

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES,  
INC.,

Defendant

Civil Action No. 13-11292-DJC

**PLAINTIFF'S STATEMENT OF FACTS IN MATERIAL DISPUTE**

Pursuant to LR 56.1, Plaintiff hereby submits his Statement of Facts in Material Dispute, which is being filed to support his Opposition to Defendant's Motion for Summary Judgment.

1. On or about May 18, 2011, Mr. Knabe asserted to Mr. Feldman, in Mr. Tuvell's absence, that Mr. Tuvell had failed to produce that day certain Microsoft Excel graphics as instructed. Verified Complaint, ¶ 14, Exhibit 42. These assertions were entirely false. Verified Complaint, ¶ 14, Exhibit 42. In fact, Mr. Knabe had not instructed Mr. Tuvell to produce any work at all that day, much less produce any Excel graphics. Verified Complaint, ¶ 14, Exhibit 42.

2. IBM has taken the position that the May 18, 2011 incident was one of the justifications for the demotion/reassignment of June 10, 2011. Def.'s Mem., at 4; Feldman Dep., at 26-27, 38-40, 59, Exhibit 43.

3. The assertion that Plaintiff was even asked to produce Excel graphics is patently pretextual, given that both Mr. Feldman and Mr. Knabe knew that Mr. Tuvell did not even use or have a copy of Excel or the Microsoft operating system, but instead he used different more

advanced software tools for all his work at IBM. Feldman Dep., at 40-41, Exhibit 43; Knabe Dep., at 102-103, Exhibit 44.

4. Defendant's assertions of what happened on May 18, 2011 are inconsistent, and therefore pretextual, as on other occasions, Plaintiff's alleged misconduct was identified as that he was working "too slowly." IBM Ans. to Int. 4, at 4-5, Exhibit 45; May 11, 2012, Position Statement, at 3, ¶ 2, Exhibit 46.

5. In response to Mr. Knabe's May 18, 2011 complaints, Plaintiff denied any wrongdoing, sought more detail concerning his alleged misconduct, and requested a three-way meeting amongst the three individuals, multiple times, to establish what exactly happened and to clear the air. Verified Complaint, ¶¶ 15, 16, Exhibit 42. Mr. Feldman repeatedly denied Plaintiff's requests to have a three-way meeting, refused to investigate the false assertion about Plaintiff's work performance, and refused to respond to the requests for more information. Verified Complaint, ¶ 16, Exhibit 42.

6. While Mr. Feldman claims he rejected the option of a three-way meeting for the reason that it would create an unhealthy "habit," he had in fact conducted just such a three-way meeting shortly before, in March 2011, concerning a different issue. Compare Feldman Dep., at 46, Exhibit 43, with Tuvell Aff., ¶ 17, Exhibit 47.

7. On June 8, 2011, Mr. Knabe yelled loudly at Mr. Tuvell in front of co-workers, asserting that Mr. Tuvell failed to produce certain specified work items that day as ordered. Verified Complaint, ¶ 15, Exhibit 42. These assertions were entirely false. Verified Complaint, ¶ 15, Exhibit 42. In fact, Mr. Knabe had ordered Mr. Tuvell to produce certain different specified work items that day, and Mr. Tuvell had indeed produced these latter work items that day, as Mr. Knabe was already fully aware. Verified Complaint, ¶ 15, Exhibit 42. On June 10, 2011, Mr. Knabe

acknowledged in writing that he had indeed raised his voice at Mr. Tuvell. Verified Complaint, ¶ 15, Exhibit 42.

8. On June 10, 2011, Plaintiff was subjected to an adverse job action, in that he was reassigned or demoted from performing the highest level (“lead”) work within the Performance Architecture Group to the lowest. Verified Complaint, ¶ 18, Exhibit 42. IBM asserts that the job action was based on the May 18 and June 8 incidents. Verified Complaint, ¶ 16, Exhibit 42. Mr. Feldman assigned Mr. Tuvell to switch the high-level work role of Mr. Tuvell with the low-level work role of Ms. Sujatha Mizar, a less qualified female of East Asian heritage. Verified Complaint, ¶ 18, Exhibit 42; Feldman Dep., at 57-59, Exhibit 43. Mr. Tuvell was decades older than Ms. Mizar, who was well under forty, and he had decades more relevant experience for the position. Verified Complaint, ¶ 18-19, Exhibit 42. Ms. Mizar had no Ph.D, while Plaintiff had one in Mathematics. Feldman Dep., at 16, Exhibit 43; Verified Complaint, ¶ 1, Exhibit 42. Plaintiff was being paid approximately \$35,000 more than Ms. Mizar. Feldman Dep., at 58, Exhibit 43.

9. Plaintiff suffers from Post Traumatic Stress Disorder. Verified Complaint, ¶ 10, Exhibit 42.

10. Mr. Feldman was aware of Plaintiff’s PTSD at least as early as May 26, 2011. Feldman Dep., at 47, Exhibit 43.

11. Plaintiff was qualified for the role of Performance Architect at IBM, in that he had a BS from MIT, a PhD in Mathematics from the University of Chicago, he had been formally evaluated positively in that role by Mr. Feldman, and IBM acknowledges a lack of performance issues prior to May 18, 2011. DSOF6; Verified Complaint, ¶ 1, Exhibit 42; Feldman Dep. Exhs. 2&3, Exhibit 48; Feldman Dep., at 18-22, Exhibit 43. Mr. Feldman regarded Plaintiff’s work in the

Performance Architecture area as competent and his interactions with others to be professional. Feldman Dep., at 17, 26, Exhibit 43.

12. Plaintiff was working at a “Band 8” level, and Ms. Mizar was working at a “Band 7” level, and so the Mizar position was a “lesser role.” Due Dep. Exh. 19, at IBM11041, Exhibit 49; Due Dep., at 119, Exhibit 50.

13. Plaintiff regarded his Performance Architecture position on the “Wahoo” project to be a very highly valued position. He wrote, “I truly thought I was extremely fortunate to be in the best possible project at Netezza.” Feldman Dep. Exh. 8, at TUVELL255, Exhibit 51; Feldman Dep., at 55-56, Exhibit 43. Plaintiff noted that Mr. Feldman told him that it was a “plum” position, and that there was “almost no other job like this for a performance professional in the country.” Due Dep. Exh. 2, at IBM8848, Exhibit 52; Tuvell Aff., ¶ 19, Exhibit 47.

