) proof/persuasion, and *no* legal theories supporting relief (but he *may* offer some of either). **Fact-finding is for the jury at trial, not for the court at summary judgment.**<sup>14</sup> “Enough evidence” is *not* a criterion (though sometimes colloquially cited).

To belabor the obvious: “**must**” here means *mandatory*. The reviewing tribunal has *absolutely no discretion* in the matter (by self-imposed, advertised, rule).

## **PSOF (Plaintiff’s Statement Of Facts)**

Conforming to customary practice for summary judgment in the 1st Circuit (see FRCP 56 and LR 56.1), seven (7) **key documents** were filed by the parties in this case, none of which was flagged as defective, and all of which are officially included in the record of this case forwarded to the appellate panel:

- (A) **DSOF** — Defendant’s Statement of Facts, Dkt. 74 (Dec. 15, 2014).

- (B) **DMemo** — Defendant’s Memorandum in Support of Summary Judgment, Dkt. 75 (Dec. 15, 2014).
- (C) **RespDSOF** — Plaintiff’s Response to DSOF, Dkt. 82 (Feb. 12, 2015). Note that RespDSOF refers to PSOF nineteen (19) times. Of the two, RespDSOF is *reactive* (to the DSOF), while PSOF is the *active* one. Both must be credited.
- (D) **PSOF**<sup>15</sup> — Plaintiff’s Statement of Facts, Dkt. 83 (Feb. 12, 2015). It explicitly declares on its face that it is submitted “[p]ursuant to LR 56.1”.
- (E) **PMemo** — Plaintiff’s Memorandum in Opposition to Summary Judgment, Dkt. 85 (Feb. 12, 2015).
- (F) **RepPMemo** — Defendant’s Reply to PMemo, Dkt. 86 (Mar. 2, 2015).
- (G) **RespPSOF** — Defendant’s Response to PSOF, Dkt. 87 (Mar. 2, 2015).

In customary practice, and by inspection in the present case, the **PSOF** is the *most important* of these key documents to be considered at summary judgment time, *above and beyond the others* (RespDSOF is second most important, but is *limited* by being *reactive* to DSOF). For, by the SJSOR (“non-movant trumps movant” tenet), the PSOF *determines* the first-tier “facts/DFs of the case” *that courts must credit*. The DSOF is consigned to a second-tier “jaundiced view”.

But that (“*courts must credit*”) did not happen.

## **PSOF-Exclusion**

With that background, the “PSOF-exclusion” class of errors can now be defined like this (with a great deal of explication to follow):

**PSOF-EXCLUSION THESIS: The courts subtly<sup>16</sup> excluded, ignored and overlooked the PSOF (failing to consider and credit it, or even acknowledge its existence), misapprehending its crucial significance with no justification whatever (explicit or implicit, intentional or inadvertent), though the courts were unconditionally required to include it. The courts thus patently failed to hew to the SJSOR's strict "all issues" and "whole record" tenets. The courts resultantly improperly/erroneously/falsefully resolved disputed facts in favor of movant, thus violating the SJSOR's "non-movant trumps movant" tenet too. This was grave legal error of procedural law ("basic rules of the game").<sup>17</sup>**

This pervasive PSOF-exclusion maneuver/scheme, originating with the district court and propagated to the appellate panel, comprises the crux issue (root cause) for many of the arguments in this *Petition*. It was a *systemic error* of procedural law that tainted every aspect of the courts' reasoning, and inevitably spawned further, derivative, errors.

As *proof of our thesis*, we begin by noting four (4) characteristics of the courts' treatment of the above seven (7) key documents:

- (A) Only two (2) of the key documents — DSOF, RespDSOF — are *listed* (op., p. 2) among the documents the courts relied upon for their facts, "*unless otherwise noted.*"
- (B) Close inspection<sup>18</sup> reveals that only two (2) of the key documents — DMemo, PMemo — were in fact "*otherwise noted.*"

- (C) That leaves fully three (3) of the key documents — PSOF, RepPMemo, RespPSOF — *completely unacknowledged* as a source for the courts’ facts.
- (D) Most conspicuous (by its *absence*) was the crucial PSOF — which was pointedly **entirely invisible** from the courts’ blind vision of the case.

Continuing with our proof, deeper analysis (presented in separate sections, below) reveals that the courts’ PSOF-exclusion principle: (i) not merely “passively neglected to mention” the PSOF; (ii) but actively had adverse consequences to Tuvell, namely, crediting many of IBM’s facts (instead of Tuvell’s) which were in actual substantive conflict and dispute with the PSOF (“movant trumped non-movant” — 180° the wrong way around from the SJSOR). The courts, by “explicitly nowhere observing” the PSOF, silently (without rationale or explanation) elevated the DSOF to dominance, and relegated the PSOF to obscurity. The courts thereby failed to meet the SJSOR “whole record” tenet, because they considered only an inexplicably-chosen “non-PSOF subset”. Plaintiff’s banished PSOF facts were *not permitted to figure at all into DF calculations* — though the SJSOR (“all issues” tenet) strictly mandates that *all* of plaintiff’s facts (especially those within the PSOF) *must* be considered, acknowledged, referenced, and credited (SJSOR “non-movant trumps movant”). The courts thus wreaked massive havoc, blatantly misstating the genuine material DFs of this case. That is *ipso facto* illegitimate.

The courts’ systemic failure to consider and credit the utterly crucial PSOF wholly eviscerated the SJSOR “all issues” tenet, to plaintiff’s great detriment. The

wrongful PSOF-exclusion, together with its consequent “unreasonable non-inferences”, comprehensively disemboweled Plaintiff’s case — because only the crucial PSOF could hope to reveal the many DFs that do indeed exist in this case (and which only a trial, not summary judgment, can resolve).

