UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES C. PACENZA, SR.

Plaintiff,

04 CIV 5831 (SCR) "*ECF Case*"

-against-

IBM CORPORATION,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,
AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

PRELIMINARY STATEMENT

This is Plaintiff's Memorandum of Law in opposition to Defendant IBM's motion for summary judgment, and in support of Plaintiff's cross-motion for partial summary judgment.[1]

Plaintiff has established a *prima facie* case of age and disability discrimination, which Defendant IBM has failed to rebut with admissible evidence. Therefore, Defendant's motion must be denied, and Plaintiff's cross-motion for partial summary judgment on liability granted.

FACTS

Plaintiff is a veteran who experienced horrible combat violence in Vietnam. He eventually became employed by IBM in 1984, which at that time had information that plaintiff's Vietnam combat experience affected him psychologically. *Plaintiff's Exhibit* ("*Pl. Exh.")* 1.

On May 28, 2003, Plaintiff returned to work after visiting the Vietnam War Memorial in Washington, DC ("The Wall"). He was fired that day, after an unblemished 19 years working for IBM, and excellent performance valuations. He was the oldest member in his job classification, and second oldest in the department, with most workers half his age. *Plaintiff's Declaration* ("*Pl. Decl*.") ¶ 157. He is also an individual who, several months prior, told his manager about receiving therapy. Plaintiff had received IBM-managed therapy for many years, for severe psychological difficulties which plagued him ever since his best friend was killed before his eyes by enemy fire in Vietnam. *Pl. Decl*. ¶ 19. Plaintiff's ADA-qualifying psychological disabilities were well known to IBM, as it allowed him leave for, and care-managed, two separate psychiatric hospitalizations (in 1997 and 1998), and ongoing psychotherapy thereafter. *Pl.Decl.¶¶ 1-3, 15.*

[1] The Court granted the parties permission to file a Memorandum of Law up to 35 pages in length.

Vulgar Words streamed in via "chat"

Plaintiff worked a full day with Vietnam on his mind on May 28, 2003, as he had just been to the Vietnam War Memorial in Washington, D.C. *Pl. Decl.* ¶ 111. Late in the day, he left his work station to assist a coworker with another computer. Immediately prior he visited the website www.ChatAvenue.com and found a chat room. *Id*. Before ever seeing any vulgar words, Plaintiff was called away from his computer to attend to a nearby computer. *Pl. Decl*. ¶ 117.

While away, a 32 year old man, Steve Questel, went to Plaintiff's computer, toggled the screen, and saw that there was chat room conversation "streaming in" from several Internet participants. *Pl. Exh. 8 (p.2); Sieverding Tr.7.*[2] It is obvious that this chat room dialog came to the computer screen after Plaintiff had departed the computer. *Id*. There is no evidence that Plaintiff wrote or saw any sexually offensive material or visited an impermissible website that day. There is no evidence that Plaintiff ever misused IBM computers during his 19 years of IBM employment. Personal Internet use is encouraged by IBM. *Pl.Exh.* 6.

Plaintiff's termination was unprecedented. *Pl. Exh. 18; Diederich Decl. 23.* No identified IBM employee has ever been fired for lawful Internet abuse, unconnected with at least the risk of violation of civil or criminal law. *Id*. IBM is unable to identify any employee who has been fired for alleged misconduct of such minor nature, with such lack of investigation, on such unproven facts. *Id.* Much more serious conduct has be condoned, for example, an employee who admitted to IBM that he viewed photographs of naked girls on his IBM computer, yet remained employed until months later when arrested for possessing child pornography. *Id*.

Moreover, the admissible evidence indicates that Plaintiff was not guilty of any misconduct at all, but rather that IBM concocted false statements and intentional misrepresentations. *Pl. Exh. 8.*

Plaintiff's Psychological disabilities related to Vietnam Combat

As mentioned, Plaintiff suffered from severe psychological disabilities resulting from horrific combat experiences (and also childhood abuse). He has a 50% disability rating from the U.S. Veteran's Agency for PTSD. Plaintiff's psychological history was not fully known to his supervisor, Joseph Mihans, when Mr. Questel reported the vulgar words on the computer. At that time, Mr. Mihans asked Plaintiff "if he is getting thereapy [and]…needed more help." *Pl. Exh. 5 (p.3)*. Plaintiff's supervisor, Mihans, had not decided what to do and wanted advice from HR (the Human Resources Department). *Mihans Tr.* 24. He began consulting with HR's Trilby Sieverding. *Mihans Tr.* 25. He informed her of his (purported) January 5, 2003 notes indicating that five months or so prior, Plaintiff "admitted to having a problem with pornography" and that Plaintiff "is currently getting help through a therapist." *Pl. Exh 5*.

After Mr. Mihans contacted IBM's HR Department, Ms. Sieverding sprung into action, with awareness that plaintiff had a psychological problem manifested by, among other things, an Internet addiction. She knew that it was impermissible for her to examine confidential medical information concerning Plaintiff. As she stated at deposition:

> "I don't have any access to any medical records. I'm not allowed to do that. It's kept very private with our global well-being services."
>
> *Sieverding Tr. 31*

Yet, she inquired into Plaintiff's mental health history anyway. She spoke with the IBM facility nurse, Al Pfluger. Before the end of May 29th, she examined sensitive and highly stigmatizing mental health information about Plaintiff. As her memorandum dated May 29, 2003 states:

> "I spoke with Al Pfluger of medical. Pacenza was treated in 1998 for sexual disorders/psychiatric problems, and that therapy was indicated. There were no restrictions on record."
>
> *Pl. Exh.* 13 *(emphasis added)*

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[2] "Tr." reflects an accompanying transcript. Excerpts of most transcript references are at *Pl.Exh.* 8.

Ms. Sieverding presumably viewed other HR notes related to Plaintiff's medical history, including email correspondence between Plaintiff's then-supervisor, Jeff Siple, IBM HR's Diane Adams and IBM's Kelliann Holtz concerning plaintiff's December 1998 discharge from Del Amo Hospital. *Pl. Exh.9.* Ms. Seiverding's inquiry into Plaintiff's mental health history presumably included reading a handwritten note from IBM HR's Diane Adams stating:

> "[Employee] is back to work; working a normal schedule & doing fine. No issues at this time. I advised Kelly that **HR ought to be notified if another episode occurs where this individual needs to go to "rehab" again** so an evaluation can be made between OHS/HR/management whether this **special accommodation** should [be made] for the **3rd** time (**he has already had two authorized rehabs** trips/time off.
> s// Dave Adams (desk file, 1997/1998) *(bolding added)*

It is only after HR's Ms. Sieverding reviewed Plaintiff's confidential information on May 29, 2003, that Plaintiff was fired. Plaintiff was called into Mr. Mihan's office and informed that his employment was terminated, (*Pl. Exh*.10) and that "my hands are tied." *Pl. Decl*.123.

After determining, based upon reviewing Plaintiff's confidential medical history, that Plaintiff should be fired due to his (perceived) mental health condition, including its perceived manifestation as Internet sex addiction, Defendant IBM began efforts to conceal its impermissible motive, by concocting pretexts—violation of its computer use and "harassment" policies, and disobedience. *Pl. Exh*. 8.

IBM's dissembling to conceal improper motives

IBM first endeavored, with Mr. Mihan's apparently fabricated notes dated January 5, 2003, to portray Plaintiff as disobeying Mr. Mihans' directive not to visit Internet chat rooms. *Pl. Exh*. 5 (p.1). However, Mr. Mihans's sworn testimony at deposition was that he gave no such instruction:

> Q Did you tell [Plaintiff] back in January that he couldn't use the computer for chat rooms?
> A No.
>
> *Mihans Tr*. 83.

