

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,  
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,  
Defendant

Civil Action No. 13-11292-DJC

**RESPONSE OF IBM TO PLAINTIFF'S**  
**"STATEMENT OF FACTS IN MATERIAL DISPUTE"**

Defendant International Business Machines, Inc. ("IBM"), responds to Plaintiff's Statement of Facts in Material Dispute as follows.

**A. Plaintiff's Statement of Facts Violates Local Rule 56.1.**

As a preliminary matter, IBM objects to Plaintiff's purported Statement of Facts on the grounds that it violates Local Rule 56.1. L.R. 56.1 permits a party opposing a Motion for Summary Judgment to include a "concise statement of the material facts as to which it is contended there exists a genuine issue to be tried." As explained by the First Circuit, L.R. 56.1, and others like it, were adopted because without them, "summary judgment practice could too easily become a game of cat-and-mouse. Such rules are designed to function as a means of focusing a district court's attention on what is -- and what is not -- genuinely controverted. When complied with, they serve to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide and greatly reduce the possibility that the district court will fall victim to an ambush." Hernandez v. Philip Morris USA, Inc., 486 F.3d 1, 7 (1st Cir. 2007) (internal quotations, citations omitted).

Plaintiff's "Statement of Facts", which is 28 pages long, includes 91 separate paragraphs and is anything but concise. It is in large part merely a re-presentation of Plaintiff's initial Response to

IBM's Statement of Facts, a Response that was in and of itself largely argumentative and conclusory. To illustrate, IBM's Statement of Facts was 18 pages when filed, but ballooned to 53 pages once Plaintiff submitted his Response, which included responses that stretched over multiple pages and included legal argument and citations. See, e.g., Response No. 10, 25, 53, 65, 79. Apparently that was not sufficient, as Plaintiff has supplemented his Response to IBM's Statement of Facts with his own Statement of Facts, which consists of an additional 28 pages that in many instances merely replicates, verbatim, Plaintiff's responses to IBM's Statement of Material Facts. Compare, e.g., Plaintiff's Statement of Material Facts ¶¶ 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 with Plaintiff's Responses to IBM's Statement of Material Facts ¶ 10. In total, Plaintiff has submitted *63 pages* of "facts" purportedly in dispute, in an attempt to manufacture a factual dispute where none exists, by burying the Court and IBM under a mountain of paper.

IBM's Statement of Facts set forth in concise form the undisputed facts that are material to the disposition of IBM's Motion for Summary Judgment. In his Response, Plaintiff admitted 32 of IBM's 81 undisputed facts outright, and virtually admitted another 46 facts (attempting to overcome his admission of the latter group by saying a witness will not be believed, setting forth his opinion without citing to evidence or disputing a statement in a non-material way). Plaintiff's Statement of Facts is merely another attempt by Plaintiff to re-argue his case, either by restating IBM's Statement of Facts in an argumentative way by placing his own "spin" on the facts, or by setting forth other facts which are not material to the disposition of IBM's Motion. As such, Plaintiff's Statement of Facts violates LR 56.1 and should not be considered by the Court.

Nevertheless, IBM hereby responds to Plaintiff's Statement of Facts as follows:

**B. Responses to Specific Paragraphs of Plaintiff's Statement of Facts<sup>1</sup>**

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.

IBM Response to 1. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that on or about May 18, 2011, Mr. Knabe did advise Mr. Feldman that Plaintiff had failed to complete a work assignment in a timely fashion. See IBM Statement of Facts ("SOF") ¶ 6.

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.

IBM Response to 2. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff was not demoted, but rather was reassigned to a different project because Mr. Feldman did not believe Plaintiff and Mr. Knabe could continue working effectively together on the Wahoo project that Mr. Knabe was managing. Neither Plaintiff's pay nor rank changed as a result, a fact admitted by Plaintiff. See IBM Statement of Facts, ¶¶ 8-9; Plaintiff's Response to IBM Statement of Facts, ¶10.

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.

