

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant

Civil Action No. 13-11292-DJC

**STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE
ISSUE TO BE TRIED IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT INTERNATIONAL BUSINESS MACHINES, INC.**

Pursuant to Local Rule 56.1, Defendant International Business Machines, Inc. (“IBM”) submits the following Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried in support of IBM’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**.

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in the Spring of 1997, in which Plaintiff claims that he was offered a job with Microsoft Corporation, but Microsoft rescinded the offer after Plaintiff and his wife visited Seattle, Washington to meet with Microsoft employees.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**.

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.

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.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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.**

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.**

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.**

**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.**

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.**

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.**

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.**

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.

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.

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**.

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**.

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**.

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**.

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.

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**.

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**.

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**.

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

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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**.

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.**

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.**

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.**

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.**

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.**

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.**

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**.

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.

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.

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.

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 decisionmakers 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**.

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**.

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.

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**.

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**.

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**.

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**.

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**.

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**.

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.

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.

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.

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.

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**.

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.

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.

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**.

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.

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.

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.

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.

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.

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**.

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**.

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**.

Respectfully submitted,

INTERNATIONAL BUSINESS
MACHINES, INC.,

By its attorneys,

/s/ Joan Ackerstein

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CERTIFICATE OF SERVICE

This is to certify that on December 15, 2014, a copy of the foregoing document was served upon all parties of record via the ECF system.

/s/ Matthew A. Porter

Jackson Lewis P.C.