IBM next tried to portray Plaintiff as violating, in several ways, IBM's published computer use policy. First, it claimed that IBM policy prohibits the use of chat rooms. It does not. Even manager Carla Meigel testified that she occasionally used chat rooms. *Meigel Tr*. 27. Next, IBM claimed Plaintiff visited a prohibited "sexually explicit" website. There is no evidence that Plaintiff did anything other than visit the permissible site www.ChatAvenue.com. Next, IBM claimed that Plaintiff accessed and viewed "pornographic" material. The evidence, which IBM knew at the time, was that Plaintiff departed his computer, yet chat conversations kept "streaming in" (*Sieverding Tr.* 7). No evidence contradicts Plaintiff's, that he neither visited, wrote or saw anything offensive. And the alleged "pornography" is merely vulgar words, not sexually explicit photographs commonly referred to as "Internet porn," *Diederich Decl.* ¶ 26. Mr. Mihans acknowledged that all past violations he knew of involved photographs. *Mihans Tr*. 27-29. IBM suggested that viewing Internet porn slows down IBM's computers (through excessive bandwidth use), *Pl. Exh.* 5 (p.1), which is true as to photographs but not as to email or chat rooms. *Pl. Exh. 8 (p.6-7); Mihans Tr.* 15-16.

Next, IBM implied that Plaintiff's "excessive use" of the Internet hurts productivity. Yet the parties agree that Plaintiff's work entailed putting his computer's "Opal Tool" in motion, and then allowing it to do its work automatically for five to ten minutes. *Def. Rule 56.1 Statement*, ¶ This was idle time, and entirely appropriate for "surfing" the Internet. Moreover, at deposition Mr. Mihans saw nothing inappropriate with the extent of Plaintiff's Internet use, even though he was "checking up" on plaintiff. *Pl. Exh.8 (pp 15-16); Mihans Tr*. 19. Nor did anyone else. *Strurrock Tr*. 6; *Questel Tr*. 32.

IBM implies offensive words struck one in the face when viewing Plaintiff's computer. However, screen was hidden by a screen saver and the words email size. (*Sturrock Tr*. 7-8; *Questel Tr*. 14); *Pl. Exh.24*. Mr. Questel should not have been reading material on Plaintiff's

computer, as this violated both the letter and the spirit of IBM's "Employee Privacy Policy", which forbids intrusion onto coworkers computer workspace and files. *Pl. Exh.4.* Mr. Questel did not simply find, but rather intruded, scrutinized and read (*Sieverding Tr.* 7) that which was not his business, on Plaintiff's computer screen. He could have simply closed the chat room dialog, or asked Plaintiff, who was nearby, to log off. *Miegel Tr.* 36. IBM characterizes the intrusion onto Plaintiff's computer screen as "sexual harassment," which is simply absurd. *E.g.*, *Questel Tr.* 21.

Age animus

Plaintiff, at 54, was within 8 months or so of voluntary retirement age when terminated. Age animus appears involved with Mr. Questel actions against Plaintiff. Mr. Questel is 25 years younger, and only socialized with coworkers his own age. *Pl.Decl.*158. He disliked older workers, as revealed by deposition testimony that the only thing he recalled about Plaintiff personally, after working next to him for two years, was that Plaintiff was married. *Questel Tr.* 27; Pl. Decl. 159.

Questel knew when he chose to report Plaintiff that he was placing Plaintiff's job in jeopardy. *Questel Tr.* 22. Moreover, he intended such jeopardy by mischaracterizing Plaintiff's a private chat room visit and inadvertent disclosure as Plaintiff's displaying "pornographic material" and Plaintiff's violating IBM's "harassment" policy, *Questel Tr.* 9 & 21, which are two grounds which often result in employment termination. *Pl.Exh.* 18. This malicious exaggeration suggests age-based *animus*. Questel was a "team leader," who then enlisted the involuntarily aid of the oldest member of the entire department, Bob Sturrock, to corroborate Questel's "chat room" discovery. *Pl. Decl.* 159. A jury could conclude that this "Young Turk" was endeavoring to abusively assert authority or control over the two oldest members of the department. His actions were intimidating this older employee as well, as suggested by Mr. Sturrock's deposition

testimony, which reflected intimidation, as Sturrock did not think Plaintiff's employment was at risk based upon what he saw at the time. (*Sturrock Tr.*11) IBM was happy to oblige Questel's mischief-making, as the department was already "over-staffed," *Mihans Tr.44*, and Plaintiff's work could be taken up by his much younger coworkers and 21 year old temps. *Id.*, *Pl. Decl.* 157-158.

Destruction of the Evidence

Astonishingly, even though Mr. Mihans' notes regarding preservation of evidence on IBM computers states that "in the past [IBM has] been able to see everything that has been viewed or every transaction that takes place," *Pl.Exh.* 5 (p. 2), the supposed evidence of Plaintiff's misdeed was intentionally destroyed by IBM. The actual facts are unpreserved because Mr. Questel and IBM kept no evidence of Plaintiff's alleged wrongdoing. Certainly Questel and IBM, computer technician and computer giant, knew enough to "save the computer screen" (using every keyboard's PrtScn key, etc.). Thus, there is no evidence that alleged multiparty chat conversation included plaintiff at all. An adverse inference is warranted.

IBM HR Department (specifically, its Trilby Sieverding) then ran with the ball, and further exaggerated Questel's unfounded facts. The disparities and contradiction between Ms. Sieverding and Mr. Mihans' deposition testimony are revealing, and suggest that Ms. Sieverding wrote (or significantly influenced) Mr. Mihans' purported January 5, 2003 notes for him, on or after May 28th, to concoct justification for terminating Plaintiff's employment.

A review of Mr. Mihans notes reveal certain consistencies, and certain contradictions with the deposition testimony. The consistencies are that he viewed Plaintiff as an excellent worker, and inquired as to whether Plaintiff needed help for a psychological problem involving the Internet (for which Plaintiff was already receiving IBM-managed psychotherapy). The

inconsistency is that it appears that notwithstanding Mr. Mihans' expressed desire to help, at the first indication of Internet abuse, Plaintiff was summarily fired. *Pl.Exh.* 8; Pl. Decl. 118 & 123.

The most plausible explanation is that HR's Sieverding explored Plaintiff's confidential medical information, determined that he had serious psychological problems, and decided that Plaintiff should be terminated, and without right of appeal. *Pl. Exh.8, 9, 12, 13.*

The facts support Plaintiff's theory, which should be permitted to go to a jury, that Ms. Sieverding perceived plaintiff as having a psychological disability which prevented him from being able to work on IBM's computers, in any capacity. IBM's subsequent position statement to the U.S. EEOC further supports this theory. *Pl. Exh. 17.* IBM characterized plaintiff's psychological condition as one which, in IBM's eyes, made it impossible for Plaintiff to stay away from pornography at work. Thus, IBM perceived and regarded Plaintiff as psychologically impaired in a manner which made him unfit for employment, "with or without a reasonable accommodation. *Id*. p. 5. This statement shows that IBM's perceived Plaintiff's disability as substantially limiting his ability to work (a major life activity).

IBM's EEOC position statement reflects dissembling, to an absurd degree—to allege as "unfit" an employee with 19 years of excellent performance evaluations, and representing as "fact" that Plaintiff had "prior warnings" (plural) without reasonable evidence that Plaintiff had even one warning. Mr. Mihans' excellent performance evaluation of Plaintiff dated January 13, 2003, suggest that the January 5th notes, supposedly dated eight days before, are fabricated.

Refusal to permit an internal appeal

After Plaintiff was fired, he remained entitled to an important right of IBM employment, the right to an internal appeal. *Pl.Exh.11; Diederich Decl. 16.* He was entitled to a "panel review" entailing an impartial panel comprised of employees and managers to review his appeal and make a decision based upon fairness. Plaintiff sought his right to an appeal. The right was

denied for no reason other than a telephonic "IBM has no programs for sex addicts" (which of course was false, as Plaintiff was receiving IBM managed therapy for this manifestation of his Vietnam War-caused PTSD and Major Depression).