14. The June 10, 2011 reassignment meant that Plaintiff was no longer doing highly significant research in an advanced development program that was unique to the industry, but instead was assigned lower level work. Tuvell Aff., ¶ 20, Exhibit 47. The reassignment to a lower position meant lesser job opportunities in future, and also by its high visibility reflected what Plaintiff considered to be public humiliation. Feldman Dep. Exh. 10, at TUVELL261, Exhibit 53; Feldman Dep., at 68, Exhibit 43.

15. IBM’s own policies considers an “undesirable reassignment” to be a tangible adverse employment action. Mandel Dep. Exh. 47, at IBM2309, Exhibit 54; Mandel Dep., at 169-170, Exhibit 55.

16. The June 10, 2011 reassignment meant change of assigned work office from Cambridge to Marlborough, resulting in a much longer commute (15 miles vs. 45 miles), and which Tuvell

regarded as a less preferable location. Feldman Dep., at 57, 63-64, Exhibit 43; Tuvell Aff., ¶ 18, Exhibit 47.

17. On June 12, 2011, Tuvell complains to Feldman in his weekly report about Mr. Knabe's "harassment and yelling," an "'illegal' adverse job action (in the IBM sense, and perhaps even in the civil sense)." Tuvell further complained about the "public humiliation of unilateral removal from the most excellent high-profile position on Yahoo to what seems . . . a highly symbolic deportation to Siberia." Finally, Tuvell noted that his multiple requests for three-way meetings with Knabe have been refused. Feldman Dep. Exh. 10, at TUVELL261, Exhibit 53; Feldman Dep., at 68, Exhibit 43.

18. On June 12, 2011, Feldman responded by email to Tuvell's June 12, 2011 email. After months of addressing Mr. Tuvell as the familiar "Walt," Mr. Feldman addresses his June 12, 2011 e-mail with stiff formality to "Dr. Tuvell." Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. In that June 12, 2011 email, Mr. Feldman requires that all of Mr. Tuvell's further written and verbal communications with him must be made in the presence of, or copied to, Human Resources representatives. Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56. Mr. Feldman states, "I go down this path regretfully. You have twice now made clear to me your history of suing when you feel you've been wronged in the office and I see no choice." Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.'s Request for Adm. 1, Exhibit 56; Verified Complaint, ¶ 20, Exhibit 42.

19. On June 14, 2011, Feldman wrote to Tuvell and Mizar, asking that they provide Feldman with a brief email at the end of every business day detailing the transition of tasks between them that have been completed and providing alerts of any problem. Feldman Dep. Exh. 13, at

TUVELL267, Exhibit 57; Feldman Dep., at 85-86, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56; Verified Complaint, ¶ 22, Exhibit 42.

20. On June 14, 2011, Mizar provided to Feldman a brief but complete status update of the transition, which was copied to Tuvell:

- 1) Finished transition of the Block IO tracing project. (Sujatha to Walter)
- 2) Finished transition of the WaltBar performance tool (Walter to Sujatha)

Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43.

Mizar's email further stated, "Walt – please feel free to add anything I might have forgotten.

Feldman Dep. Exh. 14, at TUVELL268, Exhibit 58; Feldman Dep., at 87-89, Exhibit 43.

21. Despite the fact that the email from Mizar purported to describe the transition status from the point of view of both Tuvell and Mizar, and despite the fact that Feldman had not specified that both Mizar and Tuvell were to each submit a separate (identical) report, Feldman asserted that he had concluded that Plaintiff's failure to provide him a separate report regurgitating the same information found in Mizar's report to be inappropriate. Feldman Dep., at 86, 88-89, Exhibit 43.

22. On June 15, 2011, prior to the beginning of the day's normal work hours, Mr. Feldman emailed a demand to Mr. Tuvell to submit a separate individual transition report, falsely stating that he had previously "asked you to provide ... a report from each of you daily". Feldman Dep. Exh. 13, at TUVELL266, Exhibit 57; Feldman Dep., at 86, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56; Verified Complaint, ¶ 22, Exhibit 42.

23. On June 15, 2011, Tuvell replied to Feldman, and copied Ms. McCabe and Ms. Adams, stating that he did not provide a separate report because it would have been redundant, as he knew Mizar's report already contained everything that he would have reported. Feldman Dep. Exh. 13, at TUVELL265, Exhibit 57; Feldman Dep., at 86-87, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56. In this email, Tuvell complains of age and sex discrimination with respect to his replacement by Ms. Mizar, a less qualified, younger, female individual, and Tuvell expresses his opinion Feldman's picky requirements reflect "blatant . . . harassment/retaliation." Feldman Dep. Exh. 13, at TUVELL265, Exhibit 57; Feldman Dep., at 86-87, Exhibit 43, Resp. to Pl.'s Request for Adm. 3, Exhibit 56.

24. On June 16, 2011, at 10:25 am, Feldman emailed Tuvell, asking by the next day a "detailed (one-day granularity) schedule for your work on the assigned projects between now and the beginning of your medical leave." TUVELL272, Exhibit 59; Resp. to Pl.'s Req. for Adm. 6, Exhibit 56. Tuvell's medical leave was scheduled to begin July 7, 2011, three weeks in the future. IBM8840, Exhibit 60; Tuvell Aff., ¶ 28, Exhibit 47. Mr. Tuvell reports that it "turns my stomach (literally, not figuratively) to contemplate working with him." TUVELL271, Exhibit 59; Resp. to Pl.'s Req. for Adm. 6, Exhibit 56.

25. On June 17, 2011, Mr. Tuvell complains of continuing harassment to Mr. Feldman, Ms. McCabe and Ms. Adams. Verified Complaint, ¶ 27, Exhibit 42. Tuvell complained, among other things, that Tuvell was being required to establish an independent daily schedule for the next three weeks on all four projects he was taking over from Mizer, based solely on her short one-line descriptions of her projects. TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56. Tuvell complained that he was still on a learning curve with respect for the new projects, and has never set a daily schedule for three weeks in the future, let alone for unfamiliar projects.

TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56. Mr. Tuvell requests an example of such a schedule from Mr. Feldman, but none is forthcoming. Verified Complaint, ¶¶ 26, 30, 43, Exhibit 42; TUVELL274, Exhibit 61, Pl.'s Req. for Adm. 6, Exhibit 56.

26. On June 17, 2011, Mizar provides Feldman with a transition status update for the prior two days, demonstrating that she missed the previous day's update. Feldman Dep. Exh. 15, Exhibit 62; Feldman Dep., at 92-93, Exhibit 43. However, Mizar was not disciplined or counselled for missing that update. Feldman Dep., at 92-93, Exhibit 43.

