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In the Supreme Court of the United States

WALTER TUVELL

Petitioner

v.

INTERNATIONAL BUSINESS MACHINES (IBM)

Respondent

On Petition for Writ of Certiorari to the United States Court for Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI (WITH REQUIRED APPENDIX)

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1 · Tuvell is not "really" *pro se* — see ℘vi*f*6 *infra.*

[2]QUESTION PRESENTED

Infamously, the judges "flat-out" lied, falsifying *all* the facts (*proven* herein with 100% logico-legal certitude). At summary judgment, the lower courts sabotaged good procedural-law, by *ignoring* this Court's sacred *Summary Judgment Tenets of Review* (**SJTOR,** ℘17 *infra*). Unwarrantedly/unexplainedly, the lower courts *dis*credited *all* of nonmovant's well-posed representations of *all* disputed genuine issues of *all* material facts (DIFs), and instead credited *all* of movant's (℘22*ff infra,* esp. ℘*24*; Table, ℘29 *infra* and ReqApx ℘86–90) — "180°" wrongly, per SJTOR.

Their "'misstatement' of facts" obstructed justice. Persistently: even after the courts' attention was, politely, drawn expressly to their missteps, the judges refused to repair (or even acknowledge) them (℘22*f*37–38 *infra*). Elsewhere too, persuasive evidence shows that *nation-wide* the lower courts *routinely (surreptitiously)* commit aberrant procedural practices upon this type of case (℘xi*f*7, ℘15*f*21, *infra*), "misapplying"/rejecting this Court's pronouncements. Definitive supervisory measures are urgently needed, *now* (ripely). This case is the perfect vehicle ("bare-bones model of legal simplicity, developed").

Question *[with "suggested answer"]:*

Whether the lower federal courts ***MUST*** observe this Court's SJTOR? *[Emphatically, YES.]*

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2 • Notation used throughout: § = section(s); ¶ = paragraph(s); ℘ = page(s); ℓ = line(s); *f* = footnote(s); *e* = endnote(s); ι = inline-note(s) (embedded in footnotes/endnotes).

PREFACE

We are faced with a **worst-case-scenario policy/doctrinal challenge** for this Court, of **national scope/proportions,** and **extreme/universal interest/importance** (reaching distantly beyond the parties/facts involved here; ℘xi*f*7 *infra*). Precious foundations of our **Constitutional System** are crumbling beneath us: **Fundamental Rights; Equal Protection; Due Process; Public Integrity/Service/Trust; "Who Guards the Guards."**

What's important is, not the underlying *facts* of this case, but the First Circuit's known-deviant practices (℘xi*f*7 *infra*), stunningly endorsing a staggering nullification of well-settled *procedure*[3] — **disdainfully negating *this* Court's teachings, and squarely snubbing *all* precedential lessons of *all* Circuits** (℘22*ff infra*). The case is "clean/pure;" the problem is prime for deracination by this Court.

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3 · This Petition *per se* addresses only the *primary procedural-law aspect* of the case. The *secondary substantive-law aspect,* though presumably "fairly included herein" (Sup.Ct.R. 14(i)(a)) is contingent/dependent (becoming viable/feasible only if/when the procedural-law aspect is satisfactorily resolved); that is addressed in the **Addendum** PetAdd = ReqApx ℘92–123 (see Sup.Ct.R. 14.1(i)(vi)). The Addendum is *supplemental to* (not "in support of," per Sup.Ct.R. 14.2) this Petition: **Nothing in this Petition depends in any essential way on anything in the Addendum.** Thus for the purposes of this Petition, PetAdd (together with all references to it herein) *can be ignored* — though of course the Court is *invited* to review PetAdd (and *may* do so at its discretion).

PARTIES TO THE PROCEEDINGS

Petitioner Walter Tuvell was **appellant** at appellate court, and **plaintiff** at district court.[4]

Respondent IBM was **appellee** at appellate court, and **defendant** at district court.[5]

At summary judgment proceedings, IBM was **movant** and Tuvell was **nonmovant.**

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4 • Accordingly, in this Petition, Tuvell may be called "petitioner," "appellant" ("aplt"), or "plaintiff" ("plf"), depending on context.

5 • Accordingly, in this Petition, IBM may be called "respondent," "appellee" ("aple"), or "defendant" ("def"), depending on context.

TABLE OF CONTENTS

CONTENTS OF REQUIRED APPENDIX

Opinions, Judgments And Orders Below[6]

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6 · **Tuvell is not "really" (voluntarily) a *pro se* litigant.** Initially, Tuvell was satisfactorily represented by competent legal counsel (total expenditure > $340,000 out-of-pocket). But following appellate panel's affirmation of the district court's dismissal at summary judgment, Tuvell's counsel "declined" to file PetReh (for no other reason than counsel's "Fear of Speaking Truth to Power" [potential retaliation upon counsel by judges, inimical to counsel's practice/career] — *disclaimer:* Tuvell's "surmise," please do not "blame" counsel); at that point Tuvell was *"(self-)forced"* to file PetReh *pro se*.[†] {† Tuvell's motion to extend time for filing PetReh was *denied* (bordering on judicial abuse of discretion; compare ℘30ƒ44ι† *infra*). Making up for that lost time, during the two weeks following filing of PetReh, Tuvell filed six amended versions of PetReh, all in the nature of "trivial error/typo/tweak corrections" (no substantive changes). The appellate panel accepted only the third of these versions (labeled/entitled "Amended (Ter)"), rejecting the fourth–sixth versions (again bordering on abuse of discretion). Unsurprisingly, that third version still contains some trivial mistakes (e.g., at PetReh ℘7, "2–8" should read "3–8"; herein corrected at ℘26ƒ39 *infra*).}

Court Filings By The Parties

Augmentation

TABLE OF AUTHORITIES

Constitutional Provisions

Supreme Court & Federal Cases

State Court Cases

Judicial Rules

Statutes; Agency Publications

Treatises; Articles; Miscellaneous

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7 · Our topic, **"<u>illicit federal court bias against employment discrimination/retaliation cases</u>,"** is very much "in the air" **("ripe")** currently. To the <u>*ten*</u> *articles* in the terrific *N.Y.L.S.L.R. Symposium* cited *supra* (and references therein), we here add *two* more recent ones: (i) Hon. Nancy Gertner (Ret.), *Losers' Rules,* 122 Yale L.J. Online ℘109–124 (2012) (http://yalelawjournal.org/2012/10/16/gertner.html); (ii) Marcia L. McCormick, *Let's Pretend that Federal Courts Aren't Hostile to Discrimination Claims,* 76 Ohio State L.J. Furthermore ℘22–32 (2015). **<u>"[W]here there is smoke there is fire"</u>** (Hon. Denny Chin, *N.Y.L.S.L.R. Symposium* ℘680).

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PETITION FOR WRIT OF CERTIORARI

Walter Tuvell respectfully petitions this Court for Writ of Certiorari, to review the judgment of the United States Court of Appeals for the First Circuit.

A Note On "Tone" — This Petition: (i) speaks pure/raw Truth, candidly (not "shrilly"); (ii) evinces outraged indignation (without "hysteria"), typographically and linguistically. *This is appropriate/necessary:* a "temperate elocution" *risks escaping the notice* of this Court — gravely disserving America.

For, this case stretches *indefinitely beyond* "mere error-correction": a more surreal/nightmarish travesty/abortion of justice is beyond imagination. (Literally.) The momentousness of the lower courts' waywardness in this case cannot be overstated, given its portent for other cases (℘xi*f*7 *supra,* ℘15*f*21, *infra*).

> Midway in our life's journey, I went astray
> from the straight road and woke to find myself
> alone in a dark wood. How shall I say
>
> what wood that was! I never saw so drear,
> so rank, so arduous a wilderness!
> Its very memory gives a shape to fear.
>
> How I came to it I cannot rightly say,
> so drugged and loose with sleep had I become
> when I first wandered there from the True Way.
>
> — *Dante, Inferno,* Canto I, ℓ1–6,10–12

OPINIONS BELOW

The **district court** opinion (Op) is reproduced at ReqApx ℘4–38.

The **appellate court** (panel) opinion is reproduced at ReqApx ℘0–3.

JUDGMENTS BELOW; JURISDICTION

The **district court** entered its judgment on July 8, 2015 (ReqApx ℘44–45).

The **appellate court panel** entered its judgment on May 13, 2016 (ReqApx ℘42–43).

The **appellate court denied rehearing** (both panel and *en banc*) on June 15, 2016 (ReqApx ℘40–41).

The **jurisdiction** of this Court is invoked under 28 U.S.C. §1254(1),2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Equal Protection And Due Process

The **Equal Protection Clause** of the U.S. Constitution is that part of Amendment XIV Section 1 which provides (emphasis added):

> No State shall make or enforce any law which shall … deny to any person within its jurisdiction the **equal protection of the laws**.

This Court has held (*Bolling*) that the Equal Protection Clause's requirements apply also to the federal government (not just to states), by way of the **Due Process Clause** of Amendment V. Concerning the latter, with respect to **judicial/procedural due process**, this Court has held with great wisdom/perspicacity (*Marshall* ℘242, emphasis added):

> The Due Process Clause entitles a person to an *impartial and disinterested* tribunal in both civil and criminal cases. This **requirement of neutrality** in adjudicative proceedings safeguards the … central concerns of **procedural due process** … The neutrality requirement helps to guarantee [against] **erroneous or distorted conception of the facts ["misstatement of fact"] or the law.** … At the same time, it preserves both the appearance and reality of *fairness,* "gen-

> erating the *feeling,* so important to a popular government, that *justice* has been done," … by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that **the arbiter is not predisposed to find against him.**
>
> **<u>The requirement of neutrality [fairness, equal protection, due process] has been jealously guarded by this Court.</u>**

That Constitutional Right to "equal protection of the laws" is **so fundamental** that it is the *defining maxim/motto* of this Court itself, recast memorably as **"Equal Justice Under Law"** (see ℘39 *infra*).

More generally, it's not just the courts, but any/all its subjects (in this case, Mr. Tuvell), who may/must support *Marshall*'s "jealous guardianship" *(supra)* of our Constitutional principles:

> Do the people of this land … desire to preserve those [liberties] so carefully protected by the … [Constitution]? If so, let them withstand all *beginnings of encroachment.* For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time. — *Associated Press, ℘141,* Sutherland, J., dissenting (emphasis in original).

JUDICIAL RULE INVOLVED

FRCP-LR 56.1

This is Really Important (it's at the heart of this Petition). The First Circuit's Local Rule 56.1 provides, in relevant part (emphasis added):

> **Motions for summary judgment** *shall* include a concise statement ["**DSOF**," ℘20 *infra*] of the material facts of record as to which the moving party contends there is no genuine issue to be tried[.] … A party opposing the motion *shall* include a concise statement ["**PSOF**," ℘20 *infra*] of the material facts of record as to which it is contended that there exists a genuine issue to be tried[.] … Material facts of record set forth in the *statement required* [**DSOF**] to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties *unless* [and *only* unless] *controverted* by the *statement required* [**PSOF**] to be served by opposing parties.

The point is that ***the*** *two documents required* at Summary Judgment are **DSOF** and **PSOF** (local rules elsewhere may/do differ). For why this is Really Important to our case, see ℘22*ff infra,* esp. *℘24*.

For a *full exposition* of how motions for summary judgment are (supposed to be) adjudicated in all federal courts, see the SJTOR, ℘17 *infra*.

STATEMENT OF THE CASE

Factual Background

A very concise/partial *outline* of the underlying facts suffices in this place, noting this Petition is concerned with *procedural* (not fact-intensive) issues. *Details* of plaintiff's case-in-chief are not found herewith (by the nature of this Petition), but can be gleaned from: (i) *Plaintiff's Statement of Facts* (PSOF = ReqApx ℘48–84); (ii) the *PSOF-Exclusion Table* (*Abridged* ℘29 *infra; Unabridged* ReqApx ℘86–90).

Walter Tuvell is a white male U.S. citizen, a mathematician (B.S. MIT, PhD U. of Chicago) spending his working life as a computer scientist (technical software professional). He was working at Netezza Corp. (Marlboro, Mass.) when it was acquired by IBM on January 1, 2011.[8] Tuvell's job title was Performance Architect, under the organizational supervision of Dan Feldman, but reporting on a day-to-day operating basis ("dotted-line," "matrix model") to another supervisor, Fritz Knabe, at a satellite office (Cambridge, Mass.), working on a next-generation database-warehouse project, code-named "Wahoo."[9]

Tuvell had no history of friction with anyone at Netezza/IBM, when "out-of-the-blue" on May 18, Knabe "informed" Feldman privately that Tuvell had failed to deliver certain Excel graphics that Knabe

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8 • All dates are in 2011 unless expressly stated otherwise.

9 • Projects at pre-IBM Netezza were customarily code-named after species of fish.

had instructed/ordered Tuvell to produce. That was a *whole-cloth lie:* Knabe never broached anything like any such task to Tuvell, at any time, ever. It would have been *"impossible"* for Knabe to do so — since **Knabe *knew well* that Tuvell didn't use Microsoft software of any kind (such as Excel).** Tuvell instead used *exclusively* the Linux "operating system," and its "open-source" software applications; this was quite well-known to everyone Tuvell worked with. Feldman confronted Tuvell with Knabe's accusation later that same day, "siding" with Knabe — even though **Feldman *also knew well* that Tuvell used only Linux-based tools.**[10]

Instantly, Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of PTSD, stemming from an abusive/bullying/defamatory workplace incident he'd experienced more than a decade previously while at another employer, but which was since in remission ("passive"/"dormant" phase). Knabe/Feldman's accusation immediately caused/"triggered" Tuvell to reexperience an acute/"active" PTSD "flashback"/relapse. From that moment, Tuvell struggled mightily under the resurgence of his PTSD. Tuvell hid his anguish from Feldman as best he could that day, but he did

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10 • For "(pretext-based) proof" of Knabe/Feldman's dishonesty concerning the Excel graphics episode, see ℘30*f*44 *infra* — noting, however, that such *proof* is not necessary at summary judgment stage. Instead, the judge **must** reflexively/automatically (with no more than *de minimus* plausibility of proof) *credit*/*believe* Tuvell's side of story ("nonmovant-trumps-movant" and "light-burden" tenets of the SJTOR, see ℘17 *infra*).

firmly deny Knabe's charge. The next day, Tuvell proposed a three-way meeting, so that the three men could "clear the air" (determine what had really happened — potentially/hopefully just a miscommunication), and avoid its happening again.

Tuvell's (~half-dozen) requests for three-way meeting went *unheeded,*[11] prompting Tuvell to explicitly reveal his PTSD affliction to Feldman on May 26, citing it as the reason he sought the three-way meeting "reasonable accommodation."[12] At that exact point, IBM was *aware* of Tuvell's ADA-protected disability. Feldman nonetheless continued to deny all requests for three-way-meeting (or to suggest any other means of accommodation), causing continued decline in Tuvell's psychological state.

On June 8, Knabe attacked Tuvell with *another whole-cloth lie* — this time, about Tuvell's not timely completing a certain task, even though Knabe *knew* (thanks to *daily* "stand-up" meetings) that Tuvell was on-schedule with all his deliverables[13] — by *falsely yelling loudly* at Tuvell in the presence of other Wahoo team-members in Cambridge.

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11 • The desired meeting never did materialize.

12 • Tuvell did not use the language "ADA" or "reasonable accommodation" until later, noting that the ADA does not require the use of such *"magic words"* at any time. *EEOC Guidance: Reasonable Accommodation* (excerpted extensively at PetAdd ℘6–9 = ReqApx ℘106–109).

13 • (i) Tuvell *had* completed his task due *that day*. (ii) The task Knabe *yelled about* wasn't due for *another ten days* (and Tuvell did deliver it two days later, *more than a week early*).

Knabe "informed" Feldman, and on June 10 Feldman peremptorily demoted[14] Tuvell to a much less desirable position — "switching" him with another employee, less-qualified and lower-ranked — giving for "reason" that Tuvell and Knabe could not work together (but not holding Knabe accountable for his then-known-false actions). Tuvell protested, and immediately informed Feldman that he intended to **escalate the matter to HR (Human Resources),** which he did do later that same day.

And that's when things *really* "went south."

When Tuvell met with the HR representative on June 13, she asked him *why* he thought Knabe and Feldman would act the way they did. Tuvell said he didn't know why, but based on the fact that Feldman/Knabe displayed no interest whatever in resolving the situation ("stone-walling" even the simple/obvious proposal for three-way meeting), Tuvell surmised that "something illegal must be at the root of things,"[15] and that he suspected ***age discrimination***[16] might be the motivating factor. That *discrimi-*

14 • IBM prefers euphemistic language such as "transfer/reassignment;" but we rather agree with J. Alito's candid characterization: "demotion" (℘35 *infra*).

15 • This is a legitimate/protected pretext-based inference; see ℘33*f*51 *infra*.

16 • During the course of events as they emerged (as related in this section, and *infra*), plaintiff was unable to uncover solid/direct *evidence* of *age-based discrimination* (which is why that charge was later dropped). On the other hand, very obvious *retaliation* (for complaining of discrimination in the first place)† did arise immediately, soon followed by a plentiful abundance of

nation complaint was *protected by law,* of course.[17]

It would take us too far afield at this point (the factual details being unnecessary for this Petition) to even *list* here the *dozens* of "bad things" that happened to Tuvell from that point forward.[18] Suffice it to say that at every juncture, Tuvell took the right/appropriate steps to "clear his name," according to IBM's published policies/programs/procedures/practices (e.g., invoking IBM's formal internal dispute resolution [IDR] process, called "[Corporate] Open Door Concerns & Appeals (C&A)," for which he produced a valuable/detailed/voluminous report to aid IBM's investigation). Nonetheless, he was treated him to an unrelenting stream of discriminatory/retaliatory acts, from every IBM representative/agent who "touched" his case. Whatever was the animus for the

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direct PTSD-disability-based discrimination and retaliation, which is what now forms the heart of the case. {† A charge of *retaliation* remains viable even in the *absence* of underlying *substantive discrimination* (see ℘11*f*17 *infra,* and PetAdd ℘6 = ReqApx ℘106) — provided the retaliated-upon discrimination charge was made on *reasonable* grounds (as it was, because Tuvell was the oldest technical employee at Netezza, to his knowledge), and in *good faith* (as it was, namely *pretext-based inference,* see ℘8*f*10, ℘10*f*15 *supra* and ℘30*f*44, ℘33*f*51 *infra*).}

17 • *EEOC Compliance Manual* §8-II(B)(2) ℘8-4–8-5 (excerpted extensively at PetAdd ℘5–6 = ReqApx ℘105–106), emphasis added: "Complaining to anyone about *alleged* [it does not have to be *proven,* to judge or jury] discrimination against oneself or others … constitute[s] *[protected] 'opposition'*."

18 • For a rough/summary grasp of events (with only tagline names, *sans* explanation) see the *PSOF-Exclusion Table* (*Abridged* ℘29 *infra; Unabridged* ReqApx ℘86–90).

