UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

YIYU LIN, Plaintiff, v. CGIT SYSTEMS, INC. Defendant	Civil Action No.: 1:20-CV-11051-JDG

CGIT SYSTEMS, INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction

As CGIT Systems, Inc. ("CGIT") anticipated, Plaintiff's Opposition to CGIT's Motion For Summary Judgment is short on admissible evidence in support of the Plaintiff's actual legal claims, and long on an irrelevant and false narrative that CGIT did not take COVID-19 seriously and ignored the safety of its workers at the onset pandemic. As a manufacturer of custom high voltage electrical equipment, CGIT was deemed an essential infrastructure business and did not have the luxury of simply shutting down all in-person operations in response to COVID-19, as many other businesses did. Even the evidence cited by Plaintiff demonstrates that CGIT was conscious of and vigilant in the very challenging task of keeping its workforce safe while necessarily continuing its operations during that very uncertain and chaotic period at the start of the pandemic. But, while Plaintiff would like to make this case a general referendum on CGIT's COVID-19 response, the actual question at summary judgment is whether Plaintiff has presented sufficient record evidence to go to trial on his claims of disability, age, and race discrimination under Chapter 151B, and the answer is that he has not.

Plaintiff has presented no medical evidence whatsoever to support a finding that he was at such high risk of severe illness from COVID-19 as to qualify as disabled under M.G.L. c. 151B.

He does not even cite a single medical record, much less provide an opinion from a treating physician or expert witness to support his claim of disability, which alone warrants dismissal of his disability discrimination claim. Further, Plaintiff does not present any direct or inferential evidence that is sufficient to support a finding that CGIT had a discriminatory motive in terminating his employment. To the contrary, the undisputed facts are that CGIT valued Plaintiff and wanted him to remain employed, and that if Plaintiff had simply returned to work on March 31 following his two-week stint of working from home instead of unilaterally deciding that he was not going to return until he felt it was safe, he would not have lost his job. Plaintiff himself testified at his deposition that if he had returned to work he would not have been terminated. Simply put: Plaintiff has failed to present sufficient admissible record evidence to support essential elements of his claims, and this case should not go to trial.

I. Plaintiff presents no evidentiary or legal support to support a finding that he was disabled; therefore, his disability discrimination cannot proceed to trial.

A. Plaintiff presents no evidence in his opposition to support that he was disabled.

The law is clear that if Plaintiff cannot establish that he qualified as disabled under Chapter 151B, his entire claim of disability discrimination fails. *City of New Bedford v. Massachusetts Comm'n Against Discrimination*, 440 Mass. 450, 463 (2003). As set forth at length in CGIT's Memorandum In Support of Summary Judgment (Dkt. # 75, pp. 4-10), Plaintiff simply does not have evidence sufficient to support a finding that his historical diagnosis of "benign" hypertension placed him at such high risk for severe illness from COVID-19 that he met that essential element. Plaintiff does nothing in his opposition to change that conclusion. Plaintiff does not cite a single medical record, much less present an opinion from a treating physician or expert witness, that supports that he was disabled. Plaintiff presents no evidence to dispute that he had never been referred to or treated with a cardiologist (Pl. Rule 56.1 Resp., Dkt. # 81 ¶ 37); that he lived an active lifestyle, regularly playing tennis (id.); that his "benign" hypertension was stable on medication (id., ¶40); that he was not hypertensive in March 2020, nor had he been in the preceding year-and-a-half (id., ¶ 38); that he did not check with his doctor at the time as to whether it was

safe for him to be in a work setting (id., ¶ 42); or that he never received any instruction or opinion from a medical professional that it was not safe for him to be in an in-person work setting (id., ¶ 43).[1]