27. Feldman forbids Tuvell from spending an earlier agreed-upon reasonable working time on his internal complaint of harassment, and then threatened Tuvell with termination when Tuvell responded by saying, "Now wait a minute, Dan." Verified Complaint, ¶ 46, Exhibit 42.

28. Based on the harassment that Plaintiff experienced, and the severe PTSD symptoms that resulted, including a fainting episode, Plaintiff went out on sick leave on August 11, 2011. Verified Complaint, ¶¶ 49, 53-54, Exhibit 42. Mr. Tuvell reported to IBM's Russell Mandel that: "The very REASON I'm on STD leave, and will continue to remain so, is due DIRECTLY AND SOLELY to the psychological abuse being heaped upon me by Dan Feldman, and yourself . . . The ONLY way for me to recover sufficient to return to work from STD is to settle this case. Properly and correctly." Mandel Dep. Exh. 10, at TUVELL744, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55.

29. Instead, Mandel initially refused to progress the investigation during the leave. Though Plaintiff objected, Mandel didn't complete his "investigation" until four and a half months after initial Plaintiff's request. Verified Complaint, ¶¶ 33, 81, Exhibit 42; Resp. DSOF29.

30. On or about October 19 and 20, 2011, Mr. Tuvell objects to Mr. Feldman falsely characterizing work at home days as sick days, asks for citation to the policy that supports the



practice, and notes that it is inconsistent with his work-at-home days pre-June 30, 2011. Verified Complaint, ¶ 77, Exhibit 42. On November 2, 2011, Mr. Feldman made knowingly false statement mischaracterizing Mr. Tuvell's work situation with respect to sick days — casting work-at-home days as refusal to work in the office days. Verified Complaint, ¶ 78, Exhibit 42.

31. On January 6, 2012, Chris Kime sent Plaintiff an email explaining the following was the primary reason for rejecting Plaintiff's application for transfer to a Software Developer position under Kime: "I underestimated the difficulty of moving forward with bringing you to the team. We cannot move forward with taking you directly from being on short term disability – this will receive very close scrutiny from the operations people in the organization." Kime Dep. Exh. 11, at 1, Exhibit 64, Kime Dep., at 132-133, Exhibit 65. Kime acknowledged that Feldman's input was significant in the decision, and acknowledged that Tuvell's candidacy ended upon Kime's communication with Feldman. Kime Dep., at 118-119, Exhibit 65; Further Supp. Ans. to Ints., at 10, Exhibit 66 (Kime relied on discussions with Feldman in rejecting Tuvell); Due Dep., at 135-136, Exhibit 50.

32. Plaintiff requested Mr. Mandel to conduct an investigation into his allegations of discrimination, retaliation and harassment on or about June 29, 2011. Tuvell Aff., ¶ 21, Exhibit 47. The harassment Plaintiff experienced caused him to be sick from PTSD symptoms, and Plaintiff was unable to return to work, as of August 11, 2011, to work under Mr. Feldman. Tuvell Aff., ¶ 21, Exhibit 47; Ross Dep., at 78-79, Exhibit 67. During the time of his medical leave, Plaintiff was hoping that Mr. Mandel's investigation of his complaint would progress, such that he could resolve Plaintiff's workplace difficulties, and permit Plaintiff, medical condition and all, to return back to work. Tuvell Aff., ¶ 21, Exhibit 47; Mandel Dep. Exh. 10, at TUVELL744, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55. Instead, Mr. Mandel did not inform Plaintiff of the

conclusion of his investigation until November 17, 2011, and the results were unfavorable. Tuvell Aff., ¶ 21, Exhibit 47.

33. SWG-0436579 was a posted position for a Software Developer in IBM's Littleton office. Kime Dep., at 32, Exhibit 65. The position was open, and Tuvell applied for it on or about November 28, 2011. Kime Dep., at 45-48, Exhibit 65; Verified Complaint, ¶ 85, Exhibit 42.

34. The job requisition for SWG-0436579 contained a list of four minimum qualifications for the position, including [1] a Bachelor's Degree; [2] at least 3 years experience in the "C" programming language, debugging and unit testing; [3] at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements; and [4] fluency in English. Kime Dep. Exh. 12, at 2, Exhibit 68; Kime Dep., at 28-29, 33-34, 38-40, Exhibit 65.

35. Plaintiff satisfied all of the minimum qualification for the SWG-0436579 position. Tuvell had a Bachelor's degree from MIT, and a MS and Ph.D in mathematics from the University Chicago. PSOF11. He had the required qualification of at least three years experience in the "C" programming language, debugging and unit testing, and in fact he had over twenty years of such experience. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 1, Exhibit 47. He had the required qualification of at least 1 year experience in detailed design of software meeting functional performance, serviceability requirements, because he had over two decades of such experience. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 2, Exhibit 47. Finally, Tuvell met the required qualification that he be fluent in English. Kime Dep. Exh. 12, at 2, Exhibit 68; Tuvell Aff. ¶ 3, Exhibit 47. Moreover, Tuvell possessed the vast majority of the "preferred" qualifications sought. Kime Dep. Exh. 12, at 1-2, Exhibit 68; Tuvell Aff. ¶ 4-7, Exhibit 47.

36. Christopher Kime, as of 2010, was Development and Solutions Manager, and he acted as Hiring Manager for the SWG-0436579 position. Kime Dep., at 19-20, 29, Exhibit 65. Kime drafted the posting himself, including what he regarded to be the minimum qualifications. Kime Dep., at 32-34, Exhibit 65. Kime reviewed Tuvell's resume and other documentation, and concluded he had "little doubt that you [Tuvell] have technical skills that we could use on the project." Kime Dep. Exh. 2, Exhibit 69; Kime Dep., at 51-53, Exhibit 65. On or about December 1, 2011, Kime interviewed Tuvell by phone, which touched upon Tuvell's background and qualifications. Kime Dep., at 60-62, Exhibit 65. At the interview, Kime concluded that Tuvell "had strong technical skills and that with those skills he could potentially be a contributing member of the team. Kime Dep., at 64, Exhibit 65. As a result of the interview, Kime asked his support lead, and also the next most senior member of the Littleton team, to interview Tuvell. Kime Dep., at 68-69, Exhibit 65.