IBM Response to 3. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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<sup>1</sup> The majority of facts that comprise Plaintiff's Statement of Facts in Material Dispute are supported by reference to Plaintiff's Verified Complaint (Pl. Ex. 42). While a verified complaint should be treated as the "functional equivalent of an affidavit" to the extent it complies with Rule 56(e), "conclusory allegations" – with which Plaintiff's Statement of Facts is replete – "do not pass muster, and hence, must be disregarded." Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991) (disregarding portions of Verified Complaint that were mere "conclusory allegations"). To the extent Plaintiff's Facts are supported only by conclusory allegations from his Verified Complaint, they too should be stricken from the record.

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.

IBM Response to 4. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 5. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman declined to hold an additional meeting with Mr. Knabe and Plaintiff because he deemed it would not be productive to conduct meetings between them each time there was a dispute over a work issue. Feldman Dep., p. 46, Pl. Ex. 43.

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.

IBM Response to 6. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman declined to hold an additional meeting with Mr. Knabe and Plaintiff because he deemed it would not be productive to conduct meetings between them each time there was a dispute over a work issue. Feldman Dep., p. 46, Pl. Ex. 43.

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.

IBM Response to 7. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that 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. See IBM SOF ¶ 8, Supp. Ackerstein Aff. Ex. 118 at 7.

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.

IBM Response to 8. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff was not demoted. Rather, Plaintiff was assigned to a different project in place of another employee, Sujatha Mizar, and in turn Ms. Mizar was assigned to work with Mr. Knabe on the Wahoo project. The switch did not result in any change in Plaintiff's pay or rank and was not a demotion. See IBM SOF ¶ 10.

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

IBM Response to 9. IBM admits that Plaintiff claims to suffer from Post-Traumatic Stress Disorder ("PTSD").

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

IBM Response to 10. IBM admits that Plaintiff advised Mr. Feldman that he claimed to have PTSD on or about May 26, 2011. Feldman Dep., p. 47, Pl. Ex. 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.

IBM Response to 11. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM does not dispute Plaintiff's academic credentials and states that Plaintiff had no serious issues with either Mr. Knabe or Mr. Feldman prior to May 18, 2011. IBM SOF, ¶ 6.

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.

IBM Response to 12. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff was a Band 8 and Ms. Mizar was a Band 7 employee, but denies that Ms. Mizar's responsibilities constituted a "lesser role" or that the citation provided for this fact, which are notes of Plaintiff's own comments to Lisa Due, reflect an adoption by IBM of Plaintiff's belief. See IBM SOF ¶ 10.

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.

IBM Response to 13. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff's cited email communications speak for themselves.

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.

IBM Response to 14. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that Plaintiff's new assignment was a demotion or that it was "lower level work" and admits that Plaintiff wrote the cited email, which speaks for itself. See IBM SOF, ¶ 10.

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.

IBM Response to 15. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that the cited policy, which deals primarily with sex harassment, is material to the issues to be determined on summary judgment, or applies to the reassignment of Plaintiff's and Ms. Mizar's job responsibilities. IBM submits that the cited policy speaks for itself. Pl. Ex. 54.

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.

IBM Response to 16. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff was hired in November of 2010, to work in Marlborough, Massachusetts, and after IBM's acquisition of Netezza, including the time he worked on the Yahoo project, Plaintiff continued to work out of the Marlborough office one day a week. Plaintiff cannot point to any complaint he made about the difference in commuting time between Marlborough and Cambridge at any time during his tenure with IBM.

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 Wahoo 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.

IBM Response to 17. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff wrote the cited email, which speaks for itself.

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.

IBM Response to 18. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman wrote the cited emails, which speak for themselves.

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.

IBM Response to 19. IBM admits that Mr. Feldman wrote the referenced email to Ms. Mizar and Plaintiff, which speaks for itself.

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."



IBM Response to 20. IBM admits that Ms. Mizar wrote the cited email, which speaks for itself.

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.

IBM Response to 21. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman considered Plaintiff's failure to provide a status report as Mr. Feldman had requested was inappropriate. Feldman Dep., pp. 88-89 (Pl. Ex. 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.

IBM Response to 22. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Mr. Feldman wrote the cited email, which speaks for itself, and IBM specifically denies that Mr. Feldman made a "false statement." See IBM SOF, ¶ 14.