Plaintiff's only "evidence" to support that he was disabled is a sentence from a 9-page CDC general notice to the public that, "[h]aving heart conditions such as heart failure, coronary artery disease, cardiomyopathies, and ***possibly*** high blood pressure (hypertension) can make you more likely to get very sick from COVID-19" (s*ee Pl. Ex. N* (emphasis supplied)), but the mere fact that the 116 million Americans with some version of hypertension[2] could *possibly* be at increased risk from COVID-19, is simply not enough to support the conclusion that Plaintiff *actually* was at such increased risk. If that were the case, then the 47% of adults in the United States with a history of hypertension would all qualify as disabled as a result of COVID-19, which cannot possibly be the case. *See Frederick v. Allor Mfg.*, No. 2:20-CV-12790-TGB-RSW, 2022 U.S. Dist. LEXIS 35295, at *11-14 (E.D. Mich. Feb. 28, 2022) (acknowledging that while increased risk of severe illness from COVID-19 *could* constitute a disability in some circumstances, the mere fact that plaintiff was in the category of people with a long history of smoking without evidence that *his* history of smoking and pneumonia actually placed him at risk of severe illness was not sufficient to survive summary judgment; concluding otherwise would "render somewhere between 25% and 30% of the American public disabled under federal law because they smoke."). Furthermore, and more to the point, a closer look at the guidance from the CDC demonstrates that there is no clear association between hypertension alone and risk of severe illness from COVID-19 and no conclusions can be

[1] The reality is that the evidence demonstrates that Plaintiff did not even believe he was at high risk for COVID-19 and that his request to work from home was not actually based on his history of hypertension. When Plaintiff first stated that he intended to work from home on March 15, he specifically said that he was "not that concerned of getting the virus [him]self", but that he was concerned about his mother, as well as helping to stop the spread generally. *See* CGIT's Motion for Summary Judgment, Dkt # 75, *Ex. 9*. Plaintiff further did not even mention his own hypertension as a basis for his work from home request until March 28, well after he had requested to work from home and only when he determined that his request was going to be denied. *Ex. 1, pp. 93-96*.

[2] *See* Response of CGIT to Plaintiff's Rule 56.1 Statement of Facts, Dkt. No. 86 at *Ex. 15*

drawn, completely undermining Plaintiff's already speculative and paper-thin argument. *See* CDC's updated *Science Brief: Evidence Used to Update the List of Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19*, (*See* Response of CGIT to Plaintiff's Rule 56.1 Statement of Facts, Dkt. No. 86 at *Exhibit 16*), highlighted portion at p. 6 of 21 ("The evidence suggests no clear direction of association, meaning no firm conclusions can be drawn."). Since the undisputed facts show that Plaintiff does not have sufficient evidence to support the conclusion that he qualified as disabled, Plaintiff is unable to prevail on his claim of disability discrimination, and summary judgment should enter in favor of CGIT.[3]

B. *Goldman v. Sol Goldman Invs. LLC* has absolutely no application to Plaintiff's disability discrimination claim under Chapter 151B.

Plaintiff argues that the Southern District of New York case of *Goldman v. Sol Goldman Invs. LLC,* 2022 U.S. Dist. LEXIS 140927 (S.D.N.Y. Aug. 5, 2022) is "almost identical" to this case and supports summary judgment in his favor, but the reality is that *Goldman* has no application whatsoever to Plaintiff's claims. The *Goldman* case addresses a former employee's claim under the New York City Human Rights Law ("NYCHRL"), which defines "disability" much more broadly than the ADA and Chapter 151B. *See Goldman,* at 11 ("The NYCHRL defines disability more broadly than the ADA and [the New York State anti-discrimination law].") (citing *Giordano v. City of New York*, 274 F.3d 740, 753-54 (2d Cir. 2001)). The NYCHRL defines disability as "***any*** physical, medical, mental or psychological impairment" (*id.* (emphasis

[3] With respect to his disability discrimination claim, Plaintiff spends most of his Opposition crafting a narrative in which CGIT did not take COVID-19 seriously, was not concerned with the safety of its employees generally, did not take appropriate safety precautions, and tried to hide a supposed COVID-19 breakout among its employees. *See* Pl. Opp., Dkt. # 80, pp. 5-9. While this narrative is false and not even supported by Plaintiff's own evidence (much of which is inadmissible hearsay and/or lay person opinion), it is entirely beside the point. CGIT's argument at summary judgment is that Plaintiff cannot establish that he qualified as disabled under the statute, which is dispositive of his claim of disability discrimination. Whether or not CGIT effectively enforced social distancing, wore masks properly, or were not "proactive" enough in guarding against COVID-19 does not have any bearing whatsoever on whether Plaintiff qualified in the first instance as disabled. Since he does not have sufficient evidence to establish that threshold requirement, his claim for disability discrimination must fail, and a hindsight examination of its COVID-19 response is immaterial.