37. Tuvell was interviewed by these other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive." Kime Dep., at 77, Exhibit 65; Kime Dep. Exh. 6. Kime acknowledged that the interviews with the management team did not exclude Tuvell as a candidate. Kime Dep., at 83, 97-98. Kime reported that he and his subordinates were "excited by Walt's evident technical skills." Feldman Dep., at 157, Exhibit 43. Kime considered Tuvell's technical knowledge and ability to be a strength. Kime Dep., at 93, Exhibit 65. As late as December 12, 2011, Kime considered Tuvell to be an eligible candidate for the position. Kime Dep., at 105, Exhibit 65. Kime believed Tuvell had "deep technical skills and ability to produce solid documentation." Kime Dep. Exh. 11, Exhibit 64; Kime Dep., at 132-133, Exhibit 65.

38. Mr. Tuvell's December 9, 2011 email to Kime and the other interviewers states, "You gave me quite a good picture of what you're doing, and it feels very much like what I'd like/want to be doing." Kime Dep. Exh. 6, at 1, Exhibit 70; Kime Dep., at 73-74, Exhibit 65.

39. The posting for the SWG-0436579 position calls for a "Software Developer," and was described as entailing "software development activities," for the purpose of "develop[ing] the next major release for this platform." Kime Dep. Exh. 12, at 1, Exhibit 68; Kime Dep., at 28, 32-33, Exhibit 65.

40. IBM now asserts that Plaintiff was rejected for the position because he had demonstrated difficulty working with team members, based on the input of Mr. Feldman. Kime Dep., at 100, Exhibit 65. On or about December 13, 2011, Kime communicated with Feldman, who recommended against Kime's hiring of Tuvell, based on the fact that "it isn't working out in this group, with these responsibilities and this set of relationships." Kime Dep. Exh. 8, Exhibit 71; Kime Dep., at 108-109, Exhibit 65. Feldman verbally rated Tuvell a "3", which represents a low ranking, but above those facing termination. Kime Dep. Exh. 8, Exhibit 71; Kime Dep., at 118, Exhibit 65. On December 13, 2011, Feldman reported to Kime that Tuvell "had had difficulties working with other people in the group." Kime Dep., at 111, 112, Exhibit 65. As of December 13, 2011, Kime no longer considered hiring Tuvell for the position. Kime Dep., at 118-120, Exhibit 65. On January 6, 2012, Kime formally rejected Tuvell for the position, stating as reasons primarily the difficulties inherent in "taking you directly from being on short term disability," and secondarily "concern about the work being to your liking." Kime Dep. Exh. 11, at 1, Exhibit 64; Kime Dep., at 133, Exhibit 65.

41. Plaintiff went out on Short Term Disability effective on or about August 11, 2011. Verified Complaint, ¶ 54, Exhibit 42. After 13 weeks on STD, or sometime in November 2011,

Plaintiff's benefits were reduced to 66 2/3 % of his usual salary. Verified Complaint, ¶ 69, Exhibit 42. On or about January 25, 2012, Mr. Tuvell exhausted his STD benefits, and is transitioned to unpaid leave. Verified Complaint, ¶ 125, Exhibit 42.

42. After Plaintiff was rejected for the Software Developer position, the position remained open, and IBM continued to seek applicants. Kime Dep., at 147, Exhibit 65. After Kime decided to not hire Tuvell, and after the posting lapsed, Kime re-posted the identical position for the new year to seek new candidates, this time with the identifying number SWG-0456125. Kime Dep., at 147-151, Exhibit 65. The reposted position also lapsed without being filled. Kime Dep., at 149-151, Exhibit 65.

43. While Kime explained to Plaintiff, on January 6, 2012, that his application for the Software Developer position was due to the inability to take him directly "from being on short term disability," after the fact, IBM takes the position that this was a false reason, and that indeed, Kime was counselled for identifying a false reason for the rejection. Mandel Dep., at 147-148, 150-151, Exhibit 55; Mandel Dep. Exh. 31, at TUVELL1225, Exhibit 72; Kime Dep., at 154-155, Exhibit 65.

44. There is sufficient evidence upon which a jury could infer that Mr. Kime knew of Plaintiff's internal complaints of handicap discrimination and retaliation as of the time of the January 6, 2012 rejection. For, on or about December 15, 2011, Mr. Kime and Mr. Feldman were messaging each other about Plaintiff's application for the transfer, after having discussed the matter by telephone, and Kime wrote, "I do not envy you having to deal with HR and lawyers at this point." Kime Dep. Exh. 9, Exhibit 73, Kime Dep., at 109-110, 120-121, Exhibit 65.

45. There was yet additional evidence of handicap animus, as Defendant expressly curtailed Plaintiff's access to its computer systems, and IBM facilities, and further refused to

advance or otherwise delayed finalization of its investigation of Plaintiff's complaints of discrimination and retaliation, based on Plaintiff's avilment of the reasonable accommodation of disability leave. IBM curtailed Plaintiff's access to Lotus Notes (the IBM email system), given that "you are on a LOA [leave of absence] awaiting a determination of your LTD [long term disability] application." Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 29, Exhibit 47. On August 25, 2011, IBM refused to advance Plaintiff's internal complaints of discrimination and retaliation while he was on short term disability, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68, Exhibit 55. On September 15, 2011, Plaintiff's badge access to IBM buildings was curtailed, because, as he was told, "you don't need access to IBM facilities since you aren't working [because of STD]. It is easy to return access once you return from STD." Mandel Dep. Exh. 15, at TUVELL868, Exhibit 75; Mandel Dep., at 80-81, Exhibit 55.

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

[H]as done so by replacing me with an employee whose qualifications are far inferior to mine. I have a PhD, she does not, and my work experience is much more extensive and relevant than hers who is of a different sex than me (I am male, she is female), who is much younger than me.

Due Dep., at 199-200, Exhibit 50; Def.'s Exh. 19, at TUVELL265. Dr. Snyder, who interacted with Feldman and others in connection with Tuvell's requests for reasonable accommodation, repeatedly asserted that Tuvell complained "too much", as if the length of his complaints disqualified their content, and dismissed Tuvell's initial complaint as a "diatribe."

Dean Dep. Exhs. 6, 13, Exhibits 77, 78; Dean Dep., at 22-23, 26, 36-38, 78-80, 109-110, Exhibit 79. In explaining reasons why Plaintiff's performed in an unsatisfactory manner, IBM has asserted that his focus, "beginning June 13, 2011 was more on pursuing his claims and less on performing any actual work for IBM." Ans. to Int. 4, at 6, Exhibit 45. Yet, IBM has never identified any job task that Plaintiff neglected as the result of lodging his internal, protected complaints. Id.