Excel graphics episode, the resulting upshot was that *after Tuvell revealed his PTSD and complained of discrimination/retaliation, the environment devolved into a steady torrent of abusive harassment.*

IBM continued to refuse ADA "interactive dialogue/process" and "reasonable accommodation". On August 15, unable to endure more health-wise, Tuvell took short-term disability (STD) leave. The one-and-only condition Tuvell required for resuming his job was cessation of PTSD-exacerbating psychological abuse, i.e., removal from Feldman's health-harming hostile management. Absent rehabilitation/removal/transfer of Feldman, Tuvell *twice* applied for transfer to a known open/funded position for which he qualified; IBM officially recognizes/supports that solution, and the ADA even *requires* it.[19]

But IBM refused transfer, "stone-walling" to the bitter end. Unable to return to IBM because of IBM's refusal to accommodate his PTSD, Tuvell was *forced by economic necessity* to find stop-gap employment at another software company (Imprivata, beginning on March 12, 2012), thinking it would be a "temporary gig" until IBM finally "wised up" and "did the right thing," returning him to his desired job (or alternatively approving the transfer he sought) at IBM. They never did; Tuvell never returned from his STD leave. On May 17, 2012, IBM terminated Tuvell on

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19 • EEOC Guidance: Reasonable Accommodation, at *Reassignment* (excerpted extensively at PetAdd ℘8 = ReqApx ℘108), emphasis added: "Reassignment[/transfer] is the [only] *reasonable accommodation* of **last resort** and **is required** ..."

an absurd and "trumped-up" (and illegal)[20] charge.

(And that's the Truth.)

Proceedings At MCAD/Local/District Levels

MCAD — Tuvell filed a charge with the Mass. Commission Against Discrimination (MCAD, the state's EEOC Fair Employment Practices Agency) on March 12, 2012. An additional charge was filed on September 18, 2012. Tuvell requested a "Right to Sue" letter from the EEOC on February 11, 2013, which was granted on February 19, 2013.

Local — Civil suit was filed at Middlesex County (Mass.) Superior Court on April 23, 2013. IBM removed the case to the federal courts (D. Mass., Boston) on May 30, 2013.

District — Litigation activity on interrogatories/admissions/discovery/depositions then commenced/progressed/concluded. IBM moved for **summary judgment** dismissal on December 15, 2014. Seven special summary judgment documents were filed, December 15, 2014 – March 2, 2015 (DSOF+DMemo+RespDSOF+PSOF+PMemo+RepPMemo+RespDSOF; see the section on *Plaintiff's Statement Of Facts (PSOF)*, ℘20 *infra*). The district court granted dismissal, entering its opinion on July 7, 2015 (Op = ReqApx ℘4–38), and judgment on July 8, 2015 (ReqApx ℘44–45).

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20 • Discussed at PetAdd ℘19–20 = ReqApx ℘119–120.

Proceedings At Appellate Level

Appeal — Plaintiff filed motion to appeal on August 5, 2015. Appellate and Appellee Briefs (ApltBrief, ApleBrief) were filed December 1, 2015 – February 16, 2016. Oral hearing was held on April 5, 2016. The appellate panel affirmed dismissal, entering its opinion (ReqApx ℘0–3) and judgment (ReqApx ℘42–43) on May 13, 2016.

Rehearing — Plaintiff filed Petition for Rehearing, with Annotations), on June 4, 2016 (see ReqApx ℘46–47). Petition for Rehearing was denied by the appellate court, both panel and *en banc,* on June 15, 2016 (ReqApx ℘40–41).

This Petition — The instant Petition for Writ of Certiorari now follows. The *content* of this Petition (together with its Addendum, PetAdd = ReqApx ℘92–123) actually comprises a *rewritten/upgraded version* (re-targeted to this Court, see *A Note On "Tone",* ℘1 *supra*) of the Petition for Rehearing (PetReh+PetRehAnn, see ReqApx ℘46–47) — which was *already presented/filed* to the appellate court, but *wrongfully ignored* there.

ARGUMENT/REASONS FOR GRANTING PETITION

Introduction

Manifest injustice reigns, fairness/truth/trust are eroded/frustrated/thwarted, when the *Fundamental Right* of *Due Process of Law,* guaranteed to "we the people" under the United States Constitution, is curtailed by federal judges who wander astray.[21] That's what happened in this case.

The underlying factual issues are sufficiently complicated[22] (*Factual Background* ℘7 *supra;* ℘29 *infra*) to potentially implicate a "lot of work and bother" for the lower courts. Because they "just don't

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21 • Our claim of judicial misconduct is *not* fantastical/delusional/hyperbolical (it is *proven* herein). Even worse, it's *not even unprecedented* — albeit as *surreptitious*/*unwritten*/*off-the-record*/*ersatz*/*pseudo-"law."* A *sitting federal judge* testifies **on-point** to this (Hon. Mark. W. Bennett, *N.Y.L.S.L.R. Symposium* ℘691–692): "The federal courts' daily ritual of trial court grants and appellate court affirmances of ***summary judgment in employment discrimination cases*** across the land is increasingly troubling to me. … I think that the trend away from jury trials toward a new focus on expensive discovery and summary judgment has been fueled by the ***complicity of federal trial and appellate judges*****.** … In my view, trial and appellate judges engage in the daily ritual of docket control by [unfairly/falsely] uttering too frequently the [unfair/false] incantation, 'We find no material question of fact'." See especially Bennett's *per curium* dissent in *Kampouris.*

22 • "Complicated" for an individual (non-class-action) employment case, though still very mild compared to "big/complex litigation" in the technical sense.

like" "hard" employment cases, or perhaps for another reason, the First Circuit judges falsely dismissed the case at summary judgment.

Certainly, "innocently erroneous" dismissals occasionally occur at district courts. Such simple mistakes are typically detected/corrected by the appellate courts. In the instant case however: (i) The errors made at district level (Op = ReqApx ℘4–38) were obvious/blatant/outlandish. (ii) Inexplicably, those errors were *enthusiastically adopted*[23] by the appellate panel (ReqApx ℘0–3). (iii) And when the errors were clearly/expressly *proved erroneous* in PetReh+ PetRehAnn (see ReqApx ℘46–47), all appellate judges aloofly "stone-walled" (Denial of PetReh, ℘38–39), without pretending even a hint of rationality, in plain defiance of logic, law and humanity.

The pattern of perfidy (district ⇝ panel ⇝ *en banc*) is palpable. No conclusion can be drawn by any fair-minded rational observer, other than that lower court judges unjustly "short-circuited/shrifted" Tuvell, by wrongly dismissing his case, willfully and intentionally, with premeditation, and with no cognizable legitimate justification of any nature — comprising *judicial misconduct* and *falsified result.*

All this is logically explicated and rigorously **proven** in the remainder of our Argument/Reasons.

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23 • Because of this *affirmative adoption,* the appellate court as a whole staked its claim to *coequal/joint ownership* of the district court's opinion (ReqApx ℘4–38). We therefore refer to this simply as the "lower courts' ('joint') opinion" ("Op"), without ambiguity.

A Class Of Errors: PSOF-Exclusion

The lower courts' procedural transgressions are generally categorized into one large class, which we call **"PSOF-Exclusion."** This class is deeply rooted in the Summary Judgment Tenets of Review (SJTOR). Our formal analysis must begin there.

Summary Judgment Tenets Of Review (SJTOR)

The authority for summary judgment, FRCP 56(a), provides (in relevant part, emphasis added):

> The court shall grant summary judgment *if [and only if]* the *movant shows* [both] that [(i)] there is ***no genuine dispute as to any material fact*** *and* [(ii)] the movant is entitled to judgment as a matter of law.

The *rule(-like) framework* for evaluating clause "[(i)]" is the **Tenets of Review at Summary Judgment (SJTOR)**[24] — a well-developed icon of American jurisprudence, publicly developed/promulgated by this Court throughout many years. It is stable, *binding* throughout our entire judicial system, and *strictly mandates* the duties incumbent upon any tribunal reviewing summary judgment. We formulate

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24 • The *phrase* SJTOR (inaptly called "SJSOR" in PetReh) is a neologism here, but the *idea* of "standardized principles at summary judgment" is "black-letter"; **in this forum, we may/do safely assume great familiarity with it** (no need for "infinite regression" through "citation hell"). See, e.g., *Sensing* (§II(A) ℘152–153). For summary judgment generally, see *Schwarzer*.

the SJTOR as a rubric of six **core tenets**[25] (*all* breached/broken/violated below, as proven *infra*):

T1 **All-Issues/Facts —** *All* ("each/every," not just "some") *factual issues* **must** be *considered*/*discussed* — especially, all *disputed*/*contested genuine*[26] *issues of material*[27] *facts* ("DIFs").

T2 **Whole-Record —** The *entire record* ("whole set/totality of circumstances," not just a "subset"), **must** be considered, regarding each/every issue.

T3 **In-Context**[28] **—** All issues **must** be considered in *holistic relationship* with one another, within the whole-record *environment* (not "context-free line-by-line isolation"); patterns may emerge.

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25 • Or "axioms" if you will (see ℘19*f*29 *infra*), since these tenets supply the "given" (not-to-be-questioned) "protocol" (rules of engagement) upon which further considerations are based.

26 • *"Genuine"* issues = Can be resolved in favor of either party.

27 • *"Material"* facts = Have the potential of affecting the outcome of the case.

28 • Some practitioners consider the "in-context" tenet to be an *implicit corollary* of the "whole-record" tenet. Instead, we prefer to import this tenet *explicitly* from *BNSF v. White* (℘69): "Context matters" (itself independent of the context, be it summary judgment or other). The danger of out-of-context snippets is well-encapsulated by the infamous "six-lines" aphorism (attributed (*Hoyt* ℘763) to Cardinal Richelieu (1585–1642), known to literature as the villain of Alexandre Dumas's *The Three Musketeers*): *«Qu'on me donne six lignes écrites de la main du plus honnête homme, j'y trouverai de quoi le faire pendre.»*[†] {† "If you give me six lines written by the hand of the most honest/honorable of men, I will find something in them which will hang him" (various translations).}

T4 **Nonmovant-Trumps-Movant**[29] **—** Tenets T1–3 **must** be *interpreted*/*construed* in the *light most favorable*/*advantageous* to *nonmovant* (never to movant), and *belief*/*credit awarded* thereto.

T5 **All-Inferences**[30] **—** All *reasonable*/*justifiable logical*/*legal inferences*/*implications* from tenets T1–3 **must** also be *interpreted favorably* to *nonmovant,* and credit awarded thereto.

T6 **Light-Burden —** For tenets T4–5, nonmovant bears the *undemanding* requirement of *production only* of favorable *facts* (and *law*) — i.e., *de minimus*[31] *proof*/*persuasion. All* fact/credibility-finding is for the *jury* at trial, *none* for the *judge* at summary judgment.[32]

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29 • A recent example of tenets T4–5 is *Tolan* (℘1, internal punctuation suppressed, emphasis added; cf. ℘18*f*25 *supra*): "… the *axiom* that in ruling on a motion for summary judgment, [t]he evidence of the *nonmovant is to be believed,* and *all justifiable inferences* are to be drawn in his favor."

30 • See, e.g., ℘19*f*29 *supra*.

31 • *"De minimus"* in the context of SJTOR means *unless the trial jury is required to believe otherwise* (*Reeves* ℘151): Demonstration/existence of even *some* slight/mere doubt/plausibility favoring nonmovant suffices, provided that *some* "rational/reasonable" trier of fact *could possibly* ("≧ 0% probability") find *some* "rational reason" to resolve *some* fact in nonmovant's favor. In the instant case, no suggestion of "implausibility" (facial or otherwise) has ever been lodged/hinted by IBM or the courts.

32 • *Railroad* ℘664: "It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

To belabor the obvious: **"must"** in these tenets means *"mandatory rule"* (not "optional guideline"). The reviewing tribunal has *no discretion* in the matter — by judicially self-imposed edict, promised-to and relied-upon-by "we the people." (Period.)

In sum: **Summary Stage ≠ Merits Stage.**

Plaintiff's Statement Of Facts (PSOF)

Pursuant to customary practice at summary judgment in the First Circuit district courts,[33] the parties properly filed seven **key documents:**[34]

★✔ **DSOF —** Def's Statement of Facts.

✓ ~~**DMemo**~~ **—** Def's Memorandum in Support.

★☒ **PSOF — Plf's Statement of Facts in Material Dispute (ReqApx ℘48–84).**

✓ ~~**PMemo**~~ **—** Plf's Memorandum in Opposition.

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33 • Per FRCP-LR 56.1 (℘6 *supra*), only *two* of the seven key documents are/were ***required*** ("★") to be filed: **DSOF** and **PSOF** (*so noted/declared in the PSOF itself* ***on its very face,*** PSOF ℘1 = ReqApx ℘48–49 ¶ preceding ¶1).

34 • We focus on these seven key documents because they were filed *especially* for the purpose of summary judgment (our overall theme), and formed the *primary* input to the courts' Op (cf. *infra*). (Their exhibits/appendices are just supportive, not primary.) Legend: "★" = *required* to be filed (℘20*f*33 *supra*); "✔" = *explicitly listed/cited/noted* by the courts; "✓" = "*otherwise noted*" by the courts; "☒" = *"X'd-out"* = ***ignored*** **by the courts;** "~~strikethrough~~" = "memoranda of law" (not forwarded to appeals court, replaced/superseded by ApltBrief, ApleBrief).

✔ **RespDSOF —** Plf's Response to DSOF.

☒ **RespPSOF —** Def's Response to PSOF.

☒ **~~RepPMemo~~ —** Def's Reply to ~~PMemo~~.

By customary practice in the First Circuit, and by inspection in the present case, the **PSOF** is *by far the most important* of the key documents, *above and beyond all others*.[35,36] By the SJTOR ("nonmovant-trumps-movant"), the PSOF (with its companions) comprises the first-tier "facts/DIFs of the case" *that courts must credit,* while the DSOF (with its companions) is consigned to a second-tier "jaundiced view."

But that **commandment** *("courts must credit")* was **disobeyed** by the judges in this case. **Formal statement** of this proposition/thesis follows next, *infra,* with rigorous/water-tight/rock-solid **proof.**

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35 • The factual assertions of the (i) PSOF (together with its companions ~~PMemo~~/RespDSOF) also reside, nearly-verbatim, in two other filings of record: imported from (ii) the original Complaint; and exported to (iii) ApltBrief. These documents (i–iii) stand, *in toto,* for plaintiff's **"case-in-chief."** See ℘20*f*34 *supra.* This Petition focuses on the PSOF as the main exemplar of Plaintiff's case-in-chief, for simplicity/specificity, since it the most important for our theme of summary judgment.

36 • Not counting the memos/briefs of legal theories (which are not *required* at summary judgment time; FRCP-LR 56.1), the second most important of the key documents is RespDSOF — but it is a relatively minor *pro forma* ("legalistic") brief, narrowly limited/cramped by design/implementation to be *secondary*/*responsive*/*cabined*/*reactive* to the DSOF. By contrast, the PSOF is *primary*/*free-ranging*/*proactive,* hence it has the freedom/autonomy to "tell the *whole* truth/story" (with reference to the SJTOR's "whole-record" tenet).

PSOF-Exclusion Generally

With that background, the **PSOF-Exclusion** class of errors is now *formally defined* via this *claim:*

PSOF-Exclusion Thesis:[37] The courts brazenly (only half-heartedly attempting subtlety)[38] **ignored/excluded (☒) the required (★) PSOF (= case-in-chief,** ℘21*f*35 *supra*). By this **lie(-of-omission),** the

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37 • When Tuvell ***explicitly*** **articulated and proved** this very PSOF-Exclusion Thesis in PetReh ℘3–6, he was mindful of the role of the appellate-level "rehearing" rules — namely, *focus on court mistakes, not on case-in-chief* (FRAP 35,40, *expressly cited* at PetReh ℘v*f*‡). Knowing such, he was unfailing circumspectly *respectful* towards the district and appellate judges: non-confrontational; open-minded to possible inadvertent mistake; discounting the possibility of judicial misconduct (PetReh ℘d*e*16,17). Nevertheless, the judges coldly "stone-walled" plaintiff's plea. Without an iota of compunction, and complacently emboldened by a remarkable disrespect for lawfulness, the judges "knew" they could "get away with" not even a "slap on the wrist" from a presumed (to their minds) "indifferently apathetic" Supreme Court. "Innocent error" is now even a remote possibility for these judges' actions/inactions. These judges acted as unconcealed/flagrant *bad-faith dishonest-brokers,* with purposeful aforethought. These judges lied.

38 • Secretly/covertly, the courts *quietly (sub silentio) "paid no attention" to the PSOF — "as if" it didn't exist or they never saw/read it*. When we say the lower courts "excluded/ignored" the PSOF, we're *not* saying the courts *"said"* they were doing so — we are saying they simply *"did"* so. This, despite the fact that the courts advertised they were *consciously aware* of what they were doing, *by impudently paying (only) "lip service" to SJTOR* (Op §II ℘1–2 = ReqApx ℘4–6) — thus proving their defiance of long-well-settled procedure/practice was **intentional**. They lied ("lie" = "known falsehood intended to harm").

courts "declined" to consider/credit the PSOF ("'misapprehended'/'overlooked' its 'significance'") — with no justification whatever (explicit or implicit) — though they were *unconditionally bound* (by SJTOR) to **include**/consider/credit it. That violated SJTOR's "all-issues/facts" and "whole-record" tenets. Resultantly, the courts falsely resolved *all* DIFs in favor of movant — thus *totally* breaching the SJTOR's "non-movant-trumps-movant" tenet. This was craven abrogation of procedural law ("basic rules of the game").

This pervasive PSOF-Exclusion *strategy* (or *"tactic,"* when applied to individual issues), originating with the district court and propagating to/through the appellate panel (by "adoption"/"joint ownership" of Op), is the crux/root cause for the **"SJTOR nullification"** argument of this Petition. The result was *systemic/systematic bungling* of procedural law, tainting every aspect of the courts' "reasoning," and inevitably spawning further, derivative, errors.

Proof Of Thesis: *As proof of our PSOF-Exclusion Thesis, supra,* we begin by recalling that FRCP 56(a) provides (in relevant part, emphasis added):

> The court should[/must] *state on the record* the *reasons* for granting or denying the motion [for summary judgment].

The courts did so state. Namely, the courts' Op (ReqApx ℘4–38) discloses/admits the following three disposition-types for how the lower courts made use of the seven key documents *supra* (identified in Op by their district court docket/"D." numbers):

✔ Only two of the key documents — DSOF (D.74), RespDSOF (D.82) — are *listed* in Op as sources for the courts' "finding-of-facts," *"unless otherwise noted"* (Op ℘2 = ReqApx ℘5–6, §III 1st ¶).

✓ Close analysis of Op reveals that *only two* other key documents — ~~DMemo~~ (D.75), ~~PMemo~~ (D.85) — *are "otherwise noted"* by the courts.