supplied)), whereas the Supreme Judicial Court has made clear that "[n]ot all physical or mental impairments constitute a 'handicap' under the Massachusetts antidiscrimination statute." *City of New Bedford v. Massachusetts Comm'n Against Discrimination*, 440 Mass. 450, 462 (2003). In contrast to the standard under the NYCHRL, only plaintiffs who demonstrate the existence of an impairment that "substantially limits" a "major life activity" are entitled to protection under Chapter 151B and the ADA. *Id.* (quoting *Carroll v. Xerox Corp.*, 294 F.3d 231 (1st Cir. 2002), quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002)). The Southern District of New York made this important distinction clear in *Goldman*, stating that "[a]s a result, courts must analyze NYCHRL claims separately and independently from any federal and state law claims … construing the NYCHRL's provisions broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Goldman*, supra at 11 (internal quotations omitted).[4] Thus, the court's grant of summary judgment in favor of the plaintiff in *Goldman* on his claim under the NYCHRL is not analogous and is completely inapplicable to Plaintiff's claim under Chapter 151B.[5]

In addition to the legal standard applied in *Goldman* being entirely inapplicable, the evidence of disability in *Goldman* was substantial and entirely distinguishable from that of Plaintiff. The plaintiff in *Goldman* was 69 years old, obese, and suffered from high blood

[4] In addition to a much broader and more lenient definition of "disability", the NYCHRL also presumes that all requested accommodations are reasonable, with the burden falling on defendants to demonstrate that such accommodations present an undue hardship. This is the opposite of the standard under the ADA and Chapter 151B, which places the burden on the plaintiff to demonstrate that a requested accommodation is reasonable. *See Mekonnen v. OTG Mgmt., LLC,* 394 F.Supp.3d 134, 155 (D.Mass. 2019) ("It is well-settled that 'a plaintiff must show, even at the summary-judgment stage, that the requested accommodation is facially reasonable.'") (quoting *Eschevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 128 (1st Cir. 2017).

[5] To this point, in addition to a claim under the NYCHRL, the plaintiff in *Goldman* also asserted disability discrimination claims under the ADA and New York State law but did not move for summary judgment on those claims. This underscores that the standard of proof is different and much lower under the NYCHRL, and that the Southern District of New York's ruling has no applicability to a disability discrimination claim under the ADA or comparable state law.

pressure and coronary artery disease. *Goldman,* supra at 4. The CDC has concluded that there is "conclusive" evidence that individuals with obesity *or* coronary artery disease are at higher risk of severe illness from COVID, and that advanced age "remains the strongest risk factor for severe COVID-19 outcomes." *See* Response of CGIT to Plaintiff's Rule 56.1 Statement of Facts, Dkt. No. 86 at *Ex. 16*. In contrast, Plaintiff was 55-year-old man who lived an active lifestyle, regularly playing tennis, whose only medical condition was a history of "benign" hypertension, for which, as set forth above, the CDC has stated there is no clear association with the risk of severe illness from COVID. *See* CGIT's Memorandum in Support of Motion for Summary Judgment, Dkt. # 75 at Ex. 1; Response of CGIT to Plaintiff's Rule 56.1 Statement of Facts, Dkt. No. 86 at *Ex. 16*. Further, the plaintiff in *Goldman* presented an opinion from his treating physician that his underlying medical conditions would put him at higher risk if he had to work in an office building, *id. at 6*, whereas Plaintiff has provided no medical evidence whatsoever concerning his condition or supporting his claim that he was at high risk for severe illness. In fact, the defendant in *Goldman* did not even dispute that the plaintiff had a disability within the meaning of the NYCHRL. *See id.* at 23 ("Although Defendants quibble with the exact nature of Plaintiff's disability, they do not dispute that he had one within the meaning of the NYCHRL."). Contrary to Plaintiff's argument, the *Goldman* case simply has no applicability to the circumstances here, and Plaintiff's reliance upon it only underscores the utter lack of a legal and evidentiary basis for his disability discrimination claim.

II. Plaintiff does not present sufficient evidence that CGIT discriminated against him on the basis of his age or race; therefore, CGIT is entitled to summary judgment.