**The courts’ failure to allow plaintiff’s PSOF to figure into the DF calculus constituted egregious, harmful, fatal error, causing a false opinion to be rendered, which must be corrected (vacated/reversed and remanded).**

Once the PSOF-exclusion error was ensconced into place, it became the systemic progenitor of many additional errors flowing from it — as will be reviewed in separate sections, below (by referencing certain relevant facts asserted in the PSOF).<sup>19</sup> Due to space limitations, not all such PSOF-driven facts can be individually addressed in detail here; but our arguments are generalizable, and all of Plaintiff’s arguments on the record, hereby reasserted, continue to remain in full force (are not waived). All facts asserted in the PSOF, if properly credited, provide numerous potential reasons (to the extent they are genuine and material) to correct the courts’ opinion, and deny IBM’s motion for summary judgment.

*Q.E.D. (PSOF-Exclusion thesis, modulo forward references to separate sections below.)*



## PSOF-Exclusion With Particularity

High-level PSOF-exclusion errors tainted many areas of the courts’ opinion, spawning low-level errors many times over. We present here a discrete “particularized” list (FRAP 40(a)(2)) of specific PSOF facts that the courts were required to consider/credit, but erroneously didn’t (in whole or in part, recalling the SJSOR’s “all issues” and “whole record”): ¶¶ 1, 3–8, 10–18, 21–32, 35–40, 42–52, 54–91 (all hereby incorporated by reference).

As for *with-particularity fact-areas* where PSOF-exclusion factored heavily in the courts’ wrongful rejection of Tuvell’s arguments, we cite these:

- (A) **Three-Way Meeting; Yelling; Demotion/Reassignment.** A whole section is devoted to this topic, below.
- (B) **Retaliation.**<sup>20</sup> Op., p. 26.
- (C) **Investigation.** Op., p. 25, fn. 9.
- (D) **Hostile work environment** (especially “*hyper-critical hyper-scrutiny*” [a well-known blackballing/retaliatory tactic], such as: (i) “bad” [though *protected*]<sup>21</sup> emails; (ii) “lazy” letter; (iii) Formal Warning Letter; (iv) complaining to “too many” people [also *protected*];<sup>22</sup> (v) complaining to upper management [also *protected*];<sup>23</sup> (vi) other tangible acts). Op., pp. 23–25.

## Prototype: Excel Graphics

Let the “Excel graphics” episode stand for our *prototypical example* of PSOF-exclusion error. We proceed to present an *illustrative rigorous proof* of the courts’ error for this example. This example argument/proof generalizes, *mutatis mutan-*

dis, to all items in the “particularized” PSOF-exclusion list, above.<sup>24</sup>

IBM asserts, and the courts accept (op., p.3), concerning the Excel graphics episode, that “Mr. Knabe advised Mr. Feldman that [Tuvell] had failed to complete a work assignment [the Excel graphics] in a timely fashion” (DSOF ¶ 7, p. 2). This instance of IBM’s assertion, and all other instances of the assertion, explicitly or implicitly stand for the proposition that Knabe’s report to Feldman was true. Indeed, Knabe himself has given sworn testimony that he “ask[ed] Mr. Tuvell to provide those [Excel] graphics” (Knabe dep., p. 35).

Tuvell asserts, and the courts reject, the diametrically opposite proposition, that Knabe’s report to Feldman was false (RespDSOF ¶ 7, p. 3; PSOF ¶¶ 1, 3–4, pp. 1–2), with properly provided adequate proof per SJSOR’s “light burden” tenet.<sup>25</sup>

According to the SJSOR (“non-movant trumps movant”), the courts were *tightly bound* to credit Tuvell’s version of the Excel graphics episode/fact, not IBM’s version. But they did the *exact opposite* (op., p. 3).

Now, the opposed stances (“true” vs. “false”) of the parties in this example *proves* that the Excel graphics episode/fact was a true DF (“disputed fact”, which is obviously “genuine” and “material”, since the Excel graphics episode kicked off the whole avalanche of all facts in this case). But existence of even a *single* DF, such as this, already suffices to *defeat* a motion for summary judgment (by SJ-

SOR’s “all issues”). This therefore *proves* rigorously that the courts *erred* in *granting* summary judgment.

*Q.E.D. (Excel graphics example.)*

## **Three-Way Meeting; Yelling; Demotion/Reassignment**

Going beyond PSOF-exclusion “*discrete facts*” mentioned above, this section analyzes a PSOF-exclusion “*fact-area*” which is “particularized” in a different sense, namely, to Tuvell’s individual circumstances.

PSOF ¶¶ 2, 5–8, pp. 1–3, asserts factual statements of injuries (psychological PTSD retraumatization, yelling incident [defamation, see below], undesirable demotion/reassignment, continuing harassment), and Tuvell’s protests thereto, and his requests for three-way meeting. By the SJSOR (“all issues”, “non-movant trumps movant”, “all inferences”), the courts were bound to credit these PSOF facts. But they *failed* to do so. We proceed to *prove* this.

The “stressor” (as it is technically called) for the retriggering of Tuvell’s PTSD was IBM’s falsity regarding the Excel graphics episode. Tuvell’s retraumatization prompted him to explicitly reveal his PTSD affliction to IBM on May 26, 2011 (PSOF ¶ 10, p. 3) (though implicitly it had been objectively apparent prior to that), and to cite his PTSD as the impetus for his requests for three-way meeting as reasonable accommodation therefor. Tuvell was initially worried about the specter

of “mere defamation”.<sup>26</sup>

But as time went on, and the abusive behavior escalated (notably the yelling incident, and especially Feldman’s continued refusal of requests for three-way meeting), the pretextual nature of IBM’s behaviors led Tuvell to conclude (justifiably, by the *pretext-only* theory; *Bulwer, Reeves*),<sup>27</sup> that something “*seriously more illegal* than defamation” must be motivating IBM’s behavior, namely discrimination and/or retaliation based on some combination of protected characteristics (age, sex, race, ultimately PTSD disability). This prompted Tuvell to upgrade his “mere defamation” complaint to IBM accordingly.

