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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

Civil Action
No. 13-11292-DJC

v.

March 12, 2015
2:52 p.m.

INTERNATIONAL BUSINESS
MACHINES, INC.,

Defendant.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
1 COURTHOUSE WAY
BOSTON, MA 02210

DEBRA M. JOYCE, FCRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on March 12, 2015.)

THE CLERK: Civil action 13-11292, Walter Tuvell v. IBM.

Would counsel please state your name for the record?

02:53 MR. MANTELL: For the plaintiff, Robert Mantell.

THE COURT: Good afternoon, counsel.

MS. ACKERSTEIN: Good afternoon. For the defendant, Joan Ackerstein and Matthew Porter.

THE COURT: Good afternoon.

MR. PORTER: Good afternoon, your Honor.

MR. MANTELL: Your Honor, I have my client, Walter Tuvell, with me. Would it be okay for him to sit --

THE COURT: He may, if you'd like to, sure.

Counsel -- good afternoon, sir.

02:53 Counsel, I know we're here on the defendant's motion for summary judgment. I also know there's a motion to strike which addresses certain of the affirmations by the -- assertions by the plaintiff in his supporting papers and some exhibits.

I think Ms. Hourihan may have talked to you about

1 time, but to the extent you want to use any of your time to
2 address the motion to strike, I've read those papers as well.

3 Counsel?

4 MS. ACKERSTEIN: Thank you, your Honor.

5 I'd like to speak principally about the motion for
6 summary judgment.

7 IBM has moved for judgment on the complaint in its
8 entirety. There are eight claims in the complaint, and while
9 there has been a lot of paper filed with the Court, your Honor,
02:54 10 the fact of the matter is, this is a case where there are very
11 few facts in dispute and also not much by the way of hard
12 economic loss. The plaintiff has acknowledged that he got
13 another job and the lost wages amount to \$21,000.

14 But the fact is, there are very few facts in dispute,
15 and I think it would help the Court if I just briefly outline
16 the facts which really are the subject of agreement.

17 Mr. Tuvell is a mathematician, a computer developer.
18 He began his employment with IBM in January of 2011 when IBM
19 acquired a company for whom he had been employed for a couple
02:55 20 of months.

21 From January to May 18th of 2011, he worked for IBM
22 uneventfully. What happens next between May 18th and June 9th
23 of 2011 are two ordinary workplace interactions which probably
24 happen all the time in workplaces.

25 On May 18th, Fritz Knabe, a man to whom the plaintiff

1 has a dotted line reporting authority, is unhappy the plaintiff
2 has not given him work product in a timely manner. He makes a
3 comment to Dan Feldman, the plaintiff's manager, and says he's
4 disappointed that the work has not been done in a timely
5 fashion. Mr. Feldman has a conversation with the plaintiff to
6 report that Mr. Knabe is unhappy. The plaintiff becomes
7 extraordinarily distressed about that interaction and over the
8 next few weeks is difficult to work with, demanding a meeting
9 about what happened. And about June 9th there is another
02:56 10 kerfuffle between Fritz Knabe and the plaintiff in which voices
11 are raised. Fritz Knabe then goes to Dan Feldman and says he
12 doesn't think he can work with the plaintiff any longer.

13 As a result of that, Mr. Feldman does what, again, is
14 not uncommon in a workplace. He says, I'm going to switch
15 assignments. So he meets with the plaintiff and he says,
16 Instead of working with Fritz Knabe, I'm going to put you on
17 another assignment and we're going to take another employee in
18 my group and have her work with Mr. Knabe. That employee
19 happens to be female, South Asian, and younger, and therefore,
02:57 20 the plaintiff immediately concludes that this is race, sex, and
21 gender discrimination. And so from about that point, June
22 13th -- and this is outlined in his complaint, which is very
23 detailed. From about June 13th to the end of June, his effort
24 is in talking to human resources at IBM about his concerns
25 about what happened with Mr. Feldman and Mr. Knabe and his

1 claim that he has been demoted, although there is no change in
2 his salary, no change in his rank. Because he feels he's doing
3 different work that was done by somebody with a master's
4 instead of a PhD, he calls it a demotion.

5 For most of July of 2011, he is out of work. He has
6 some cosmetic surgery done for two weeks and he takes a week's
7 vacation. And then on August 1st or 2nd he returns to work,
8 and on August 3rd, he has another interaction with Mr. Feldman,
9 his supervisor, which he thinks is inappropriate. He gets a
02:58 10 warning for some of his behavior.