☒ That leaves three of the key documents — **PSOF** (D.83), RespPSOF (D.87), ~~RepPMemo~~ (D.86) — ***completely un-"noted"/untapped/ignored*** as sources for the Op's "facts."

The Big Lie(s): **(i)** Most *conspicuous* (by its ***absence***) is the ineffably "central/critical/crucial/decisive/indispensable/paramount/pivotal/urgent/utmost/vital" ***required*** (✯) **PSOF** — which is ***BLINDINGLY ENTIRELY INVISIBLE*** (☒) from the district court's (Op's) self-blinkered vision of the case. **That was a "bald-faced lie"**(-of-omission). ***(!)***

(ii) The appellate panel's "opinion" categorically compounded that lie (ReqApx ℘3): "[T]he district court … closely considered each of Tuvell's arguments and, in clear terms and for persuasive reasons, rejected them." **That was a "cover-up bald-faced lie"**(-of-commission). ***(!!)***

(iii) The *en banc* court ratified. **That was a "double-down all-in cover-up bald-faced lie."** ***(!!!)***

Continuing with our proof, yet deeper analysis of Op (presented in separate sections *infra*) reveals that the courts, due to their PSOF-Exclusion principle: (i)

not only "passively neglected to consider" (= "lie-of-omission") the PSOF; (ii) but also *actively inflicted adverse consequences* (= "lie-of-commission") upon Tuvell therefor. That is, *many (indeed, all)* "disputed issues of material facts" (DIFs) favorable to Tuvell, though expressly articulated in the PSOF, were falsely credited to IBM's benefit (instead of Tuvell's). **"Movant-trumped-nonmovant" ⟺ "180°" the wrong way around from the SJTOR.** The lower courts, by "explicitly nowhere observing" the PSOF, *silently* elevated the DSOF to dominance/omnipotence, and relegated the PSOF to subservience/obscurity. The courts thereby failed to meet the SJTOR's "whole-record" tenet; *viz,* they considered only the inexplicably-chosen "non-PSOF subset" of the record. Plaintiff's banished PSOF facts were *not permitted to figure at all into DIF calculations* — though the SJTOR ("all-issues/facts") strictly mandates that *all* of plaintiff's facts (*especially* those within the PSOF) *must* be considered/credited to Tuvell (SJTOR "non-movant-trumps-movant"). The lower courts thus wreaked havoc — ***grossly/wrongly/falsely misstating/distorting/inventing/falsifying the facts***. That is *prima facie* ineluctably *ipso facto* illegitimate. They lied. (Period.)

The lower courts' perverse failure to consider/credit the *sine-qua-non* all-important PSOF eviscerated *all* SJTOR tenets, to plaintiff's great detriment. Wrongful PSOF-Exclusion, together with its consequent "unreasonable non-inferences," comprehensively disemboweled plaintiff's case — because, *only*

the imperative PSOF could possibly hope to reveal the many DIFs that do indeed exist in this case (and which only a merits trial, not summary judgment, can resolve).

The lower courts' failure to allow plaintiff's PSOF to figure into the DIF calculus constituted egregious/harmful/fatal error, causing a falsified Op to be rendered. That must be corrected (by granting this Petition, reversing and remanding).

This proves our PSOF-Exclusion Thesis. QED.

PSOF-Exclusion With Particularity

Once the *high-level*/"upstream" PSOF-Exclusion program *(supra)* was launched/ensconced into place, it permeated/infected *all* the courts' deliberations, becoming the progenitor of *low-level*/"downstream" errors. Two "particularized" (FRAP 40(a)(2)) lists of low-level errors were *explicitly*/*expressly presented* to the lower courts in PetReh (see ReqApx ℘46–47) — which they were *required to heed and credit to Tuvell* (under SJTOR), but faithlessly *didn't:*

PSOF-Excluded Discrete-Facts:

- PSOF ¶1,3[39]–8,10–18,21–32,35–40,42–52,54–91.

PSOF-Excluded Fact-Areas:

- **Three-Way Meeting; Yelling; Demotion.** See separate section, ℘31 *infra*.
- **Retaliation.** Op ℘26 = ReqApx ℘36–37.

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39 • The typo mentioned at ℘vi*f*6ι† *supra* is corrected here.

- **Investigation.** Op ℘25 = ReqApx ℘35–36, *ƒ*9.
- **Hostile work environment.**[40] Op ℘23–25 = ReqApx ℘32–36.

Those two "particularized" lists *supra* should suffice to "make the point" (that high-level PSOF-Exclusion permeated/infected everything, generating many lower-level errors). But just in case they don't (say, they may be too "coarse-grained" for one's taste), the ubiquitous scope/impact of the courts' illicit PSOF-Exclusion tactic will be better appreciated with the aid of the following "fine-grain-particularity" Table,[41] which cross-correlates (via tags Ⓐ–Ⓧ) *pinpoint / page-*

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40 • Of the several *hostile work environment* dodges available to unscrupulous employers, in the instant case IBM chose "psychological warfare", via the "bullying"/"blackballing" tactic of *heightened hyper-critical (false) hyper-scrutiny* — knowing Tuvell had a particular susceptibility to it (PTSD). This included, e.g.: (i) emails which IBM labeled "bad" (though they were in actuality merely candid, but most importantly truthful and *protected,*[†] because they voiced complaints about discrimination/retaliation); (ii) the trumped-up "lazy letter" incident; (iii) the threatening Formal Warning Letter, and other threats; (iv) communications to "certain" people which IBM (falsely) labeled "bad" (but which were likewise *protected*);[‡] (v) etc. There is a list of *seventeen* "tangible acts" at ~~PMemo~~ ℘2–3 (imported from Complaint ℘28; exported to ApltBrief ℘48–51). {*†,‡ EEOC Compliance Manual* §8-II(B)(2) ℘8-4–8-5, excerpted extensively at PetAdd ℘5–6 = ReqApx ℘105–106.}

41 • This fine-grained table wasn't included in PetReh ("blank area" at PetReh ℘7) because of: (i) page-count limitation; and (ii) it was "unnecessary," in the sense that both district court and appellate panel were properly **assumed/required** to have **included/studied the PSOF** before rendering their "decision" (which is not necessarily the case for this Petition).

specific fact/issue instances[42] of PSOF-Exclusion. Even to a casual reader, *without* this Table, the "scope/impact" postulate we're "flogging" here is no doubt already "subjectively probable;" but *with* the Table's massive irrefutable evidence (of "'misstated' facts"), it becomes "objectively indubitable."[43]

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42 • As damning as this Table of *small-scale (fine-grain, individual-item) procedural-law* abuses is, we remind the Court that the lower courts additionally employed *large-scale (cascading, multiple-target) substantive-law* abuses to avoid meaningful adjudication of this case (℘ii*f*3 *supra*). See the Addendum (PetAdd), under the labels: (i) pervasive *Pretext(-"Related")-Blindness* (which already makes many appearances in this Petition; PetAdd ℘11 = ReqApx ℘111, *f*4); (ii) *QDI-Exclusion* class strategy (PetAdd ℘12–14 = ReqApx ℘112–114).

43 • This short/Abridged version of the Table presented here (one page, four items) suffices for the purposes of this Petition. The full/Unabridged version appears at ReqApx ℘86–90 (five pages, twenty-four items).

PSOF-Exclusion Table (Abridged):

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓐ Knabe Excel graphics episode	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘1–2 = ReqApx ℘48–50, ¶1,3–5. Credit DSOF ℘2 ¶7.
Ⓑ Feldman refuse three-way meeting	Op ℘3 = ReqApx ℘6–8 *(silent)*. **Dis**credit **PSOF** ℘2,5,18 = ReqApx ℘49–50,53–54,70–71, ¶5–6,17,59. *Credit DSOF ℘2 (silent).*
Ⓒ Knabe yelling incident	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘2–3,5,15–16 = ReqApx ℘49–50,53–54,66–69, ¶7,17,50. Credit DSOF ℘2–3 ¶8.
Ⓓ Feldman demotion	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘3–5,18 = ReqApx ℘50–54,71–71, ¶8,12–16,58. Credit DSOF ℘3–4 ¶9–13.

{ Went to HR — here's where things really "went south." }

Twenty additional issues/facts:

Ⓔ Ⓕ Ⓖ Ⓗ Ⓘ Ⓙ Ⓚ Ⓛ Ⓜ Ⓝ Ⓞ Ⓟ Ⓠ Ⓡ Ⓢ Ⓣ Ⓤ Ⓥ Ⓦ Ⓧ

See Unabridged version of this Table, ReqApx ℘86–90.

NOTE: *The tags Ⓐ–Ⓧ provide cross-correlation amongst (i) the Unabridged version of this Table, (ii) Op (ReqApx ℘4–38), and (iii) the PSOF itself (ReqApx ℘48–84); and also with (iv) DSOF (not included in ReqApx).*

Prototype: Excel Graphics

Let the "Excel graphics" incident (item Ⓐ of the preceding Table) stand for our prototypical example of PSOF-Exclusion error. *For this example, we now proceed to present an illustrative rigorous proof* of why the lower courts' PSOF-Exclusion methodological botch is so importantly wrong. This example argument/proof *generalizes, mutatis mutandis,* to all "particularized" PSOF-Exclusion items mentioned above (see preceding Table), supplying *proofs for all*.

IBM asserts that "Mr. Knabe advised Mr. Feldman that [Tuvell] had failed to complete [the Excel graphics task] in a timely fashion" (DSOF ℘2 ¶7). That assertion (and its other instances) posits (explicitly or implicitly) the *truth* of Knabe's report; Knabe swears to it (Knabe dep. ℘35).

But Tuvell asserts the *diametrically opposite* proposition — that Knabe's report to Feldman was defamatorily *false* (RespDSOF ¶7; PSOF ℘1 = ReqApx ℘48–49, ¶1) — and properly provides adequate proof per SJTOR's "light-burden" tenet (PSOF ℘1–2 = ReqApx ℘48–50, §3–4).[44]

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44 • In his *Annotated version* of PetReh (which was filed to the appellate court for review at its discretion, but which the judges explicitly refused to even *accept,* much less review[†]), Tuvell presented a long endnote (*e*25), which not only includes adequate *de minimus* proof of Knabe's falsity, but also offers extensive additional such proof. Such extensive offer of proof is of course not even required at summary judgment time (by SJTOR's "light-burden" tenet), and is not amenable for inclusion here. {† The court's refusal to accept/review the proffered Annotations/Endnotes (ReqApx ℘46–47), from a newly *pro se* litigant

According to the SJTOR ("nonmovant-trumps-movant"), the lower courts were *tightly bound* to *accept/credit* Tuvell's version of the Excel graphics episode/fact, and *discredit/reject* IBM's version. But they did the *exact opposite* (Op ℘3 = ReqApx ℘6–8).

Now, the opposed stances ("true" vs. "false") of the parties *proves* that the Excel graphics episode is a truly disputed issue of fact (DIF) — which is obviously "genuine" and "material" (since the Excel graphics episode kicked off the whole avalanche of all facts in this case). But existence of even a ***single*** such DIF already suffices to *defeat* a motion for summary judgment (SJTOR, FRCP 56(a)). This *proves rigorously* that the lower courts *erred* in *granting* summary judgment. They should have *denied* it.

This proves our Excel graphics example. QED.

Three-Way Meeting; Yelling; Demotion

We next analyze a fact-*area* (items Ⓑ–Ⓓ of the preceding Table; for background, see *c.* ℘10 *supra*) involving PSOF-Exclusion.[45]

Items Ⓑ–Ⓓ (for pinpoint ℘'s&¶'s see Table above)

(traditionally afforded a measure of relative leniency), demonstrates a "curious lack of curiosity" by the judges (bias, or suspicion thereof), "as if" they'd "already made up their minds" — which we *do* now charge (recalling ℘15*f*21 *supra*).}

45 • Actually, this fact-area involves an *admixture* of PSOF-Exclusion together with Pretext (see ℘32*f*46 *infra*). But consistent with our design for this Petition, we do not pursue the Pretext "angle" here, rather relegating it to the Addendum (PetAdd ℘15–17 = ReqApx ℘115–117, "Second Proof").

— which were victims of the lower courts' PSOF-Exclusion principle — assert factual statements of injuries, Tuvell's protests thereto, and requests for three-way meeting. By the SJTOR ("all-issues/facts," "all-inferences" "nonmovant-trumps-movant"), the lower courts were **bound** to credit these PSOF facts.[46] *But they failed/refused to do so. We proceed to prove this.*

The stressor for the triggering of Tuvell's PTSD[47] was IBM's falsity regarding the Excel graphics episode.[48] Tuvell's retraumatization prompted him to *explicitly* reveal his PTSD affliction to IBM on May 26, 2011 (PSOF ℘3 = ReqApx ℘50–52, ¶10), *explicitly*[49] citing it to Feldman as the impetus for his requests for three-way meeting as reasonable accommodation therefor (℘9 *supra;* PSOF ℘2 = ReqApx ℘49–50, ¶5; Tuvell email of June 14, 2011).

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46 • Had they done so, they would then *also* have faced clear issues of *pretext* (see ℘33*f*51 *infra*). But for the purposes of this Petition, that consideration of Pretext(-Blindness) has been relegated to PetAdd ℘i = ReqApx ℘93, QB).

47 • According to §309.81 of the DSM-IV-TR (controlling edition) and all other authorities, PTSD exhibits intermittent active/passive phases (retraumatization is triggered by events subjectively "flashing" the patient "back" to an original/primal qualifying "Criterion A1" stressor). PTSD falls within the ambit of the ADA (ADAIR §1630.2(j)(3)(iii) ℘17001, excerpted extensively at PetAdd ℘6 = ReqApx ℘106).

48 • ℘30*f*44 *supra.*

49 • Though i*mplicitly,* Tuvell's PTSD had already been objectively apparent prior to the May 26, 2011 date (Tuvell email of June 14, 2011). IBM does not challenge Tuvell's PTSD diagnosis (~~DMemo~~ ℘4; ~~PMemo~~ ℘9).

Tuvell's initial worry was the specter of "mere defamation" (℘33*f*50 *infra*).[50] But as time went on, and the abusive behavior escalated (notably Knabe's yelling incident, but especially Feldman's obstinate refusals of requests for three-way meeting), the *pretextual* nature of IBM's behaviors led Tuvell to speculate (justifiably, by the *pretext-only* theory; *Reeves, Bulwer*)[51] that something "'*seriously more illegal*'

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50 • Workplace abuse, particularly defamation (fallacious injury to reputation), is the main trigger/stressor (℘32*f*47 *supra*) that exacerbates Tuvell's individual/peculiar "flavor" of PTSD ("eggshell skull" principle, if you will). The legal theory underlying Tuvell's fear of defamation is that known-false slanderous attacks on reputation in regard of vocation/profession constitute "defamation *per se*" (without proof of "special damages;" *Sack* §2.8.2). Tuvell was familiar with that theory because he'd experienced workplace defamation abuse previously, at a different employer, as he explained to Feldman at their meeting on May 26, 2011 (Tuvell email of June 14, 2011).† {† At that meeting, Tuvell was merely *informing* Feldman about his PTSD, *not* "threatening to sue" (cf. Tuvell email of June 14, 2011), though Feldman claimed/pretended otherwise (quoting Tuvell email of June 13, 2011: "I believe this is necessary to protect yours, my and the firm's interests. … You have twice [— false, it was only once: *Id.*] now made clear to me your history of suing when you feel you've been wronged in the office and I see no choice").‡ But *no matter what* Feldman/IBM *claim/pretend,* <u>such speech was *protected*</u> (*EEOC Compliance Manual* §8-II(B)(2) ℘8-4, excerpted extensively at PetAdd ℘5 = ReqApx ℘105). {‡ Feldman's email is **direct evidence** of *retaliation;* ℘11*f*17 *supra.*}}

51 • See PetAdd ℘i = ReqApx ℘93, QB: It is at this point the lower courts in our case <u>reject</u> both <u>this Court's holding</u> (*Reeves,* e.g.), and <u>the Mass. SJC's holding</u> (*Bulwer,* e.g.), which affirm "pretext-only" liability at summary judgment in discrimination/retaliation cases. The courts instead prefer a historical First Circuit case (*Che,* see Op ℘22–23 = ReqApx ℘31–33), which they

than defamation" must be motivating IBM's crazy behavior (no three-way meeting?) — probably discrimination and/or retaliation based on some combination of protected characteristics (age, sex, race, ultimately PTSD disability). This prompted Tuvell to "upgrade" his "mere defamation" complaint to IBM accordingly.

At that exact point, having been properly apprised of Tuvell's PTSD status and notified of his protected[52] discrimination/retaliation claims, IBM was *required* by the ADA to engage with Tuvell in an *interactive process / dialogue concerning accommodation*[53] (esp., award him the three-way meeting he'd been begging-for so urgently/insistently). Not only did (i) IBM refuse to engage in interactive discussion or award three-way meeting, but it also (ii) took the *directly* discriminatory/retaliatory tack of unilaterally demoting/reassigning Tuvell to an undesirable position — again based on Knabe's falsity (this time about his reason for yelling).[54] That combination (i–

endorse for promoting an outdated "pretext-plus" ("causal connection") theory — which is *no longer "good law"* (by *Reeves, Bulwer, et al.*).[†] That was no "innocent oversight," for the courts go further and *repeat* the same "pretext-plus bias" at Op ℘27 = ReqApx ℘37–38. {† The courts' preference for *Che* is by no means apt, since *Che* is not even a summary judgment case: it arises from a jury trial, and it further brings *McDonnell Douglas* into the mix (which is largely unneeded here, due to so much *direct* evidence in the instant case; see ℘11*f*17 *supra*).}

52 • See ℘27*f*40ι†,‡ *supra.*

53 • *EEOC Guidance: Reasonable Accommodation,* excerpted extensively at PetAdd ℘6–9 = ReqApx ℘106–109.

54 • See PSOF ℘4–5 = ReqApx ℘52–54, ¶14–17 — which was *ignored* by the lower courts, by their PSOF-Exclusion scheme.

ii) trammeled Tuvell's rights under both *Humphrey* (MOD) and *BNSF v. White* (demotion/reassignment is retaliatory); to wit:

- For purposes of the ADA, with [only] a few exceptions, *conduct resulting from a disability* [*"Manifestation-of-Disability" (MOD),* such as Tuvell's PTSD-driven fear of defamation and pretext-based harassment] *is considered to be part of the disability, rather than a separate basis for termination.* The link between the disability and termination [or other adverse act, such as demotion/reassignment] is particularly strong where it is the *employer's failure to reasonably accommodate a known disability* [such as granting three-way meeting] that leads to discharge [or other adverse acts] for performance inadequacies resulting from that disability. — *Humphrey ℘1139–1140, emphasis added.*

- Based on th[e] record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee [at least in retaliation cases]." … "*[R]eassignment* was … *virtually an admission* that respondent was *demoted* when [] responsibilities were taken from her [at least in retaliation cases]. — *BNSF v. White ℘71,80, Alito, J., concurring (emphasis added).*

The lower courts were *bound* by SJTOR ("non-movant-trumps-movant," "all-inferences") to credit Tuvell's PSOF facts. Had they done so (they didn't), they would then have been further bound (by *Humphrey* (PetAdd ℘i = ReqApx ℘93, QC(ii)) and *BNSF v. White,* both just quoted) to find that IBM was guilty of (i) failure to engage in interactive process, (ii) failure to accommodate (three-way meeting), and (iii) discrimination/retaliation (demotion/reassignment). But the courts failed miserably to do so. That was senseless/correctable/reversible error.

