UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

YIYU LIN, Plaintiff, v. CGIT SYSTEMS, INC., Defendant.	)	C.A. 1:20-cv-11051

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,
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Dated: January 13, 2023

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NOW COMES the Plaintiff, Yiyu Lin ("Plaintiff"), by and through counsel, and hereby files this Reply Brief ("Reply") in Support of his Partial Motion for Summary Judgment ("Plaintiff's Motion"). Despite Defendant's rhetoric that Plaintiff's Motion is "preposterous" and "approaches frivolousness," nothing could be further from the truth. CDC guidance, provided and relied upon by Defendant, expressly provides that Plaintiff's medical condition, age, race/ethnicity, and work environment made his risk for a severe outcome from COVID-19 significantly high such that the Court can deem him disabled as of March 2020 as a matter of law when considering the totality of the circumstances. Where Defendant never challenged Plaintiff's medical condition at the time, including never seeking more information or documentation about it, and did not deny the request because it believed Plaintiff was not disabled, it should be estopped from making that argument now.

The Court can rule that Plaintiff's accommodation request (eight days of continued remote work) was reasonable as a matter of law, particularly in light of recent case law approving much longer requests. Defendant cannot seriously challenge that Plaintiff was able to perform the essential functions of his job remotely for eight days—all of the evidence conclusively demonstrates that he could and in fact did over weeks. Defendant also cannot seriously claim that it engaged in the required interactive process by merely calling Plaintiff with a return to in-person work ultimatum—this particularly the case where Defendant previously admitted there were several specific available reasonable alternatives. For all of these reasons, in addition to considerations of public policy, summary judgment should enter as to Count I.

It is undisputed that Defendant told its staff that it terminated Plaintiff to "make an example" of him in order to dissuade other employees from requesting time off. This is supported by the testimony and recorded recollection of a percipient witness, both of which are

admissible. Moreover, the declarant does not deny the statements, and instead claims lack of memory. This is not sufficient to support a denial under well-established principles of law. Accordingly, summary judgment should enter in Plaintiff's favor as to Count IV as well.

In further support of Plaintiff's Motion and this Reply, Plaintiff states as follows:

I. Plaintiff Is Entitled To Summary Judgment As To Count I.

A. CDC Guidance Relied Upon By Defendant Unequivocally Establishes That Plaintiff Was Disabled As Of March 2020 In the Context Of COVID-19.

CDC guidance provides that having hypertension can potentially make you more likely to get very sick from COVID-19. See SOF ¶ 85. Defendant attempts to cherry-pick a statement in other CDC guidance that with respect to hypertension, there is "mixed evidence." See Defendant's Exhibit 16, p. 7. Defendant ignores the most meaningful information in that guidance upon which it relies—namely, Plaintiff's age, race/ethnicity and work environment, in addition to his underlying health condition, placed him at higher and disproportionate risk of serious illness and death from COVID-19.[1]

1. Plaintiff's Age Made His Risk Of Death 25 Times Higher.

CDC guidance provides that "[a]ge remains the strongest risk factor for severe COVID-19 outcomes, with risk of severe incomes increasing markedly with increasing age." See Defendant's Exhibit 16, p. 2. "[T]he risk of death is 25 times higher in those ages 50-64 years old." See Defendant's Exhibit 16, p. 2. "Risk of severe outcomes is increased in people of all

[1] While Defendant cites to large numbers of hypertensive individuals for the proposition that Plaintiff was not disabled, this is not consistent with the "individualized inquiry" required. There is no evidence to show, for instance, that any of the 116 million alleged hypertensive Americans cited by Defendant are similar to Plaintiff in (a) being in an age bracket that significantly increases their risks (50-64); and (b) being a racial or ethnic minority which disproportionately increases their risk of death; and (c) being required to work in a location without safety precautions and where sick individuals with COVID-19 were present unbeknownst to workers other than management.

ages with certain underlying medical conditions and in people who are 50 years or older." See Defendant's Exhibit 16, p. 2. Accordingly, the CDC states that an employee's "age, vaccination status, and presence of other underlying medical conditions and risk factors" should be considered. See Defendant's Exhibit 16, p. 2.

It is undisputed that at the relevant time, Plaintiff was 55 years old, squarely within the range that elevated his risk of a severe outcome by 25 percent. That, combined with his unvaccinated status (no vaccine was available in March 2020), other underlying conditions (hypertension), and other risk factors (his race/ethnicity and Defendant's infectious Medway work location), must be considered per the CDC guidance Defendant relies upon.