47. As a direct response to Plaintiff's March 2, 2012 Complaints of discrimination, retaliation and failure to accommodate, which he circulated to a number of people at IBM, IBM curtailed Plaintiff's access to IBM email systems, based expressly on the fact that he had forwarded his protected complaints of discrimination and harassment to others. Verified Complaint, ¶¶ 122, 123, Exhibit 42; TUVELL 1230, 1235-1236, Exhibit 80; Mandel Dep. Exh. 35, Exhibit 74; Tuvell Aff., ¶ 10, 29, Exhibit 47.

48. On March 13, 2012, Mr. Tuvell was threatened with termination for forwarding his complaints of discrimination and retaliation to agents of IBM, which, again is protected conduct. Mandel Dep. Exhs. 38, 39, Exhibits 81, 82; Mandel Dep., at 156-157, Exhibit 55; Verified Complaint, ¶¶ 129, 131, Exhibit 42.

49. On August 3, 2011, Plaintiff was prohibited from using a previously agreed-upon reasonable amount of his workday to draft his internal complaints of discrimination, and Feldman threatened Plaintiff for making this request. Verified Complaint, ¶ 46, Exhibit 42.

50. On August 3, 2011, Plaintiff was given a formal discipline, with threat of termination, for innocently writing, "if you're lazy you can just click this link;" meanwhile, Mr. Knabe, who had not filed a discrimination complaint nor declared a disability, was never disciplined for raising his voice at Mr. Tuvell. Feldman Dep., at 53-55, Exhibit 43; Verified

Complaint, ¶ 44, 48, Exhibit 42; Due Dep., at 110, 141-142, Exhibit 50 (concluding that Mr. Knabe raised his voice). Mr. Mandel testified that he, too, found the “lazy” comment to be inappropriate. Mandel Dep., at 54, Exhibit 55.

51. On June 12, 2011, Feldman told Plaintiff that he was required to copy HR on all written and verbal communications with Feldman, based on “your history of suing when you feel you’ve been wronged.” Verified Complaint, ¶ 20, Exhibit 42; Feldman Dep. Exh. 10, at TUVELL259, Exhibit 53; Resp. to Pl.’s Request for Adm. 1, Exhibit 56.

52. In response to one of Tuvell’s complaints of harassment, Feldman stated, “assertions of bad faith . . . are inconsistent with success.” TUVELL284, 286, Exhibit 83; Resp. to Pl.’s Request for Adm. 10, Exhibit 56. After Tuvell reasonably complained of harassment on June 30, 2011, Feldman urged HR to discipline him based on that complaint. Feldman Dep. Exh. 18, Exhibit 84; Feldman Dep., at 101-102, Exhibit 43.

53. On January 25, 2012, after exhausting all of his STD benefits, and with no indication that he would ever be provided with reasonable accommodation, IBM transitioned Tuvell to unpaid leave, where he is kept until his termination on May 17, 2012. Verified Complaint, ¶ 110, 132, Exhibit 42.

54. At about this time, and thereafter, IBM attempted to hire a replacement for Plaintiff’s position, asserting that “key investigation necessary to support the correct development of future generations of the Netezza appliance have stopped making progress pending Dr. Tuvell’s return to work.” Feldman Dep., at 163-164, Exhibit 43.

55. On May 8, 2012, Plaintiff submits his Fourth Open Door Complaint alleging unlawful discrimination and retaliation. Verified Complaint, ¶ 135, Exhibit 42; TUVELL1464-1465, Exhibit 85; Def.’s Further Resp. to Req. for Adm. 95, Exhibit 87. On May 14, 2012,



Plaintiff likewise complained of unlawful harassment and retaliation. Verified Complaint, ¶ 141, Exhibit 42.

56. On May 7, 2012, IBM wrote to Plaintiff, stating that it believed Plaintiff to be working for EMC, a competitor, and threatening termination. Verified Complaint, ¶ 134, Exhibit 42; TUVELL1461, Exhibit 86; Def.'s Further Resp. to Req. for Adm. 94, Exhibit 87. On May 8, 2012, Tuvell responds, and denies working for EMC. Verified Complaint, ¶ 137, Exhibit 42. Also, on May 8, 2012, Tuvell files another formal complaint, with IBM, complaining of retaliation and discriminatory harassment. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87. Tuvell explains that he does not wish to inform IBM where he is working, as he fears a retaliatory response. Verified Complaint, ¶ 139, Exhibit 42.

57. On May 11, 2012, IBM demands to know where Tuvell is working, citing an inapplicable policy, and its need to confirm that Tuvell is not working for a competitor. Verified Complaint, ¶¶ 140-141, Exhibit 42; TUVELL 1468-1470, Exhibit 88; Tuvell Aff., ¶ 11, Exhibit 47. On May 15, 2011, IBM demanded to know Tuvell's new employer, based on its duty to confirm that Tuvell is not working for a competitor. Verified Complaint, ¶ 142, Exhibit 42; TUVELL1482, Exhibit 89; Def.'s Further Resp. to Req. for Adm. 97, Exhibit 87. Tuvell voluntarily provided information to demonstrate that he was not working for a competitor, provided authorization to IBM to contact EMC to confirm his status as a (non)employee there, and he suggested that he be permitted to submit the information about his alternate employment, to a confidential, trusted third party who could confirm to IBM that there was no competition. Verified Complaint, ¶ 141, Exhibit 42; TUVELL1468-1469, Exhibit 87; Tuvell Aff., ¶ 11, Exhibit 47. Despite the fact that Tuvell responded to all of IBM's concerns and neutralized all asserted reasons to threaten his employment, Tuvell was terminated on May 17, 2014. Verified Complaint, ¶ 145,

Exhibit 42. The termination occurred within days after Tuvell engaged in protected conduct. TUVELL1464-1465, Exhibit 85; Def.'s Further Resp. to Req. for Adm. 95, Exhibit 87.

58. Before the Massachusetts Commission Against Discrimination, Defendant took the position that Plaintiff's June 10, 2011 transfer/demotion, in which Tuvell was taken away from the oversight of Knabe, was an effort to "accommodate [Tuvell's] unhappiness with working with Mr. Knabe." IBM Position Statement, at 4, Exhibit 46. However, that is shown to be pretextual by IBM's assertion that "IBM policy is pretty clear that supervisors aren't changed because an employee's not getting along with their current supervisor." Snyder Dep., at 85, Exhibit 90. Moreover, Plaintiff actively opposed the demotion. Def.'s Exh. 19, at TUVELL265-266.