At that point, having been properly apprised of Tuvell’s PTSD status and notified of his discrimination/retaliation claims, IBM was required by the ADA to engage with Tuvell in an interactive process/dialogue concerning accommodation, and award him the three-way meeting he’d been requesting so urgently. But not only did IBM refuse to engage in interactive discussion or award three-way meeting, it took the plainly discriminatory/retaliatory step of unilaterally demoting/reassigning Tuvell to an position undesired by Tuvell — again based on Knabe’s falsity (about his reason for yelling). This trammled Tuvell’s rights under such decisions as *Humphrey*<sup>28</sup> and *BNSF v. White*<sup>29</sup> (see PSOF ¶¶ 14–17, pp. 4–5).

The courts were bound by the SJSOR (“non-movant trumps movant”, “all inferences”) to credit these PSOF facts, and were further bound (by *Humphrey* and

*BNSF v. White*) to find that IBM was guilty of failure to engage in interactive process, of failure to accommodate (three-way meeting), and of discrimination/retaliation (demotion/reassignment). But the courts failed to do so. That was error.

*Q.E.D. (Three-way meeting; yelling; demotion/reassignment.)*

## **QDI: MTR; STD; “Totally Disabled”; And All That**

The “QDI-exclusion” class of errors refers to the courts’ wrongful crediting of IBM’s woefully flawed (but superficially plausible-sounding)<sup>30</sup> “*totally disabled*”/not-QDI argument, which goes like this:

- (A) On his **MTRs** (Medical Treatment Reports), Tuvell’s health-care providers checked certain “*totally disabled*” check-boxes, and circled certain number-choices consistent with typical PTSD symptoms<sup>31</sup> and with Tuvell’s particular circumstances.<sup>32</sup>
- (B) “Therefore” Tuvell *was “totally disabled from being able to do his job, or indeed any job of any kind”* (paraphrased; IBM Appellate Brief, p. 43).
- (C) **IF** this “totally disabled” argument were valid/creditable (which it isn’t!), then of course Tuvell would not be a “**QDI (Qualified Disabled Individual) in the sense of the ADA**” — that is, he would not be able to: “perform all essential job functions, *with or without reasonable accommodation*.” That in turn would mean that Tuvell was not covered by the ADA at all (since QDI is a prerequisite for ADA coverage), so all his ADA claims would automatically fail.

**QDI-EXCLUSION THESIS: The courts (op., p. 13) wrongly credited the above “totally disabled”/not-QDI argument, thereby excluding all of Tuvell’s issues that were QDI related. It was grievous error for the courts to do so.**

As *proof of our thesis*, we now present no fewer than five (5) (!) “clear and convincing arguments” that IBM’s “totally disabled”/not-QDI argument is utterly specious and false, on many different levels. Each one yields a proof of our thesis.

**First Proof** — Tuvell’s MTRs were filed for the *sole purpose* of **STD** (short-term disability) benefits (leave), and *not* for any ADA purpose whatsoever; this is undisputed.<sup>33</sup> And in *that* (STD) context, Tuvell’s health-care providers routinely<sup>34</sup> filled out the MTRs, correctly and accurately, with the *meaning*<sup>35</sup> that: (i) under the PTSD-exacerbating conditions Tuvell found himself subjected to, he was (temporarily<sup>36</sup>) able to perform only 0% of his *job-as-assigned functions (essential or not)*<sup>37</sup> without accommodation; and (ii) that he could work only 0% with his harassers Feldman and Knabe (but could work 100% with all non-harassers). The problem for IBM is that double-underlined phrase in the preceding sentence: the very terms of IBM’s own STD plan did not include a “with or without accommodation” clause<sup>38</sup> — and so, the STD MTRs are *inconsistent with (inapplicable to)* the ADA concept of “with or without accommodation”. Since the courts unquestioningly swallowed IBM’s bait to interpret the MTRs *out-of-context* in the non-STD ADA manner, the courts thereby *violated* the SJSOR (“in context” tenet). That was error, harmful to Tuvell. *Q.E.D. (QDI-Exclusion thesis.)*

**Second Proof** — The MTRs are very short documents (2 pages each), so everything on an MTR is naturally in the *context* of everything else. Importantly, Tu-

vell's health-care providers inscribed certain short (but extremely informative) free-form narrative writing (as opposed to mere check-box-checking and number-circling) on the MTRs. That inscribed writing indicated Tuvell could function well if he were just *accommodated*, to the extent of removing the abuse that was being committed upon him.<sup>39</sup> Yet, the courts unhesitatingly accepted IBM's insinuation to interpret the MTRs in an *out-of-context* ("line-by-line isolation") manner, looking only at the checked-boxes and circled-numbers, and closed its eyes to the inscribed writing. The courts thereby again *violated* the SJSOR ("whole record", "in context", "non-movant trumps movant"). That was error, harmful to Tuvell.