From the facts it is incomprehensible that an internal "panel review" would not have restored Plaintiff's employment, if given the opportunity. Plaintiff violated no rules or policies, except perhaps inadvertently "failing to log." His internet usage was legal, was not designed to offend, and did not hurt his work productivity. An impartial review panel certainly would have viewed as draconian, and unprecedented, the firing of a 19+ year, exceptionally performing employee under such circumstances. Unlike HR's Ms. Sieverding, an impartial review panel would have been sympathetic to Plaintiff's lifelong efforts to rid himself of the psychological demons of the horrific combat he experiences serving our Nation in Vietnam, and commended him on his fortitude in keeping these demons out of the IBM workplace throughout his previously unblemished 19+ years.

In sum, Plaintiff was the second oldest employee in his department, older than both his managers, and 25 years older than the "team leader" who falsely reported him for "pornography" and "harassment." Plaintiff was then fired only after the human resources department, which was "advising" plaintiff's managers, looked at his IBM- documented history of extensive psychological illness and ongoing IBM-funded psychotherapy. *Pl.Exh.* 9. HR was not interested that Plaintiff is a Vietnam combat veteran. *Pl.Exh.* 8 (p.1); *Sieverding Tr*. 31. It was interested, however, in preventing Plaintiff from obtaining the internal appeal to which he was entitled, and which, because the standard is "fairness," would undoubtedly have restored his employment. *Pl.Exh.* 11-13; *Diederich Decl*. paras. 16-18.

ARGUMENT

A. Standard of Review

It is well-established that in determining whether summary judgment is appropriate, a Court must resolve all factual ambiguities and draw all reasonable inferences in favor of the non-moving party. Matsushita Elc. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Quite notably, the non-moving party need not prove their case dispositively at the summary judgment stage, in order to defeat such a motion. Rather, the non-movant need only demonstrate that there are material factual issues in existence, such that a reasonable fact finder could resolve such issues in favor of the non-moving party. Knight v. U.S. Fire Ins. Co., 804 F. 2d 911 (2nd Cir. 1986).

As the above summary judgment standard has been applied to cases of employment discrimination, the burden of proof that must be met to permit the plaintiff to survive a summary judgment motion at the *prima facie* stage is *de minimis*. Chambers v. TRM Copy Ctrs. Corp., 43 F. 3d 29, 37 (2nd Cir. 1994). Thus, it is established that, in determining whether an employment discrimination plaintiff has established a *prima facie* case, the function of the Court on a summary judgment motion is to determine "whether the 'proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive.'" Cronin v. Aetna Life Insurance Co., 46 F.3d 196, 204 (2d Cir.1995) (quoting Chambers, 43 F.3d at 38). Moreover, as the Second Circuit noted in Gallo v. Prudential Residential Services, 22 F.3d 1219, 1224 (2d Cir. 1994):

> "Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination."

The Court must also be cognizant that "when a case turns on the intent of one party, as employment discrimination claims often do, a motion for summary judgment must be

approached with special caution. Id. Because the employer rarely leaves direct evidence of its discriminatory intent, the Court must carefully comb the available evidence in search of circumstantial proof to undercut the employer's explanations for its actions. See, Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990).

B. "Dissembling" In Itself Can Be "Quite Persuasive" Evidence of Discrimination

As stated in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000), an employer's "dissembling," [3] designed to cover-up its discriminatory action, can be powerful circumstantial evidence of discrimination. Where an employer lies about the reason for an employment action, a jury can properly draw an inference of discriminatory intent on this basis alone. As the Supreme Court points out:

> "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."

See, Schnabel v. Abramson, 232 F.3d 83, 89-90 (2d Cir. 2000) supra, citing Reeves, supra, 120 S.Ct., at 2104-05.

As the Supreme Court stated in Reeves, a defendant's "dissembling" can be "quite persuasive" evidence of discrimination. Moreover, evidence of dissembling will compel the inference of discrimination when there is no other likely explanation for the employer's lie.

[3] A dictionary definition of "dissemble" is: "a. to hind under a false appearance 2: to put on the appearance of : Simulate ~ vi: to put on a false appearance : conceal facts, intentions, or feelings under some pretense **syn** see disguise." See, Webster's Ninth New Collegiate Dictionary, at p. 366.

POINT I
PLAINTIFF HAS ESTABLISHED A *PRIMA FACIE* CASE OF AGE AND DISABILITY DISCRIMINATION

Plaintiff has both indirect and direct evidence of discrimination. For the sake of clarity, the argument below will use the *McDonnell-Douglas* burden-shifting analysis[1] regarding both age and disability discrimination, while noting that the *Price-Waterhouse* analysis may also be used regarding plaintiff's disability claim because there exists direct evidence of discrimination.[2]

A. Age Discrimination P*rima Facie* Case

1. Plaintiff is a member of a protected class under federal and New York law

Plaintiff was 54 years old at the time of his termination, and therefore qualifies for protection under both the Age Discrimination in Employment Act ("ADEA") and the N.Y.S. Human Rights Law (New York applies the same legal analysis to age claims).

2. Plaintiff was replaced by younger workers, and under circumstances suggesting discrimination

Plaintiff's department was "over-staffed," and although plaintiff was not directly replaced, both his younger coworkers and *per diem* employees, "Temps", in their 20's. *Mihans Tr*. 44-45; *Pl. Decl*. ¶¶ 155-159. Plaintiff was the oldest worker in his job, and the second oldest in his department (including all supervisors). He was 10 years or more older than approximately 63% of his department, and 5 years or more older than 88% of his department.

Mr. Questel's conduct reflects age animus, as stated in the facts above. "Team leader" Questel, the man who reported the chat room, was 25 years younger than plaintiff, and only

[1] The basic *prima facie* case of employment discrimination involves showing (i) membership in a protected class, (ii) qualification for the position, (iii) an adverse employment action, and (iv) circumstances suggesting discrimination See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); see also, Ennis v. National Association of Business & Educational Radio, Inc., 53 F.3d 55 (4th Cir. 1995). If the plaintiff makes out the *prima facie* case, a presumption of discrimination arises. James v. New York Racing Assoc., 233 F.3d 149, 153-54 (2d Cir. 2000); see also, Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000). This shifts the burden of production to the defendant to proffer a nondiscriminatory reason for its challenged action or actions. See 233 F.3d at 154. If the defendant provides evidence of such nondiscriminatory reason, the *prima facie* presumption of discrimination is eliminated.

socialized with workers his own age (working 2 years next to plaintiff, and knowing only that Plaintiff was married!) *Pl. Decl.* 159; *Questel Tr.* 27. He apparently sought to demonstrate his "authority" as team leader by forcing Mr. Sturrock, the oldest person in the department, to become an involuntary witness against Plaintiff (thereby evidencing an effort to intimidate him as well). Mr. Questel's animus is also revealed by his incredible and varying accounts of his reasons for reporting Plaintiff to higher management, including a) that he was required to, because this was computer misuse (no IBM policy requires this) or alternatively, b) that he was worried that he might be blamed for the vulgar chat (when all he needed to do was close the chat dialog). *Questel Tr*. p*assim*. Mr. Questel realized that he was placing Plaintiff's employment in jeopardy. Questel Tr. 22. He wantonly increased the jeopardy by falsely reporting that Plaintiff (who was not even at the computer) was viewing "pornographic material." *Questel Tr.* 9. Questel intruded into Plaintiff's workspace, and the chat room dialogue, violating IBM policy.

With the ever present threat of layoffs, especially in an "overstaffed" department, it is easy to envision a "Young Turk" upstart, Mr. Questel, devising mischief via false accusations, against a much older worker, with IBM human resources department happy to oblige and facilitating elimination of the older employee. *Pl.Exh.* 4.

There is extensive evidence here of IBM's dissembling regarding Plaintiff's termination. *Pl.Exh.* 8. From IBM officials' dissembling, cover-up, back-tracking and serious violations of IBM procedures designed to afford fairness and "due process" to IBM employees, including the right to a "panel review" appeal, a reasonable jury can permissibly infer the existence of age discrimination.