59. The May 18 and June 8 incidents were not the true reasons for the June 10, 2011 demotion/transfer. Mr. Feldman failed to take action to resolve any alleged difficulties involving Knabe and Tuvell. Verified Complaint, ¶ 16, Exhibit 42. For example, Mr. Feldman refused to investigate, and refused to respond to Mr. Tuvell's repeated inquiries for more detail concerning his alleged misconduct. Verified Complaint, ¶ 16, Exhibit 42. Mr. Feldman repeatedly denied Mr. Tuvell's requests for a three-way meeting with Knabe, himself and Feldman to clear the air. Feldman Dep., at 46-47, Exhibit 43; Verified Complaint, ¶ 16, Exhibit 42. While Mr. Feldman claimed to have rejected the option of a meeting as it would create an unhealthy "habit," he had conducted such a meeting shortly before, in March 2011, concerning a different issue. Compare Feldman Dep., at 46, Exhibit 43, with Tuvell Aff., ¶ 17, Exhibit 47.

60. In order to remain a productive employee of IBM, Plaintiff required either a new supervisor, or a transfer to a new department, so that he would not have to interact with Mr. Feldman. Medical documentation provided to IBM in December 2011 attested that "the only modification that would be possible [to return Tuvell to work] is a change of supervisor and

setting.” DSOF49. Plaintiff, on a variety of occasions informed IBM that he could no longer work in any capacity with Mr. Feldman, for medical reasons, and requested that Plaintiff be accorded a new supervisor, or a transfer to a different position. On June 23, 2011, Plaintiff wrote that the continuing harassment he experienced exacerbated his medical symptoms, and that he was then nearly incapacitated by PTSD symptoms. Verified Complaint, ¶ 28, Exhibit 42; Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50. Mr. Tuvell informed IBM, “I am nearly incapacitated now by recurrence of PTSD . . . I’ve started seeing my psychological health-care professionals again about this problem, including . . . medication.” Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50. Continuing at this point, and many times thereafter, Plaintiff expressly requested the reasonable accommodation of either a new supervisor, or transfer to a new department entirely. Due Dep. Exh. 3, at TUVELL279, Exhibit 91; Due Dep., at 82, Exhibit 50.

61. On June 24 and June 28, 2011, Plaintiff requested job modification that he no longer interact with Mr. Feldman, as a reasonable accommodation to his disability. Verified Complaint, ¶ 29, Exhibit 42. Plaintiff notes that such accommodation would be a preferable reasonable accommodation to the grant of disability leave. Verified Complaint, ¶ 29, Exhibit 42. On October 17, 2011, Mr. Tuvell asserted that he was not medically capable of continuing to work with Mr. Feldman, and requested the reasonable accommodation of no longer working with him. Verified Complaint, ¶ 72, Exhibit 42. IBM rejected these repeated requests. Verified Complaint, ¶¶ 73, 74, Exhibit 42.

62. On November 9, 2011, Plaintiff provided a letter to IBM, describing Mr. Tuvell’s disability, his need for reasonable accommodation, and seeking the accommodation of transfer and/or new supervisor. Verified Complaint, ¶ 80, Exhibit 42. On November 28, 2011, Plaintiff

wrote, “I will be unable to return to work . . . In fact, the thought of returning to work under your [Feldman’s] supervision is leading me to experience extremely high levels of anxiety and an abnormal measure of fear. I intend absolutely no disrespect or rancor in this statement. It is simply my medical reality. . . . It is for this reason that I have pressed for transfer of some sort as a reasonable accommodation.” Feldman Dep. Exh. 32, at TUVELL984, Exhibit 92; Feldman Dep., at 152, Exhibit 43.

63. On January 18, 2012, Plaintiff informed IBM, “Based on my handicap of PTSD, and the symptoms I am experiencing when I contemplate returning to my position, I just do not see a way in which I can medically continue to work with, or under [Mr. Feldman].” Tuvell Aff., ¶ 22, Exhibit 47; Mandel Dep. Exh. 38, at TUVELL1038, Exhibit 93; Mandel Dep., at 159-160, Exhibit 55. On January 27, 2012, IBM was again informed that Plaintiff was medically incapable of continuing to work under Mr. Feldman. Verified Complaint, ¶ 112, Exhibit 42; TUVELL1197-1198, Def.’s Further Resp. to Req. for Adm. 78, Exhibit 87. Plaintiff necessarily rejected IBM’s faux proposal of his returning to work under Mr. Feldman, precisely pointing out that it was contrary to Plaintiff’s medical limitations as documented by his health care provider, and was contrary to his own reports about what triggers his medical condition. TUVELL1197-1198, Exhibit 94; Def.’s Further Resp. to Req. for Adm. 78, Exhibit 87. When Tuvell expressly declined IBM’s proposal for this reason, IBM failed to return with any other dialog for accommodation. Tuvell Aff., ¶ 23, Exhibit 47.

64. IBM repeatedly rejected Plaintiff’s requests for reasonable accommodation to provide him with a different supervisor, and/or to transfer him to another position away from Mr. Feldman, including on October 10, 2011, November 23, 2011, January 6, 2012, January 16, 2012, January 24, 2012. Verified Complaint, ¶¶ 70, 82, 97, 101, 109, Exhibit 42.

65. Even after IBM repeatedly rejected Plaintiff's requests for reasonable accommodation, Plaintiff continued to seek interactive dialogue for reasonable accommodation. Mandel Dep. Exh. 31, at TUVELL1221, 1222-1223, Exhibit 72; Mandel Dep., at 150-151, Exhibit 55. On January 11, 2012, after Plaintiff's application for transfer was rejected, he wrote "Is there any other option, any other positions, any other reporting structures, that you can think of that would help me return to IBM as a productive employee?" Tuvell Aff., ¶ 22, Exhibit 47; Mandel Dep. Exh. 38, at TUVELL1040, Exhibit 93, Mandel Dep., at 159-160, Exhibit 55. On January 18, 2012, Plaintiff said, "I am at a loss as to what I can suggest by way of reasonable accommodation that would permit me to work under you. Do you have any ideas?" Id.; Mandel Dep. Exh. 38, at TUVELL1038, Exhibit 93; Mandel Dep., at 159-160, Exhibit 55. IBM did not respond with anything of substance (Id.); it was IBM who shut down the interactive process, and not Plaintiff.