2. Racial/Ethnic Minorities Such As Plaintiff Die Disproportionately From COVID-19.

CDC guidance provides that "[e]stimates of COVID-19 deaths in the U.S. show that people from racial and ethnic minority groups are dying from COVID-19 disproportionately." See Defendant's Exhibit 16, p. 2. "[P]eople from racial and ethnic minority groups are more likely to be infected with [COVID-19 and o]nce infected people from racial and ethnic minority groups are more likely to be hospitalized, be admitted to the ICU, and die from COVID-19 at younger ages." See Defendant's Exhibit 16, p. 2.

It is undisputed that Plaintiff is a Chinese-American and therefore a racial and ethnic minority. According to the CDC guidance, upon which Defendant relies, this disproportionately made him more likely to end up in a hospital ICU or morgue.

3. Plaintiff's Work Environment Must Be Considered.

CDC guidance provides that "other risk factors" should be considered. See Defendant's Exhibit 16, p. 2. To that end, the CDC is "still learning about how the environments where

people live, learn and work can influence the risk for infection and severe COVID-19 outcomes." See Defendant's Exhibit 16, p. 2 (emphasis added).

Here, it cannot be disputed that Defendant knew that sick employees, including those who likely had COVID-19, were coming into work. It hid this fact from employees in ordering them back to in-person work. At the same time, Defendant's corporate office in Texas was preventing Medway from implementing safety measures. See Document 80, pp. 5-9. Plaintiff's other risk factors—namely the illness spreading throughout the Medway facility that was not taking safety precautions—must be considered per CDC guidelines, relied upon by Defendant.

4. Medical Providers Themselves Are Encouraged To Work Remotely By The CDC.

CDC guidance provides that even medical providers should work remotely where possible. See Defendant's Exhibit 16, p. 7 ("Consider use of telehealth when appropriate."). This is consistent with the federal government's recommendation on March 16, 2020 to work from home whenever possible to slow the spread of COVID-19 for 15 days. See SOF ¶ 42. This is consistent with federal government's recommendation on March 31, 2020 (the day plaintiff was terminated), to continue to work from home whenever possible to continue slowing the spread of COVID-19. SOF ¶ 43. This is consistent with Defendant's policy to "arrange for telecommuting and working from home, when possible," which it did not follow with respect to Plaintiff. See ADD SOF ¶ 99.[2] This is consistent with the DOL and OSHA guidance to encourage, and in fact require, telework as an infection control strategy and reasonable accommodation. ADD SOF ¶ 102. This is consistent with the "Best Practices for Manufacturers," announced by the CDC and Vice President, which included working from home. See ADD SOF ¶ 104.

[2] ADD SOF refers to Plaintiff's Additional Statement of Undisputed Material Facts in response to Defendant's Motion for Summary Judgment. See Document 81.

At the time, every governmental agency was telling Defendant to allow remote work. Even today, the CDC is recommending doctors work remotely where possible. It is impossible to understand why Defendant drew an eight-day line in the sand with respect to Plaintiff in light of all of this guidance.

B. Plaintiff's Claim Of Disability Must Be Judged By The Totality Of The Circumstances In The Context Of COVID-19.

Persuaded by sister courts, this Court has found that "during the COVID-19 pandemic, whether a plaintiff has a disability should be judged by the totality of the circumstances, including the heightened risks of an impairment caused by the pandemic." Peeples v. Clincal Support Options, Inc., 487 F.Supp.3d 56, 66 (D. Mass. 2020), citing Silver v. City of Alexandria, 470 F. Supp. 3d 616, 621-622 (W.D. La. 2020). In Peeples, this Court found that the employee's "moderate asthma…qualifies as an impairment" that was likely to qualify as a disability, "at least during the COVID-19 pandemic." Id. at 62. In connection with that finding, there was nothing to suggest that the employee with moderate asthma was also at risk due to age, race/national origin and working conditions, as here.

In almost identical factual circumstances, the U.S. District Court for the Southern District of New York ruled that a hypertensive employee was disabled as a matter of law in the context of the COVID-19 pandemic—his age and body mass index were also considered, but not his race/ethnicity or working conditions. Goldman v. Sol Goldman Investments LLC, 20CV06727MKVSN, 2022 WL 6564021 (S.D.N.Y. Aug. 5, 2022); see also Arazi v. Cohen Brothers Realty Corp., No. 20-cv-8837 (GHW), 2022 WL 912940, at *7 n.5 (S.D.N.Y. Mar. 28, 2022) (citing May 20, 2020 guidance in support of conclusion that "an individual with an underlying condition that renders them more susceptible to COVID-19 ... has a disability for which they may seek an accommodation under the NYCHRL.")