This proves our "failure to do so" contention (℘32 supra). QED.

Ad Nauseam

At this point, we have closely examined-with-proof the consequences of PSOF-Exclusion for items Ⓐ–Ⓓ of the Table *supra* (Abridged, ℘29). And (as already observed in the *Prototype: Excel Graphics* section *supra*), slogging through "isomorphic" examinations-with-proofs for the remaining items Ⓔ–Ⓧ of the Table (Unabridged, ReqApx ℘86–90), *mutatis mutandis,* now poses no insuperable barriers. The interested reader is invited do so *ad libitum.* But little new (only new facts, not new principles/techniques) would be gained by us doing so here — it would only be tedious. So we stop now.

A Look Beyond This Petition (Towards The Addendum)

Our reluctance *here* to proceed further along the PSOF-Exclusion *continuum* having just been explained *supra*, we do nevertheless wish to remark that PSOF-Exclusion *does* have additional ramifications, even beyond the Table (℘29) and this Petition. Namely, in the Addendum (PetAdd = ReqApx ℘92–123), we study, among other things:

- An additional question ("QC(i)") with argument; it is partially based on PSOF-Exclusion.
- An additional class of lower court errors (the **"QDI-Exclusion"** class), with *three proofs* for its corresponding Thesis (analogous to the PSOF-Exclusion Thesis, ℘22 *supra*); the "First Proof" of the three is based on PSOF-Exclusion.

Are Employment Cases "Special"?

Is there something about employment-based (discrimination/retaliation) cases that makes them "special," with regard to summary judgment proceedings? We believe the answer is (and should be) "No."

There has long been a *sotto voce* aura (publicly at least, as opposed to privately, see ℘xi*f*7 *supra*) that "employment cases are *'disfavored'* for summary judgment dismissal."[55] For that reason we think it

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55 • (i) See *Torgerson* §II(A) ℘1042–1043 and its Appendix ℘1058–1060 (listing no fewer than *sixty-two* decisions voicing some measure of support for *disfavorability* of summary judg-

prudent to unequivocally dispel any notion that this Petition seeks "extraordinary privilege/dispensation" by virtue of the fact that *Tuvell v. IBM* is an employment case. It does not.

Our only "ask" in this Petition is honestly limited to *fairness/parity/equity:* **"Equal Justice Under Law"**[56] — of employment cases *vis-à-vis* other types of cases, with respect to the Summary Judgment Tenets of Review (SJTOR).

That is not too much to ask.[57] For, that *is,* we believe, what this Supreme Court *already infallibly ordains* — but the lower courts "just don't 'get it' (yet)."

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ment dismissal, just in the Eighth Circuit),[†] concluding that employment cases do not represent a "fair-haired" exception to the SJTOR tenets. We agree. (ii) But neither should employment cases be *favored*[‡] for dismissal, either: "[T]he Supreme Court … seems to have placed a thumb on the justice scale favoring corporate and government defendants" (*Miller* ℘304). {† Of course, this happens in all Circuits, including the First (*Che* ℘40, borrowed): "This court has consistently held that determinations of motive and intent, particularly in discrimination cases, are questions better suited for the jury, as proof is generally based on inferences that must be drawn [indirect evidence], rather than on the proverbial 'smoking gun' [direct evidence]."} {‡ See, of course, ℘xi*f*7, yet again.}

56 • See ℘39 *infra.*

57 • Despite what we seek in *this* Petition, the *future* of summary judgment in employment cases is murky, due to rising research in the psychology of *implicit/unconscious bias* — on the part of both *employers* and *judges.* See *Beiner*. "[T]he circuits are in a state of confusion" (*Beiner* ℘675) — which this Court will doubtlessly face/address squarely at some point in future.

U.S. Supreme Court Building, West Façade

Equal Justice Under Law

Contemplation Of Justice

"Who Will Guard The Guards?"[58]

The only answer (Sup.Ct.R. 10, emphasis added):

> A petition for a writ of certiorari will be granted only for **compelling reasons.** The following … indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has … **so far departed** from the accepted and usual course of judicial proceedings, [and/]or **sanctioned such a departure** by a lower court, as to call for an exercise of this Court's **supervisory power**[.]

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58 • *Juvenal,* Liber secundus, Satura VI ℘325ℓ347–348 (various translations): *"[Q]uis custodiet ipsos custodes?"*

CONCLUSION

For the many reasons presented/*proven* herein, Petitioner prays this Court to exercise its **Supervisory Power** (Sup.Ct.R. 10(a), ℘39 *supra*), granting this Petition. The lower judges' summary judgment dismissal (stemming from their "PSOF-Exclusion" ruination) constituted ***judicial malfeasance.***[59] They lied (℘22*f*37–38 *supra*); falsified *all* the facts; committed "fraud upon the courts (legal system)."

No employment case can be pre-deemed (overtly or covertly) *"too 'big' (complicated/difficult/unsavory/embarrassing) to succeed."* That would provide a *carte blanche "how-to" blueprint* for employers to blithely commit illegal discrimination/retaliation.[60]

Ethical/honorable public servants must render good-faith fair-dealing honest-services in the name of public trust. A "shadow imperial judiciocracy" of rogue bureaucrats, exercising capricious whims and scornful of oversight, is shameful/grotesque charade.[61] It is odious and intolerable in America.

Cynicism and exploiting "Fear of Speaking Truth to Power"[62] are not legitimate bases of authority.[63]

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59 • Repeat ℘15*f*21 *supra* here.

60 • See ℘15*f*22 *supra.* "[C]lever men discriminate in clever ways" (Hon. Denny Chin, *N.Y.L.S.L.R. Symposium* ℘680).

61 • Or "rape" = "outrageous violation of fundamental principle or institution" (Webster's Third New International Dictionary).

62 • See ℘vi*f*6 *supra.*

Respectfully Submitted,

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September 12, 2016

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63 • Socioeconomic philosophers (beginning with *Weber*) survey a tripartite typology of *legitimate/genuine rule/authority,* comprising: (i) Charismatic; (ii) Traditional; (iii) Legal/Rational. The U.S. Constitution endeavors to implement the Legal/Rational model, via **uniform Rule of Law:** a *publicized system (no "secret pseudo-'law'")* of explicit rules, applied/enforced administratively and judicially, in accordance with predictable/known principles.

In the Supreme Court of the United States

WALTER TUVELL

Petitioner

v.

INTERNATIONAL BUSINESS MACHINES (IBM)

Respondent

On Petition for Writ of Certiorari to the United States Court for Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI, REQUIRED APPENDIX (ReqApx)

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1 • Tuvell is not "really" *pro se* — see the main Petition ℘vi*f*6.

CONTENTS OF REQUIRED APPENDIX

Opinions, Judgments And Orders Below

Court Filings By The Parties

Augmentation Material

Not for Publication in West's Federal Reporter

United States Court of Appeals
For the First Circuit

No. 15-1914

WALTER TUVELL,
Plaintiff, Appellant,
v.
INTERNATIONAL BUSINESS MACHINES, INC.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Denise J. Casper, U.S. District Judge]

Before
Torruella, Lynch, and Thompson,
Circuit Judges.

Andrew P. Hanson for appellant.

Matthew A. Porter, with whom Joan Ackerstein and Anne Selinger were on brief, for appellee.

May 13, 2016

Appellate Panel Opinion

◀ *2* ▶

PER CURIAM. The plaintiff, Walter Tuvell, brought this action against his former employer, defendant International Business Machines, Inc. ("IBM") claiming that it violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. and Mass. Gen. Laws Ann. ch. 151B, §§ 4(1), 4(4), 4(5), 4(16). In sum, the complaint alleged that IBM failed to reasonably accommodate Tuvell's disability (post-traumatic stress disorder), discriminated against him because of this disability, as well as because of his race, gender, and age (white male born in 1947), retaliated against him, including unlawfully terminating him, and failed to properly investigate his allegations. After discovery was conducted, IBM moved for summary judgment on all counts. The district court granted the motion. Tuvell v. Int'l Bus. Machines, Inc., No. CIV.A. 13-11292-DJC, 2015 WL 4092614, at *1 (D. Mass. July 7, 2015). Tuvell now appeals.

In finding for IBM, the district court concluded that Tuvell could not establish a viable accommodation claim because his own medical reports and provider showed that he was incapable of performing his essential job functions even with accommodation and, therefore, Tuvell was not a qualified disabled individual. And, even assuming arguendo Tuvell was so qualified, the court concluded that IBM did attempt to engage in an interactive process with Tuvell and offered him reasonable accommodations (e.g., providing extended leave and proposing different review and ◀ *3* ▶ feedback procedures). With respect

to Tuvell's disability-based discrimination claim, the court held that Tuvell could not make out a valid claim because the undisputed facts established (1) he was not able to perform the essential functions of his job, (2) the actions alleged by Tuvell (i.e., his not getting a job in another group, certain other "tangible acts"[1]) were not sufficiently adverse, and (3) IBM had a legitimate, nondiscriminatory reason to terminate Tuvell, which was the fact that he started working for another software company while still on leave from IBM. For similar reasons (that is, no adverse employment actions and a legitimate termination) Tuvell's retaliation claims were also found by the court to be unmeritorious. As for his race, age, and gender-based discrimination claims, the court decided that Tuvell alleged no facts to support these claims and only appeared to vaguely argue ◀*4*▶ that his being required to switch projects with a younger Asian female must have constituted discrimination.[2]

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1 · Examples of the so-called tangible acts included IBM limiting Tuvell's facilities access when he was on leave, sending him a warning letter regarding his communication with colleagues, and failing to process his internal complaint. Tuvell also alleges that these acts formed the basis of a hostile work environment claim — a contention the district court rejected. Relatedly, the court also dismissed Tuvell's failure to investigate claim since it concluded that the supposed failure to investigate did not give rise to a hostile work environment and, to the extent Tuvell was trying to advance a standalone Massachusetts claim, failure to investigate does not give rise to an independent cause of action absent underlying proof of discrimination.

2 · Tuvell does not appear to contest on appeal the dismissal of his race, age, and gender discrimination claims.

Under the plenary standard of review for summary judgment, we perceive no genuine issue of material fact and agree with the district court that IBM is entitled to judgment as a matter of law. See Veléz-Vélez v. Puerto Rico Highway & Transp. Auth., 795 F.3d 230, 235 (1st Cir. 2015); Fed. R. Civ. P. 56(a). Simply said, the district court got it right. It closely considered each of Tuvell's arguments and, in clear terms and for persuasive reasons, rejected them.

We have made it abundantly clear that "when lower courts have supportably found the facts, applied the appropriate legal standards, articulated their reasoning clearly, and reached a correct result, a reviewing court ought not to write at length merely to hear its own words resonate." deBenedictis v. Brady-Zell (In re Brady-Zell), 756 F.3d 69, 71 (1st Cir. 2014); see also Seaco Ins. Co. v. Davis-Irish, 300 F.3d 84, 86 (1st Cir. 2002) (providing that "when a lower court accurately takes the measure of a case and articulates a cogent rationale, it serves no useful purpose for a reviewing court to write at length"). ◀ *5* ▶

This is one of those cases. We summarily affirm the judgment below for substantially the reasons articulated in the district court's opinion.

Affirmed. See 1st Cir. R. 27.0(c).

◀ ■ ▶

NOTE: The tags Ⓐ–Ⓧ are defined in the Unabridged PSOF-Exclusion Table (ReqApx ℘86–90); they provide a cross-correlation of the district court's opinion (here, ℘4–38) with the PSOF itself (ReqApx ℘48–84), and also with the DSOF (not included in ReqApx).

◀ *1* ▶

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER TUVELL,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.**
	)	**13-11292-DJC**
INTERNATIONAL BUSINESS MACHINES, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

CASPER, J. **July 6, 2016**

I. Introduction

Plaintiff Walter Tuvell ("Tuvell") filed this lawsuit against Defendant International Business Machines, Inc. ("IBM") alleging that he was unlawfully terminated as a result of discrimination and retaliation in violation of the Americans with Disabilities

Act (the "ADA"), 42 U.S.C. §§ 12101 et seq., and Mass. Gen. L. c. 151B, §§ 4(1), 4(16), 4(4) and 4(5). D. 10. IBM has moved for summary judgment. D. 73. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago-Ramos v. Centennial P.R. Wireless ◀ *2* ▶ Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in her pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), but "must, with respect to each issue on which she would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in her favor." Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5 (1st Cir. 2010). "As a general rule, that requires the production of evidence that is 'significant[ly] probative.'" Id. (quoting Anderson, 477 U.S. at 249) (alteration in original). The Court "view[s] the record in

the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

The facts are as represented in IBM's statement of material facts, D. 74, and undisputed by Tuvell, D. 82, unless otherwise noted.

Tuvell is a white male, born in 1947, who claims to suffer from post-traumatic stress disorder ("PTSD")[1] stemming from an incident in 1997 when he was allegedly offered a job with the Microsoft Corporation ("Microsoft"), which was subsequently rescinded. D. 82 ¶¶ 1, 2.

On November 3, 2010, Tuvell was hired by Netezza Corporation ("Netezza") in the Performance Architecture Group. Id. ¶ 4. In this position, Tuvell reported directly to Daniel Feldman and reported "on a dotted line" to Fritz Knabe. Id. IBM subsequently acquired ◀3 Ⓐ Ⓑ Ⓒ Ⓓ Ⓔ Ⓕ ▶ Netezza, and Tuvell, Feldman and Knabe became IBM employees. Id. ¶ 5. Until May 2011, Tuvell worked with Feldman and Knabe without any notable conflicts. Id. ¶ 6.

A. Tuvell's Conflicts with Supervisors at IBM

In the spring of 2011, however, Tuvell and Knabe's professional relationship began to deteriorate. Id. ¶¶ 6, 8–9. On May 18, 2011, Feldman reported to

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1 · For the purposes of this motion, IBM does not challenge Tuvell's claimed disability. D. 75 at 4 n.3.

Tuvell that Knabe had expressed concern that Tuvell had not completed a work assignment on time. Id. ¶ 7. Then, on June 8, 2011, Knabe asked Tuvell about an outstanding assignment in front of several other employees. Id. ¶ 8. During this conversation, both Tuvell and Knabe were heard to raise their voices. Id. Seemingly as a result of these two incidents, on June 10, 2011, Feldman told Tuvell that he did not believe that Knabe and Tuvell could continue to work together effectively. Id. ¶ 9. Feldman subsequently switched Tuvell to a different project and, in turn, assigned another employee, Sujatha Mizar, who is Asian, female and younger than Tuvell, to work with Knabe. Id. ¶¶ 10–12. This transfer did not result in any change to Tuvell's pay or his rank within the company. Id. ¶¶ 10–11. Nevertheless, Tuvell contends that Knabe's conversation with Feldman on May 18, 2011 constituted discrimination based on age, sex and race. Id.

On June 14, 2011, Feldman sent Mizar and Tuvell an email asking for daily status reports detailing the transition tasks completed and raising any issues with regard to the shift in responsibilities. Id. ¶ 14 (citing Transition of Responsibilities Email, D. 76-19). Mizar replied to the email with a brief status update, copying Tuvell and adding that Tuvell should "feel free to add anything" that Mizar "might have forgotten." Id. (quoting Transition of Responsibilities Email, Tuvell Exh. 58). The next day, Feldman clarified that he expected a separate status report from both Tuvell and Mizar. Id. In response, Tuvell sent an email to Feldman, copying Human Resources Spe-

cialists Kelli-ann McCabe and Diane Adams, complaining that the request to ◀ *4* Ⓕ Ⓖ Ⓗ Ⓙ Ⓛ ▶ provide separate status reports was "blatant" and "snide harassment/retaliation." Id. ¶ 15 (quoting Transition of Responsibilities Email, D. 76-19). Tuvell further complained that Feldman had "unilaterally forced an adverse job action upon [Tuvell]" and that the transition constituted "a prima facie case (and even stronger) for discrimination on the grounds of both age and sex, and perhaps even race." D. 76-19 at 1–2. On June 16, 2011, Tuvell sent additional emails to Adams and McCabe complaining of harassment by Feldman based on Feldman's decision to switch Tuvell's assignment. D. 82 ¶ 16. Tuvell told Adams and McCabe that he believed it was "infeasible" for him to work with Feldman. Id.

That same day, Adams forwarded Tuvell's email regarding Feldman to a Senior Case Manager in IBM's Human Resources Department, Lisa Due. Id. ¶ 17. Due then conducted an investigation into the situation, interviewing five individuals, including Tuvell. Id. In his interview with Due, Tuvell described his experience with Feldman and Knabe as the equivalent of "torture" and "rape." Id. On June 29, 2011, Due informed Tuvell of the results of her investigation and her conclusion that his concerns were not supported. Id. ¶ 19. Due further informed Tuvell of his appeal rights if he was dissatisfied with Due's findings. Id. Based upon Due's findings, IBM decided not to transfer Tuvell to another supervisor. Id. ¶ 18.

In July 2011, Tuvell took medical leave for elective surgery followed by vacation. Id. ¶ 20; D. 76-1 at 6 (clarifying date). Before taking leave, Tuvell sent an email to Feldman and another colleague notifying them that he had completed an assignment regarding a wiki page. D. 76-22 at 3. In the email, Tuvell explained that the update could be found by searching the wiki but he also attached the link, adding "if you're lazy you can just click this link." Id. Feldman thanked Tuvell for the work but informed Tuvell that his communication style was "the sort of thing that you want to avoid." Id. at 2. Tuvell apologized for his use of the word "lazy" and said ◀ *5* Ⓙ Ⓜ Ⓝ Ⓟ Ⓠ ▶ that he would "search harder for less ambiguous/offensive wording." Id. at 1. On July 20, 2011, Tuvell sent a second email explaining that "laziness is lauded as a prime virtue of programmers," concluding that "[o]bviously no apology was necessary." Id. at 4. Tuvell then apologized for the apology. Id. When Tuvell returned from leave on August 3, 2011, Feldman met with him to discuss pending and future projects. D. 82 ¶ 24. At this meeting, Feldman also talked with Tuvell about the series of emails, which Feldman considered to be inappropriate, and gave Tuvell a warning letter. Id. ¶ 25. The letter instructed Tuvell to "[i]mmediately cease" "unprofessional, disrespectful, demeaning, disrupted, offensive or rude" behavior and specifically mentioned Tuvell's July 20, 2011 email. D. 76-11.