A. There is no direct evidence of discriminatory animus.

CGIT argues in its Memorandum (Dkt. # 75, pp. 11-12) that Plaintiff does not have sufficient direct evidence to support a finding of discriminatory animus, and Plaintiff's Opposition does not alter that conclusion. There is no evidence that the decisionmakers ever raised any issue

concerning Plaintiff's accent or ethnicity (*Pl. 56.1 Resp., Dkt. # 79, ¶ 45*), and in fact, it is undisputed that Plaintiff's dual language ability was a benefit to CGIT. *Id., ¶ 46-48*. The fact that, unbeknownst to Plaintiff, fellow employees who were not decisionmakers supposedly raised issues to each other about Plaintiff's accent as Plaintiff claims (*see Pl. Opp. Dkt. # 80, p. 11*) simply has no bearing on the issue of discriminatory animus and should be disregarded.[6] *See Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 667, 729 N.E.2d 1068 (2000) ("Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy the plaintiff's threshold burden"). Finally, it is certainly notable that Plaintiff himself testified that he did not believe that CGIT denied his request to work from home because of his Chinese ethnicity. *See* CGIT's Memorandum in Support of Motion for Summary Judgment, Dkt. # 75 at *Ex. 1, p. 186*. Such an admission, combined with the utter lack of direct evidence of discriminatory animus, strongly suggests that Plaintiff's race discrimination claim was simply thrown into the complaint as part of a "kitchen-sink" approach.

B. There is no comparator evidence that can support an inference of discriminatory animus.

Plaintiff points to so-called comparator evidence as inferential of discriminatory animus, but this evidence misses the mark. First, "in order to be probative of discriminatory animus, a claim of disparate treatment must rest on proof that the proposed analogue is similarly situated in material respects." *Gonzalez-Bermudez v. Abbott Labs. P.R. Inc.*, 990 F.3d 37, 43 (1st Cir. 2021) (internal quotation omitted). The comparators' circumstances must be "substantially similar to those of the complainant in all relevant aspects concerning the adverse employment decision." *Trustees of Health & Hosps. of Boston, Inc. v. Massachusetts Comm 'n Against Discrimination,* 449 Mass. 675, 682 (2007) (internal quotation omitted). Given the nature of the

[6] Plaintiff does not even attempt to argue that there is direct evidence of discriminatory animus on the basis of age.

project engineer position, and the need to for the project engineer to be physically present on the shop floor to handle manufacturing issues promptly as they arise (*see Pl. 56.1 Resp., Dkt# 81,¶¶ 13-18*), the only appropriate comparators to Plaintiff are the other project engineers. Plaintiff has pointed to the fact that indefinite work from home requests were granted to three white employees, but none of those individuals were project engineers, and therefore, are not appropriate comparators. *Pl. 56.1 Resp.,Dkt. #81, ¶51.*[7]

Second, with respect to Plaintiff's actual comparators, there is no evidence of disparate treatment. It is undisputed that there were only two project engineers in addition to Plaintiff who submitted requests to work from home, and both of those requests were denied. *Pl. 56.1 Resp., Dkt. # 81 ¶ 52.* Thus, Plaintiff's request to work remotely was treated no differently than that of any comparator. Plaintiff states that fellow project engineer Aaron Sheldon was permitted to work remotely on prior occasions in order to deal with a family member's health, but Mr. Sheldon's deposition testimony makes clear that he never worked remotely to care for his family member, and Plaintiff presents absolutely no evidence to the contrary. *Pl. 56.1 Resp.*, Dkt. # 81 Ex. GG, at. *p. 38-41; Pl. 56.1 Resp., Dkt. # 81, ¶ 92.* Mr. Sheldon took time off on the occasions where he brought his family member to a doctor's appointment, but that is entirely different from working remotely for an extended period of time (which Mr. Sheldon never requested), and thus creates no inference of discriminatory animus.[8]

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[7] In response to a number of CGIT's statements of material fact in its Rule 56.1 statement, including his response to ¶ 51, Plaintiff states: "Plaintiff lacks sufficient information to admit or deny this statement." Plaintiff's Rule 56.1 response is not an answer to a complaint, where simply stating one is without information to admit or deny deems the allegation denied. This is summary judgment. Plaintiff must dispute a statement of material fact with admissible evidence to the contrary. Thus, in each instance in his Rule 56.1 response that Plaintiff has stated that he lacks information to admit or deny, CGIT's statement of fact must be deemed admitted for the purposes of summary judgment. *See Local Rule 56.1.*

[8] *See also*, C*GIT's Memorandum in Support of Motion for Summary Judgment (Dkt. #75), pages 17-19* (discussion regarding lack of comparator evidence).