C. Plaintiff's Accommodation Request For Eight Days Of Continued Remote Work Was Reasonable As A Matter Of Law.

This Court has recently found a significantly longer remote work request reasonable as a matter of law in the context of COVID-19. Peeples, 487 F.Supp.3d at 66. In Peeples, this Court found that an employee with moderate asthma was likely to prove he had a disability in the context of COVID-19, and found that a sixty-day remote work accommodation was reasonable as a matter of law. Id. In fact, the Court ordered the employer to provide the accommodation. Id.

Even aside from COVID-19, this Court has found as a matter of law that a four-week part time work accommodation was reasonable as a matter of law, and in fact so "eminently reasonable" that the Court was "puzzled" as to why the employer fought so hard against granting it voluntarily. See Ralph v. Lucent, 135 F.3d 166, 172 (1st Cir. 1998).

Here, Plaintiff was regarded as an excellent engineer, having just reached fifteen years of service with Defendant. He had been working from home successfully for weeks, as the vast majority of his job could be performed remotely. While working remotely, he made clear to Defendant that he was willing to come in to the office when in-person attendance was absolutely required for some tasks. Those tasks were never necessary during that time.

Plaintiff sought to continue to work remotely for a period of eight working days until April 7, 2020.[3] The period was not selected at random, but instead coincided with the Governor's

[3] Defendant's claim that Plaintiff sought "indefinite" remote work is nothing more than an "after-the-fact justification[], provided subsequent to the beginning of legal action." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56 (1st Cir. 2000). There is nothing within the more than 10,000 documents produced by Defendant that anywhere references Plaintiff's remote work request as being indefinite. To that end, Defendant did not deny Plaintiff's remote work request because it was indefinite. The only support for Defendant's assertion is self-serving testimony, which should be discredited "in light of the documented evidence." Bowers v. Colvin, CIV.A. 11-40229-TSH, 2014 WL 3530781, at *12 (D. Mass. Mar. 12, 2014), report and recommendation adopted sub nom. Bowers v. Astrue, CIV.A. 11-40229-TSH, 2014 WL

stay-at-home order at the time. The request was narrowly tailored, not open-ended or "indefinite."[4] This Court can find that the requested remote work accommodation of eight day—during the height of the COVID-19 pandemic in March 2020—was reasonable as a matter of law, and should certainly be puzzled why Defendant chose to "draw a line in the sand" with respect to Plaintiff (which is also evidence of pretext supporting his other discrimination claims).

"Once a plaintiff has made a showing that an accommodation seems reasonable on its face, as Plaintiff has here, the defendant then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." Peeples, 487 F. Supp. 3d at 64. Where an employer simply rejects an accommodation request, does not engage in a discussion with the employee and does not attempt to show undue hardship, the employee is entitled to summary judgment. See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 n.12, 650 (1st Cir. 2000) (reversing summary judgment for employer and granting judgment for employee where company had "simply rejected the request for the accommodation without further discussion and did so without pointing to any facts making the accommodation harmful to its business needs.").

Here, Defendant has not even attempted to claim undue hardship, nor could it. Beyond that fact, Defendant simply rejected Plaintiff's accommodation request without giving a reason, had no further discussion with Plaintiff other than reiterating that he must return to in-person work to keep his job, and did not point Plaintiff to any facts that would establish harm to the

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3530797 (D. Mass. July 14, 2014). The documented evidence, which includes the remote work request itself and multiple emails, all reflect an end date to the request of April 7, 2020.

[4] Despite claiming indefinite requests were non-starters, Defendant allowed at least three such requests, including one that sought remote work until "COVID-19 is over." SOF ¶ 74. Defendant admits, however, that if Plaintiff's request was limited to only one week (which it was), it would "probably not" have changed Defendant's evaluation. Lavelle Depo., 48: 12-21.

business. To the contrary, the undisputed evidence establishes that Plaintiff's termination, not his remote work, caused the company hardship.[5]