B. Tuvell's Short Term Disability Leave, Internal Complaints and Accommodation Requests

On August 11, 2011, Tuvell told Kathleen Dean, a nurse in IBM's Medical Department, that he wanted to apply for Short Term Disability ("STD") because of a "sudden condition." D. 82 ¶ 26. Dean provided Tuvell with information on how to apply for STD leave and, on August 15, 2011, Tuvell notified Feldman that he would be taking sick days until his STD request was processed. Id. Tuvell simultaneously submitted a Medical Treatment Report ("MTR"), indicating that he was suffering from a "sleep disorder and stress reaction." Id. ¶ 32. Tuvell represented that due to his medical condition he was not "able to function at his job responsibilities." D. 76-38 at 1. The MTR further indicated that Tuvell "suffered severe impairment in his ability to manage conflicts with others, get along well with others without behavioral extremes, and interact and actively participate in group activities" and "suffered serious impairment in his ability to maintain attention, concentrate on a specific task and complete it in a timely manner, set realistic goals, and have good autonomous judgment." D. 82 ◀ *6* ®©©® ▶ ¶ 33. IBM approved Tuvell's STD leave on August 17, 2011. Id. ¶ 34. While Tuvell was out on medical leave, IBM restricted his access to the company's internet and facilities. Id. ¶ 53.

On August 18, 2011, Tuvell filed a "Corporate Open Door Complaint" entitled "Claims of Corporate and Legal Misconduct." Id. ¶ 27. The first part of the complaint was titled "Acts of Fr*{it}*z Knabe" and was 129 pages, including 22 pages written by Tuvell and 107 pages of supporting materials. Id. The sec-

ond part was titled "Acts of Dan Feldman" and included 31 pages of allegations, plus 122 pages of supporting documents. Id. Tuvell acknowledges that he spent 22 hours a day over the course of 2–3 weeks on these complaints. Id. ¶ 28.

A week later, on August 25, 2011, Tuvell complained that IBM had not finalized its investigation of his Open Door Complaint. Id. ¶ 29. On September 15, 2011, the Program Director for IBM's Concerns and Appeals, Russell Mandel, completed a version of the investigation report. Id. Based upon his interviews with nine people, including Tuvell, Mandel concluded that Tuvell had not been subject to any adverse employment actions. D. 88-2 at 19 (Mandel Investigative Report).

Tuvell submitted a second MTR on September 9, 2011, indicating that he was "totally impaired for work." D. 82 ¶ 35. Upon receiving the second MTR, Dean contacted Tuvell and informed him that given the nature of his diagnosis for a sleep disorder and stress reaction, the MTR form must be completed by a specialist. Id. ¶ 36. Tuvell responded that his "family physician is fully competent to diagnose [his disorder]." D. 76-16 at 5. Tuvell added that, if necessary, it would take time to get a psychotherapist and that he would "be forced to enter an abusive situation" if he had to return to work as his condition was a direct result of Feldman's "direct abusive psychological attack." Id. Dean agreed to accept the MTR completed by his physician for one month. D. 82 ¶ 36. Dean was subsequently informed by Dr. Stewart

Snyder, ◀ 7 ©℠ ▶ the Physician Program Manager of IBM's Integrated Health Services, that for psychological disorders IBM policy required the MTR forms to be completed by a psychiatrist if the employee is out for more than six weeks "because if a person is ill enough that they can't work for that long then they have exceeded the expertise level of a family physician to deal with their mental illness." Id. ¶ 37. Dean contacted Tuvell and told him "that in the interest of ensuring that he was receiving proper care, IBM required a psychiatrist to complete his MTR" if he remained out for another month. Id. ¶ 38. Tuvell responded that there was nothing that a psychiatrist could do to "help" him because there was nothing "wrong" with him and emphasized that the only reason that he was out on STD was because of the abuse he faced at work. Id. ¶ 39. Tuvell added that IBM's handling of his complaints was "intentionally psychologically abusive." Id. Dean subsequently informed Tuvell that IBM would accept a MTR from his Licensed Social Worker, Stephanie Ross, who was providing him psychotherapy. Id. ¶¶ 36, 40, 41. Tuvell then provided IBM with MTRs completed by Ross for October and November of 2011. Id. ¶ 41. These MTRs all indicated that Tuvell was totally impaired for work. Id.

Ross's October MTR indicated that Tuvell suffered from "ongoing acute stress symptoms especially regarding the perception of retaliation following sudden demotion without cause, disruption of sleep, eating, symptoms of helplessness and anxiety," id. ¶ 42 (quoting October MTR, D. 76-26 at 1), and noted that

Tuvell had "serious impairment in getting along with others without behavioral extremes and initiating social contacts, negotiating, and compromising." Id. Tuvell acknowledges that, at around this time, he stopped at a gas station near a work facility and that simply being that close to the building "triggered" a "blow up." Id. ¶ 43.

Ross's November MTR listed, for the first time, Tuvell's diagnosis as PTSD and indicated that Tuvell was still totally impaired for work. Id. ¶ 44. The MTR also noted that ◀ *8* ①◎ ▶ Tuvell continued to have serious impairment "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and interaction and active participation in group activities, and continued to have serious impairment as well with respect to managing conflict with others, negotiating, compromise, setting realistic goals, and having good autonomous judgment." Id. Ross noted that "any contact with people from work, any discussion about work, going anywhere near the work facility at that time was a circumstance in which [Tuvell] was triggered into a state that involved hyper-reactivity, hyper-arousal" and that Tuvell "had a significant amount of obsessive thinking." Id. ¶ 45 (quoting Ross Depo., D. 76-7 at 11). Ross further noted that Tuvell would become "extremely upset," "had trouble speaking" and would cry and shake when talking about work. D. 76-7 at 10. Ross was concerned for Tuvell's "mental health stability and believed that just going into the building where he worked and seeing [] Feldman or [] Knabe could trigger his obses-

sive thoughts, depression, or other strong reactions." D. 82 ¶ 46.

In early November, while Tuvell was out on medical leave, his counsel wrote to Mandel identifying PTSD as a disability and requesting a reasonable accommodation. Id. ¶ 30. Specifically, Tuvell's counsel requested that Tuvell no longer be required to report to Feldman. Id. IBM subsequently informed Tuvell that it did not consider reassignment to another management team to be a reasonable accommodation but indicated that it was receptive to other proposals for possible accommodations. Id. ¶ 31. IBM also noted that Tuvell was free to look for open positions using IBM's Global Opportunity Marketplace ("GOM"). Id.

In December 2011, Tuvell submitted another MTR completed by Ross, which indicated that he was "unable to return to previous setting with [his] current supervisor and setting — PTSD symptoms exacerbate immediately." Id. ¶ 47. Ross indicated that Tuvell had serious impairment ◀ *9* ⓠⓣⓤ ▶ "getting along well with others without behavioral extremes, initiating social contacts, negotiating and compromising, interacting and actively participating in group activities, managing conflicts with others, and setting realistic goals and having good autonomous judgment." Id. ¶ 48. Ross also noted that the "only modification that would be possible is a change of supervisor and setting." Id. ¶ 49. Ross explained that around that time Tuvell could not "drive within a 50 mile radius — 20 mile radius of where he worked for

a period of time without becoming hysterical." Id. ¶ 52.

C. Tuvell Applies for Another Position within IBM

On December 8, 2011, Tuvell interviewed for an open position in another IBM facility. Id. ¶ 57. Despite having submitted MTRs indicating that he was "totally disabled," Tuvell told the interviewer, Christopher Kime, that he had a "completely clean bill of health." Id. On January 6, 2012, Kime emailed Tuvell and told him that he would not be offering him the open position. Id. ¶ 64. Kime explained that he had "underestimated the difficulty of moving forward with bringing [Tuvell] to the team" and that he could not "move forward with taking [Tuvell] directly from being on short term disability."[2] 2 Id. at 38 (quoting, Kime Email, Tuvell Exh. 64). Kime added that "[g]iven the current needs of our group" there was "concern about the work being to [Tuvell's] liking and keeping [Tuvell] as a productive and satisfied member of the team." Id. ¶ 64.

Tuvell subsequently emailed Feldman accusing IBM of retaliation based upon his failure to receive an offer for the open position. Id. ¶ 66. Feldman responded offering Tuvell a variety of other options, including receiving performance feedback from another

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2 · IBM contends that Kime was not aware when he initially interviewed Tuvell that the fact that Tuvell was on short term disability leave prevented Kime from providing a performance review to management for an assessment of his qualifications and work performance. D. 82 ¶¶ 63–64.

supervisor, leaving ◀ *10* ⓉⓊⓋ ▶ work as necessary to seek medical attention and continued access to GOM to look for open positions. Id. ¶ 67. Tuvell rejected these proposals and, on January 23, 2012, Tuvell's counsel requested as a reasonable accommodation that IBM transfer Tuvell to Kime's open position, which had been reposted after the posting had expired. Id. ¶ 68. IBM denied Tuvell's request for reassignment. Id. ¶ 69. IBM reiterated its proposal that Tuvell receive all feedback from a different manager. Id. Tuvell reapplied for the reposted Kime position, but was not considered for the position. Id. ¶ 70.

D. Tuvell's Employment with Another Company and Termination from IBM

On January 25, 2012, Tuvell exhausted his STD benefits but remained on unpaid medical leave. Id. ¶ 55. On February 15, 2012, Feldman's supervisor, John Metzger, contacted Tuvell directly and offered to give Tuvell all of his performance evaluations personally. Id. ¶ 71. Tuvell rejected Metzer's proposal, indicating that he was medically incapable of returning to work under Feldman. Id. ¶ 72. Around this time, unbeknownst to IBM, Tuvell was interviewing for a full time position with another company, Imprivata, which develops and sells software products. Id. ¶¶ 73, 80. On February 28, 2012, Imprivata made an offer to Tuvell and, on March 12, 2012, Tuvell started working for the software company while still on medical leave from IBM. Id. ¶ 73. Tuvell's salary at Imprivata is higher than his salary at IBM. Id. ¶ 81.

On April 25, 2012, IBM learned that Tuvell's Long Term Disability ("LTD") benefits had been denied. Id. ¶ 56. IBM informed Tuvell that he could remain on unpaid leave pending his appeal of the denial. Id.

In May 2012, Human Resources Specialist Adams became aware that Tuvell's LinkedIn page listed another company, EMC, as his current employer. Id. ¶¶ 15, 76. Adams wrote Tuvell asking him to confirm that he was not working for EMC. Id. ¶ 74. Adams notified Tuvell that ◀ *11* ⓥⓦⓧ ▶ working for EMC would be a violation of IBM guidelines and that, if true, he would be terminated. D. 10 ¶ 134. Tuvell then accused IBM of defamation, arguing that he was not violating any guidelines. D. 82 ¶ 74. Adams responded that Tuvell's LinkedIn page listed EMC and asked him again to confirm that he was not working for EMC. Id. ¶ 76. Tuvell indicated that he was not working for EMC and that continuing to ask him if he was working for them was harassment and defamation. Id. ¶ 77. Tuvell refused to respond to further inquiries about where he had been working during his leave. Id. On May 15, 2012, Adams wrote to Tuvell that he should "advise IBM where you are currently working by 5pm tomorrow." Id. ¶ 78; Adams Email, Tuvell Exh. 89. Adams explained that "IBM ha[d] been attempting for approximately the past two weeks to find out if you are engaged in competitive employment" and that "IBM employees may not work for a competitor in any capacity without obtaining consent." Adams Email, Tuvell Exh. 89. Tuvell refused to provide IBM with

his work information. D. 82 ¶ 79.

On May 17, 2012, IBM terminated Tuvell. Id.

IV. Procedural History

Tuvell instituted this action on April 24, 2013 in the Middlesex Superior Court. D. 1. IBM subsequently removed the action to this Court, id., and Tuvell filed an amended complaint. D. 10. Plaintiff seeks recovery for failure to engage in interactive process (Count I); failure to reasonably accommodate (Count II); failure to assist plaintiff in obtaining reasonable accommodation (Count III); failure to reassign as reasonable accommodation (Count IV); failure to reassign due to discriminatory/retaliatory purpose (Count V); numerous adverse tangible job actions due to discrimination and/or retaliation (Count VI); harassment based on discrimination and/or retaliation (Count VII); and failure to investigate and remediate harassment (Count VIII). Id. IBM has now moved for summary judgment. D. 73. Subsequently, IBM also moved to ◀ *12* ▶ strike certain portions of Tuvell's affidavit in opposition to IBM's motion for summary judgment, as well as several exhibits submitted by Tuvell. D. 89.[3] The Court heard the parties on the pending motions and took these matters under advisement. D. 92.

V. Discussion

3 · The Court did not rely on the contested portions of Tuvell's affidavit, D. 84, Exh. 47, or the challenged exhibits, D. 84, Exhs. 114-16, in considering this motion. In light of the Court's conclusion here, however, the Court DENIES IBM's motion to strike, D. 89, as moot.

To survive IBM's motion for summary judgment, Tuvell "must initially present a prima facie case of employment discrimination." Rennie v. United Parcel Serv., 139 F. Supp. 2D 159, 164 (D. Mass. 2001) (quoting Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1134–35 (8th Cir. 1999)) (internal quotation marks omitted). "The general rule is that 'no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.'" Id. (quoting 42 U.S.C. ¶ 12112(a)). In this area "[t]here are two general types of employment discrimination claims — claims involving discriminatory discharge and claims concerning the failure to reasonably accommodate a disability." Id. Tuvell raises both types of claims.

A. Accommodation Claims (Counts I–V)

To prove a reasonable accommodation claim under both the ADA and Chapter 151B,[4] ◀ *13* ▶ Tuvell

4 • The Court notes that "[f]or purposes of this lawsuit, analysis under the ADA and Chapter 151B is identical." Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 n.2 (1st Cir. 2010); see also Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 153-54 (1st Cir. 2009) (explaining that "Chapter 151B is considered the Massachusetts analogue to the [ADA] … and noting that "[t]he [SJC] has indicated that federal case law construing the ADA should be followed in interpreting the Massachusetts disability law") (internal citations and quotation marks omitted)). Moreover, the Court notes that "[a]lthough the ADA uses the term 'disability,' and Chapter 151B uses the term

must show that: (1) he suffers from a disability as defined by the ADA and Chapter 151B; (2) he was nevertheless able to perform the essential functions of his job, with or without reasonable accommodation, and (3) IBM knew of his disability but did not reasonably accommodate it upon his request. Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010). IBM focuses first on the second prong, arguing that Tuvell's accommodation claims (Counts I–V) must fail because Tuvell was not capable of performing the essential functions of his job, with or without a reasonable accommodation. D. 75 at 4 and 6–7 (quoting Mass. Gen. L. c. 151B, ¶ 1(16)). "The employee bears the initial burden of producing some evidence that an accommodation that would allow him or her to perform the essential functions of the position would be possible, and therefore that he [] is a 'qualified [disabled] person.'" Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 120 (2010).

1. Tuvell is Not a Qualified Disabled Person

The Court agrees with IBM that Tuvell has failed to demonstrate that he was capable of performing the essential functions required of his job, even with a reasonable accommodation. Tuvell argues that he was "medically able to perform work for IBM if he was provided the reasonable accommodation of a different supervisor, or a transfer to a new position

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'handicap,' the statutory definitions are essentially the same" and the Court will "use the term 'disability' solely for consistency." Faiola, 629 F.3d at 47.

away from Feldman." D. 85 at 9. The record, however, belies such a contention.

Tuvell admits to submitting a number of MTRs, which characterized Tuvell as not "able to function at his job responsibilities," D. 76-38 at 1, and claimed that Tuvell was "totally disabled." D. 82 ¶¶ 35, 41; see also Beal v. Bd. of Selectmen of Hingham, 419 Mass. 535, 543 (1995) (noting that where the plaintiff has claimed that they are unable to perform the duties of ◀ *14* ▶ the job to their employer "the plaintiff cannot now successfully claim that [they are] capable of performing the essential functions of the job").[5] Moreover, these MTRs indicated that Tuvell generally suffered from "severe impairment in his ability to manage conflicts with others, get along well with

5 • Tuvell relies on Sullivan v. Raytheon Co., 262 F.3d 41, 47 (1st Cir. 2001) and Labonte v. Hutchins & Wheeler, 424 Mass. 813, 819 (1997) for the proposition that employees may be considered qualified disabled individuals even if they have claimed total disability on medical documents. D. 85 at 9. In Sullivan, however, the First Circuit noted that although past claims of disability "do not necessarily preclude" a plaintiff's ability to argue subsequently that he is capable of performing his job with a reasonable accommodation, a plaintiff in that situation "must explain why the representations of total disability he has made in the past are consistent with his current claim that he could perform the essential functions of [his job] with reasonable accommodation." Sullivan, 262 F.3d at 47. And in Labonte, the Supreme Judicial Court's analysis turned on the fact that the plaintiff never actually claimed total disability, only stating that he was disabled without the reasonable accommodation. Labonte, 424 Mass. at 818 (distinguishing from cases where the request for accommodations was made after the plaintiff had already admitted to being "totally disabled" and, thus, not a qualified handicapped person).

others without behavioral extremes, and interact and actively participate in group activities." D. 82 ¶ 33; see also id. ¶ 42, 44. Tuvell's own treatment provider, Stephanie Ross, noted that "any contact with people from work" or, even "any discussion about work" could trigger Tuvell "into a state that involved hyper-reactivity, hyper-arousal." Id. ¶ 45 (quoting Ross Depo., D. 76-7 at 11). Ross stated that Tuvell had trouble speaking and would cry and shake when talking about work. D. 76-7 at 10. Tuvell could not "drive within a 50 mile radius — 20 mile radius of where he worked for a period of time without becoming hysterical." D. 82 ¶ 52. Ross was concerned for Tuvell's "mental health stability" and thought that just seeing Feldman or Knabe "could trigger his obsessive thoughts, depression, or other strong reactions." Id. ¶ 46.