*Q.E.D. (QDI-Exclusion thesis.)*

**Third Proof** — IBM's "totally disabled" argument had its after-the-fact genesis with IBM's *external lawyers* (at the MCAD hearings on this case) — the argument was never raised (or claimed to be raised) by anyone at IBM *at the time of events*, as IBM's own *internal lawyer*, Bliss, has self-admitted.<sup>40</sup> Since it was concocted after-the-fact, IBM's "totally disabled" argument was by definition post hoc rationalization for earlier actions (namely, any action depending on "not-QDI" for its rationale, such as denial of transfer) — that is, it was by definition pretextual ("not the real reason"). Hence, the courts' wrongful acceptance of IBM's pretext here again abridges Tuvell's pretext-only rights under *Bulwer* and *Reeves*.

*Q.E.D. (QDI-Exclusion thesis.)*

**Fourth Proof** — IBM’s “totally disabled” argument must not be credited in any event (even ignoring pretext), though the courts erroneously did so, due to the on-point holding of *Cleveland* (pp. 802–803, commentary added, internal punctuation omitted, emphasis in original and also added) and its accords:<sup>41</sup>

[D]espite the [misleading, mere] *appearance* of conflict that arises from the [superficial, out-of-context] *language* of the two statutes [SSDI (analogous to STD, both having **no** “reasonable accommodation” clause) and ADA] ... the two claims *do not inherently conflict* ... because there are too many situations in which an SSDI claim and an ADA claim can *comfortably exist side by side* [even if claimant or health-care providers declare “total disability” on disability benefits application (recalling en. 35)] ... [especially since] the ADA defines a “qualified disabled individual” to include a disabled person who can perform the essential functions of her job *with reasonable accommodation* [as *Tuvell* declares in this case (plaintiff’s Appellate Brief, p. 29), and which the court *must* credit, by the SJSOR “non-movant trumps movant” and “all inferences” tenets] [but SSDI does not have such a clause].

*Q.E.D. (QDI-Exclusion thesis.)*

**Fifth Proof** — IBM *knew at the time* it terminated Tuvell that he was working for another company (though Tuvell didn’t disclose the identity of that company, Imprivata, at the time of events). So IBM knew Tuvell couldn’t possibly have been “disabled from working at ‘any’ job”, as IBM now claims (IBM Appellate Brief, p. 43). So yet again we see that IBM’s “totally disabled” argument was *false/pretextual*, and the courts erred yet again by agreeing with IBM, and again violating the SJSOR (“whole record” tenet this time). *Q.E.D. (QDI-Exclusion thesis.)*



## **QDI-Exclusion With Particularity**

High-level not-QDI errors tainted many areas of the courts' opinion, spawning low-level errors many times over. We present here a "particularized" list (FRAP 40(a)(2)) of not-QDI fact-areas the courts erroneously *excluded*, though they were *required to include* them. For, the courts' exclusions of these fact-areas were wholly predicated on the now-discredited "totally disabled"/not-QDI argument.<sup>42</sup>

(A) **Accommodation;**<sup>43</sup> **interactive process; transfer.** Op., pp. 16, 20.

(B) **Discrimination;**<sup>44</sup> **retaliation.** Op., p. 21.

(C) **Termination.** Op., p. 22. At this time, we further bring one *additional* argument regarding the termination:<sup>45</sup> the courts' decision abridged Tuvell's "symptoms-of-disability" rights under *Humphrey*.<sup>46</sup>

## **Conclusion**

For the reasons presented herein, plaintiff's claims (Complaint, Dkt. 10; Appellate briefs, principal and reply; etc.) were wrongly rejected. The courts' decision granting summary judgment in this case was patent error (stemming from the "PSOF-exclusion" and "QDI-exclusion" blunders), and must be corrected. Without correction, manifest injustice results; fairness and truth suffer.

No employment case can be secretly deemed "*too big (complicated) to succeed*". That would provide a *carte blanche* "*how-to*" *blueprint* for employers to blithely commit illegal discrimination/retaliation.

## ENDNOTES

- 1 Dual-purpose (FRAP 35, 40) petitions are explicitly envisioned, hence implicitly permitted, by FRAP 35(b)(3).
- 2 FRAP 40.
- 3 FRAP 40(a)(2) (emphasis added): “[E]ach point of law or fact that the petitioner believes the *court has overlooked or misapprehended*”. These points need not be listed here at the beginning; instead, they are stated with particularity and argued in context, below.
- 4 FRAP 35.
- 5 FRAP 35(b)(1) and 35(b)(1)(A) (emphasis added): “The petition must begin with a statement that ... the *panel decision conflicts* with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases)”.
- 6 FRAP 35(b)(1) and 35(b)(1)(B) (emphasis added): “The petition must begin with a statement that ... the proceeding ... involves an issue on which the *panel decision conflicts* with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.” Such cases are listed in the *CASES CITED* section, with citations given in the *ARGUMENT* section, below.
- 7 Neither FRAP 35 nor 40 requires citation to applicable authoritative state law (but they do not forbid it, either).
- 8 FRAP 35(b)(1) and 35(b)(1)(A): “The petition must begin with ... citation to the conflicting case or cases”. Additional particularized citations are given in context, below. (Note that a “Table of Authorities” is not required.)
- 9 A prime example of how PSOF-exclusion and QDI-exclusion are intertwined occurs in the courts’ handling of Tuvell’s *discrimination* claims: see en. 44 in the *QDI-Ex-*

*clusion With Particularity* section.