D. Plaintiff Could Perform The Essential Functions Of His Job As A Matter Of Law.

Of the nine items involved in Plaintiff's job description, eight could be performed completely remotely. SOF ¶ 11. One job function, project fabrication review, would be "difficult" to perform, but Plaintiff's manager could not say that it "100 percent, cannot be performed remotely." Allen Depo., 22: 3-8. Plaintiff's manager testified "Other than that, I think most of the other things could be done remotely."[6] Allen Depo., 22: 9-10. If an issue arose on the shop floor that needed in-person attendance, Plaintiff's manager could call him to come in, as he only lived twenty minutes away. SOF ¶¶ 14. To that end, Plaintiff offered during his remote work to come in should the need arise, which Defendant concedes is random in nature. SOF ¶¶ 13, 32. No project fabrication review was necessary during Plaintiff's remote work, SOF ¶¶ 34 or during the period he sought to extend the same.[7] It is also undisputed that it would have been

[5] Allen admitted that Plaintiff's termination caused a "hiccup" with a project he was working on, including "some delays on things." Allen Depo., 120: 3-8. Allen admitted that Plaintiff's termination "was not helpful" for a project he was working on at the time, making more work for him. Allen Depo., 85: 13-19. Krome testified that Plaintiff's termination caused "huge issues," to the point that Defendant's client considered "trying to dump [Defendant] from the project." Krome Depo., 64: 4-16.

[6] Similarly in Peeples, the Court credited the belief of the employee's immediate supervisor who believed that they could "perform the essential functions of the job while working remotely." Peeples, 487 F. Supp. 3d at 64.

[7] After being compelled to do so, Defendant also produced documents relative to work performed during the eight-day period that Plaintiff sought to continue remote work. Those documents contained hundreds of emails of employees collaborating on projects. Nowhere in those documents is there any indication of collaboration other than over email, phone or other electronic means. And of course, Defendant's Medway location was closed between April 3rd and 7th due to its COVID-19 outbreak, meaning in-person work could not be performed at all during that time. ADD SOF ¶¶ 69-70. Plaintiff will produce those emails to the Court upon

possible to have distributed this in-person duty to other employees. SOF ¶¶ 127. In fact, that is exactly what Defendant did after Plaintiff's termination.

Moreover, at the relevant time (March 27, 2020), Plaintiff's manager felt that he "was performing great work," and had "given 15 years of excellent service to the company." Allen Depo., 127: 12-17. Defendant's argument that somehow Plaintiff was not performing and could not perform the essential functions of his job remotely is yet another failed justification manifested for the purposes of defending its indefensible actions in this litigation. Santiago-Ramos, 217 F.3d at 56.

E. Defendant Failed To Engage In The Interactive Process As A Matter Of Law.

Defendant gave Plaintiff a return to in-person work ultimatum, and did not engage in the required "meaningful dialogue with the employee to find the best means of accommodating that disability." Peeples, 487 F. Supp. 3d 56 at 62. A "blanket" return to work order to ensure "efficient operation" does not comply with the interactive process requirement, which requires a "great deal of communication." Id. at 64. The employer has "at least some responsibility in determining the necessary accommodation." Id. at 64.

Defendant did not ask Plaintiff for any medical documentation concerning his medical condition. SOF ¶ 89. Defendant did not wait for Plaintiff to provide any documentation concerning his medical condition before terminating him. SOF ¶ 90. Defendant never offered Plaintiff an office with a closed door, admitting it has space in the building to do so, admitting it could have, and admitting that it would have been a reasonable alternative to termination. SOF

request, but has not done so given the voluminous nature of the documents and the speciousness of Defendant's argument.

¶¶ 106-107. Defendant did not offer Plaintiff altered working hours to limit his exposure to colleagues. SOF ¶ 105. The required interactive process did not happen.

F. Defendant Should Be Precluded From Arguing That Plaintiff Was Not Disabled And That It Had No Reasonable Alternatives To Termination Under Principles Of Estoppel.

The purpose of estoppel is "to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment." New Hampshire v. Maine, 532 U.S. 742, 749–750 (2001) (internal quotations and citations omitted). It "is an equitable doctrine invoked by a court at its discretion." Id. (internal quotation and citation omitted). Invocation of the doctrine is "probably not reducible to any general formulation of principle," but considers, among other things, if a later position by a party is clearly inconsistent and causes unfairness. Id. at 751. The United States Supreme Court recognizes that "inflexible prerequisites or an exhaustive formula for determining the applicability" of estoppel have not been established. Id.

At no point before receiving notice of Plaintiff's claims did Defendant take the position that Plaintiff's reasonable accommodation request of continued remote work for eight days was denied because Defendant believed that he was not disabled.[8] This is simply a legal argument manufactured to avoid clear liability.[9] Defendant did not "request additional information about his conditions and limitations." See Goldman, 2022 WL 6564021, at *8 and SOF ¶ 89.