C. The denial of Plaintiff's request to work from home does not constitute an adverse employment action; therefore, it cannot be the basis for Plaintiff's race or age discrimination claims.

While a termination is obviously an adverse employment action under the law, the denial of Plaintiff's request to work from home was not. As set forth in greater detail in CGIT's Memorandum, numerous courts have held that denying a request to work remotely does not constitute an adverse employment action under anti-discrimination statutes. *See CGIT Mem., Dkt. #75, pp. 13-14.* Plaintiff does not cite any cases holding the contrary.[9] Thus, to the extent that Plaintiff's age and/or race/national origin discrimination claims are based on CGIT's decision to deny his request to work from home, Plaintiff cannot prove the essential element of adverse employment action and CGIT is entitled to summary judgment.

D. Plaintiff has failed establish pretext.

CGIT sets forth in detail its legitimate, nondiscriminatory reasons for denying Plaintiff's request to work from home and for ultimately terminating him in its Memorandum in Support of Motion for Summary Judgment, and will not separately re-state those reasons here in their entirety. *See CGIT. Mem. Dkt*. #75, pp. 15-19. But CGIT will take the opportunity to respond Plaintiff's arguments that CGIT's stated reasons are pretext.

1. CGIT's stated reasons were not "weak."

The most critical time for a project engineer is when he has a piece of equipment being built on the shop floor because that is when he needs to be physically present at the facility in order to react promptly and resolve any issues that arise as quickly as possible so as not negatively impact downstream work and slowdown the manufacturing process. *See CGIT. Mem. Dkt*. #75, Ex. 4, Kurt Allen, pp. 22-23. It is undisputed that Plaintiff had equipment being built on the shop floor at the time he made his request to continue to work from home. *Pl. 56.1 Resp.,Dkt. 81, ¶ 14*. Thus,

[9] Cases that concern the denial of a reasonable accommodation to a disabled plaintiff are not applicable here. The law of reasonable accommodations is specific to disability discrimination claims, and there is no analogue under the anti-discrimination provisions of Chapter 151B pertaining to age and/or race/national origin.

CGIT denied Plaintiff's request.[10] Thereafter, Plaintiff stated that he "underst[oo]d" the decision, but refused to abide by it, informing management on multiple occasions that he did not intend to return to work until he felt it was safe.[11] *See CGIT. Mem. Dkt*. #75, Ex. 8; Ex. 1, pp. 102-103; Ex. 2, p. 93. CGIT even reached out to Plaintiff to try to convince him to reconsider his decision, but he refused. *See CGIT. Mem. Dkt*. #75, Ex. 1, pp. 102-103. When Plaintiff did not come to work on March 31, 2020, he was terminated. *Pl. 56.1 Respn., ¶ 32*. Thereafter, Plaintiff's two active projects were assumed by to existing project engineers, Aaron Sheldon and Jack Chen, both of whom were working on site. *Pl. 56.1 Respn., ¶ 33*, 52 (no project engineers were giving permission to work from home after March 27); Sheldon Dep., p. 24 (Sheldon never worked from home in March 2020). Plaintiff even fully acknowledged at his deposition that had he returned to work on March 31, he still would have had a job [*CGIT. Mem. Dkt*. #75, *Ex. 1, pp. 185-186*], which underscores that his failure to show up *was the real reason* and not a pretext. The bottom line is that terminating an employee for refusing to show up to work despite clear instructions to do so is hardly a "weak" reason, and certainly not so "implausible" as to establish pretext under these circumstances.

2. CGIT's decision makers are identified.

Plaintiff argues that it is "axiomatic" that if a defendant cannot identify the decisionmakers, it cannot claim that a decision was not pretext. *Pl. Opp., p. 15*. Plaintiff cites *Velazquez-Fernandez v. NCE Foods, Inc.*, 476 F.3d 6, 11 (1st Cir. 2007), for this statement, and quotes from that case: "When assessing a claim of pretext in an employment discrimination case, an inquiring court must focus on the motivations and perceptions of the actual decisionmaker" (emphasis added by

[10] As stated above, it is undisputed that CGIT did not grant any requests to work from home to any of the project engineers. *Pl. 56.1 Respon*se, Dkt. #81, at 52.