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[2] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

B. Disability Discrimination *Prima Facie* Case under ADA

Under the Americans with Disabilities Act, 42 U.S.C. Section 12101 *et seq.* (herein "ADA"), a person is protected from disability-based discrimination if that person has an impairment which substantially limits a person in performing a major life activity, including, for example, sexual relations, thinking, and working. See 42 U.S.C. § 12112(a); Sutton v. United Airlines, 527 U.S. 471, 491 (1999); 29 CFR § 1630. A person has a "disability" for purposes of the ADA if he or she has a) such major life activity impairment, or b) a record of such impairment, or c) is "regarded as" (i.e., perceived, even if mistakenly) as having such impairment. See, 42 U.S.C. § 12102(2).

The courts have long recognized that the scope of protected disabilities includes not only physical impairments, but also psychological impairments or injuries. See Treglia v. Town of Manlius, 313 F. 3d 713, 719 (2nd Cir. 2002). Post-Traumatic Stress Disorder ("PTSD") is a protected disability under the ADA. See Felix v.New York City Transit Authority, 154 F. Supp.2d 640 (S.D.N.Y. 2001); see generally, Department of Labor guidance on PTSD, attached at *Pl.Exh.* 22. Similarly, the courts have recognized that depression as qualifying as an ADA impairment. Adams v. Rochester General Hospital, 977 F.Supp. 226, 232 (W.D.N.Y. 1997). The analysis for ADA protection is highly fact-sensitive, and depends upon the degree and severity of impairment, and the major life activity that is limited. See Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1037 (5th Cir., 1998).

Plaintiff has Major Depression and PTSD (with 50% VA disability rating, *Pl.Exh.* 22).

Plaintiff qualifies for protection under any of the three categories (actual, record of, perceived) of "disability," but most prominent are IBM's records and perceptions of Plaintiff as being impaired in his major life activity of working virtually any IBM job, and any 21st Century Internet-based white collar job, particularly with his technical skills. *Pl.Exh.* 17. Perception is

obviously a question of intent, and particularly appropriate for jury adjudication. See, e.g., McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001). An employee is protected under the ADA's perception ("regarded as") category even if not disabled. See, Olson v. G.E. Astrospace, 101 F.3d 947 (3d Cir. 1996)(summary judgment denied on issue of perception of disability).

Plaintiff also qualifies for protection under the ADA's non-interference and anti-retaliation provisions. Specifically, under the non-interference and anti-retaliation provisions of the ADA, even a person not considered "disabled" is protected against "interference, coercion, or intimidation" regarding protections of the ADA, and from retaliation, even if without a qualifying disability. See, 42 U.S.C. § 12203(a, b).

1. Plaintiff is a "qualified individual" under the ADA

a. Plaintiff has an disability covered by the ADA

The Plaintiff has presented evidence that he suffers from an actual disability, and has a record of disability, as defined under the ADA. See, *Gladys Pacenza Decl* 7-8; *Pl. Decl*. 27-30, 44-47,57-63,72-87; *Pl.Exhs.1-3*, 25. His Post-Traumatic Stress Disorder ("PTSD") and Major Depression, and the significantly impairing manifestations of these psychological afflictions, namely, various addictions including alcohol, food, sex, and internet addiction; recurring sexual impotence; difficulty in his adult life interacting with spouse, family, friends; inability to concentrate, think, and avoid suicidal thoughts; and suicidal actions. Pl. Decl. 85; G. Pacenza Decl. ¶ 9. These show limitations of major life activity. IBM's records show that its health care appears to have enabled Plaintiff to persevere, including in the ability to work (noting his two separate in-patient hospitalizations in 1997 and 1998 and out-patient therapy thereafter).

Thus, Plaintiff clearly had at the time of his termination psychological disabilities qualifying him for protection under the ADA, as IBM's was fully aware, as it managed his care.

b. Plaintiff has a "record" of disability

IBM had records of Plaintiff's psychological afflictions as they developed, including releases for all his medical and health care treatment. *Pl.Exhs. 1-3.* This included documentation that he has psychological problems connected with horrific combat experiences in Vietnam, and also psychological afflictions that resulted in his (IBM-approved and funded) psychiatric hospitalization in 1997 (initiated by suicidal behavior on the Newburgh-Beacon Bridge), and then another IBM-approved hospitalization in 1998, followed by IBM's accommodating a reduced schedule while he continued his psychological recovery at a halfway house, followed by IBM-funded and IBM health care managed psychotherapy that continued throughout the rest of Plaintiff's employment, through his termination in the early evening of May 29, 2003.

IBM documents reveal that Ms. Sieverding was advising Mr. Mihans regarding Plaintiff's situation, and that she obtained ADA-confidential information about Plaintiff's mental-health history prior to his termination. *Pl.Exh.* 9. The IBM's human resources department investigated, explored and learned information concerning Plaintiff's psychological history (including his hospitalizations and "'rehab'"), and only thereafter was Plaintiff fired. *Pl.Exhs. 9 & 10.* A jury will permissibly find-- and will be almost compelled to find-- that IBM HR's impermissible intrusion into Plaintiff's mental-health records resulted in unlawful disability discrimination.

The courts have found that psycho-therapy treatment can be a reasonable accommodation allowing an employee to perform his job. Rascon v U.S. West Comm. Inc., 143 F.3d 1324, 1333 (10th Cir. 1998)(Vietnam veteran with PTSD). It is also clear from the records that IBM was in fact furnishing Plaintiff with an ongoing reasonable accommodation, namely, IBM-managed psycho-therapy and medication for his PTSD and Major Depression.

And with his psychotherapy, Plaintiff was able to perform his IBM work in an exemplary manner. *Pl. Decl.* ¶ 87; *Pl.Exh.* 20. Ironically, Plaintiff's difficulty interacting with others and

Internet addiction were ideally suited for being productive in his IBM job. Although IBM did not intend it as such, by making the Internet available for its employees' personal use, and by providing plaintiff with a job which afforded him five to 10 minutes of free time on the Internet to displace repeated thoughts of Vietnam death and childhood sexual abuse with Internet news and eBay, Plaintiff was able to "self-medicate" his PTSD and major depression, and in the process become an employee with excellent attendance (perfect in 2001) and excellent performance evaluations. *Pl.Exh.* 20.

In sum, plaintiff had a mental health record with IBM which included recognition of his psychological afflictions and addictive tendencies. IBM knew, through its medical departments and health care program, and IBM funded, Plaintiff's psychotherapy for, among other things, Internet sexual addiction. IBM, as a corporation, and its local officials and HR department, clearly knew before terminating Plaintiff that he was in remission for serious psychological addictive traits involving PTSD and Major Depression. Plaintiff's performance records, not his mental health records, should have governed IBM's decision-making.

Though it is vastly overly simplistic to regard Plaintiff merely as a "recovering Internet sex addict" in light of his well-documented medical history, it is IBM's biased perception of Plaintiff, and its fear of his psychological problems, improperly using his records, which led it to the conclusion that he was psychologically unable to do his IBM work.

c. Plaintiff was "perceived" as disabled

As the facts reveal, Plaintiff was perceived as being psychologically disabled. An employee qualifies for protection under the ADA when "regarded as" (perceived to be) disabled. See, 42 U.S.C. § 12102(2); McKenzie, supra, Olson, supra, 101 F.3d 947 (3d Cir. 1996)(summary judgment denied on issue of perception of disability).

The ADA uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. *See, e.g.*, 28 CFR 42.540(k)(2)(iv), which provides:

> (iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The rationale for this test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling.

> "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id*. at 283.

The Court concluded that, by including this test in the Rehabilitation Act's definition:

> "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Id*. at 284.