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.

IBM Response to 23. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff wrote the referenced email, which speaks for itself. See IBM SOF, ¶ 15.

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.

IBM Response to 24. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff and Mr. Feldman authored the referenced emails, which speak for themselves, and that Plaintiff took a medical leave for cosmetic surgery in early July of 2011. See IBM SOF, ¶¶ 16-17, 20.

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.

IBM Response to 25. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff wrote the referenced email, which speaks for itself. Pl. Ex. 61.

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.

IBM Response to 26. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Ms. Mizar wrote the referenced email, which speaks for itself, in compliance with Mr. Feldman’s request. Pl. Ex. 62.

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.

IBM Response to 27. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies Plaintiff's characterization of the incident, which is not supported by any documents aside from Plaintiff's Complaint.

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.

IBM Response to 28. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff wrote the referenced email, which speaks for itself, and that Plaintiff went out on a leave of absence on or about August 11, 2011. See IBM SOF, ¶ 26; Pl. Ex. 63.

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.

IBM Response to 29. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel issued a 19-page report regarding Plaintiff's Open Door Complaint on or about September 15, 2011, concluding that Plaintiff was not subjected to any adverse or unfair employment actions. IBM SOF, ¶ 29.

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.

IBM Response to 30. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies Plaintiff's characterization of these incidents, which are not supported by any documents aside from Plaintiff's Complaint.

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.

IBM Response to 31. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. IBM admits that Mr. Kime authored the cited email. Further responding, IBM denies that Mr. Feldman recommended that Mr. Kime not hire Plaintiff. See IBM SOF, ¶¶ 60-65.

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.

IBM Response to 32. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel issues a 19-page report regarding Plaintiff's Open Door Complaint on or about September 15, 2011, concluding that Plaintiff was not subjected to any adverse or unfair employment actions. See IBM SOF, ¶ 29.

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.

IBM Response to 33. IBM admits that Plaintiff applied for the SWG-0436579 position with Mr. Kime's group. See IBM SOF, ¶ 57.

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.

IBM Response to 34. IBM admits that the SWG-0436579 job requisition includes the cited qualifications. Pl. Ex. 68.

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.

IBM Response to 35. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that the SWG-0436579 job requisition includes the cited qualifications, among others. Pl. Ex. 68.

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.

IBM Response to 36. IBM admits that Mr. Kime, one of the decision makers for the SWG-0436579 position, interviewed Plaintiff, and had other members of his team interview Plaintiff. IBM further states that Mr. Kime wrote the cited email to Plaintiff, which speaks for itself. Pl. Ex. 69.

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.

IBM Response to 37. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Kime wrote the cited email, which speaks for itself. Pl. Ex. 64.

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.

IBM Response to 38. IBM admits that Plaintiff wrote the referenced email, which speaks for itself.

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.

IBM Response to 39. IBM admits that the cited job requisition for the SWG-0436579 contains the cited language.

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.

IBM Response to 40. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the communications between Mr. Feldman and Mr. Kime speak for themselves and IBM specifically denies that Mr. Feldman recommended that Mr. Kime not hire Plaintiff. See IBM SOF, ¶¶ 60-65.

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.

IBM Response to 41. IBM admits the statements in this paragraph.

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.

IBM Response to 42. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that the SWG-0456125 was a reposting of the SWG-0436579 job requisition, which had lapsed without having been filled, and that the SWG-0456125 job requisition also lapsed without having been filled. See IBM SOF, ¶ 70.

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.

IBM Response to 43. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that when considering

Plaintiff's candidacy, Mr. Kime looked for Plaintiff's job performance 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. Mr. Kime was not aware at the onset of the interviewing process that the fact that Plaintiff was on STD 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. Accordingly, on January 6, 2012, Mr. Kime emailed Plaintiff to tell him that he would not be offering him the position. Mr. Kime testified that he could not move forward with taking Plaintiff directly from short term disability based upon the difficulty of assessing his work performance without a 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." IBM SOF, ¶¶ 60-65.

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.

IBM Response to 44. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the cited text messages between Mr. Kime and Mr. Feldman speak for themselves.