[11] In fact, Plaintiff's own testimony makes clear that, even if Plaintiff's request to work from home was granted through April 7, he still did not intend to return to the office at that time and only planned to return when he felt it was safe. [*CGIT. Mem. Dkt*. #75, *Ex. 1, p. 85-86*]. He ultimately testified that he did not feel safe to return to an in-person work setting until after his second vaccine in April 2021. [*CGIT. Mem. Dkt*. #75, *Ex. 1, pp. 24-25, 88-89*]

Plaintiff). *Pl. Opp., p. 16*. First, the quoted language appears nowhere in the *Velazquez-Fernandez,* which CGIT assumes was an inadvertent mistake and not an intentional attempt to mislead the Court. Second, the *Velazquez-Fernandez* holding is that a stray remark made by an individual who was not a decisionmaker does not support an inference of pretext, which does not exactly support the Plaintiff's "axiomatic" assertion. Further, and more importantly, Plaintiff's claim that we do not know who the decisionmakers were here is demonstrably false. It is undisputed that it was CGIT General Manager Sean Noel who denied Plaintiff's request to work from home. *Pl. Rule 56.1 Resp., ¶ 20*. With respect to the decision to terminate Plaintiff, the evidence is that there were collective discussions involving Ken Lavelle, Sean Noel, Kurt Allen, Marcy Dupont, and Tom Henderson, but that Mr. Lavelle, as President of the Electrical Division, had final authority. *CGIT. Mem. Dkt*. #75, Ex. 2. pp. 78-80; *Exhibit 1* attached hereto, Noel Dep. 40-43, 88. There is simply no evidence to contradict the fact that, although he fully considered the input from others on the ground in Medway, Mr. Lavelle had final authority on this decision. *Id*.

3. It cannot reasonably be disputed that Plaintiff did not plan to return to the office on April 8.

Plaintiff now argues that the fact that Plaintiff did not intend to return to the office on April 8 has been "manufactured" by CGIT, but this argument is contrary to the evidence, including Plaintiff's own testimony. Although the form that Plaintiff submitted indicated an end date for his work from home request of April 7, Plaintiff fully admitted that he did not necessarily intend to return to work at that point but instead planned to "reevaluate" the situation to determine if it was safe. *CGIT. Mem. Dkt*. #75, *Ex. 1, pp. 85-86*. If he did not feel it was safe, he planned to continue to work from home. *Id. p. 88*. Plaintiff did not make this a secret. When his request to work from home beyond March 26 was denied, Plaintiff stated that he understood, but that he did not intend to return to work "until I feel it is safe." *CGIT. Mem. Dkt*. #75, *Ex. 8.* When Ken Lavelle called Plaintiff on March 30 in the hopes of convincing him to reconsider his decision not to come into the office, Plaintiff reiterated that he would not come back to the office until he felt it was safe, which CGIT naturally understood to be of indefinite duration. *CGIT. Mem. Dkt*. #75, *Ex. 2, p. 47-*

48, 93-94, 156-157. Finally, Plaintiff testified that he did not ultimately feel it was safe to return to an in-person work setting until after he received his second COVID-19 vaccination.[12] *CGIT. Mem. Dkt*. #75, *Ex. 1, pp. 24-25, 85-89*. Plaintiff should not be permitted to base his argument at summary judgment on the assertion that he would have only been out of the office through April 7 when the evidence clearly demonstrates that was not the case.

4. CGIT did not violate its own policies in denying Plaintiff's request to work from home or in terminating him when he refused to return to work.

Plaintiff argues that CGIT deviated from its "established guidelines" in denying Plaintiff's request to work from home and in terminating him when he refused to return to the office, but that is simply not the case. First, Plaintiff does not point to a specific policy of CGIT that governed these situations. Plaintiff cites Exhibit HH as stating CGIT's policy, but there is absolutely no foundation for that assertion. Plaintiff further cites CGIT's general desire to comply with government directives and recommendations as somehow establishing firm policy of the company, which it does not. Plaintiff further points to a statement concerning taking ***vacation time*** in order to self-quarantine as somehow establishing a policy that applied to remote work and a refusal to return to the office in the fact of a direct order to do so. None of these myriad (and in some instances overlapping and contradictory) documents constitutes a policy of CGIT that applies to this particular circumstance, and therefore, this "evidence" does not provide the basis for an inference that CGIT's stated reason for the denial of Plaintiff's request to work from home and termination was somehow pretext.