The evidence here includes, *inter alia*, not only Ms. Sieverding's looking at Plaintiff's confidential medical information relating to psychiatric hospitalizations, suicidal conduct and inability to work (and perceived possible inability to work again if "rehab" failed), but also IBM's official statement to the EEOC setting forth IBM's view that Plaintiff was unable to work (unqualified for his job, or any job at IBM) due to his psychological impairment (mistakenly and rather viciously characterized by IBM as a "sexual behavior disorder"). IBM's submission to the EEOC dated May 6, 2004 states, in part, that because of Plaintiff's Internet sex addiction, he was "not a qualified individual" under the ADA, for the reason that he was:

> > "unable to perform the essential functions of his job with or without reasonable accommodation." (page 5)

And IBM goes on to state:

> "…Mr. Pacenza's sexual fantasy addiction requires him to access Internet chat rooms. Clearly he cannot perform the duties of his job as he needs to visit porn sites during working hours …." (*id*.)

Clearly, IBM applied bias and psychological stereotypes to Plaintiff's situation, in total disregard to the true facts. IBM officials may have used their beliefs or myths about "internet addiction" in stereotyping Plaintiff, and then firing Plaintiff based upon these stereotypes and myths, regardless of the fact that Plaintiff has an established, *bona fide* and on-the-record disabilities stemming from his War-caused PTSD and Major Depression, with resulting addictive tendencies.

IBM's prejudice was so profound here that it even took the extraordinarily biased action of denying Plaintiff the opportunity for the "panel review" appeal, to which Plaintiff was entitled under IBM's official published policy, *Pl.Exh.* 11, thus disclosing its view that Plaintiff's psychological condition made him unqualified to work for IBM. FN: As argued below, this action also constituted ADA-prohibited interference and retaliation for seeking ADA protection.

In sum, Plaintiff was a protected individual under the ADA's "regarded as" category. He was perceived as unable to work, yet was fully able to work (as he did in an exemplary fashion for 19 years).

2. IBM's actions toward Plaintiff were discriminatory

A required element of a plaintiff's *prima facie* case under *McDonnell-Douglas* is evidence suggesting discrimination. The burden on Plaintiff's *prima facie* case is minimal. However, because discrimination for purposes of a *prima facie* case can also be used on the "pretext" third prong of *McDonnell-Douglas*, Plaintiff has set forth "pretext" evidence here as well.

a. Dissembling

As discussed throughout this memorandum, IBM's officials offer contradictory reasons and outright misrepresentations regarding their justification for Plaintiff's termination, and no

explanation as to why he was denied the right to appeal. *Pl.Exh.* 8; *Diederich Decl.* ¶ 13. IBM officials themselves violated numerous IBM policies designed to protect employees such as Plaintiff. As clearly stated by the Supreme Court in Reeves, supra, a jury can permissibly find dissembling to be evidence of improper motive and discrimination. See also, Young v. Warner-Jenkinson Co., 152 F.3d 1018 (8th Cir. 1998)(inconsistent reasons advanced by employer was sufficient to create a genuine issue of fact as to proffered reason for discharge).

b. Unprecedented harshness, without warning, unlike any other employee

A comparison between plaintiff's case and all the other individuals identified by IBM as fired for Internet related offenses reveals that Plaintiff was treated more harshly, upon less evidence, and given less "due process" (e.g., adequate advance warning of the prescribed conduct, fair and thorough investigation, an opportunity to provide the employee's side of the story) than the other individuals identified by IBM. *Pl.Exh.* 18; *Diederich Decl.* ¶ 23.

No other IBM worker has been identified who was treated as harshly as Plaintiff merely for alleged Internet abuse. Every other instance of termination involving Internet abuse involved other misconduct, and in particular it appears that every other termination involved violation of law, either civil (potential Title VII violation or tort liability) or criminal law. One individual was permitted to remain an employee for several months, notwithstanding his admission of wrongdoing, and was not fired until arrested on felony child pornography charges. Mr. Mihans only recalled photographic pornography as resulting in discharge. *Diederich Decl.* ¶ 23 & n. 2.

c. IBM's fired Plaintiff because it perceived him, to be psychologically disabled

Plaintiff had a record of disability with IBM, informed his manager of his PTSD-caused addictive limitation (being a recovering Internet sex addict) and as a result, when "caught" in a minor rules violation (if a violation at all), Plaintiff was given an immediate termination, singling out Plaintiff for punishment of unprecedented harshness, for lawful Internet use (no civil or

criminal law was violated), and then denied the right to an internal appeal (including an impartial "panel review") purportedly enjoyed by all IBM employees.

The most obvious factor explaining the above harsh and discriminatory treatment are the facts which reveal that IBM officials, and in particular HR Representative Sieverding, became aware of Plaintiff's mental health history shortly before the decision was made to terminate his employment. A reasonable jury will conclude that she perceived him as being psychologically disabled due to perceived addictive problems relating to his well-documented history of psychological disabilities.

These are facts even more compelling that those of McKenzie, supra, involving a former deputy sheriff also with a record of psychiatric illness, including PTSD.

A reasonable jury can permissibly conclude that when Plaintiff disclosed to Mr. Mihans in 2002 or January, 2003, that he was a recovering Internet addict, and, as Mr. Mihans wrote in his (disputed) notes "receiving therapy," that Mr. Mihans, made a mental note of this discussion, and this, combined with confidential health care information presumably related to him by Ms. Sieverding, created a perception of psychological disability.

These perceptions are further documented by IBM's official submission to the EEOC, where IBM states its view that Plaintiff had a compulsive "sexual behavior disorder" that disqualified him from employment with IBM, because he would be unable to use its computers.

d. IBM denied Plaintiff an internal "panel review" of his termination, because of its perceptions regarding his psychological disability—and that he was not a "drug or alcohol addict"

Plaintiff requested the appeal rights purportedly afforded all employees, yet he was refused the right to appeal. Instead, as corroborated by IBM's own email documentation, he was denied his right to appeal because of his "addiction." *Pl.Exhs.* 12 & 13. IBM's attorneys mentioned nothing about a right to appeal when Plaintiff's counsel wrote them within 60 days of Plaintiff's

termination. IBM's panel review appeal time is 90 days. *Pl.Exhs.* 11 & 15; Diederich Decl. ¶¶ 11-15. IBM letter dated September 9, 2003, states summarily "[plaintiff was] terminated for legitimate and non-discriminatory business reasons."). *Id*.

e. Inquiring into Plaintiff's IBM medical history was discriminatory, and violated the express provisions of the ADA

IBM's HR Representative Sieverding acknowledged at deposition that it was impermissible to look at Plaintiff's confidential medical/mental health information. *Sieverding Tr. 31*. The ADA specifically makes inquiry into an employee's medical history confidential. 42 U.S.C. § 12112 (d)("The prohibition against discrimination referred to in subsection (a) shall include medical … inquiries."). IBM policy protects employee privacy. *Pl.Exh.* 4.

Yet discovery documents provided by Defendant revealed that IBM's HR personnel, including Ms. Sieverding, intruded into Plaintiff's confidential information. *Pl.Exh.* 9.

The reasonable inference is that IBM officials were fishing for an excuse to fire this older, psychologically-disabled worker. This was grossly improper, discriminatory, and as set forth below next, separately illegal under the ADA. This illegal intrusion into Plaintiff's medical records and information was both retaliatory, and designed to interfere with protections offered by the ADA.

3. IBM interfered with, threatened, and retaliated against, plaintiff for asserting and seeking ADA protection and enjoyment

The ADA makes it illegal to discriminate against anyone who "has opposed any act or practice made unlawful by [the ADA]…", and makes it unlawful to "coerce, intimidate, threaten or interfere with … the exercise or enjoyment of … any right granted or protected by [the ADA]." Section 12,203 (a, b) This protection applies even if the underlying disability claim is insufficient. See, 42 U.S.C. § 12203; Mondzelwski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998).