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.

IBM Response to 45. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the emails were written by Mr. Mandel and speak for themselves and IBM states that Plaintiff’s VPN access to IBM’s systems and facilities was restricted because Plaintiff was on a leave of absence and not working, and therefore had no need to access those systems, and his access to IBM’s Lotus Notes and internal corporate network were restricted because of his misuse of those systems. See IBM SOF, ¶¶ 54, 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.

IBM Response to 46. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the referenced emails and Interrogatory responses speak for themselves.

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.

IBM Response to 47. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel's March 6, 2012 email to Plaintiff concerning the reasons for curtailing his Lotus Notes access, speaks for itself. See IBM SOF, ¶¶ 54, 55.

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.

IBM Response to 48. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel's email to Plaintiff concerning Plaintiff's use of his personal email to forward HR-related issues to numerous IBM employees speaks for itself. Pl. Ex. 82.

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.

IBM Response to 49. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies this paragraph.

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.

IBM Response to 50. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that on August 3, 2011, Plaintiff was given a Warning Letter for his disruptive conduct, which included his July, 2011 emails to Mr. Feldman and Garth Dickie, including the email cited by Plaintiff. IBM SOF ¶¶ 24-25.

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.

IBM Response to 51. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states the email exchange between Plaintiff and Mr. Feldman cited by Plaintiff speaks for itself. Pl. Ex. 53.

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.

IBM Response to 52. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states the emails written by Plaintiff and Mr. Feldman speaks for themselves, and IBM denies that Mr. Feldman sought disciplinary action against Plaintiff based upon any complaint of discrimination or harassment. Pl. Ex. 83, 84.

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.

IBM Response to 53. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff exhausted his STD on January 25, 2012, and remained on an approved, unpaid medical leave until May 17, 2012. See IBM SOF, ¶ 55.

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.

IBM Response to 54. IBM admits that it sought to hire a replacement for Plaintiff’s position. Feldman Dep. p. 163-64.

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.

IBM Response to 55. IBM states that Plaintiff's May 8, 2012 Open Door Complaint speaks for itself.

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.

IBM Response to 56. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that it communicated with Plaintiff in an effort to confirm that he was not working for a competitor of IBM, but Plaintiff refused to identify where he was working. When he continued to refuse IBM's requests for clarification as to his current employer so IBM could confirm whether or not it was a competitor, he was terminated. IBM SOF, ¶¶ 74-79. IBM further states that the cited communications between IBM and Plaintiff speak for themselves.

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.

IBM Response to 57. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that it communicated with Plaintiff in an effort to confirm that he was not working for a competitor of IBM, which was prohibited without IBM's express permission as set forth in IBM's Business Conduct Guidelines, but Plaintiff refused to identify where he was working. When he continued to refuse IBM's requests for clarification as to his current employer so IBM could confirm whether or not it was a competitor, he was terminated. IBM SOF, ¶¶ 74-79; Supp. Ackerstein Aff. Ex. 117 at 26. IBM further states that the cited communications between IBM and Plaintiff speak for themselves.

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.

IBM Response to 58. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 59. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 60. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the communications cited by Plaintiff speak for themselves. IBM admits that Plaintiff stated on a number of occasions that he could not work with Mr. Feldman, but IBM denies that Plaintiff was a qualified handicapped individual or that IBM failed to provide Plaintiff with a reasonable accommodation or otherwise failed to engage in the interactive process.

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.

IBM Response to 61. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the emails cited by Plaintiff speak for themselves, and IBM denies that Plaintiff’s requests for a new supervisor were reasonable.

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.

IBM Response to 62. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that the communication cited by Plaintiff speaks for itself.

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.

IBM Response to 63. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that it made a “faux proposal” to Plaintiff.

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.

IBM Response to 64. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies that Plaintiff’s repeated requests for a new supervisor or to be transferred away from Mr. Feldman was a reasonable accommodation.

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.

IBM Response to 65. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the emails cited by Plaintiff, including IBM's responses to his inquiries, speak for themselves. IBM denies Plaintiff characterization that it "shut down" the interactive process and failed to offer alternatives.

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.