11 He then decides as of August 11th, he notifies IBM
12 he's going on leave. He begins his leave on August 15th,
13 that's acknowledged by IBM on August 17th of 2011. At that
14 point, the plaintiff never returns to work.

15 Now, towards --

16 THE COURT: And the leave at that point is medical
17 leave?

18 MS. ACKERSTEIN: Medical leave.

19 THE COURT: Okay.

02:58 20 MS. ACKERSTEIN: In June, after immediately claiming
21 sex, race, and gender discrimination because the person who
22 changed places with him and takes on his workload is of a
23 different status, he also concludes that he's being
24 discriminated against because he suffers, according to him,
25 from post-traumatic stress disorder diagnosed in 2001, again,

1 according to him, for which he had been under treatment for
2 something like 18 years.

3 On August 15th, IBM gets the first medical report from
4 the healthcare provider who's treating him. That is repeated
5 in September, October, November, and December. All of those
6 reports indicate that the plaintiff is totally impaired from
7 work, and they describe the symptoms of his either stress,
8 anxiety, PTSD, the diagnoses vary, an inability to work with
9 people, inability to manage conflict, poor judgment, and the
02:59 10 like, but severe or serious impairment.

11 Now, at that point, in December, there's a new form
12 completed by his social worker, who continues to say he suffers
13 from serious impairment, he's totally impaired from his job,
14 maybe there's a possibility with a different supervisor or a
15 different circumstance he might be able to work, but she
16 considers him to be seriously impaired.

17 Now, the claims, your Honor, there are eight claims in
18 the complaint. The first five are all a form of disability
19 discrimination, failure to accommodate, engage in the
03:00 20 interactive process, et cetera. And for purposes of the
21 defense, the key point here is that for all of those first five
22 claims, the plaintiff fails to state a *prima facie* case because
23 he is not a qualified handicapped individual. His healthcare
24 providers have said he is totally impaired from employment,
25 and, therefore, he is not entitled to a reasonable

1 accommodation, he is not able to do the essential functions of
2 his job.

3 Having said that, IBM has a secondary defense, your
4 Honor, which is that he was reasonably accommodated. He was
5 permitted to take leave, he was paid short-term disability
6 leave. When that ran out, IBM continued to allow him to be on
7 leave. And so IBM says, as to all of those claims, there is no
8 failure to accommodate, but, more importantly, he was not a
9 qualified handicapped person because his own physician
03:01 10 certified to IBM that he was not able to work.

11 THE COURT: And is my memory correct from the record
12 that the medical opinions that he -- that the plaintiff
13 proffers here relate the PTSD not just to a particular
14 supervisor but to the workplace?

15 MS. ACKERSTEIN: The PTSD was diagnosed some years
16 earlier in 2001 relating to an incident he had with Microsoft.
17 There is no origin given by the healthcare providers other than
18 he has PTSD.

19 Now, the other claims, your Honor, in addition to the
03:02 20 disability claims, there are three claims of tangible harms
21 that the plaintiff suffered due to age, national origin, race,
22 disability, discrimination, and retaliation, also harassment in
23 the workplace, also a failure to investigate due to all of
24 those claims.

25 The adverse actions and the harassment that the

1 plaintiff articulates are not sufficient under the law to
2 constitute either adverse actions or harassment. The adverse
3 actions he points to, for example, are while he's on leave,
4 they deny his use of a computer, and his ability to come into
5 the building. That is not a serious harm. The adverse action
6 requires some real harm to the person. If he's on medical
7 leave, he's not coming into the building anyway.

8 Likewise, the harassment. The case law is pretty
9 clear that in order to have harassment, you need severe and
03:03 10 pervasive behavior of a -- a kind that falls within the context
11 of some sort of discrimination based on a protected
12 characteristic.

13 In this case, what Mr. Tuvell is complaining about is
14 the e-mails that he's getting, but there's nothing in there
15 that's harmful to him, it's just that they don't agree with his
16 view of what happened. They are not changing his manager, they
17 are not agreeing that he's been subject to discrimination or
18 retaliation, and, therefore, he sees that as harassment.

19 Perhaps the clearest instance of this being
03:03 20 Mr. Tuvell's view being different than IBM's view is his claim
21 of a failure to investigate. There were two investigations
22 done with clear reports that he has that he's seen. One case
23 there were nine witnesses interviewed, in another case there
24 were seven. One report is 19 pages, another is 15. Mr. Tuvell
25 takes issue with the investigation because he doesn't agree

1 with the conclusion.