A reasonable jury can that IBM interfered with plaintiff's ability to exercise rights provided by the ADA in a number of respects, in violation of the interference prohibition of the ADA, and that IBM's actions taken after Plaintiff identified himself as a recovering Internet sex addict constituted unlawful retaliation under the ADA. See, 42 U.S.C. 12112 (a, b).

Threatening a plaintiff with adverse job action absent taking action with regard to a psychological condition has been held to violate the "interference, coercion, or intimidation" provisions of the ADA. See, Brown v. City of Tuscan, 336 F.3d 1181 (9th Cir. 2003). The framework of proof between an "interference" claim and a "retaliation" claim differs. Id., at 1189. In the present case, there is a great deal of evidence that IBM intended to interfere with Plaintiff's exercise of rights protected under the ADA, and also evidence of retaliation. And even an employee without a statutory disability is protected by the non-interference and non-retaliation provisions of the ADA. See, e.g., Wright v CompUSA, Inc., 352 F.3d 472 (1st Cir. 2003)(non-qualifying individual fired shortly after requesting a reasonable accommodation).

i. INTERFERENCE WITH PLAINTIFF'S MEDICAL/MENTAL HEALTH INFORMATION CONFIDENTIALITY

First, and perhaps most egregious, as argued above documents uncovered during discovery show that IBM intentionally violated the sanctity of ADA confidentiality by inquiring into plaintiff's mental health care history immediately before terminating him. *Pl.Exhs. 9 & 10; Diederich Decl. ¶¶ 14 & 15.*

HR representative located medical information, including Plaintiff's hospitalizations and prior officials comments regarding Plaintiff's "2nd rehab", and psychological condition, and thereafter, almost immediately, Plaintiff was fired. The conclusion is inescapable that IBM's decision makers impermissibly used confidential psychological information in formulating the decision to fire.

This was impermissible. Medical information is confidential, 42 U.S.C. § 12112 (d)(3)(B) with the sole exception that managers can be "informed regarding necessary restrictions … and necessary accommodations." Id.(i). 42 U.S.C. § 12112 (d)(4) provides:

> **Examination and inquiry**
> **(A) Prohibited examinations and inquiries**
> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
> **(B) Acceptable examinations and inquiries**
> A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

42 U.S.C. § 12112 ()(3)(B) provides:

> (B) information obtained regarding the medical condition or history of [the employee] … is treated as a confidential medical record, except that—
> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; …

IBM did not explore Plaintiff's mental health records in order to develop a "necessary restriction" or a "necessary accommodation," but rather engaged in a fishing expedition resulting in a prejudicial termination of employment. This is prohibited by the ADA and IBM's own policies. *Pl.Exh.* 4 (IBM's About Your Job § 2.5, D00288).

ii. IBM'S IMPLICIT THREATS—DO NOT SEEK AN ACCOMMODATION, AND ESPECIALLY NOT A "SPECIAL ACCOMMODATION"

It was incumbent upon IBM, rather than fire Plaintiff as a result of (its mistakenly perceived) conduct relating to his psychological afflictions to discuss with plaintiff, an "on record" psychologically impaired individual, the possible need of a "reasonable accommodation" regarding his perceived Internet addiction. After all, this addiction was known to IBM, both in its health-care records, and also because Plaintiff expressly informed his manager that he was a recovering Internet addict.

US Department of Labor regulations state at 29 CFR § 1630.9:

> "It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified … employee with a disability, unless .. the accommodation would impose an undue hardship on the operation of its business." (*emphasis added*)

On May 28, 2003, plaintiff had a known mental limitation (at least this is what IBM perceived—based upon its termination action). And IBM knew him to be, and regarded him as, psychologically disabled. Therefore it was unlawful for it not to make a "reasonable accommodation to [his] known … mental limitations."

Such an accommodation could have been something as simple as forgiveness regarding entirely legal Internet use which IBM perceived (incorrectly) to violate its policies. Progressive discipline (if discipline was required) would have been another form of reasonable accommodation. Taking away or limiting Plaintiff's access to the Internet was another alternative. Plaintiff's job description did not require access to the Internet. *Pl.Exh.* 19.

iii. SECRET MONITORING, RATHER THAN DISCUSSION

What was most certainly not a reasonable accommodation was Mr. Mihans' secret monitoring of plaintiff computer usage after his 2002 or January 2003 revelation that he was a recovering Internet sex addict. *Mihans' Tr. 19.* If non-secret, such as after a formal warning about usage, the monitoring could properly be viewed as corrective training. Secret monitoring, without advance warning, was discriminatory treatment of Plaintiff because of a perceived disability, and also directly interfered with Plaintiff's potential right under the ADA to have an "iterative" dialogue with his employer regarding whether any reasonable accommodation was needed regarding the addictive psychological condition for which he was receiving therapy.

There is no suggestion in this case that Mihans was cunningly waiting to see if plaintiff would succumb to Internet addiction, and then fire him, and such intention would also contradict

Mihans' purported offer of help reflected in both his purported January 5 and his May 28, 2003 notes. However, firing Plaintiff makes no sense. Why was Mr. Mihans secretly checking to make sure that Plaintiff was staying away from impermissible Internet sites, if not in order to correct Plaintiff, and perhaps obtain help for him, if Plaintiff did? Was an ambush intended?

These questions, particularly in light of IBM's dissembling, are for a jury to decide.

iv. INTERFERENCE WITH RIGHT TO APPEAL

Not only was it discriminatory to deny an internal appeal, it was "interference" prohibited by the ADA. A jury may find that IBM's statement to Plaintiff that we have "no programs for sex addicts" was a HR Department- orchestrated tactic designed to stop Plaintiff in his tracks regarding pursuing an ADA remedy from IBM, including pursuing an impartial Panel Review that undoubtedly would have rescinded his termination.

Moreover, refusing an appeal prevented (and intentionally avoided) any ADA-mandated "iterative" dialog regarding granting Plaintiff a "reasonable accommodation." Plaintiff and his wife certainly requested an accommodation by seeking an appeal (implicitly requesting fairness and relaxation of the overly harsh application of IBM rules). IBM's instead improperly sought to avoid any iterative process regarding possible psychological disability accommodations, through the (IBM-unauthorized) refusal to grant Plaintiff's right to an internal appeal. See, Bultemeyer v. Ft. Wayne Cmty Schs., 100 F.3d 1281, 1285 (7th Cir. 1996).

Also, although the ADA expressly excludes for protection conduct relating to active drug or alcohol abuse, such is not the case with other psychological illness, such as Plaintiff's PTSD. See, 42 U.S.C. § 12114(b)(1). The obvious implication of specifically excluding drug/alcohol-related conduct is that conduct related to other psychological disability may be protected. This is

supported by case law.[3] Thus, conduct directly related to other psychological disabilities (such as Plaintiff's PTSD- related Internet addiction) can be the proper subject of accommodation under the ADA.

Yet, HR Representative Sieverding's observation that Plaintiff "better continue therapy" reflects a view hostile to accommodation. *Sieverding Tr.* 22-23. It is a view hostile to the ADA. Moreover, by administering its appeals program in a biased manner, summarily denying the right to appeal by anyone claiming a psychological disability, IBM violated U.S. Department of Labor regulation which provides:

> "It is unlawful for a covered entity to use … methods of administration which are not job-related and consistent with business necessity, and: (a) That have the effect of discriminating on the basis of disability; or (b) That perpetuate the discrimination of others who are subject to common administrative control."

See, 29 CFR § 1630.7. Essentially, IBM's "method of administering" its appeal program (besides being unsupported by IBM's own written policy) had the "effect of discriminating on the basis of disability" in Plaintiff's situation, and also would "perpetuate the discrimination of others," because even the most disabled "obsessive-compulsive" employee (an "addict"), or even an absolute psychotic, is denied an employment benefit (the right to appeal) under IBM's local (Fishkill, NY) method of administering its appeal program.