66. Mr. Tuvell has seen Stephanie Ross, LICSW, professionally since 1993. Ross Aff., ¶ 3, Exhibit 95. Ms. Ross has a Masters degree in social work from the University of Pennsylvania, and was licensed to practice social work (LICSW) in Massachusetts continuously since about 1984. Ross Aff., ¶ 1, Exhibit 95. Ms. Ross is qualified to diagnose and treat PTSD. Ross Aff., ¶ 2, Exhibit 95. Ms. Ross formally diagnosed Mr. Tuvell as suffering from PTSD in or about 2001, but understood Mr. Tuvell to be suffering from PTSD for some time before that. Ross Aff., ¶ 5, Exhibit 95; Ross Dep., at 58, 60, 137, Exhibit 67.

67. Over 10% of Ross' patients in last 24-25 years she has diagnosed with PTSD. Ross Dep., at 57-58, Exhibit 67.

68. Mr. Tuvell's diagnosis is based on a variety of symptoms, including lost weight, trouble sleeping, difficulty eating, triggered state, and every symptom of stress, including anxiety and depression. He has experienced hyper-vigilance, and has obsessive, recurrent, intrusive

thoughts. He has suffered flashbacks and has fainted, has experienced prolonged psychological distress, has experienced an altered sense of surroundings and self, and has engaged in strong efforts to avoid distressing feelings and reminders. In Ms. Ross', he has wept uncontrollably when describing his experiences. Mr. Tuvell is subject to irritability and outbursts. Ross Aff., ¶ 5, Exhibit 95.

69. To manage his PTSD, Mr. Tuvell has been treated by Ms. Ross with psychotherapy, as well as Eye Movement Desensitization and Reprocessing (EMDR, which is a qualified technique used to treat PTSD patients). Ross Aff., ¶¶ 2, 8, Exhibit 95. Mr. Tuvell has seen Ms. Ross professionally approximately 250 times, alone, and has seen Ms. Ross along with his spouse on many other occasions. Ross Aff., ¶ 3, Exhibit 95.

70. On October 19, 2011, Kathleen Dean of IBM spoke with Ms. Ross about Mr. Tuvell, and Ms. Dean's notes, contained at Dean Dep. Exh. 16, at 2 (Exhibit 96), accurately reflect the conversation. Dean Dep., at 115-117, Exhibit 79.

71. On January 23, 2012, Ms. Ross stated that while she advised Tuvell "not to return to specific job environment," that also "Patient has good functioning in the absence of trauma related stimuli." Ross Dep. Exh. 8, at 1-2, Exhibit 97; Ross Dep., at 91-94, Exhibit 67. On January 31, 2012, Ms. Ross reiterated that "the only course to recovery for Mr. Tuvell required a reassignment by the company." Def.'s Exh. 29, at 2. On September 28, 2012, Ms. Ross stated, "in a new setting with different people it was possible that Mr. Tuvell could function quite well and attend his work." Def.'s Exh. 29, at 3.

72. Ms. Ross testified that she believed that Mr. Tuvell could return to work, productively, at IBM, if provided reasonable accommodations. Ross Dep., at 176-177, Exhibit 67. She reported that Mr. Tuvell was very positive when interviewing for a new position at IBM, and

that his experience with Feldman, the harassing supervisor, did not taint the prospect of a new position at IBM. Ross Dep., at 177, Exhibit 67.

73. In December 2011, Mr. Tuvell went to IBM's Littleton facility in order to interview for a transfer that he affirmatively pursued. Tuvell Dep., at 217-218, Exhibit 98. Mr. Tuvell was not triggered with respect to his efforts to obtain a new position, and the interview process attending it. Ross Dep., at 182, Exhibit 67; Tuvell Aff., ¶ 15, Exhibit 47. Mr. Tuvell reported no psychological difficulty in returning to that IBM building for an interview. Ross Dep., at 183, Exhibit 67.

74. Tuvell conducted himself professionally at the December 1, 2011 interview with Kime. Kime Dep., at 65, Exhibit 65. Tuvell's was interviewed by two other individuals on or about December 8, 2011, and Kime reported that "the conversations were very positive" and their interactions were congenial. Kime Dep., at 77, 144, Exhibit 65; Kime Dep. Exh. 6, Exhibit 70. Tuvell's many communications with Mr. Kime concerning the position were "cordial and professional." Kime Dep., at 132, Exhibit 65.

75. In this case, change of reporting relationship to a different supervisor is entirely reasonable under these facts. IBM's own policies embrace the notion of transferring a supervisor in cases of the supervisor's harassment and misconduct. Mandel Dep. Exh. 47, at IBM2310, Exhibit 54; Mandel Dep., at 169-170, Exhibit 55 ("In certain circumstances, it may be appropriate to transfer the offender to another department or location"). Plaintiff had amply reported that Feldman had been harassing Plaintiff, and consequently a change of supervisor is reasonable as it is absolutely consistent with IBM's written policy. DSOF ¶¶ 12, 15, 16, 27. IBM takes the position that Tuvell's June 10, 2011 transfer/demotion, in which Tuvell was taken away from

being under the oversight of Knabe, was an effort to “accommodate [Tuvell’s] unhappiness with working with Mr. Knabe.” IBM Position Statement, at 4, Exhibit 46.

76. Plaintiff provided to IBM protected complaints of discrimination, retaliation and requests for reasonable accommodation on October 5, 2011, October 10, 2011, October 17, 2011, October 19, 2011, November 9, 2011, November 28, 2011, December 6, 2011. Verified Complaint, ¶¶ 69, 71, 72, 76, 80, 87, 91, Exhibit 42.

77. On August 5, 2011, Plaintiff communicated to IBM indicating that a disrespectful statement was made to a non-Caucasian coworker, and indicating that the coworker could be the subject of discrimination. TUVELL448-451, Exhibit 99; Resp. to Pl.’s Request for Adm. 21, Exhibit 56. On August 5, 2011, Mr. Mandel replied, stating that IBM does not accept third party complaints, and that if the coworker is offended, he would have to file a complaint himself. Id.; Verified Complaint, ¶ 52, Exhibit 42. Mr. Mandel’s statement to Plaintiff was false, as IBM would investigate third party complaints, and IBM documents encourage employees to bring third party complaints. Mandel Dep., at 55-56, Exhibit 55; Due Dep., at 187-188, Exhibit 50; IBM11395, Exhibit 100; October 23, 2014 Stipulation, Exhibit 101 (training materials suggesting asking, “do you believe this alleged discrimination and/or retaliation happened to others as well as yourself?”).