Furthermore, even if this evidence did somehow represent applicable policies, CGIT did not deviate from any of them. None of these so-called policies stated that CGIT had to grant

[12] In his Rule 56.1 response, Plaintiff denied that he testified that he ultimately did not feel safe to return to an in-person working until he received his second vaccination shot, arguing that Plaintiff stated, "That is not true." *See Pl. 56.1 Resp., ¶ 26*. While part of Plaintiff's deposition response is "That is not true", CGIT submits that Plaintiff has taken this quote out of context. A reading of pages 24-25 and 88-89 makes clear that Plaintiff did not feel it was safe to return to an in-person work environment until after his second vaccination shot. *See CGIT. Mem. Dkt*. #75 *Ex. 1, pp. 24-25, 88-89*.

requests to work from home no matter what and under any circumstances, even if it determined that an employees' presence was needed. None of the so-called policies dictated that CGIT could not terminate an employee who refused to come to work. The logical conclusion of Plaintiff's argument is that CGIT, which was deemed an essential infrastructure business, had to allow anyone and everyone to work from home for as long as they would like, lest it be in violation of its own policy. That simply cannot be the case.

II. Plaintiff does not have sufficient evidence to support his claim that CGIT retaliated against him for using earned sick time.

As is set forth in CGIT's Memorandum in Support of Summary Judgment, Plaintiff simply does not have sufficient evidence to support his claim that CGIT violated M.G.L. c. 149, § 148C by terminating Plaintiff's employment because the undisputed reason he was terminated was his failure to report to work on March 31. *See Def. Mem., Dkt. # 75, p. 20.*[13] Further, Plaintiff's evidence is simply insufficient to support that Plaintiff took any actions in retaliation for Plaintiff's use of earned sick time.

M.G.L. c. 149, § 148C applies to a very specific thing: earned sick time. *See M.G.L. c. 149, § 148C(c)* (defining earned sick time). It does not apply to vacation time[14], floating holidays, or requests to work from home. Therefore, all of the evidence that Plaintiff cites regarding the latter issues is simply irrelevant to this determination.[15] Plaintiff cites no evidence that CGIT prevented Plaintiff from using his remaining sick time, or that it stated any disagreement or problem with his doing so. In fact, the undisputed evidence is that Plaintiff requested and took his

[13] CGIT further references and incorporates the arguments it set forth in its Opposition to Plaintiff's Motion for Partial Summary Judgment. *See Def. Opp., Dkt. # 82, pp. 15-18.*

[14] The statute separately identifies vacation time, making clear that it is separate and distinct. *See M.G.L. c. 149, § 148C (k).*

[15] In addition to only addressing to "vacation time" and nowhere mentioning earned sick time, Kurt Allen's alleged statements as contained in Chelsie Krome's after-the-fact timeline that she constructed for the purposes of potential litigation against the company are inadmissible hearsay, and should not be considered by this Court at summary judgment. *See Def. Opp., Dkt. # 82, pp. 15-17.*

remaining sick time on March 30 without question or resistance. *Pl. 56.1 Resp.,Dkt. # 81, ¶ 11*. Finally, Plaintiff admitted that he understood that if he did return to work on March 31 – even after taking his remaining sick time on March 30 – he would not have been terminated and would still have his job. *CGIT Mem. Dkt. # 75, Ex. 1, pp. 185-186*. Since it is undisputed that Plaintiff would not have been terminated had he reported to work on March 31, even after using his sick time on March 30, the undisputed evidence demonstrates that it was his refusal to come to work on March 31 and not his use of sick time on March 30 that caused his termination.

Conclusion

For the reasons stated above, as well as the reasons stated in CGIT's Memorandum in Support of Motion for Summary Judgment, Plaintiff has failed to present sufficient evidence on any of his claims, entitling CGIT to summary judgment on all counts.