IBM's actions interfered with an employees pursuit of disability-related company remedies, and an ADA iterative process which would have occurred in a Panel Review appeal.

v. OTHER INTERFERENCES

In 2003, IBM management was certainly aware of the growing workplace phenomenon labeled "internet addiction," and this likely contributed to IBM's perceptions, and its prejudice.

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[3] See, e.g., Teahan v. Metro-North Commuter Railroad Co., 951 F.2d 511, 516-17 (2d Cir. 1991)(under Rehabilitation Act claim, termination based on a factor closely related to a disability constitutes discrimination based solely on that disability). See also, Hindman v. GTE Data Servs., Inc., No. 93-1046 CIV T-17C, 1994 WL 371396 (M.D.Fla. June 24, 1994)(denying summary judgment for employer; whether bringing firearm to work, for which plaintiff was

Cf. *Pl.Exh.* 23 (article on internet addiction). Certainly IBM was savvy enough to realize, in 2003, that an employee such as Plaintiff, with a substantial mental health history involving addictive behaviors, potentially needed an accommodation as a recovering addict.[4] *Cf. Diederich Decl*. ¶ 30 ("unsupervised kid in candy store"). IBM perceived a risk that Plaintiff might pursue an ADA-authorized accommodation, and firing Plaintiff to avoid such risk. This is a violation of the ADA's "non-interference" provisions.

Moreover, once the employer knows of the employee's disability and desire for an accommodation (here, accommodation in the form of sympathetic understanding of why Plaintiff may have ventured onto a chat room—which a panel review would have afforded!), the burden is on the employer under the ADA to request additional information that the employer needs, especially in cases of mental illness. See, Taylor, supra n.5, at 296; Bultemeyer, supra.

Plaintiff's request for sympathetic understanding regarding his psychological disability, both pre-termination and in connection with requesting appeal, is analytically no different for ADA interference purposes than was the request for a reasonable accommodation by the non-disabled employee in Wright, supra. Moreover, if IBM granted the panel review appeal process to which Plaintiff was entitled, IBM would have been obligated to at least consider Plaintiff's request for a reasonable accommodation. Again, IBM interfered with Plaintiff's ADA rights.

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dismissed, was caused by plaintiff's chemical imbalance disability was question of fact).

[4] Plaintiff's disability, as perceived by IBM, fits the situation where the employer, IBM, had an obligation to initiate an iterative process without the employee making a request. See, *EEOC Enforcement Guidance, Reasonable Accommodation and Undue Hardship*, http://www.eeoc.gov/policy/docs/accommodation.html, page 52, question 40; Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994)(employer had obligation to provide reasonable accommodation because it knew of the employee's alcohol problem and had reason to believe that an accommodation would be effective). This is especially true where the employee has difficulties communicating a need for an accommodation because of the disability. See, Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000). For example, in a case where an employee has a mental disability that makes communication difficult, the employer may have a heightened duty to begin and engage in the process. See also, *Taylor v. Phoenixville*, 184 F.3d at 296 (3d Cir. 1999)(recognizing that "an employee with a mental illness may have difficulty effectively relaying medical information about his or her conditions, particularly when the symptoms are flaring and reasonable accommodations are needed"); Bultemeyer v. Ft. Wayne Cmty Schs., supra, 100 F.3d, at 1283 & 1285 (Mental illness makes communication process more difficult, yet employer cannot avoid iterative process; as to reasonable accommodation,

C. Disability Discrimination *Prima Facie* case under N.Y.S. Human Rights Law

The legal analysis for disability discrimination under New York law is similar, but not identical, to the ADA. Because it is manifest here that plaintiff makes out a *prima facie* case under the stricter ADA criteria, Plaintiff adopts his ADA arguments for this motion.

D. Plaintiff has established a prima facie case of age and disability discrimination

The burden in establishing a prima facie case of employment discrimination is described by the courts as "minimal." Plaintiff has certainly met this burden. The above evidence is also clearly sufficient evidence of "pretext" to satisfy the third prong of McDonnell-Douglas analysis, even if defendant IBM were able to produce evidence of a legitimate basis for its decision which, as argued next, it does not.

POINT II
IBM HAS NO EVIDENCE TO SUPPORT ANY LEGITIMATE BUSINESS REASON FOR FIRING PLAINTIFF AFTER 19 YEARS UNBLEMISHED SERVICE

Once Plaintiff establishes a *prima facie* case of discrimination, the burden of production then shifts back to the defendant to proffer a nondiscriminatory reason for its challenged action or actions. See Point I (B) supra. Admissible evidence is required.[5] If the defendant provides evidence of such nondiscriminatory reason, the presumption of discrimination is eliminated, and the burden shifts back to plaintiff to show defendant's reason to be pretextual.

In this case IBM has not demonstrated, with or without admissible evidence (and admissible evidence is necessary under Fed. R. Civ. Proc. 56(e)), that it had a legitimate business reason for terminating Plaintiff's employment. Plaintiff had excellent performance appraisals, an almost perfect attendance record in his last three years, an unblemished disciplinary record, in 19+

McDonnell-Douglas analysis unnecessary).

[5] It is clear from Reeves and its predecessors that the defendant must actually produce evidence to meet its burden of production. Defendant cannot claim that "our ex-employee is an ax murderer" or "a thief" without any evidentiary support for the burden to shift back to plaintiff. After it produces evidence, then the Court will not weigh such evidence at this second step of the *McDonnell Douglas* burden shifting analysis

years of IBM employment, and his alleged misconduct is unproven (and even if proven, not misconduct for which anyone else at IBM has ever been fired).

Perhaps most significantly, Plaintiff was refused the internal IBM appellate process which undoubtedly would have restored his job. IBM has no legitimate business interest more weighty here than abiding by its own rules of employee fairness, and certainly none where, as here, not abiding by its own rules reeks of age and disability prejudice.

A. IBM's policy is to treat employees with fairness

IBM is not unionized, and presumably one of its arguments to stay that way is that it treats its employees fairly, including with regard to discipline. IBM has a formal policy stating fairness toward employees as its policy. It implements this policy in several ways, including providing an "Open Door" to discuss issues with management, and a "Panel Review" to prevent arbitrary management decisions, including employee dismissals.

For reasons unexplained by IBM, Plaintiff was refused the right to seek review of his termination by a Panel Review. A Panel Review involves a review of the matter by a panel (presumably impartial) of IBM employees and managers. *Pl.Exh.* 11. Plaintiff requested an appeal, but he was told that none was available to him. Nor did IBM reconsider (nor even provide an explanation) as to why no Panel Review was being provided when Plaintiff's attorney wrote IBM, explaining its unfairness, by letter dated August 1, 2003. *Pl.Exh.* 15.

It is obvious, based upon facts which are undisputed in this case, namely:

- IBM encourages personal use of the Internet;
- Neither IBM nor Plaintiff's supervisor prohibited Internet chat room conversation;
- No evidence exists that Plaintiff visited an impermissible web site, or wrote or saw any offensive or vulgar chat room dialog, before he departed the computer on May 28, 2003, as chat conversation of others kept "streaming in")
- no IBM employee was identified who was fired merely for Internet abuse, unconnected with other conduct involving violation of civil or criminal law.

It is simply incomprehensible that any impartial IBM Panel Review reviewers would have upheld the termination decision. Most likely, the reviewers would have simply cautioned Plaintiff to stay away from chat rooms, especially if his PTSD was acting up or on his Vietnam War "anniversary" dates. This likelihood also explains why there was no Panel Review—because it would have restored Plaintiff's job. Bias prevailed over fairness here. IBM had no legitimate business reason for denying a Panel Review. A Panel Review would have restored Plaintiff's job.

B. IBM Fails to Offer Admissible Evidence that Plaintiff Violated its Rules or Directives

1. Plaintiff violated no IBM written policies, nor any supervisors' directive

There is no dispute that IBM encourages personal use of the Internet, *Pl.Exh.* 6; *Mihans Tr. 56.* Nor is there any dispute that Mr. Mihans testified under oath, contrary to his purported written notes, that he never instructed plaintiff not to visit Internet chat rooms.