2 And if I could just address the termination, your
3 Honor, because the plaintiff also claims that his termination
4 is due to discrimination and retaliation, and that is sort of
5 key. He's on leave, IBM is continuing to try and accommodate
6 him. They say, Look, you've acknowledged there is no manager
7 you can have, we don't have another manager for you, we're not
8 prepared to change your manager, but we will identify somebody
9 else who will be the person who takes care of reviewing your
03:04 10 performance, so come back to work. That's an accommodation
11 they offer in January and February of 2012. Come back to work,
12 John Metzger will review your performance. We'll allow to you
13 take time off for doctor's appointments. He refuses. And
14 then, on February 28th, he has a job offer from Imprivata, he
15 starts that on March 12, 2012.

16 He never discloses while he's on leave to IBM that he
17 has a job. When IBM believes he's working for someone else
18 because of his LinkedIn page, they start corresponding with him
19 and asking him, Who are you employed by? We have a business
03:05 20 conduct guideline that says you cannot work for a competitor,
21 we need to know if you are. He refuses to divulge it. They
22 say to him, If you continue to refuse to tell us who you're
23 employed by, we will have no choice but to terminate you. He
24 refuses, and he's terminated. And so the business conduct
25 guideline is the basis of that termination.

1 THE COURT: Counsel, I think you're at the end of your
2 time, but let me ask you one other question.

3 In regards to the retaliation claim in regards to the
4 plaintiff not being given the other job that he applies for --

5 MS. ACKERSTEIN: Yes.

6 THE COURT: -- am I correct that at the time that
7 happens, he's out on disability? Is he out on --

8 MS. ACKERSTEIN: He's out on disability leave, and the
9 hiring manager did not know that the plaintiff had made claims
03:06 10 about discrimination at IBM, which prevents any kind of causal
11 connection between his protected activity and the fact that he
12 didn't get the job.

13 THE COURT: Thank you, counsel.

14 Counsel?

15 MR. MANTELL: Thank you, your Honor.

16 If I have time, I will go over the facts, but I want
17 to address the arguments of law that have been made here today
18 first.

19 The medical treatment forms that were submitted in
03:07 20 this case, submitted to IBM, say that Mr. Tuvell is able to
21 work if he gets reasonable accommodation. And Exhibit 28 says
22 the only modification that would be possible is change of
23 supervisor and setting.

24 On January 23rd, the same social worker, who has been
25 treating Mr. Tuvell for many times with over 250 individual

1 sessions and many more sessions and couple's therapy, says that
2 she can't -- that he can't return to the specific job
3 environment, but he has good functioning in the absence of
4 trauma-related stimuli. The only course of recovery
5 required -- Tuvell required, a reassignment by the company. On
6 September 28, 2012, she says, In a new setting with different
7 people, it is possible that Mr. Tuvell could function quite
8 well and attain -- and attend his work.

9 Mr. Tuvell at the same time within IBM was saying the
03:08 10 same thing, I can't work with you, Mr. Feldman, but I can work
11 elsewhere. And ostensibly, they said, Okay, apply elsewhere.
12 They didn't say, You're totally disabled, you can't work
13 anywhere. They said, Go apply. So that's what he did.

14 So Mr. Tuvell could work if he just got away from the
15 triggers that exacerbated his PTSD. We know he's right,
16 because in May 2012 -- March 2012, he gets another job at a
17 different company. He's been there for three years. So he's
18 not -- and he's working full time, not totally disabled at all,
19 he just has to get away from the trigger.

03:08 20 So this is not an example of the august doctrine on
21 totally disability.

22 THE COURT: But doesn't the fact that he's out on
23 disability cut against the argument that he is qualified for
24 this position? I mean, to stay on the first prong for a moment
25 before I move to accommodation, doesn't that cut against on

1 this record? Doesn't that cut against a finding as to his
2 being qualified?

3 MR. MANTELL: Not at all, because the Supreme Court in
4 the Cleveland case, the Sullivan case, in Massachusetts the
5 Labonte case all say that assertions of total disability are
6 completely consistent with the allegation of qualifications so
7 long as it's your position that you could do the work with
8 reasonable accommodation. And you can. And in their reply,
9 they seek to distinguish this line of cases saying, Well, no,
03:09 10 that's only for Social Security. But we have cases making --
11 saying that it's for private, you know, short-term disability
12 and private plans including --

13 THE COURT: Counsel, I know the line of cases you're
14 talking about, I think it's the Sullivan, Labonte --

15 MR. MANTELL: Right --

16 THE COURT: -- case, but doesn't there have to be a
17 showing that whatever accommodation you're seeking will
18 actually allow you to perform your duties? Was there any -- is
19 there any showing of that here?