- 10 Or “axioms,” if you will, since these are the fundamental, “given,” not-to-be-ques-  
tioned, rules of engagement, upon which further consequences are based.
- 11 As used herein, unless otherwise explicitly noted or implicitly deducible from con-  
text: (i) “*issue* [of dispute]” means “*genuine issue*”; (ii) “*facts* [of the case]” means  
“*material facts*”. In turn, the terms “genuine” and “material” are used with their  
meanings as defined in *Sensing*, p. 152: (i) “*genuine*” means “can be resolved in fa-  
vor of either party”; (ii) “*material*” means “has the potential of affecting the out-  
come of the case”.
- 12 The “in context” tenet doesn’t appear explicitly in *Sensing*, but is imputed implicitly  
as a corollary of the “whole record” tenet from numerous other sources (the leading  
one being simply “Context matters”, *BNSF v. White*, p. 69). The danger of out-of-  
context snippets, seen many times in IBM’s filings in this case, is well-captured in  
Cardinal Richelieu’s famous cynical aphorism: “If you give me six lines written by  
the hand of the most honest of men, I will find something in them which will hang  
him.”
- 13 The continuing vitality and axiomatic nature of the SJSOR’s “non-movant trumps  
movant” and “all inferences” tenets recently figured in a rare “error-correction”  
(summary vacation) reprimand of the 5th Cir. by the Supreme Court (*Tolan*, p. 1, in-  
ternal punctuation suppressed, emphasis added): “In articulating the factual context  
of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion  
for summary judgment, [t]he evidence of the *nonmovant is to be believed*, and *all*  
*justifiable inferences* are to be drawn in his favor.”
- 14 “*De minimus*” *proof/persuasion of facts* means mere demonstration that a *reason-*  
*able trier of fact could possibly* (> 0% probability) *resolve facts* in non-movant’s fa-  
vor. As a general rule (*though not always*), that requires production of evidence of

“significant probative value”, which means a “non-conclusory reason” that fact-finder can arguably hang their hat on (“> 0% probability”). However, the clause “*though not always*” does indeed apply in Tuvell’s case. For, by case law in the *context of employment discrimination and retaliation*, a showing of *causative facts* is *not* required: instead, a mere showing of pretext (“not-the-true-reason”), without more (that is, without a showing of actual discriminatory or retaliatory *animus*), already suffices to defeat summary judgment — by the so-called “**pretext-only**” holdings of *Reeves* and *Bulwer* (see below in this endnote). Since Tuvell’s PSOF does indeed provide many instances of such pretext (with SJSOR-sufficient “light burden” *showings of pretext* [not necessarily showings of substantive discrimination/retaliation; *Reeves, Bulwer*], via such accepted forms as “contradictory statements” and “shifting explanations”), the courts’ opinion conflicts with authority:

**(i)** *Reeves* (p. 147, emphasis added): “[O]nce the employer’s justification has been eliminated, discrimination may well be the *most likely* [> 50% probability] alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.”

**(ii)** *Bulwer* (slip opinion, p. 19, internal punctuation omitted, emphasis added): “[T]he burden of persuasion at summary judgment remains with the *defendants* [not plaintiff], who, as the *moving parties*, have the burden of *affirmatively demonstrating the [total] absence* of a genuine issue of material fact on every relevant issue, *even if* they would not have the burden on an issue if the case were to go to trial.”

- 15 The PSOF in this case obviously (by inspection) satisfies the pleading criteria of the SJSOR, *Sensing*, p. 152, internal punctuation omitted (see also en. 14): “Once the moving party has pointed to the [alleged] absence of adequate evidence supporting the nonmoving party’s case [DSOF], the nonmoving party must come forward with facts that show a genuine issue for trial [PSOF]. ... At this [summary judgment] stage, the nonmoving party may not rest upon mere [conclusory] allegation or denials [RespDSOF] of the movant’s pleading, but must set forth specific facts show-

ing that there is [existence of] a genuine issue of material fact [DF] as to each issue upon which he would bear the ultimate burden of proof at trial [such proof is not required at summary judgment stage though].”

- 16 Invisibly; *sub silentio*; the courts “*paid no attention*” to the PSOF. When we say the courts “excluded/ignored” the PSOF, we’re *not* saying the courts “*said*” they were excluding/ignoring it — we are saying they simply “*did*” exclude/ignore it (from all externally detectable points-of-view we can imagine). Perhaps inadvertently. In particular, we are *not* arguing that the PSOF was “rejected” or “stricken” by the courts, for that kind of language would connote a *positive act* (with a motive), which we do not perceive.
- 17 Also called “judicial thumb on the scale.” If this were done *intentionally* (which we do not allege, see en. 16), it would even qualify as judicial misconduct.
- 18 Aided by the search functionality of a word processing program.
- 19 In some instances, certain offers of proof or of legal theories may be included (many others exist) in our arguments, but those offers are *optional*; see fn. † in the *AUTHORITY* section. See also en. 14.
- 20 For which we rely on the main teaching of *BNSF v. White*, p. 57 (emphasis added), to the effect that: “[T]he anti-retaliation provision ... covers those (and only those) employer actions (or inactions, such as denial of three-way meeting) that would have been materially adverse to a reasonable employee or job applicant. In the present context [of retaliation] that means that the employer’s actions must be harmful to the point that they *could well dissuade a reasonable worker from making or supporting a charge of discrimination.*”
- 21 Because under the aegis of *course/conduct/context* of complaints about discrimination and retaliation.
- 22 EEOC Compliance Manual, § 8, Retaliation, May 20, 1998, at 8-II(B)(2), emphasis

added: “Examples of Opposition: *Complaining to anyone* about alleged discrimination against oneself or others.”