THE DEFENDANT,

CGIT SYSTEMS, INC.,

BY ITS ATTORNEYS

*/s/ Jed DeWick*_____

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Dated: January 13, 2023

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) or sent by first-class mail to any persons presently indicated as non-registered participants on this date.

/s/ Sarah E. A. Sousa

Sarah Sousa (BBO # 691089)
January 13, 2023

EXHIBIT 1

A. Yes, sorry.

Q. There is a lengthy answer here that doesn't make clear, in my mind, who made the decision to terminate Mr. Lin. So I am asking you, here today, who ultimately made the decision to terminate Mr. Lin's employment?

MR. DeWICK: Objection.

You can answer.

A. In this timeline, there was multiple decisions. But based on the responses and as it unfolded, usually it is a group discussion of what the options are and the best alternative. And the group decision was made to terminate Mr. Lin. That is the same procedure we do with any situation like this.

BY MR. SZAL:

Q. Who was involved in that decision?

A. To the best of my memory, it would have been Ken, myself, Kurt.

Q. Ms. Dupont?

A. She was involved in part of these decisions.

Q. Mr. Henderson, Tom Henderson?

A. I can't recall him being a part of the

final conversation.

Q. When you say, "final conversation," there was a telephone conference on March 30, the day before Mr. Lin was terminated, between you and Mr. Lavelle. Correct?

A. Yes.

Q. Did Ms. Dupont participate in that call?

A. I can't recall.

Q. Do you know if anybody else did, besides you two?

A. I can't recall. You would have to look at the meeting invitation.

Q. Okay. We will look at that.

It is fair to say, prior to that call, that Mr. Lavelle had presented two other options to you, other than terminating Mr. Lin's employment. Correct?

MR. DeWICK: Objection.

A. We were discussing various courses of action.

BY MR. SZAL:

Q. But he had specifically said in an email prior to that, that there were two additional options to terminating his employment. One was to

approve his vacation requested and the other was to ask him to apply for a general leave of absence. Correct?

MR. DeWICK: Objection.

A. Correct.

BY MR. SZAL:

Q. Who made the decision to not utilize either one of those options?

A. That was a group discussion. Mr. Lavelle had a conversation with Kevin Lin after that meeting, which I didn't participate. But during that meeting, Kevin took the position that he was not going to return until he felt safe, which was completely open-ended.

Q. So if Mr. Lavelle testified that the ultimate decision regarding Mr. Lin's employment came from Medway, that is not accurate?

MR. DeWICK: Objection.

A. It is mincing words. Typically, the management team makes their recommendation. Sometimes it is approved by people above us and sometimes it is not. So it is based on the facts. I said it was a group discussion, with all of the information we had, and that was determined to be

the best decision for the business.

BY MR. SZAL:

Q. These interrogatories were signed back in November of 2021. My question is, in interrogatory 10, you state, on behalf of the company, that it did not hire any individual to replace plaintiff. Is that still true?

A. Correct.

Q. So nobody was ever hired to replace him as senior project engineer?

A. No.

Q. If it was so crucial that Mr. Lin be in person in the office, in his role, why did the company not hire an individual to replace him?

A. It was based on workload. There was a critical project going on. People made extra effort to take care of that project and, based on the workload going forward, there is no additional need.

Q. Work slowed down after he was terminated? Is that what you are testifying to?

A. We were finishing projects, yes.

Q. When did the work start to slow down?

A. We are a large project business, so it

institute a reduction in force in early April 2020?

A. Yes. It was based on the impact on the business and the discussions with Ken.

Q. Whose ultimate decision was it? Would it have been yours or Ken's, or would it have been a collective?

A. In the meetings, it is a collective discussion. But ultimately, it is Ken, because he has final authority.

MR. SZAL: Off the record.

(Discussion off the record.)

(Exhibit 41, Request form from Joseph C. Giordano, Bates number CGIT001795 through 1798, marked for identification.)

BY MR. SZAL:

Q. Mr. Noel, I have placed in front of you a document that has been marked as Exhibit 41. This is a work-from-home request that has the name, Joseph C. Giordano, on it. Do you see that?

A. Yes.

Q. And if you look on page 1, he has checked off "telecommute." Correct?

A. Yes.

Q. On page 2, where it has places for a start