03:10 20 MR. MANTELL: Yes. We have Ms. Ross saying he can do
21 it, the medical statements that I've just quoted to you. Also,
22 we have the fact that Mr. Tuvell has worked for the past three
23 years, more than three years full time. He's not being
24 harassed, he can do the work. So we have that.

25 Also, the cases say that it doesn't have to be a

1 guarantee that it will work, in fact, the cases say if one
2 reasonable accommodation doesn't work, you have to try and try
3 again. And I have the cases in the memorandum, if you'd like
4 me to find them. But you don't have to have a guarantee, you
5 just have to have a possibility, and that's enough showing.

6 But he's saying over and over -- in fact, he tried to
7 work from home during sick leave. This is, yet, another piece
8 of direct evidence of animus. He's working from home, he's on
9 sick leave, he's contributing on the Wiki page, and

03:11 10 Mr. Feldman, the supervisor, goes to HR and says, We have to
11 stop him from doing this because that will show that he
12 deserves a reasonable accommodation and can work away from me.
13 So he's not saying, Oh, Mr. Tuvell is not being properly
14 supervised, this work is deficient, he's saying, No, we have to
15 stop him to undermine his claim of reasonable accommodation.

16 And in fact, that is Exhibit 111. It says, My concern
17 is that if we don't continue to notify him he can work during
18 his leave, then we are allowing Walt to create a track record
19 of IBM using work product created by him while on leave and
03:12 20 from home to establish a *prima facie* case for a claim of
21 accommodation.

22 So they're trying to undermine him during this time.
23 So he can do the work, we know that as a fact, and his doctors
24 attest to it at the time. So he has created a genuine issue of
25 material fact on this point.

1 Now, they have argued that the leave they provided was
2 sufficient, reasonable accommodation. I've provided to this
3 Court many cases saying that, no, leave, especially unpaid
4 leave, as it turned into, is not a reasonable accommodation
5 when there are other accommodations that would permit the
6 plaintiff to go to work, further his career opportunities, and
7 experience an equal playing field. That's the whole purpose of
8 the handicap discrimination law, is to allow people to go to
9 work and be productive.

03:13 10 THE COURT: But what do you say to your sister's point
11 that the reasonable accommodation requirements are a two-way
12 street? And if I'm remembering the record correctly, the
13 plaintiff, at some point during this leave, takes another job
14 with another employer. Doesn't that suggest that there isn't a
15 two-way street on trying to achieve a reasonable accommodation?
16 Not just that the employer engage in a process of whether or
17 not there's reasonable accommodation, but that the plaintiff
18 does as well.

19 MR. MANTELL: I would say that the record shows dozens
03:13 20 of efforts of the plaintiff to request reasonable
21 accommodation, provide reasonable accommodation.

22 He allows them to actually speak to his therapist, and
23 they have notes to try to figure out what's going on here.
24 They take in medical records. He's requesting reasonable
25 accommodation many, many times.

1 He only took the job in March 2012 after all this
2 happened out of economic necessity because they stopped paying
3 him completely. And maybe I'll jump ahead to the termination
4 point.

5 They say, We think you're working at EMC, and we don't
6 want you working for a competitor. He says, I'm not working
7 for EMC. They say, We think you are. He says, I give you
8 permission, go talk to EMC, I'll sign something, figure out,
9 make sure that I'm not there, but also to make sure I'm not
03:14 10 working for a competitor, I'm willing to approach a third
11 party, a trusted third party, give them all the information
12 just to satisfy you that I am not competing with you. Fair
13 point, I agree, I shouldn't be competing, let's figure it out.

14 They fire him anyway. They don't respond to that,
15 okay? They claim he was violating a policy, but we know that
16 that policy did not apply to him at the time, because it was a
17 personal leave policy and he wasn't on personal leave.

18 So, yes, that -- their argument on that is pretextual,
19 and again, it's completely consistent with his claim that he
03:15 20 was qualified to work full time at a high level.

21 Now, you asked a question before about his disability
22 being related to IBM in general or the particular building he
23 was working with, and the record is that he had the difficulty
24 with that particular building, but IBM had many buildings, and
25 in fact, he applied for a transfer to the Littleton office,

1 which is a different building. So he would have no problem
2 going there and entering. In fact, he interviewed there, had
3 no problems with that. His interactions with the people
4 interviewing him were professional, competent, they attest to
5 that.