78. On or about August 28, 2011, Plaintiff submitted Addendum I to his Corporate Open Door filing, in which he accused Mr. Mandel, based on delays in the investigation to be contributing to a hostile work environment and engaging in handicap discrimination. Mandel Dep. Exh. 11, at 757-758, Exhibit 102; Mandel Dep., at 72-73, Exhibit 55. Mr. Mandel reviewed the complaints during the investigation. Mandel Dep., at 72-73, Exhibit 55.



79. IBM policy requires that investigators “must not have been involved in the issue being investigated . . . .” Mandel Dep. Exh. 43, at TUVELL2562, Exhibit 103; Mandel Dep., at 161-162, Exhibit 55.

80. On November 23, 2011, Mr. Tuvell requested a written response to his internal complaint, pursuant to Section 2.8 of the Concerns and Appeals Program. Verified Complaint, ¶ 84, Exhibit 42. Mr. Mandel replies with a non-substantive answer, saying only that after investigation, Mr. Mandel concluded that “management treated you fairly regarding the change in your work assignment, disciplinary actions, project plan request and day-to-day interactions with you.” Verified Complaint, ¶ 84, Exhibit 42.

81. On March 2, 2012, Plaintiff filed a third Corporate Open Door Complaint, alleging that Mr. Mandel engaged in discrimination and retaliation, and continued refusal to reasonably accommodate him. Mandel Dep., at 151-152, Exhibit 55; Mandel Dep. Exh. 34, at 5-6, Exhibit 104. Mr. Mandel never opened up an investigation to respond to this Complaint, and there was no formal response. Mandel Dep., 152-153, Exhibit 55; Tuvell Aff., ¶ 24, Exhibit 47.

82. Lisa Due conducted the initial investigation of Plaintiff’s discrimination allegations in June 2011. DSOF17. When conducting that investigation, Ms. Due knew Plaintiff to be alleging that Mr. Feldman and/or Mr. Knabe to have discriminated against him on the basis of age and/or gender when he was required to switch job functions with Ms. Mizar. Def.’s Exh. 19, at TUVELL265-266; Due Dep., at 38-40, Exhibit 50. Ms. Due considered these allegations of age and sex discrimination to be part of her investigation. Due Dep., at 42-43, Exhibit 50.

83. As part of her investigation, Ms. Due did not explore the qualifications of Ms. Mizar as part of her investigation, nor did she explore whether Mr. Feldman or Mr. Knabe had a history of engaging in sexist or ageist behavior or comments in the workplace. Due Dep., at 43-44,

Exhibit 50. Ms. Due did nothing to inquire of Tuvell's PTSD, or to speak with Feldman about his attitudes towards Plaintiff's PTSD. Due Dep., at 87, Exhibit 50. Prior to the Ms. Due's completion of the investigation, she met with Mr. Mandel, who instructed her to inform Plaintiff that Ms. Due had no reason to conclude that Plaintiff had been mistreated. Due Dep., at 145-146, Exhibit 50.

84. In addition to never seriously investigating Mr. Tuvell's complaints of discrimination, Ms. Due also never investigated, nor did she come to a determination, of whether Mr. Knabe engaged in discrimination, or engaged in any type of wrongdoing at all. Due Dep. Exh. 12, at IBM8283, Exhibit 76; Due Dep., at 164-165, Exhibit 50 (finding insufficient information to support allegations with respect to Mr. Feldman, and not addressing allegations with respect to Mr. Knabe at all).

85. Plaintiff was advised of his rights to appeal the conclusion of the investigation, which he did, to Mr. Russell Mandel. DSOF19; Mandel Dep., at 43-44, Exhibit 55. However, Mr. Mandel was biased as an appeal investigator, rendering him a patently inappropriate choice to take a fresh look at the complaint. Due Dep., at 145-146, Exhibit 50. Moreover, Mr. Mandel was an inappropriate investigator, under IBM's own conflict-of-interest policy, as he, personally, had been accused by Plaintiff of wrongdoing and discrimination, based on his failure to advance the investigation, and false assertions about IBM's practice of investigating third party complaints. PSOF77, 78, 79.

86. On August 25, 2011, Mr. Mandel wrote to Plaintiff, stating, "I do not plan on discussing your concerns directly with you until you return from Short Term Disability." Mandel Dep. Exh. 10, at TUVELL745, Exhibit 63; Mandel Dep., at 68-70, Exhibit 55. On August 30, 2011, Mr. Mandel wrote Plaintiff, stating, "I am simply not going to discuss with you the concerns

raised while you are out on STD.” Mandel Dep. Exh. 12, at TUVELL1518, Exhibit 105, Mandel Dep., at 73, Exhibit 55.

87. Mr. Mandel accorded Mr. Knabe and Mr. Feldman the opportunity to review his draft report and make suggestions about his version of events, but Mr. Mandel did not accord Plaintiff with the same courtesy, demonstrating the one-sided nature of the investigation. Mandel Dep., at 87, 91, Exhibit 55; IBM10266-10275, Exhibit 106.

88. While Mr. Mandel understood that Plaintiff’s complaint included the allegations that his demotion/transfer in June 2011 was discriminatory and/or retaliatory, he never investigated whether that demotion/transfer was appropriate, and he failed to inquire as to whether Mr. Feldman exhibited any animus in the workplace based on handicap and/or retaliation. Mandel Dep., at 26, 97-98, Exhibit 55.

89. On January 22, 2012, Mr. Tuvell initiated a second Corporate Open Door Complaint, which alleged that IBM denied Plaintiff a requested transfer on January 6, 2012, based on handicap discrimination, avilment of reasonable accommodation, denial of the obligation to reasonably accommodate and/or retaliation Mandel Dep., at 142-144, Exhibit 55; Mandel Exh. 33, at TUVELL1105, Exhibit 107. Mr. Mandel assigned himself the investigation of this Complaint, however, in performing these duties, Mr. Mandel admitted never investigating whether rejection was based on retaliation or was in violation of IBM’s duty to reasonably accommodate the Plaintiff. Mandel Dep., at 145, 147, Exhibit 55.

90. Since May 12, 2012, Plaintiff has been working at Imprivata, in a high level, technical capacity. He is able to perform these functions, despite his PTSD, because he is not being harassed. Tuvell Aff., ¶ 26, Exhibit 47.

91. It is denied that Plaintiff's current employer is a competitor of IBM. In fact, Imprivata is part of a "strategic provisioning partnership" with IBM, such that its product is integrated with IBM's corresponding product. Tuvell Aff., ¶ 27, Exhibit 47.

Respectfully submitted,

The Plaintiff,  
By his Attorney

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#### RULE 5.2 CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 12, 2015.

/s/ Robert S. Mantell