- 23 Because *ordained and solicited* by IBM policy (Corporate Open Door process).
- 24 At the end of this section, we will claim our *argument* concerning the single Excel graphics episode, *standing by itself in isolation without more arguments*, already suffices to impel the courts to overturn their decision (by the SJSOR “all issues” tenet, because the Excel graphics is a true DF). But much more is also true: (i) the Excel graphics example is just a *prototype*, intended to be applied to all the “*particularized*” *PSOF facts* (see section on *PSOF-Exclusion With Particularity*), and those *in toto* further suffice to overturn the courts’ decision (by SJSOR “all issues”); (ii) the Excel graphics had material *consequences* (the domino effect of kicking off the whole avalanche of all facts of this case), and *all those consequential facts in aggregate* further suffice to overturn the courts’ opinion (by SJSOR “all inferences”). Another explicit example of such a “stand-alone impeller” for overturning the courts’ decision is given in the section on *Three-Way Meeting; Yelling; Demotion/Reassignment*, below.
- 25 The proffered SJSOR-style “light burden” adequate proof amounts to item (i) in the following list. More robust (non-required) offers of proof would include items (ii) and (iii) as well.
- (i)** In Mandel’s Open Door Report (IBM11168), Mandel reports that Knabe told Mandel *both* that Knabe “suggested” that Tuvell “use Excel charts”, *and* that Tuvell used a “nonstandard choice of operating system” which made it “*impossible* to run Microsoft Office tools such as Excel” (emphasis added). Further, Knabe also admitted at his deposition (p. 24) that he knew Mr. Tuvell “did not use Excel”, though he didn’t “recall the exact date” he learned this (it was certainly on or before Feb. 1, 2011, see item (ii) following). Feldman also admitted at his deposition (p. 39) that, as of May 18, 2011, he “knew that they [Microsoft Windows and Excel] were *not*

*installed* on his [Tuvell’s] system” (emphasis added). Those establish pretext (logically inconsistent self-contradiction).

**(ii)** In Mandel’s Open Door Report (IBM11169), Mandel reports that Knabe told Mandel that Tuvell did not “seem to have access [to Excel] or familiarity with a suitable Excel substitute”. However, Knabe had received an email from Tuvell (on Feb. 1, 2011, and Tuvell spoke to Knabe about that email within a day), wherein Tuvell wrote, “I work in OpenOffice [referring to the OpenOffice Calc program, which is a ‘suitable Excel substitute’], I’ve exported to Excel for you, hope it works.” Further, Knabe received another email from Tuvell (Apr. 7, 2011), containing a major technical document authored by Tuvell (“*PMtest.pdf*”) which Knabe himself had instructed Tuvell to produce, which Knabe admitted at his deposition (p. 110) demonstrated that Tuvell used a “very sophisticated . . . excellent” statistics and graphics package “[f]ar more sophisticated than” (hence a “suitable substitute for”) Excel. Those establish pretext (contradiction).

**(iii)** IBM has variously claimed that: (α) Tuvell “had not been able to produce” the Excel graphics (Knabe dep., p. 37); (β) Knabe “[didn’t] recall” when he learned that Tuvell “was not going to prepare” the graphics (Knabe dep., pp. 38–39); (γ) Knabe told Feldman that he was “frustrated” because Tuvell was “moving too slowly [on the Excel graphics] and [not] getting the tooling and tests done in a timely manner” (Mandel Open Door report, IBM11169; see also IBM’s response to Interrogatory 4, Sep. 26, 2013); (δ) Feldman claimed Knabe “complained about Excel graphics not being produced in a timely fashion”, yet he “[couldn’t] recall” exactly what Knabe said about it, and he recalled nothing else about the conversation (Feldman dep., p. 38); (ε) Knabe “[didn’t] recall” telling Tuvell of any deadline for the graphics (Knabe dep., p. 39); (ζ) Feldman did recall Knabe “asked for a specific deliverable [the graphics in Excel format] and a specific time frame” (Feldman dep., pp. 39–40); (η) Knabe thought Tuvell “did not appear to grasp [or] comprehend” what Knabe wanted with regard to the graphics (Mandel Open Door report, IBM11168); (θ) Kn-

abe reported “Tuvell offered to generate the data [for the graphics] in a usable [comma-separated value, CSV] format” (Mandel Open Door report, IBM11168); (i) Knabe “[didn’t] recall” whether Tuvell offered to help Knabe reformat in CSV format (Knabe dep., p. 39); (κ) Knabe “made a quick sketch [on a Post-It Note] showing a series of strip charts, each with all three quantities plotted” (Mandel Open Door report, IBM11168); (λ) Knabe “[didn’t] know” if he provided Tuvell with said Post-It Note (Knabe dep., p. 40); (μ) Knabe did not recognize the Post-It Note when presented to him, nor whether it related to the graphics Knabe requested of Tuvell (Knabe dep., p. 40), but then later did recognize it (Knabe dep., p. 143); (ν) the Post-It Note bears no resemblance whatsoever to Knabe’s description of it (it contained no “three quantities plotted”; see the Post-It Note itself, and Knabe dep., pp. 143–145); (ξ) Knabe himself admitted that to derive Knabe’s desired Excel graphics from the Post-It Note “would be extremely difficult ... [and] would require clairvoyance [mind-reading]” (Knabe dep., pp. 107–108); (ο) “Mr. Knabe states that while [Tuvell’s] reports contained much useful data, it [was] difficult to analyze the information because there were over 20 reports, each in a separate file corresponding to a different test, making it difficult to recognize trends or patterns across tests. In addition, the choice of ASCII art made it difficult to understand any particular test’s results because three separate quantities were represented in three separate graphs, making it difficult to see at a glance how the different quantities were varying relative to each other over time and impossible to view the entire graph at once, as many extended for pages and pages. Mr. Knabe states that he suggested that Mr. Tuvell use Excel charts, because the data could be displayed far more concisely.” (Mandel Open Door report, IBM11167–11168); (π) Knabe “[didn’t] recall” why he wanted Tuvell to make the graphics (Knabe dep., p. 43), or why he needed the graphics (Knabe dep., p. 44); (ρ) Feldman claimed at his deposition (p. 39) that Tuvell “essentially refused [to Dan’s face] to produce Excel graphics,” yet he also “[couldn’t] remember if Tuvell den[ied] that he had even been asked to produce Excel graphics”;