As such, Tuvell has not demonstrated that he would have been able to perform the essential functions of his job, even if IBM had assigned him to a different supervisor or transferred him to a new position. See Bryant v. Caritas Norwood Hosp., 345 F. Supp. 2D 155, 166 (D. Mass. 2004) (noting that "[t]he ADA defines a 'qualified individual with a disability,' ◀ *15* ▶ the members of the class it protects, as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires'") (citation omitted) (emphasis in original)). Even with a different supervisor, Tuvell would have had to enter the facility and have "contact with people from work." D. 82 ¶ 45. Indeed,

Tuvell admits that even he "could not and did not identify anyone who could serve as his manager in place of [] Feldman." D. 82 ¶ 51. And a position transfer would not guarantee that Tuvell would never have to see, or hear about, Feldman again. Nor would Tuvell's proposed accommodations necessarily affect Tuvell's ability to get along with others "without behavioral extremes" or affect his ability to negotiate, compromise or manage conflicts with others. See id. ¶ 48. Nothing in the record demonstrates that Tuvell would have been able to successfully interact with groups or deal appropriately with criticism. Accordingly, the Court concludes that even with Tuvell's proffered reasonable accommodation — a different supervisor or a transfer to a new position — Tuvell has not demonstrated a genuine issue of material fact that he would have been capable of performing the essential functions of his job. ◀ *16* ▶

2. The Interactive Process and Reasonable Accommodations

Next, IBM argues that, even assuming that Tuvell was a qualified handicapped person, Tuvell's claims fail because IBM did engage in an interactive process (Count I) and provided Tuvell with reasonable accommodations for his alleged disability (Counts III–V). D. 75 at 4. IBM highlights that it permitted Tuvell "to take medical leave until such time as he was able to return to his position." Id. at 8 (citation omitted). Furthermore, IBM notes that, in addition to granting extended medical leave, IBM offered to allow Tuvell to receive his performance re-

views from a different manager, while simultaneously affording him leave for medical appointments whenever necessary and the ability to continue looking for open positions. Id. at 8–9. In response, Tuvell argues that the "uncompensated leave" provided by IBM was "not a valid, effective or acceptable reasonable accommodation" and that any proposal that required to Tuvell to return to work below Feldman was unreasonable because it "was contrary to Tuvell's medical limitations." D. 85 at 6.

As a threshold matter, the Court notes that having found that Tuvell was not a qualified disabled person, the Court need not reach the question of whether IBM provided him with a reasonable accommodation, as it was under no obligation to do so. See Bryant, 345 F. Supp. 2d at 168. Moreover, while "the ADA's interpretive regulations may require an employer to initiate an informal, interactive process with the individual seeking accommodation … there is no such requirement under Massachusetts law in chapter 151B." Sullivan, 262 F.3d at 47–48 (internal citations and quotation marks omitted). And even where IBM is required to engage in such a process, "an interactive process is not necessary where, as here, no reasonable trier of fact could [find] that the employee was capable of performing the job, with or without reasonable accommodation." Id. ◀ *17* ▶

Nevertheless, the Court will address the parties' remaining accommodation arguments. First, IBM argues that it was Tuvell who refused to engage in an interactive process. D. 75 at 13. It is not disputed

that Tuvell made a request for a specific accommodation, as he demanded a transfer to a new supervisor or to a new position. IBM argues, however, that Tuvell's behavior — "repeatedly demanding that IBM acquiesce to the only accommodation he would accept, while consistently refusing to consider any alternatives set forth by IBM" — does not amount to participation in an interactive process. Id. at 13–14. Indeed, "[b]oth parties, not just the employer, are required to engage in the reasonable accommodation process and to act in good faith." Rennie, 139 F. Supp. 2d at 168. The process is meant to be "cooperative" and an "appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." Id. (citation omitted).

Here, the record evidence shows that IBM attempted to engage in an interactive process with Tuvell. Although IBM indicated that it did not consider reassignment to another management team to be a reasonable accommodation, IBM indicated that it was open to other proposals for other possible accommodations. See e.g., D. 82 ¶¶ 18, 31. Despite IBM's demonstrated willingness to negotiate, Tuvell never made an alternate proposal.[6] Nevertheless,

6 · At the motion hearing, Tuvell seemed to suggest that he was able to successfully work from home and that IBM's failure to allow him system access while on short term disability leave was an attempt to deny him the reasonable accommodation of working remotely. See Feldman Email, Tuvell Exh. 111. Neither party, however, actually suggested this measure and, therefore, Tuvell cannot now ground his claim on IBM's failure

◀ *18* ▶ IBM allowed Tuvell to remain on extended leave, encouraged him to continue to look for another IBM position through the GOM system and regularly reached out to Tuvell proposing different review and feedback procedures. See e.g., id. ¶¶ 26, 31, 34, 55–57, 67, 71. Indeed, on separate occasions, both IBM and Feldman offered Tuvell the opportunity to receive all feedback from a different manager and Metzger, Feldman's supervisor, reached out to Tuvell after Tuvell had exhausted his STD benefits offering to give Tuvell all his performance evaluations personally. Id. ¶ 71. Tuvell rejected these proposals.

In response, Tuvell contends that none of IBM's proposals were reasonable. Specifically, Tuvell argues that none of the accommodations given, or offered, to him were reasonable because he was medically incapable of returning to work under Feldman and, therefore, the only possible reasonable accommodation was to receive a new supervisor[7] and/or

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to give him an accommodation that he never asked for absent evidence that his disability prevented him from properly requesting an accommodation or the accommodation was obvious. Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 102 & n.11 (1st Cir. 2007) (quoting Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001)) (noting that "the employer's duty to accommodate is triggered by a request from the employee" and "the plaintiff has the burden of showing that she 'sufficiently requested the accommodation in question'"). Moreover, even if Tuvell had been offered the option of working remotely, he still may have reported to Feldman, or interacted with him.

7 · As noted above, Tuvell "could not and did not identify anyone who could serve as his manager in place of [] Feldman." D. 82 ¶ 51.

transfer to a new department. D. 85 at 5–8. Again, as discussed above, "a plaintiff must show that a proposed accommodation would enable [him] to perform the essential functions of [his] job." Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001); Evans v. Fed. Express Corp., 133 F.3d 137, 140 (1st Cir. 1998) (noting that "[o]ne element in the reasonableness equation is the likelihood of success"). For the reasons already articulated, Tuvell has not shown that even his requested accommodation would have allowed him to perform his job.

In any case, the Court notes that the law requires only that "employers [] offer a reasonable accommodation, not necessarily the accommodation sought." Bryant, 345 F. Supp. 2d at 169 (emphasis in original). Indeed, the employer retains "the ultimate discretion to choose ◀ *19* ▶ between effective accommodations." Id. (citation omitted). Contrary to Tuvell's arguments, IBM was under no obligation to, essentially, "find another job for an employee who is not qualified for the job he or she was doing." August v. Offices Unlimited, Inc., 981 F.2d 576, 581 n.4 (1st Cir. 1992) (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987)). Rather, "[e]mployers are only required not to 'deny an employee alternative employment opportunities reasonably available under the employer's existing policies,'" id., and for "the position involved." Mass. Gen. L. c. 151B, ¶ 4(16). Here, IBM allowed an extended leave period and encouraged Tuvell to apply for any open positions in the company through the G*{OM}* system. These are reasonable accommoda-

tions, and the ADA does not require IBM to transfer Tuvell or assign him to another supervisor. See e.g., Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996) (noting that plaintiff's proposal to "work under a different supervisor" was the equivalent of asking to be able to "establish the conditions of her employment, most notably, who will supervise her" and explaining that such a "decision remains with the employer"); Wernick v. Fed. Reserve Bank of New York, 91 F.3d 379, 384 (2d Cir. 1996) (noting that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy. Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons").

Finally, Tuvell argues that IBM should have transferred him to the open position in Kime's group (Counts III–V). See e.g., D. 85 at 11. It is correct that the ADA does provide that a "reasonable accommodation may include … reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). Here, however, Tuvell's admitted, serious impairments "getting along well with others without behavioral extremes, initiating social contacts, negotiation and compromise, and ◀ *20* ▶ interaction and active participation in group activities" indicates that even his desired transfer would not have been reasonable under the circumstances. D. 82 ¶ 44; see also Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202 (6th Cir. 2010) (holding proposed accommodation unreasonable where plaintiff failed to show how proposal would al-

low him to overcome a "key obstacle" to performing an essential function); Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 90 (1st Cir. 2012) (noting that "to show that a proposed accommodation is reasonable, a plaintiff must demonstrate that it would enable [him] to perform the essential functions of [his] job and would be feasible for the employer under the circumstances") (internal quotation marks omitted) (alteration in original)). This is especially true given the additional evidence in the record that "any contact with people from work, any discussion about work" and "going anywhere near the work facility" could trigger Tuvell "into a state that involved hyper-reactivity, hyper-arousal" and "obsessive thinking." D. 82 ¶ 45.

Accordingly, the Court concludes that Tuvell has not rebutted IBM's showing that there is no genuine issue of material fact as to his failure to accommodate claims.

B. Discrimination Claims (Counts VI–VIII)

IBM next argues that Tuvell's discrimination claims must fail because he "has failed to make out a *prima facie* case of disability discrimination or provide any evidence demonstrating that the legitimate business reasons proffered by IBM are pretext for discrimination …" D. 75 at 14.

To assess Tuvell's employment discrimination claims, the Court must apply the familiar burden-

shifting framework.[8] Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 154 ◀*21*▶ (1st Cir. 2009) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). To establish a *prima facie* case of discrimination under the ADA and Chapter 151B, Tuvell must show that: (1) he suffers from a disability; (2) he was nevertheless able to perform the essential functions of his job, with or without reasonable accommodation; and (3) his employer took an adverse employment action against him because of his disability. Faiola, 629 F.3d at 47. Tuvell has the initial burden of establishing a *prima facie* case. Beal, 419 Mass. at 540. If Tuvell establishes his *prima facie* case, "the burden then shifts to [IBM] to articulate a legitimate, non-discriminatory reason for [its] employment decision and to produce credible evidence to show that the reason advanced was the real reason." Sensing, 575 F.3d at 154 (quoting Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 104 (1st Cir. 2005)). If IBM offers "such a legitimate reason, the burden shifts back to [Tuvell] to produce evidence to establish that [IBM's] non-discriminatory justification is mere pretext, cloaking discriminatory animus." Id.

1. Adverse Employment Actions

For the reasons articulated above, the Court concludes that Tuvell cannot establish a *prima facie* case

8 • "The application of the McDonnell Douglas framework to claims of disability discrimination under the ADA was confirmed in Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999)." Furtado v. Standard Parking Corp., 820 F. Supp. 2d 261, 270 (D. Mass. 2011).

of disability discrimination as he was unable to perform the essential functions of his job. Moreover, the Court concludes that the two adverse employment actions that Tuvell relies on — his failure to get a job in Kime's group and IBM's decision to terminate him — are not adverse actions taken because of his disability. It is correct that termination "is not the only 'adverse employment action' that can satisfy this element." Sensing, 575 F.3d at 157. Indeed, "[p]revailing case law in the First Circuit and elsewhere supports a fairly liberal approach in determining what constitutes an adverse employment action." Rennie, 139 F. Supp. 2d at 169. Nevertheless, Tuvell must demonstrate that the allegedly adverse action had an effect "on ◀ *22* ▶ working terms, conditions, or privileges that are material … as opposed to those effects that are trivial and so not properly the subject of a discrimination action." Sensing, 575 F.3d at 160 (citation omitted). To begin, Tuvell's failure to receive the open position in Kime's group is not an adverse action, as his position with the company did not change. Tuvell remained employed in his current position and the objective terms and conditions of his employment — his salary, benefits, title and responsibilities — remained unchanged. Indeed, Tuvell did not experience any change in his employment until IBM terminated him in May 2012. D. 82 ¶ 79. Further, the record evidence does not show that IBM's decision to terminate Tuvell was motivated by a discriminatory animus.

2. Legitimate, Nondiscriminatory Reason for IBM's Employment Decision

Because this Court concludes that Tuvell cannot establish a prima facie case of employment discrimination, IBM does not have to articulate a nondiscriminatory reason for its decision to terminate him. Beal, 419 Mass. at 545 n.6 (citing Sarni Original Dry Cleaners, Inc. v. Cooke, 388 Mass. 611, 614–15 (1983)). Nevertheless, IBM has offered a legitimate, nondiscriminatory reason for its decision to terminate Tuvell. In brief, IBM discovered that Tuvell had posted that he was working for an IBM competitor, EMC, while still employed by IBM. D. 82 ¶¶ 73–81. When IBM attempted to confirm that Tuvell was not, in fact, working for EMC, Tuvell refused to disclose his new employer. Id. As a result, IBM terminated Tuvell's employment.

This brings the Court to the final step in the burden-shifting framework. Here, Tuvell must present evidence to rebut IBM's explanation. He has not done so. To survive summary judgment, Tuvell must present specific, admissible evidence to create a genuine issue as to "show that the adverse employment action was [actually] the result of discriminatory animus." ◀ *23* ▶ Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 39 (1st Cir. 2003). While "there is no mechanical formula for finding pretext," it can be demonstrated "by showing that the employer's proffered explanation is unworthy of credence." Id. (citation omitted). Tuvell argues only that because: (1) he "authorized" IBM to contact EMC to confirm that he was not employed there; (2) he feared "a retaliatory response" if he actually did tell IBM where he was working and; (3) he offered to tell an (unidentified)

third-party where he was working who could then confirm with IBM that he was not working for a competitor — that he had completely "neutralized" IBM's concerns. D. 85 at 19–20. Tuvell asserts, therefore, that there is a sufficient inference of "discriminatory or retaliatory motive." Id. Notably, Tuvell does not dispute: (1) that he posted online that he was working for an IBM competitor; (2) that IBM contacted him to confirm whether he was working for a competitor; (3) that IBM repeatedly asked him to confirm where he was working while still employed by the company; and (4) that he refused. As such, Tuvell's arguments are insufficient to rebut IBM's legitimate, nondiscriminatory explanation for Tuvell's termination. The record shows that, on March 12, 2012, Tuvell had indeed started working for the software company Imprivata while still on medical leave from IBM. D. 82 ¶ 73.

3. Other "Tangible Acts"

Finally, Tuvell raises a number of other "tangible acts" (Counts VI–VII) that he contends constitute adverse employment actions. Specifically: (1) the curtailment of his access to IBM facilities, computer networks and email while he was out on medical leave; (2) the August 2011 formal warning letter Tuvell received regarding his communication with colleagues; (3) his reassignment within his own group; (4) refusing to process and finalize his internal complaint; and (5) treating his work from home days as sick days. D. 85 at 3–5. ◀ *24* ▶

To show an adverse employment action, how-

ever, "[t]here must be real harm; subjective feelings of disappointment and disillusionment will not suffice." King v. City of Boston, 71 Mass. App. Ct. 460, 468 (2008) (internal quotation marks omitted) (citing MacCormack v. Boston Edison Co., 423 Mass. 652, 664 (1996)). The "action must materially change the conditions of plaintiffs' employ." Gu v. Boston Police Dep't, 312 F.3d 6, 14 (1st Cir.2002). Here, Tuvell's access to facilities and computer networks was only limited while he was out on leave and reportedly totally incapacitated to work. See e.g., D. 82 ¶ 35. As such, there was no "real harm" in limiting his access while he was not working. King, 71 Mass. App. Ct. at 468. Furthermore, the formal warning letter did not have any effect on Tuvell's pay, benefits, title or any other term or condition of employment. Nor did his inter-group transfer result in any change to Tuvell's pay or his rank within the company. In addition, Tuvell has presented no evidence to support the allegation that IBM did not process his complaint; in fact, it is undisputed that two investigations were conducted into Tuvell's allegations (Due's and Mandel's). D. 82 ¶¶ 17, 29. And finally, Tuvell's work from home days were only treated as sick days after Tuvell had advised IBM that he was "totally disabled" and unable to work. Tuvell, therefore, did not need work from home days while he was not working.

4. Hostile Work Environment

Tuvell also alleges that the "tangible acts," discussed above, created a hostile work environment "on

the basis of his handicap, retaliation, race, gender [and] age" (Count VII). D. 10 at 28–29. To prove a hostile work environment claim, Tuvell must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Andujar v. Nortel Networks, Inc., 400 F. Supp. 2d 306, 329 (D. Mass. 2005) ◀ *25* ▶ (citation omitted). "The work environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [Tuvell] in fact did perceive to be so." Id. (citing Conto v. Concord Hosp., Inc., 265 F.3d 79, 82 (1st Cir.2001)). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Here, Tuvell found these incidents subjectively offensive. Without diminishing his subjective belief, however, Tuvell's complained of "tangible acts" represent regular business practices and policies (i.e., treating medical leave days while "totally disabled" as sick days or switching employees on projects within the same group) and relatively standard workplace interactions and criticisms. As such, the Court concludes that Tuvell's allegations do not approach the level of severe or pervasive conduct that would be objectively

offensive. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000) (noting that the "workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins — thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world").

In sum, the Court concludes that Tuvell has not rebutted IBM's showing that there is no genuine issue of material fact as to his disability discrimination claims.[9] ◀ *26* ▶

C. Retaliation Claims (Counts V–VIII)

Having determined that Tuvell cannot sustain his accommodation and discrimination claims, the Court will address briefly his retaliation claims (Counts V–VIII), which are based on the same conduct described in detail above. To succeed on his retaliation claim, Tuvell must prove that: (1) he was "engaged in protected conduct;" (2) "suffered an adverse employment action; and (3) [that] there was a causal connection between the protected conduct and the adverse action." Jones v. Walgreen Co., 679 F.3d 9, 21 n.7 (1st Cir. 2012) (citing Colón–Fontánez v.

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9 • Tuvell's failure to investigate claim (Count VIII) is likewise dismissed. Tuvell's claim that IBM's alleged failure to investigate gave rise to a hostile work environment has been addressed above. To the extent that Tuvell also seeks to argue that IBM's alleged failure to investigate gives rise to an independent cause of action under Massachusetts law, see D. 85 at 23, the Court notes that no independent claim of failure to investigate exists absent underlying proof of discrimination. Keeler v. Putnam Fiduciary Trust Co., 238 F.3d 5, 13 (1st Cir. 2001).

Municipality of San Juan, 660 F.3d 17, 36 (1st Cir. 2011)) (alteration in original). If Tuvell establishes a prima facie case of retaliation, then the burden shifts to IBM "to articulate a legitimate, nondiscriminatory [or nonretaliatory] reason for its employment decision." Id. at 20 (citation omitted) (alteration in original). If IBM meets this burden, then Tuvell must show that the offered reason is pretextual. Id. Under both Massachusetts and federal law, the success of Tuvell's retaliation claims does not depend on the success of his disability claims. Id. (noting that "[f]ederal and Massachusetts law are in harmony on this issue"). As discussed in detail above, however, the pre-termination actions complained of by Tuvell are not adverse employment actions. Furthermore, IBM has offered a legitimate, nonretaliatory reason for terminating Tuvell's employment, and Tuvell has offered no admissible evidence to rebut IBM's proffered explanation. Accordingly, the Court concludes that Tuvell's retaliation claims are without merit.

D. Age, Gender and Race Discrimination Claims (Counts V–VIII)

◀ *27* ▶

Finally, the Court notes that Tuvell has offered no facts to support his discrimination claims based on age, gender and race. Tuvell has alleged no facts, distinct from those addressed elsewhere, to sustain a discrimination claim on the basis on age, gender or race. Tuvell appears to argue that his transfer within his group, switching projects with Mizar — who is Asian, female and younger — may have con-

stituted discrimination. Tuvell offers no support for this opinion, however, stating only that it constituted discrimination because "something bigger" was "at play" that "had to be illegal." D. 82 ¶ 11 (quoting Tuvell Dep., D. 76-2 at 7). This allegation, standing alone, is not enough to rebut IBM's showing that there is no genuine issue of material fact as to his age, gender and race discrimination claims. Moreover, as discussed above, Tuvell acknowledges that this switching of projects did not result in any change to Tuvell's pay, title or rank within the company. Accordingly, the Court concludes that there is no genuine issue of material fact as to Tuvell's remaining discrimination claims.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS IBM's motion for summary judgment, D. 73. In addition, the Court DENIES IBM's motion to strike, D. 89, as moot.