IBM Response to 66. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits Ms. Ross' testimony about her background and her diagnosis of Plaintiff as suffering from PTSD in 2001.

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

IBM Response to 67. IBM objects to this paragraph as not material conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 68. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.



IBM Response to 69. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 70. IBM admits that the referenced document reflects the notes of a telephone call between Ms. Ross and Ms. Dean, which speak for themselves. Pl. Ex. 96.

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.

IBM Response to 71. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the cited documents prepared by Ms. Ross speak for themselves. Pl. Ex. 97; IBM Ex. 29.

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.

IBM Response to 72. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff has misstated Ms. Ross' cited testimony.

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.

IBM Response to 73. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff interviewed at the Littleton location in or about December of 2011 with Mr. Kime's subordinates.

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.

IBM Response to 74. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff's interactions with Mr. Kime were professional.

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.

IBM Response to 75. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 76. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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?").

IBM Response to 77. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM denies Plaintiff's assertion that an alleged statement about another IBM employee was "disrespectful" and further states that the referenced emails between Mr. Mandel and Plaintiff and IBM's internal communications speak for themselves.

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.

IBM Response to 78. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff's referenced Open Door Filing speaks for itself.

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.

IBM Response to 79. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM submits that its internal communications speak for themselves.

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.

IBM Response to 80. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Mr. Mandel investigated Plaintiff's

concerns and concluded, in a 19-page report based on interviews with nine individuals, that he had not been subject to any adverse or unfair employment actions. Supp. Ackerstein Aff. Ex. 118.

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.

IBM Response to 81. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM admits that Plaintiff filed a third Open Door Complaint on or about March 2, 2012, which speaks for itself.

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.

IBM Response to 82. IBM admits that Ms. Due conducted a thorough investigation into the concerns raised by Plaintiff. See IBM SOF, ¶¶ 17-19; Plf. Ex. No. 49.

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.

IBM Response to 83. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Ms. Due conducted a thorough investigation into the concerns raised by Plaintiff, and concluded that Plaintiff's concerns were unsupported, and so advised Plaintiff. IBM denies that Mr. Mandel instructed Ms. Due to inform Plaintiff that she had no reason to conclude that Plaintiff had been mistreated, as Ms. Due reached that conclusion independently based upon her own investigation and the conversation with Mr. Mandel took place after she concluded the investigation. See IBM SOF, ¶¶ 17-19; Plf. Ex. No. 49.

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).

IBM Response to 84. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Ms. Due conducted a thorough investigation into the concerns raised by Plaintiff, and concluded that Plaintiff's concerns were unsupported, and so advised Plaintiff. See IBM SOF, ¶¶ 17-19; Pl. Ex. No. 49.

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.

IBM Response to 85. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Ms. Due advised Plaintiff of his appeal rights, and his appeal was investigated by Mr. Mandel. IBM denies that Mr. Mandel was an inappropriate or biased investigator.

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.

IBM Response to 86. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that the cited emails between Mr. Mandel and Plaintiff speak for themselves.

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.

IBM Response to 87. IBM objects to this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 88. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 89. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that Plaintiff initiated another Open Door Complaint on or about January 22, 2012, which speaks for itself, and which was investigated by Mr. Mandel.

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.

IBM Response to 90. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1.

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.

IBM Response to 91. IBM objects to the statements in this paragraph as conclusory, argumentative, and in violation of L.R. 56.1. Further responding, IBM states that it considers Imprivata to be a competitor of IBM and that IBM's Business Conduct Guidelines expressly state that an employee "may not, without IBM's consent, work for an organization that markets products or services in competition with IBM's current or potential product or service offerings." IBM's Business Conduct Guidelines further explain that "organizations have multiple relationships with IBM. An IBM Business Partner may be both a client and a competitor," and therefore IBM employees are obligated to consult with IBM to determine whether their activities "will compete with any of IBM's actual or potential business." Supp. Ackerstein Aff., Ex. 117, at pp. 17, 26.

Respectfully submitted,  
INTERNATIONAL BUSINESS  
MACHINES, INC.,

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**CERTIFICATE OF SERVICE**

This is to certify that on March 2, 2015, 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.