- (σ) etc. Those establish pretext (shifting contradictory and/or significantly different explanations).
- 26 Workplace abuse, particularly defamation, is the main stressor that exacerbates Tuvell’s personal/peculiar “flavor” of PTSD. The legal theory underlying Tuvell’s fear of defamation is that known-false attack on reputation in regard of vocation constitutes defamation *per se* (without proof of special damages). Tuvell was familiar with this legal theory because he’d experienced workplace defamation abuse previously, at a different employer, as Tuvell told Feldman at their meeting on May 26, 2011.
- 27 For unknown reasons, the courts rely on a case (*Che v. Mass. Bay Transp. Auth.*, op., p. 23) that promotes a “**pretext-plus**” theory, which is *no longer good law*. The courts even go so far as to repeat their no-longer-good-law pretext-plus bias in their argument in the first paragraph of op., p. 17.
- 28 *Humphrey* (pp. 1139–1140, emphasis added): “For purposes of the ADA, with [only] a few exceptions, conduct resulting from a disability [such as Tuvell’s great fear of pretext-based harassment] is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination [or other adverse act, such as demotion/reassignment] is particularly strong where it is the employer’s *failure to reasonably accommodate a known disability* [such as granting three-way meeting] that leads to discharge [or other adverse acts] for performance inadequacies resulting from that disability.”
- 29 *BNSF v. White* (pp. 71, 80, Alito’s concurrence, emphasis added): “Based on th[e] record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee [at least in retaliation cases].” “[R]eassignment was ... virtually an admission that respondent was *demoted* when [] responsibilities were taken from her [at least in retaliation cases]”.

- 30 See *Cleveland's* comment about *confusion of language*, in the Fourth Proof, below.
- 31 PTSD is a serious affliction, and has some symptoms that can be “scary-sounding” to the uninitiated. (One of the goals is to protect disabled individuals from stereotyping and stigmatization prejudice based on “scary-sounding” symptoms.) Amongst the typical symptoms, all of which were exhibited by Tuvell in some degree, are hyper-vigilance, hyper-arousal, hyper-reactivity, hyper-startle, hyper-focus and hypo-mania.
- 32 Tuvell’s PTSD is specifically sensitive to workplace bullying/harassment/abuse (colloquially, “blackballing”), especially defamation.
- 33 At oral argument for this case (Apr. 5, 2016), IBM’s counsel admitted for-the-record that: “[I]n each of those MTRs, he [Tuvell] was described as ‘totally disabled’ from working. These [the MTRs] are the basis on which he sought and received short-term disability [STD].” This proves *both* that: (i) the MTRs were indeed submitted *for the purpose of STD* (not for any ADA-related reason); and (ii) IBM *believed* the MTRs’ contention that Tuvell “had PTSD” (for otherwise Tuvell *wouldn’t* have received the STD leaves).
- 34 That is, neither Tuvell nor his health-care providers had any idea at the time they innocently filled out the MTRs that IBM would try to pervert the MTRs in out-of-context twisted ways to pretend they reported “bad” things about him that were never intended. See Cardinal Richelieu’s aphorism in en. 12.
- 35 Ross dep., p. 80 (emphasis added):
- Q.** So your belief that Mr. Tuvell could not return to the work situation was that his [e]motions were so intense [due to PTSD] that it was going to *retrigger all of the things that you are talking about*, his not sleeping, his obsessive thoughts, his depression, *all of that?* Just going into that building and seeing *Dan Feldman and Fritz Knabe* might trigger those strong reactions?

A. Yes.

Q. And so *that's the reason* that you indicated that for *some [temporary] period of time* he was *totally impaired* from work?

A. *I did*, and I was concerned for his mental stability *at the time*.

- 36 Noting that PTSD has only intermittent disabling active phases, it is nevertheless fully recognized by the ADA, as emphasized by the ADA Amendments Act (ADAAA), 29 CFR Ch. XXIV § 1630.2(j)(3)(iii): “[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: ... post-traumatic stress disorder ... substantially limit[s] brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.”
- 37 Working for a specified individual supervisor was *not* an “essential job function” for Tuvell’s job, because the position existed independently of the identity of the group’s supervisor.
- 38 The MTRs were governed by IBM’s STD policy (employee handbook contract), which only contemplates the employee’s *job-as-assigned* (not only “essential job functions”), *without accommodation*: “‘Unable to work’ means unable to perform the duties of the job you held at the time of your sickness or accident, or the duties of any other job IBM determines that you are capable of performing” (*About Your Benefits — Income & Asset Protection*, Document Number USHR109, Jul. 1, 2010, p. 15). We repeat again that *at the time of events*, nobody at IBM ever spoke to anyone (Tuvell or another) about any suspicion that Tuvell was “incapable” (“totally disabled”) of doing any job.
- 39 Because *context was ignored* at summary judgment, Tuvell’s rights were abridged. *In context*, alongside the rigid check-box/number-circling exercise, the MTRs (which are all in the record) carry the following important material in flexible narrative format inscribed by Tuvell’s health-care providers, which the courts were *bound*

to credit according to the SJSOR (“in context”, “whole record”, “non-movant trumps movant” tenets), but refused to do so:

**(i)** Ongoing acute stress symptoms, especially regarding perception of retaliation following sudden demotion without cause. Disruption of sleep, eating, symptoms of helplessness & anxiety. [MTR of Oct. 12, 2011.]