6 So with respect to the harassment, one of the things
7 that IBM ignores is the idea that false criticisms, knowingly
8 false criticisms of work can contribute to a harassing work
9 environment. That's a point that you made in the White v.
03:16 10 DaVita case, and you cited the Noviello v. City of Boston case,
11 1st Circuit case for that. And here we have a litany of false
12 criticisms lodged against him, and in fact, ridiculous ones.

13 When Mr. Tuvell was presenting some work product to
14 his boss, he said the work product is here, but if you're lazy,
15 click this link, and they criticize him for that.

16 Well, guess what, for a month beforehand, they had
17 been planning on disciplining him. We know that, because they
18 have their e-mails and we have the drafts of the discipline
19 more than a month before the discipline issued and more than a
03:17 20 month before this "lazy" comment even occurred. They were
21 setting him up, and they were criticizing him falsely on other
22 occasions, too. We know this, this is on paper.

23 THE COURT: Counsel, I'm going to have to ask you to
24 wrap it up, but I will look back at the record, particularly at
25 the things that you're pointing me to today.

1 MR. MANTELL: Okay.

2 Wrapping up, there's extremely strong direct evidence
3 of handicapped discrimination and retaliation here. In fact,
4 the transfer, he's rejected because he says -- because the
5 decision maker says, You're on short-term disability, and
6 that's going to create a problem bringing you back on.

7 With respect to the investigation, there were many
8 allegations that Mr. Tuvell brought up, which they acknowledged
9 were never investigated, never ruled on, such as the fact that
03:17 10 the transfer was retaliatory or that it represented a failure
11 to reasonably accommodate. They acknowledge that they failed
12 to investigate many of his claims of discrimination. It's in
13 there.

14 So thank you very much, I appreciate it. If you have
15 any question, let me know.

16 THE COURT: Thank you, counsel.

17 I'll give you a moment or two to respond.

18 MS. ACKERSTEIN: Thank you very much, your Honor.

19 I would like to make a couple of points.

03:18 20 The -- Mr. Mantell read from an MTR statement by one
21 of the health care providers where he suggests that the
22 provider was saying the plaintiff was no longer totally
23 impaired. That one is dated December 16th. So there is no
24 dispute that in August, September, October, November, all of
25 the reports indicated that he was totally unable to report to

1 work. In this last one in December, Ms. Ross indicates that it
2 might be possible that the plaintiff could work in a different
3 setting with a different supervisor. And at her deposition she
4 said it's only a possibility. She wasn't certain. And in
5 fact, the plaintiff testified to just being in the vicinity of
6 IBM in mid-December and flipping out in a car with his wife and
7 daughter.

8 But the point is, the case law is very clear that the
9 plaintiff does not get his choice of a reasonable
03:19 10 accommodation. And he was accommodated with leave, and while
11 there are cases that Mr. Mantell cites that suggest that
12 reasonable accommodation does not include leave or may not --
13 may require something other than leave, those are cases where
14 the plaintiff's healthcare provider said they could return to
15 work in some fashion. And so there's a case, for example,
16 where somebody couldn't handle a gun, a police officer, but
17 there were other things he could do. That is not this case,
18 because four of these reports disable Mr. Tuvell entirely from
19 working, and additionally, the last one is only a possibility
03:20 20 that some other setting might work.

21 And finally, in the suggestion that it's IBM that is
22 at fault, I do want to remind the Court that IBM has pointed
23 out that Mr. Tuvell failed to engage in the interactive
24 process. The only thing he really wanted was a change of
25 manager, which he was not required under federal law to get or

1 under state law, and when he was asked, as he started to be out
 2 on leave, Please go see a specialist, and then later, Since
 3 you've been out six to eight weeks already, please see a
 4 psychiatrist, that's part of the interactive process,
 5 Mr. Tuvell was unwilling to do that.

6 And so we believe that after a careful review of the
 7 record, the Court should enter judgment for IBM.

8 THE COURT: Thank you.

9 Counsel, and I'm going to have to cutoff argument
 03:20 10 there, counsel, but I assure you that I will go back and look
 11 at your papers carefully.

12 I will take the matter under advisement.

13 MR. MANTELL: Thank you, your Honor.

14 THE CLERK: All rise.

15 (Court adjourned at 3:21 p.m.)

16 - - - - -

17 CERTIFICATION

18 I certify that the foregoing is a correct transcript
 19 of the record of proceedings in the above-entitled matter to
 20 the best of my skill and ability.

21
 22
 23
 24 /s/Debra M. Joyce
 Debra M. Joyce, FCRR
 25 Official Court Reporter

September 30, 2015
 Date