So Ordered.

/s/ Denise J. Casper
United States District Judge

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United States Court of Appeals
For the First Circuit

No. 15-1914

WALTER TUVELL
Plaintiff — Appellant

v.

INTERNATIONAL BUSINESS MACHINES, INC.
Defendant — Appellee

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson, and Kayatta,
Circuit Judges.

ORDER OF COURT

Entered: June 15, 2016

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Walter Eugene Tuvell Jr.
Matthew A. Porter
Joan I. Ackerstein
Anne Selinger

◄■►

United States Court of Appeals
For the First Circuit

No. 15-1914

WALTER TUVELL,
Plaintiff, Appellant,

v.

INTERNATIONAL BUSINESS MACHINES, INC.,
Defendant, Appellee.

JUDGMENT

Entered: May 13, 2016

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:
/s/ Margaret Carter, Clerk

cc:
Andrew P. Hanson
Matthew A. Porter
Joan I. Ackerstein

Anne Selinger

◄■►

◀ *1* ▶

United States District Court
District of Massachusetts

WALTER TUVELL
Plaintiff(s)

v. CIVIL ACTION NO. **13-11292-DJC**

INTERNATIONAL BUSINESS MACHINES, INC.
Defendant(s)

JUDGMENT IN A CIVIL CASE

CASPER, D.J.

☐ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. In accordance with the Memorandum and Order dated July 7, 2015 granting summary judgment for the defendant{}.

IT IS ORDERED AND ADJUDGED

Judgment for the defendant International Business Machines, Inc.

Robert M. Farrell, Clerk

Dated: 7/8/15 /s/ Lisa M. Hourihan
(By) Deputy Clerk

NOTE: The post judgment interest rate effective this date is ___%.

(judgciv.frm — 10/96) [jgm.]

United States Court of Appeals
For the First Circuit

No. 15-1914

WALTER TUVELL
Plaintiff — Appellant

v.

INTERNATIONAL BUSINESS MACHINES, INC.
Defendant — Appellee

ORDER OF COURT

Entered: June 7, 2016

That portion of plaintiff-appellant's third pro se motion seeking leave to file an amended petition for rehearing/rehearing en banc is granted. The third amended pro se petition is accepted for filing on this date. Because appellant is not entitled to file more than one version of his petition for rehearing, the remaining portion of plaintiff-appellant's third motion seeking leave to file an annotated version of the petition is denied, and the Clerk is directed to return to plaintiff-appellant the tendered amended annotated version of his petition for rehearing/rehearing en banc. Similarly, the Clerk is directed to return the "Motion of Filing Amended Oral Argument Transcription, Amended" and the "Notice of Filing Re-

Amended Oral Argument Transcription, Annotated" as such filings are also unauthorized. No further requests for leave to amend plaintiff-appellant's petition for rehearing/rehearing en banc will be entertained by the court.

By the Court:
/s/ Margaret Carter, Clerk

cc:
Walter Eugene Tuvell Jr.
Matthew A. Porter
Joan I. Ackerstein
Anne Selinger

◄■►

NOTE: *The tags Ⓐ–Ⓧ are defined in the Unabridged PSOF-Exclusion Table (ReqApx ℘86–90); they provide a cross-correlation of the district court's opinion (ReqApx ℘4–38) with the PSOF itself (here, ReqApx ℘48–84), and also with the DSOF (not included in ReqApx).*
{For the ✯ (¶ preceding ¶1), see main Petition ℘20of33.}

◀ *1* ▶

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 ◀ *2* ▶ 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 ◀ *3* ▶ acknowledged in writing that he had indeed raised his voice at Mr. Tuvell. Veri-

fied 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 that 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 ◀ *4* ▶ 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 ◀ *5* ▶ 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 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.

Ⓔ 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 ◀ *6* ▶ 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 trac-

ing 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. ◀ 7 ▶

Ⓕ 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 inde-

pendent 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. ◀ *8* ▶ 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 Com-

plaint, ¶¶ 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 ◀ *9* ▶ 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 ◀ *10* ▶ conclusion of his investigation until November 17, 2011,

and the results were disfavorable. 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. ◀ *11* ▶

Ⓣ 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. ◀ *12* ▶

Ⓣ 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, ◀ *13* ▶ 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 Soft-

ware 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 ◀ *14* ▶ advance or otherwise delayed finalization of its investigation of Plaintiff's complaints of discrimination and retaliation, based on Plaintiff's availment 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 "inap-

propriate":

> [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." ◀ *15* ▶ 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 ◀ *16* ▶ 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 Plain-

tiff 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 dis-

crimination 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, ◀ *17* ▶ 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, ◀ *18* ▶ 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 ◀ *19* ▶ 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 ◀ *20* ▶ 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. ◀ *21* ▶

Ⓤ 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 ◀ *22* ▶ 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 uncontrol-

lably 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 Densitization 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 ◀ *23* ▶ 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*{}* 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 ◀ *24* ▶ 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 co-

worker 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. ◀ *25* ▶

Ⓚ 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 con-

cluded 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 work-

place. Due Dep., at 43–44, ◀ *26* ▶ 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 prac-

tice 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 ◀*27*▶ 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, availment 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. ◀ *28* ▶

Ⓦ 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
/s/ Robert S. Mantell
Robert S. Mantell
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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___

◄■►

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NOTE: *The tags Ⓐ–Ⓧ defined in this Unabridged PSOF-Exclusion Table (here, ReqApx ℘86–90) provide a cross-correlation with the district court's opinion (ReqApx ℘4–38) and with the PSOF itself (ReqApx ℘48–84), and also with the DSOF (not included in ReqApx).*

PSOF-Exclusion Table (Unabridged)[α]

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓐ Knabe Excel graphics episode	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘1–2 = ReqApx ℘48–50, ¶1,3–5. Credit DSOF ℘2 ¶7.
Ⓑ Feldman refuse three-way meeting	Op ℘3 = ReqApx ℘6–8 *(silent)*. **Dis**credit **PSOF** ℘2,5,18 = ReqApx ℘49–50,53–54,70–71, ¶5–6,17,59. *Credit DSOF ℘2 (silent).*
Ⓒ Knabe yelling incident	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘2–3,5,15–16 = ReqApx ℘49–50,53–54,66–69, ¶7,17,50. Credit DSOF ℘2–3 ¶8.
Ⓓ Feldman demotion	Op ℘3 = ReqApx ℘6–8. **Dis**credit **PSOF** ℘3–5,18 = ReqApx ℘50–54,71–71, ¶8,12–16,58. Credit DSOF ℘3–4 ¶9–13.
{ Went to HR — here's where things really "went south." }	

α • Abridged version at main Petition ℘29. *"Warning":* This rather complicated Table almost certainly contains one-or-more (isolated/trivial/inadvertent/immaterial) typographical errors.

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓔ Feldman "Dear Dr. Tuvell" email	Op ℘3 = ReqApx ℘6–8 *(silent)*. **Discredit PSOF** ℘5,16 = ReqApx ℘53–54,67–69, ¶18,51. Credit DSOF ℘4 *(silent)*.
Ⓕ Feldman transition status reports	Op ℘3–4 = ReqApx ℘6–9. **Discredit PSOF** ℘5–8 = ReqApx ℘53–58, ¶19–23,26. Credit DSOF ℘4 ¶14–16.
Ⓖ Feldman impossible project planning	Op ℘4 = ReqApx ℘8–9 *(silent)*. **Discredit PSOF** ℘7–8 = ReqApx ℘55–58, ¶24–26. Credit DSOF ℘4 ¶16.
Ⓗ Due "sham"[β] investigation	Op ℘4 = ReqApx ℘8–9. **Discredit PSOF** ℘25–26 = ReqApx ℘79–82, ¶82–84. Credit DSOF ℘4–5 ¶17–19.
Ⓘ Refusal to separate Tuvell from Feldman (many times)	Op ℘8 = ReqApx ℘13–14. **Discredit PSOF** ℘19–20,23–24 = ReqApx ℘71–74,77–79, ¶61–62,64,75. Credit DSOF ℘7 ¶30–31.

β • Like *everything* else in this case and in this Table, Plaintiff has much *direct evidence* for the "sham" nature of IBM's investigations (items Ⓗ, Ⓚ in this Table). Additionally, Plaintiff plans to present an extensive Expert Report[†] testifying to the investigations' "shamness." {† Not included in the Petition's ReqApx (lack of relevancy to the Question Presented by the Petition).}

Issues/Facts	**Lower Courts' *Faux* "Findings"**
Ⓙ "Bad" emails; e.g., *"ad hominem"* and esp. "lazy" letter	Op ℘4–5 = ReqApx ℘8–10. **Dis**credit **PSOF** ℘14–16 = ReqApx ℘65–69, ¶46,50,52. Credit DSOF ℘5–6 ¶22–25.
Ⓚ Mandel C&A; Open Door complaints; "sham"*fβ supra* investigation	Op ℘6 = ReqApx ℘10–12. **Dis**credit **PSOF** ℘8–10,14–17,24–27 = ReqApx ℘57–61,65–70,78–83, ¶28–29,32,55–56,76,78–81,85,87–88. Credit DSOF ℘6–7 ¶27–29.
Ⓛ Pseudo-yelling; Feldman forbid work-time for complaint	Op ℘4 = ReqApx ℘8–9 *(silent)*. **Dis**credit **PSOF** ℘8,15 = ReqApx ℘57–58,66–67, ¶27,49. Credit DSOF ℘5 *(silent)*.
Ⓜ Feldman Formal Warning Letter	Op ℘5 = ReqApx ℘9–10. **Dis**credit **PSOF** ℘8 = ReqApx ℘57–58, ¶28. Credit DSOF ℘6 ¶25.
Ⓝ Fainting	Op ℘5 = ReqApx ℘9–10 *(silent)*. **Dis**credit **PSOF** ℘8,22 = ReqApx ℘57–58,75–77, ¶28,68. Credit DSOF ℘6 ¶25 *(silent)*.
Ⓞ *"Raison d'être"* (no third-party complaints)*γ*	Op ℘6 = ReqApx ℘10–12 *(silent)*. **Dis**credit **PSOF** ℘24 = ReqApx ℘78–79, ¶77. Credit DSOF *(silent)*.

γ • Mandel/IBM's claim that "IBM does not accept third-party complaints" is either (i) *false* or (ii) *illegal* (per ADA, PetAdd ℘5,

Issues/Facts	Lower Courts' *Faux* "Findings"
Ⓟ STD leave; Mandel refusal to investigate	Op ℘5 = ReqApx ℘9–10. **Dis**credit **PSOF** ℘8,12–14,16,26–27 = ReqApx ℘57–58,62–66,67–69,81–83, ¶28,41,45,53,86. Credit DSOF ℘6,8 ¶26,34.
Ⓠ MTRs; false interpretations[δ]	Op ℘5–9 = ReqApx ℘9–16. **Dis**credit **PSOF** ℘9,23 = ReqApx ℘58–59,77–78, ¶31,66–72. Credit DSOF ℘7–11 ¶32–33,35–52.
Ⓡ Rescind physical & electronic access	Op ℘6 = ReqApx ℘10–12 *(silent)*. **Dis**credit **PSOF** ℘13–15 = ReqApx ℘63–67, ¶45,48. Credit DSOF ℘12 ¶53–54.
Ⓢ Feldman misclassify work- at-home days	Op ℘7 = ReqApx ℘12–13 *(silent)*. **Dis**credit **PSOF** ℘8–9 = ReqApx ℘57–59, ¶30. Credit DSOF *(silent)*.
Ⓣ Feldman & Kime sabotage transfer	Op ℘9–10 = ReqApx ℘14–17. **Dis**credit **PSOF** ℘9–13,16,23 = ReqApx ℘58–65,67–69,77–78, ¶31,33–40,42–44,54,73–74. Credit DSOF ℘12–15 ¶57–66,68,70.

"oneself or others") — hence, either (i) *pretextual* or (ii) *direct* evidence of wrongdoing. This is one-of-many-*many* items towards which the lower courts *steadfastly maintained a "blind eye."*[†] {† This is not the meaning signified by the blindfold on the classic image of Lady Justice (Latin *iūstitia,* justice/fairness/equality/righteousness) since ancient Roman times!}

δ • See ReqApx ℘12 *f*4, ℘15 *f*8.

Issues/Facts	Lower Courts' *Faux* "Findings"
ⓤ Fake offer of accommodation (Metzger)	Op ℘9–10 = ReqApx ℘14–17. **Dis**credit **PSOF** ℘18–21 = ReqApx ℘70–74, ¶60,63,65. Credit DSOF ℘14–15 ¶67,69,71–72.
ⓥ LinkedIn; EMC$^{\varepsilon}$	Op ℘10–11 = ReqApx ℘16–18. **Dis**credit **PSOF** ℘17 = ReqApx ℘69–70, ¶56. Credit DSOF ℘16 ¶74–77.
ⓦ Imprivata$^{f\varepsilon\ supra}$	Op ℘11 = ReqApx ℘17–18. **Dis**credit **PSOF** ℘17,27–28 = ReqApx ℘69–70,82–84, ¶57,90–91. Credit DSOF ℘17 ¶78–79.
ⓧ Termination$^{\zeta}$	Op ℘11 = ReqApx ℘17–18. **Dis**credit **PSOF** ℘17–18 = ReqApx ℘69–71, ¶57. Credit DSOF ℘17 ¶79–81.

ε • These two items (ⓥ, ⓦ) were "made-up" "issues" by IBM, serving no purpose other than *harassment* — hence *falsely* leading *directly* to the termination (item ⓧ, see $f\zeta$ *infra*).

ζ • Besides illicitly employing: (i) their *PSOF-Exclusion* tactic to *wholly avoid* addressing termination (this ⓧ entry); *and* (ii) their *QDI-Exclusion* tactic to wholly avoid the termination issue (see Petition ℘27 f41, and PetAdd ℘19); the lower courts *also additionally* (iii) *conflicted* with the Ninth Circuit on ADA *substantive-law* regarding "Manifestation-of-Disability (MOD)" termination (see PetAdd ℘19).

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In the Supreme Court of the United States

WALTER TUVELL

Petitioner

v.

INTERNATIONAL BUSINESS MACHINES (IBM)

Respondent

On Petition for Writ of Certiorari to the United States Court for Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI, ADDENDUM

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1 • Tuvell is not "really" *pro se* — see main Petition ℘vi*f*6.

[2]QUESTIONS PRESENTED

In this Addendum, we are concerned with *substantive-law* questions that were deferred from the main Petition.[3]

QA *{ The main Petition introduced the SJTOR procedural-law question, which we refer to herein as QA. In this Addendum, we now define QB, QC(i) and QC(ii). }*

Questions *[with "suggested answers"]:*

QB Whether, at summary judgment in an employment case, the lower courts may rely upon their own Circuit's historical "Pretext-Plus" opinions; or must they now hew to this Court's superseding "Pretext-Only" precedent (exemplified by *Reeves*)? *[The latter only, not the former.]*

QC Whether, at summary judgment in an ADA employment case, the lower courts must/should observe:

(i) This Court's *Cleveland* teaching regarding the subject of "Qualified Disabled Individuals (QDI)"? *[Yes.]*

(ii) The Ninth Circuit's *Humphrey* decision regarding the subject of "Manifestation-of-Disability (MOD)"? *[We think so, but this Court should decide.]*

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2 • For convenience (familiarity), this Addendum is arranged and formatted identically to the main Petition, *mutatis mutandis.*

3 • See *PREFACE* section of the main Petition ℘ii*f*3.

PREFACE

{ Import PREFACE section from the main Petition. }

PARTIES TO THE PROCEEDINGS

{ Import PARTIES TO THE PROCEEDINGS section from the main Petition. }

TABLE OF CONTENTS

CONTENTS OF APPENDIX

{Import CONTENTS OF REQUIRED APPENDIX section from the main Petition.}

TABLE OF AUTHORITIES

{Import TABLES OF AUTHORITIES section from the main Petition.}

Supreme Court & Federal Cases

State Court Cases

Statutes; Agency Publications

Miscellaneous

PETITION FOR WRIT OF CERTIORARI, ADDENDUM

{Not applicable; see PETITION FOR WRIT OF CERTIORARI section in main Petition.}

OPINIONS BELOW

{Import OPINIONS BELOW section from the main Petition.}

JUDGMENTS BELOW; JURISDICTION

{Import JUDGMENTS BELOW; JURISDICTION section from the main Petition.}

STATUTORY AND AGENCY PROVISIONS INVOLVED

{ This Addendum does not reference the CONSTITUTIONAL PROVISIONS INVOLVED section of the main Petition. }

Americans With Disabilities Act (ADA)

Of relevance for this Addendum are the following provisions of the ADA.

- ADA §12111(8) (emphasis added):

  Qualified [Disabled] [I]ndividual [QDI]
  The term *"qualified individual"* means an individual who, *with or without reasonable accommodation,* can perform the *essential functions of the employment position* that such individual holds or desires. For the purposes of this subchapter, *consideration [but not deference]* shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

- ADA §12112(a) (emphasis added):

  General [R]ule
  No covered entity shall discriminate against a *qualified [disabled] individual [QDI]* on

> the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

EEOC Interpretations

The EEOC is the governmental agency charged and empowered to enforce the ADA (42 U.S.C. §2000e-4–5), among other other acts of Congress. As such, the EEOC enjoys "administrative deference" from the courts (*Chevron*). It is pertinent to excerpt here the following provisions of the EEOC.

- ***EEOC Compliance Manual*** §8-II(B)(2) ℘8-4, *Elements of a* ***Retaliation*** *Claim,* ***Protected Activity:*** *Opposition, Examples of Opposition* (emphasis added):

  > *Threatening* to file a charge or *other formal complaint* alleging discrimination … [such as] a ***lawsuit*** … constitutes **[protected]** "opposition."

- ***EEOC Compliance Manual*** §8-II(B)(2) ℘8-4–8-5, *Elements of a* ***Retaliation*** *Claim,* ***Protected Activity:*** *Opposition, Examples of Opposition* (emphasis added):

  > Complaining to anyone about *alleged* [it does not have to be *proved*] discrimination against oneself or others …
  > *Example 1* — CP [Charging/Complaining

> Party] calls the President of R's [Respondent's] parent company to protest [] discrimination by R. …
> *Example 2* — CP complains to co-workers about harassment [].
> Th[ese] complaint[s] *constitute* ***[protected]*** *"opposition."*

- ***EEOC Compliance Manual*** §8-II(B)(2) ℘8-8, *Standards Governing Applications of the Opposition Clause, Opposition Need Only Be Based on Reasonable and Good Faith Belief* (emphasis added):

  > A person is protected against retaliation for opposing *perceived discrimination* if s/he had a *reasonable* and *good faith* belief that the opposed practices were unlawful. Thus, it is well settled that a violation of the retaliation provision can be found *whether or not the challenged practice ultimately is found to be unlawful.*

- **ADA Implementing Regulations (ADAIR)** §1630.2(j)(3)(iii) ℘17001 (emphasis added):

  > [I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: … **post-traumatic stress disorder [PTSD]** … substantially limit[s] brain function. The types of impairments described in this section may substantially limit additional major life activities not ex-

plicitly listed above.