**(ii)** Pt. [patient] continues to experience intense triggering of symptoms with any reference to work environment & incident of demotion & lack of investigation. Symptoms of high reactivity, anxiety, and fear resume easily. [MTR of Nov. 3, 2011.]

**(iii)** Pt. continues to experience extreme triggering regarding workplace previously assigned. Only modification that would be possible is a change of supervisor & setting. Unable to return to previous setting w/ [with] current supervisor & setting. PTSD symptoms exacerbate immediately. [MTR of Dec. 19, 2011.]

40 Plaintiff’s Appellate Reply Brief (p. 1, Bliss letter dated Jan. 24, 2012 [*chronologically following* all MTRs, see en. 39], emphasis added): “The ADA does not require IBM to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell’s manager as a reasonable accommodation, since *Mr. Tuvell is capable of performing the job.*”

41 As already highlighted above, the courts’ verbiage in its decision at op., p. 14, fn. 5, is now invalidated because of the courts’ PSOF-exclusion.

42 And along with discreditation of the “totally disabled”/not-QDI argument, additional discreditations follow (by the SJSOR “all inferences” tenet), like a domino effect. As a result, *everything* in the courts’ decision tainted by the QDI-exclusion error is now invalidated, and must now be reopened for reconsideration (just as everything tainted by PSOF-exclusion must be reopened for reconsideration). Here are just three examples:

**(i)** The finding by the courts (op., pp. 15, 18) to the effect that Tuvell “could not and did not identify anyone who could serve as his manager in place of [] Feldman”, is

now shown to be hopelessly prejudicial (insinuating that “Tuvell could work for no one”) because of its misleading *out-of-context misrepresentation*. (So this is another place, in addition to ignoring the PSOF, where the courts blindly accepted IBM’s false arguments without actually consulting actual record.) In context, the actual transaction tells a very different story (Tuvell dep., vol. II, p. 89):

**Q.** Well, did you work for Dan Feldman’s group?

**A.** Yeah.

**Q.** Did you identify somebody there you thought could manage you? [*Where the second “you” refers to its immediate referent, Feldman’s group, not to Tuvell personally, or so Tuvell thought, as his next answer shows.*]

**A.** No. [*Tuvell answered this way because he was not a manager, so had no knowledge of the various criteria that figure into managerial promotions at IBM, such as qualifications, availability, desire, etc.*] It was certainly nobody in that group that I felt was qualified to be a manager of that group. Including me, of course.

**(ii)** The finding by the courts (op., p. 15) to the effect that “[a] position transfer would not guarantee that Tuvell would never have to see, or hear about, Feldman again”, is just plain silly. For, “seeing and hearing” Feldman was never a problem for Tuvell. All of Tuvell’s problems with Feldman arose in the context of *interacting* with Feldman as a bullying/harassment manager (see en. 35, “*the work situation*”), and if that reporting arrangement weren’t in effect the problem would disappear.

**(iii)** The finding of the courts (op., p. 18) to the effect of IBM’s giving Tuvell the “opportunity” to receive feedback and performance evaluations from Metzger (Feldman’s supervisor) as a “reasonable accommodation”, is too impossibly duplicitous to fathom. For, Tuvell’s problems with Feldman were related, not to performance evaluation *per se*, but to day-to-day manager/employee *interactions* (which would continue under IBM’s “opportunity”), and in any case it would still be Feldman who would send his (skewed) reports to Metzger, upon which Metzger would base his

feedback and performance evaluations. And that’s not even to mention that Metzger had already shown himself to be an ally of Knabe and Feldman, and a foe of Tuvell, and Tuvell had already accused him of wrongdoing in his internal complaints to IBM (which were forwarded to Metzger).

- 43 The courts’ citation of “likelihood of success [of proposed accommodation]” at op., p. 18, seems to be another example of the courts’ failure to observe the SJSOR’s “light burden” tenet. For, the courts seem to be hinting that a “*high* likelihood of success” is required; whereas the “light burden” tenet really requires only “> 0% probability.” See en. 14.
- 44 By its blanket citation to the *McDonnell Douglas* framework (op., p. 20, fn. 8), the courts cite an *incorrect standard* for Tuvell’s burden and nature of proof. That framework only applies to discrimination cases relying on *indirect evidence*. The *Tuvell* case, however, relies on a great deal of *direct evidence*, obviating the utility of *McDonnell Douglas* for almost all of *Tuvell*. No only that, but even if the courts *had* applied the correct (direct evidence) standard, they *still* would have missed the correct decision on this question of discrimination — because of *PSOF-exclusion* (because Tuvell’s direct evidence is raised in the PSOF, which the courts *ignored*).
- 45 It hasn’t been raised previously because it’s a legal theory, and it’s not necessary to raise legal theories at summary judgment time.
- 46 To be more specific about this legal theory: Tuvell’s *refusal to name* his new employer (Imprivata) to IBM — which IBM claims was the sole reason for his termination (DSOF ¶ 79, p. 17) — was prompted by Tuvell’s PTSD symptoms (en. 31), which caused him overwhelming fear that IBM would retaliate upon him by interfering with his advantageous relationship with Imprivata (PSOF ¶¶ 56–57, pp. 17–18). At the time, IBM *was well acquainted* with Tuvell’s PTSD, and that his refusal to name Imprivata was based precisely on his PTSD symptoms (Tuvell’s email of May 10, 2012: “I will, however, tell you why I refuse to inform you where I now

work. The reason is that I fear IBM, either by rogue individuals or corporately, would happily use such information to work back-channels to get me fired”). Therefore, according to *Humphrey* (en. 28), IBM terminated Tuvell for the very sole reason of his PTSD disability.