There can be no genuine dispute that www.ChatAvenue.com, the site Plaintiff visited, is not an impermissible site, nor is there any evidence that Plaintiff visited any impermissible site. IBM personnel intentionally failed to preserve, or destroyed, such evidence. *Pl. Decl.* ¶ 144. And there is no evidence that Plaintiff wrote, or saw, any sexually descriptive words or vulgar expressions on the computer station where he had been working. On the contrary, the deposition testimony evidence of IBM's witnesses is clear: plaintiff left his computer, and thereafter conversation continued "streaming in" to the chat room in Plaintiff's absence. It was clear to IBM then, and now, that it had no evidence that plaintiff saw or wrote any offensive or "pornographic" material. Rather, its decision-makers (especially Ms. Sieverding, of HR) jump to the conclusion, based upon their misguided and biased assumptions after examining Plaintiff's confidential psychological health history, that Plaintiff is an incurable Internet sex addict.

IBM's computer use rule in a "virtual world" are like "real world" company rules prohibiting, say, employees from visiting houses of prostitution or illegal casinos during work

hours. An employee at a mid-town New York City conference then travels 42d street (a permissible site), and engages in a conversation with a woman. After he departs, the woman is found propositioning another man for sex. The company then fires the employee because he had previously spoken to the woman, who identified herself as "Virgin One," and who made very suggestive and vulgar comments the man she propositioned. The company employee was unfairly fired, as he did nothing wrong. Nor did Plaintiff here, in the "virtual" world of the Internet.

IBM's policy on personal computer use is that it not interfere with productivity. *Pl.Exh.*.6. There is no evidence whatsoever that plaintiff's chat room use interfered with his productivity. He was an extremely productive employee, as shown by his excellent performance evaluations, the positive comments from both his supervisors at deposition, as well as the fact that he was "caught" while helping a coworker's work production.[6] An impartial Panel Review would certainly agree.

2. IBM's Mr. Questel violated IBM's "Personal Privacy" policy by reading private "chat room" conversation

As stated in the facts, when Mr. Questel intruded into Plaintiff's workspace, without Plaintiff's permission or the "prior approval" of management, toggled to reveal Plaintiff's computer screen and a chat room, and then read the details of the chat, rather than simply closing the dialog box, or asking Plaintiff, who was nearby, to log off, Mr. Questel was violating IBM's personal privacy policy. A fair reading of IBM's "Employee Privacy" policy[7] is that coworkers should not be reading other coworkers private email (or what is the same, chat dialog). *Pl.Exh.* 4

[6] Nor is there any evidence that Plaintiff ever visited sites with pornographic photographs. In this regard, the testimony of Mr. Mihans seemed to concede that viewing the online "swimsuit edition" of Sports Illustrated magazine did not violate company policy. *Mihans Tr.* 27. From the testimony and evidence, it appears that what IBM prohibits is pornographic photographs or other patently offensive material—material likely to be seen by coworkers, and thus to offend. Any other standard permits complete arbitrariness in application, as words about war , violence, crime and environmental catastrophic may be much more offense to many people than words relating to biological reproduction

[7] Section 3.4 of the "IBM Business Conduct Guidelines" states: "employees … should not access another employee's workspace, including electronic files, without prior approval from management."

3. The notes of Mr. Mihans purportedly dated January 5, 2003 is not admissible evidence

The handwritten notes dated suspiciously January 5, 2003, cannot properly be considered as admissible evidence supporting Defendant's motion. See, Fed. R. Civ. Proc. 56(e). No exception to the Hearsay Rule is present, and, moreover, the notes contained hearsay within hearsay.

As to Mr. Mihans' notes, containing so many important facts contradicted by Mr. Mihans himself at his deposition, [8] Plaintiff suspects the document was actually written on or after May 28, 2003, at the behest of the IBM's HR or legal departments. The fact that Plaintiff received an excellent performance valuation, from Mr. Mihans a mere eight (8) days after January 5, 2003, with face-to-face review, with no mention whatsoever of any "problem with the Internet," *Pl.Exh.* 20, make the purported January 5th notes appear incredulous.

C. After-Acquired medical hearsay is irrelevant

IBM's attempted use of "after-acquired" medical and therapy notes to rationalize its biased action must be rejected. It is borders on discovery abuse. None of the evidence involves employee wrongdoing. Cf., McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995). And all of the medical information is ADA-confidential, that is, not properly disclosed to an employer for purposes of personnel decisions (with exceptions inapplicable here) and not properly used in this litigation on the issue of liability for the same reason. Moreover, besides being hearsay and hearsay-within-hearsay, the treatment records (and testifying experts too) say nothing more than what Plaintiff readily concedes—that he went onto the Internet and a chat room website www.ChatAvenue.com to engage in conversation which Plaintiff hoped would distract himself from his thoughts of Vietnam combat experiences. All this is permissible, and helpful to doing his

[8] Mr. Mihans contradicts the January 5, 2003 note when he testified that he observed no Internet abuse (even when secretly checking up on Plaintiff) and that he did not prohibit chat rooms. *Mihans Tr.* 19 & 83. Mr. Questel, who worked in the same aisle as plaintiff, confirms observing no excessive internet use. *Questel Tr.* 28.

job.[9] IBM appears to seek to invade the doctor-patient or psychotherapist-patient privilege for the illegitimate purpose of embarrassing and vilify plaintiff, which is an improper litigation tactic.

POINT III
IBM'S DISSEMBLING EXPOSES ITS DISCRIMINATORY PRETEXT

As argued above, IBM's violations of its own policies, its contradictory versions of its justification for decision, its assertion of facts which did not exist, its assertion that Plaintiff violated policies which did not exist, its irrationality in firing a highly productive employee, its January 5, 2003 "notes" which directly contradict Plaintiff's January 13, 2003 face-to-face performance review and the note-taker's subsequent sworn deposition testimony; its singling out Plaintiff for the severest (and unprecedented) punishment for a trivial Internet activity, and its unexplained refusal to permit Plaintiff an internal "panel review" appeal (where employees and managers of IBM would make a decision using fairness as the guide), all taken together, present overwhelming and compelling evidence of employer pretext designed to conceal discriminatory animus.

POINT IV
BECAUSE DEFENDANT IBM HAS NOT REFUTED PLAINTIFF'S *PRIMA FACIE* CASE OF AGE AND DISABILITY DISCRIMINATION WITH PROOF OF A LEGITIMATE BUSINESS GROUNDS FOR TERMINATION, THE COURT MUST GRANT PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Thus is a case which a jury must decide, unless the Court sees fit to grant Plaintiff's cross-motion for partial summary judgment on liability. Such a grant, though unusual in an employment discrimination case, would be quite appropriate here, because no reasonable jury could possibly find that defendant IBM had a legitimate business purpose in firing in 19+ year exemplary employee in the circumstances of this case. Defendant's dissembling makes its case incredulous.

[9] As Plaintiff told his therapists, and anyone who asked: "IBM fired him [for its biased and unfounded conclusion] for Internet porn," just as would an inmate say "I'm serving life for murder" with the follow-on explanation, "but I didn't do it." That therapist notes are inaccurate in this regard is a fact issue.

Defendant possesses no admissible evidence (nor credible evidence) that Plaintiff's visiting a chat room violated any policy or directive, and even if it did, no reasonable employer, no reasonable employee/manager "panel review" internal reviewing body of such employer, could possibly find a legitimate, *bona fide*, reason for terminating such a long-term, loyal, valuable employee, and combat veteran.

CONCLUSION

Plaintiff's has established a *prima facie* case of age and disability discrimination and, with Defendant IBM's misrepresentations, falsities and dissembling, of pretext. Defendant fails to support any legitimate business justification for Plaintiff's termination. Therefore, Defendant's motion for summary judgment must be denied, and Plaintiff's cross-motion granted, together with such other and further relief as is just and equitable.

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