- **EEOC Guidance: Reasonable Accommodation** under the ADA (emphasis added):

  1. How must an individual request a reasonable accommodation?
  When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use *"plain English"* and **need not** *mention the ADA* or use the phrase *"reasonable accommodation." [I.e., "no magic words."]* … A request for reasonable accommodation is the first step in an informal, **interactive process** [two-way dialog] between the individual and the employer. …
  9. Is an employer required to provide the reasonable accommodation that the individual wants?
  The employer may choose among reasonable accommodations **as long as the chosen accommodation is <u>effective</u>.** …
  10. How quickly must an employer respond to a request for reasonable accommodation?
  An employer should respond <u>expeditiously</u> to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an *interactive process,* this too should proceed <u>*as quickly as*</u>

possible. Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA. …

Reassignment [Transfer]

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation. This type of reasonable accommodation **must** be provided to an employee who, *because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation,* unless the employer can show that it would be an undue hardship. An employee must be "qualified" **[QDI]** for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) **can perform the essential functions of the new position, with or without reasonable accommodation.** The employee *does not need to be the best qualified* individual for the position in order to obtain it as a reassignment. … Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the **reasonable accommodation of last resort** and is

required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her *current position,* or (2) all other reasonable accommodations would impose an undue hardship. However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee. … Reassignment means that *the employee gets the vacant position if s/he is qualified for it* [as opposed to "being permitted to compete for the job"]. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

STATEMENT OF THE CASE

{Import STATEMENT OF THE CASE section from the main Petition.}

ARGUMENT/REASONS FOR GRANTING PETITION ADDENDUM

{This Addendum <u>assumes</u> the ARGUMENT/REASONS FOR GRANTING PETITION section of the main Petition, and now <u>augments</u> it with the following.}

Classes Of Error: Pretext (QB); QDI (QC(i)); MOD (QC(ii))

With reference to the *QUESTIONS PRESENTED*, ℘i *supra*, recall that (α) one *class*/*strategy* of lower court errors has been analyzed in the main Petition:

- **"PSOF-Exclusion"** errors (cf. QA).

In this Addendum we will introduce (β) another *class*/*strategy* of lower court errors:

- **"QDI-Exclusion"** errors (cf. QC(i)).

This class is intertwined with QA, and also with (γ) an additional, non-*class* but *pervasive,* problem:

- **"Pretext-'Related'"**[4] errors (cf. QB): "Pretext-Blindness;" "Pretext-Plus;" "Pretext-Only."

The (δ) final error-type examined in this Addendum,

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4 • In this *Addendum,* Pretext-Related errors appear primarily in the Second Proof, ℘16 *infra.* However, Pretext-Related errors already make ***<u>many</u>*** appearances in the main Petition itself: ℘7*f*9; ℘10*f*15; ℘28*f*42; the Abridged Table at ℘29 (or better, its Unabridged version at ReqApx ℘86–90, esp. ℘88*f*γ); ℘31*f*45; ℘32*f*46; ℘33*f*51; *etc.*

"Manifestation-of-Disability (MOD)" (cf. QC(ii)), is a "bonus" free-standing error (as distinguished from a *class* or *pervasive* error), not fitting elsewhere within the above classification, but which is affiliated with QDI-Exclusion (cf. QC(i)).

QDI: MTRs; STD; "Totally-Disabled;" And All That (QA/QB/QC(i))

The "QDI-Exclusion" class of errors (QC(i)) refers to the lower courts' wrongful crediting of IBM's woefully flawed (but *superficially* plausible-sounding) **"totally-disabled"/not-QDI argument,** to wit:

- Tuvell submitted six Medical Treatment Reports (MTRs) when applying for his five Short-Term Disability (STD) leaves. On three of them, Tuvell's primary psychological health-care provider of long standing (Stephanie Ross, qualified licensed psychotherapist) checked certain *"totally-disabled"* check-boxes, and circled certain number-choices, consistent with typical PTSD symptoms[5] and with Tuvell's individual-

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5 · PTSD has some *typical* symptoms that can "sound" "scary" to the uninformed, such as (see generally DSM-IV-TR §309.81; PetReh ℘he31): hyper-vigilance, hyper-arousal, hyper-reactivity, hyper-focus, hyper-startle, hyper-sensitivity to medications, and hypo-mania — all of which were exhibited by Tuvell in some degree at various times ("textbook case" of PTSD). Amongst the goals of the ADA is to relieve/protect disabled individuals from *"myth, fear, and stereotype" stigmatization prejudice* based on unfounded/irrational fears engendered by "scary"-"sounding" symptoms (ADAIR ℘16985).

ized circumstances.[6]

- "Therefore" (IBM pretends), Tuvell *was "totally-disabled from being able to do his job, or indeed any job of any kind"* (paraphrased; ~~RepPMemo~~ ℘4).[7]

- ***IF*** this "totally-disabled" argument were valid/creditable (which it isn't!), then of course Tuvell would not be a "QDI (Qualified Disabled Individual) in the sense of the ADA"[8] — that is, he would not be able to: "perform all *essential* job

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6 · Tuvell's *individual* "flavor" of PTSD is specifically sensitive to workplace harassment/abuse/bullying/blackballing (Petition ℘27ƒ40), especially defamation (Petition ℘33ƒ50).

7 · IBM (unquestioningly seconded by the lower courts) falsely tries to make a "big deal" of the argument that Tuvell was "totally-disabled from all work *of any kind*" (as opposed to his actual claim of "totally-disabled from *working under the abusive circumstances* in which he found himself"). That's false; but more importantly for summary judgment purposes (SJTOR "whole-record", "nonmovant-trumps-movant"), it simply *cannot* be credited — because IBM's contention is belied by the testimony of Tuvell's health-care provider (Ross dep. ℘80, emphasis added), which *must* be credited instead:

Q: So your belief that Mr. Tuvell could not return to the work situation was that his [e]motions were so intense [due to PTSD] that it was going to *retrigger all of the things that you are talking about,* his not sleeping, his obsessive thoughts, his depression, *all of that?* Just going into that building and seeing *Dan Feldman and Fritz Knabe* might trigger those strong reactions?
A: Yes.
Q: And so *that's the reason* that you indicated that for *some [temporary] period of time* he was *totally impaired* from work?
A: *I did,* and I was concerned for his mental stability *at the time.*

functions, <u>*with or without* reasonable accommodation</u>." That in turn would mean that Tuvell was not covered by the ADA at all (since QDI is a prerequisite for ADA coverage),[9] so all his ADA claims would automatically fail.

QDI-Exclusion Thesis: The lower courts **<u>wrongly</u>** credited IBM's just-stated "totally-disabled"/not-QDI argument (Op ℘13 = ReqApx ℘19–21), thereby **<u>excluding</u>** all of Tuvell's issues that were QDI-related. It was grievous **<u>error</u>** for the lower courts to do so.

In his PetReh filed to the appellate court, Tuvell <u>*explicitly articulated and proved this Thesis*</u> (PetReh ℘11–14) by presenting *five* "clear and convincing arguments" that IBM's "totally-disabled"/not-QDI argument is utterly specious and false, on many different levels. *Each one* of those five proofs yields a proof of our Thesis (though the appellate court *ignored* them). For the purpose of conveniently illustrating QA/QB/QC(i) presented by this Addendum, we distill the number of <u>*proofs of our Thesis*</u> down to the following *three*[10] (numbered differently from those in PetReh):

First Proof Of Thesis (QA/SJTOR-based) — The

8 • See definition of QDI in the *Americans With Disabilities Act (ADA)* section, ℘4 *supra.*

9 • See General Rule clause in the *Americans With Disabilities Act (ADA)* section, ℘4 *supra.*

10 • Additionally, a variation of the First Proof exists, whereby the First Proof remains valid, *mutatis mutandis,* if its usage of ℘15*f*11 *infra* is replaced by ℘13*f*7 *supra.* Similarly, a variation of the Third Proof is mentioned at ℘16*f*13 *infra.*

MTRs are very short documents (two pages each), so everything on an MTR is naturally in the *context* of everything else. Importantly, Tuvell's health-care providers inscribed certain short (but extremely informative) free-form narrative writing (as opposed to mere check-box-checking and number-circling) on the MTRs. That inscribed writing, which the lower courts were *bound to credit,* indicated Tuvell *could* function well if he were just *accommodated*, to the extent of *removing the abuse* that was being heaped upon him.[11,12] Yet, the lower courts unhesitatingly accepted IBM's false insinuation to interpret the MTRs in an *out-of-context* ("line-by-line isolation")

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11 • Alongside the rigid "one-size-fits-all" box-checking/number-circling exercise, the completed MTRs carry the following more informative and reliable individualized material in flexible free-form narrative format, *inscribed* by Tuvell's health-care provider (Ross):

(i) Ongoing acute stress symptoms, especially regarding perception of retaliation following sudden demotion without cause. Disruption of sleep, eating, symptoms of helplessness & anxiety. — *MTR of October 12/14, 2011.*

(ii) Pt. [patient] continues to experience intense triggering of symptoms with any reference to work environment & incident of demotion & lack of investigation. Symptoms of high reactivity, anxiety, and fear resume easily. — *MTR of November 3/4, 2011.*

(iii) Pt. [patient] continues to experience extreme triggering regarding workplace previously assigned. Only modification that would be possible is a change of supervisor & setting. Unable to return to previous setting w/ [with] current supervisor & setting. PTSD symptoms exacerbate immediately. — *MTR of December 16/19, 2011.*

12 • See also Ross's statement to MetLife, and IBM's transcript of her phone conversation of October 19, 2011.

manner, *looking only at the checked-boxes and circled-numbers,* and closed their eyes to the inscribed writing. The lower courts thereby (QA) ***violated* the SJTOR** ("whole-record," "in-context," "nonmovant-trumps-movant"). That was error, harmful to Tuvell. *This completes our First Proof. QED.*

Second Proof Of Thesis (QB/Pretext-based)[13] — IBM's "totally-disabled"/not-QDI argument had its *after-the-fact genesis* with IBM's *external lawyers* — the argument was never raised (or claimed to be raised) by *anyone at IBM at the time of events*, as IBM's own *internal lawyer*, Larry Bliss, voluntarily self-admitted.[14] Since it was *concocted after-the-fact*,

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13 • As noted at ℘14*f*10 *supra*, a variation of this Third Proof (which should be studied first) goes as follows: IBM *knew at the time* it terminated Tuvell that he was actively working for another company (see the *MOD Termination (QC(ii))* section, ℘20 *infra*). Hence, *for that reason* (as distinguished from the Third Proof's "*post hoc* rationalization" reason), IBM *knew at the time* it terminated Tuvell that he couldn't possibly have been "disabled from working at 'any' job" — so its "totally-disabled"/not-QDI argument was irreducibly pretextual. We can now finish off this variation as in the Third Proof: the courts disdained the "inconvenient fact" that IBM knew Tuvell was performing the new job (violation of SJTOR, "whole-record" tenet this time); and instead whole-heartedly swallowed IBM's pretextuality regarding the "totally-disabled"/not-QDI argument; and then shallowly brushed aside *Reeves* and *Bulwer*.

14 • Bliss's letter is dated January 24, 2012, *chronologically following all MTRs/STDs* (for which see ℘15*f*11 *supra*), and it states (Bliss email of January 24, 2012, emphasis added): "Mr. Tuvell has repeatedly made it quite clear in numerous communications that he can perform the just, but just can't work under the direction of Dan Feldman. The ADA does not require† IBM

IBM's "totally-disabled" argument was *by definition post hoc* rationalization for earlier actions (namely, any action depending on "not-QDI" for its rationale, such as denial of transfer) — that is, it was *by definition pretextual* ("not the real reason"). The courts ignored this pretextuality, wrongfully accepted IBM's "totally-disabled"/not-QDI argument, and thereby again abridged Tuvell's pretext-only rights under *Reeves* and *Bulwer* (see Petition ℘33*f*51). *This completes our Second Proof. QED.*

Third Proof Of Thesis (QC(i)/*Cleveland*-based) — IBM's "totally-disabled"/not-QDI argument *(supra)* must not be credited, though the lower courts did so, due to conflict with this Court's ***on-point*** holding of *Cleveland* (℘802–803, commentary added, internal punctuation omitted, emphasis in original and also added) and its accords:

> [D]espite the [misleading, mere] *appearance* of conflict that arises from the [superficial, out-of-context] *language* of the two statutes [(i) SSDI (analogous to IBM's STD plan,[15] neither having a *"reasonable accommoda-*

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to transfer Mr. Tuvell or change Mr. Feldman as Mr. Tuvell's manager as a reasonable accommodation, ***since Mr. Tuvell is capable of performing the job*** [without accommodation]. … ***Mr. Tuvell can perform his job*** [repeating, for emphasis] …" {† Note that Bliss/IBM here literally misstate the ADA law to an employee complaining about ADA violation (a clear obstruction of justice, unethical/disbarment offense for a lawyer, and *de facto* retaliatory). What they're saying is: "The ADA only requires the employer to help employees who **cannot** do their jobs (in any manner)" — which is *utter nonsense*/*double-talk*.}

> *tion" clause);* (ii) ADA] … the two claims *do not inherently conflict* … because there are *too many situations* in which an SSDI claim and an ADA claim can *comfortably exist side by side* [even if claimant or health-care providers declare *"total disability"* on disability benefits application (recalling our ℘15ƒ11 *supra*)] … [especially since] the ADA defines a "qualified disabled individual" [QDI] to include a disabled person who can perform the essential functions of her job *with reasonable accommodation* [as Tuvell certainly does declare in this case (PSOF ℘8 = ReqApx ℘57–58, ¶28; ~~PMemo~~ ℘9–10), and which the courts *must* credit, by the SJTOR "nonmovant-trumps-movant" and "all-inferences" tenets] [but, neither SSDI nor IBM's STD plan has such a clause].

This completes our Third Proof. QED.

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15 • With the SJTOR's "in-context" tenet in mind, we observe that Tuvell's MTRs were submitted strictly in the *context of STD* (never in any ADA context whatever). As such, the MTRs were governed by IBM's *STD policy/plan,* which contemplates only employee's: (i) *job-as-assigned* (as opposed to "essential job functions" in the sense of ADA); (ii) *without (i.e., no contemplation of) accommodation* (as opposed to "with or without accommodation" in the sense of ADA). The exact, complete, language of IBM's STD policy/plan in this regard, as promulgated in IBM's multi-document employee handbook, is this (*About Your Benefits*, emphasis added): "'Unable to work' means unable to perform the *duties of the job you held* at the time of your sickness or accident, or the duties of *any other job IBM determines* that you are capable of performing."

Consequences Of QDI-Exclusion (QC(i))

While the lower courts *only implicitly* invoked their PSOF-Exclusion scheme, they *brashly explicitly* invoked their (false!) QDI-Exclusion scheme. Namely, they ***falsely wholly eliminated*** the following complaint-areas, by wrongly *wholly predicating* them on QDI-Exclusion, *explicitly:*

- **Accommodation;[16] interactive process; transfer.** Op ℘16,20 = ReqApx ℘23–24,28–30.
- **Discrimination;[17] retaliation.** Op ℘21 = ReqApx ℘30–31.

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16 · Regarding accommodation: The lower courts' Op mumbles something about an amorphous quality/quantity they call "likelihood of success [of proposed accommodation]" (Op ℘18 = ReqApx ℘26–27). That is yet another example of the courts' *annulment/rejection of the SJTOR*. *Any* such requirement other than "≧ 0% probability" ("not impossible") — much less a suspiciously unspecified "likelihood" — obviously runs squarely afoul of the SJTOR's "light-burden" tenet. See Petition ℘19*f*31.

17 · Regarding discrimination: We note that the lower courts' blanket citation to the *McDonnell Douglas* framework (Op ℘20 = ReqApx ℘28–30, *f*8) for burden-shifting and nature of proof of discrimination incorrectly ignores the fact that *McDonnell Douglas* only applies to (certain) discrimination cases relying on *indirect/circumstantial* evidence, whereas Tuvell's case relies on a great deal of *direct* evidence (see, e.g., Petition ℘30*f*44ι‡); that obviates the utility of *McDonnell Douglas*. But it get worse: *even if* the lower courts had applied the correct (direct evidence) standard, they *still* would have missed the correct decision on the discrimination question — because of PSOF-Exclusion (namely, Tuvell's direct evidence is articulated in the PSOF, which the courts ignored).

- **Termination.** Op ℘22 = ReqApx ℘31–32.

MOD Termination (QC(ii))

We can say one more thing about the lower courts' cavalier/insensate attitude toward Tuvell's **termination** claim. As noted immediately above, the courts refused to think about the termination, instead sweeping it under their QDI-Exclusion carpet. What they irresponsibly missed was the alternative theory, raised at PetRehAnn ℘m *e*46 (recalling that the appellate court refused to consider the Annotations/Endnotes [see ReqApx ℘46–47], but further noting that legal theories need not be proffered at summary judgment in any case): *Manifestation-of-Disability (MOD)* protection afforded under *Humphrey*.

Namely, Tuvell's *refusal to name* his new employer (Imprivata) to IBM — which IBM claims was the *sole reason* for his termination (~~DMemo~~ ℘8*f*7; DSOF ℘17¶79) — was a manifestation of Tuvell's disabling PTSD symptoms (quotation at ℘21 *infra*), which caused him to experience overwhelming fear that IBM would retaliate upon him by interfering with his advantageous relationship with Imprivata (PSOF ℘17–18 = ReqApx ℘69–71, ¶56–57). At the time of events, IBM was well-acquainted with Tuvell's PTSD, and that his refusal to name Imprivata was based precisely and solely on his PTSD symptoms, as articulated by Tuvell in his email of May 10, 2012:

> I will, however, tell you why I refuse to inform you where I now work. The reason is that I fear IBM, either by rogue individuals or corporately, would happily use such information to work back-channels to get me fired.

Therefore, according to the Manifestation-of-Disability (MOD) theory (*Humphrey* ℘1139–1140, quoted at Petition ℘35), IBM terminated Tuvell exactly for the very sole reason of (the symptoms of) his PTSD disability. Hence it was illegal.

CONCLUSION

The Questions and Arguments/Reasons presented in this Addendum do not rise to the same "earth-shaking" level discussed in the main Petition, but they do have an independent interest of their own. Were it not for the "cosmic" importance of the QA/SJTOR issues in the main Petition, the issues presented in this Addendum might have been presented instead, as they seem to rise to a level that should/would warrant the interest of this Court (in its supervisory role).

Respectfully Submitted,

{Not applicable to this Addendum.}