[8] Massachusetts law also protects employees who are "regarded as having" a disability." See G.L. c. 151B, § 1 (17). An employer who receives an accommodation request based on a medical condition who does not challenge that condition at the time should be viewed as "regarding" such employee as disabled for the purposes of the request.

[9] Lavelle testified on behalf of Defendant: "The basis of our denial was that he had already worked from home two weeks, we thought he provided a good working environment, and we need an engineer on the job." Lavelle Depo., 48: 3-9. Defendant does not have doctors, nurses or trained people to consider medical conditions in any event. ADD SOF ¶ 57.

Defendant did not wait for Plaintiff to provide information from his doctor before terminating him. SOF ¶ 90. Where Defendant did not challenge Plaintiff's medical condition at the time, and admittedly did not make its decision to deny Plaintiff's accommodation request based on evaluation of his medical condition, it should be estopped from claiming now, for the purposes of litigation, that Plaintiff was not disabled.[10]

Defendant also previously admitted that there were reasonable alternatives to Plaintiff's termination that could have been discussed between Plaintiff and Defendant. See Exhibit PP, attached hereto, p. 7 ("**[Plaintiff] Had Reasonable Alternatives.**"). Among other things, Defendant's position previously was that providing Plaintiff "different hours than most of his colleagues to limit exposure" was a reasonable alternative. See Exhibit PP, p. 7. Defendant's position previously was that assigning Plaintiff "an office with a door" was a reasonable alternative. See Exhibit PP, p. 7. Defendant's position previously was that providing Plaintiff "with PPE similar to what health care providers use" was a reasonable alternative. See Exhibit PP, p. 7. It is undisputed that Defendant did not propose any of these options to Plaintiff, and instead called him only to ask that he reconsider Defendant's return to in-person work ultimatum. Defendant should be estopped from arguing that reasonable alternatives were not

[10] As Defendant notes, a significant portion of the population is disabled. The Court should consider the effect on disability law if employers were allowed to deny accommodation requests out of hand without consideration or evaluation of an employee's medical condition, force that employee to vindicate their rights through years of litigation, and then years later claim that the employee was not disabled, which was not considered by the employer at the time and not the basis for its decision. This is the type of "fast and loose" argument that should be prevented per the Supreme Court. See Maine, 532 U.S. at 750. Where an employer receives a reasonable accommodation request, does not seek further medical information, and does not deny the request on the basis that the employee is not disabled, it should be estopped from arguing in litigation that the employee was not disabled. To the extent that Massachusetts law does not speak to this precise point, the Court may certify the question to the Supreme Judicial Court.

available through the interactive process (which Defendant did not engage in) and that it had no reasonable alternatives other than terminating Plaintiff's employment.

G. Considerations Of Public Policy Support Granting Plaintiff Summary Judgment.

This Court has recognized that there is a public interest in these types of employment matters. In Peeples, this Court recognized that the employer "performed critical work for a vulnerable population." Peeples, 487 F. Supp. 3d at 66. It was established that the employee in Peeples "had the skills necessary to serve [the employer's] clients," and that the termination of the employee's employment "may negatively impact public health." Id.

Similarly here, Defendant likes to beat its proverbial chest in stating that it is in the "critical infrastructure industry" and had been deemed "part of an essential industry." It goes without saying with 15 years of experience with Defendant, Plaintiff was admittedly one of Defendant's best engineers and had the skills to serve Defendant's clients. As predicted in Peeples, Plaintiff's termination did negatively impact Defendant's clients, as noted above. Summary judgment is proper where Plaintiff's termination was contrary to public policy.[11]

II. Plaintiff Is Entitled To Summary Judgment As To Count IV.

Defendant's manager (Allen) told employees the day after Plaintiff's termination that the company was "making an example" of Plaintiff after he exhausted his lack sick day. SOF ¶ 146.

[11] It must also be stressed that Plaintiff's remote work accommodation request was consistent with the protection of everyone's health and welfare. As noted to his manager, he was following CDC recommendations, See Defendant's Exhibit 5, following state guidance, See Defendant's Exhibit 9, following the request of the Governor "in order to help dampening the spread of the COVID-19 Virus," Defendant's Exhibit 6, and following federal guidance to slow the spread of COVID-19. See SOF ¶¶ 42-43. The Court may consider that Plaintiff was following "legislative expressions of public policy," Smith v. Mitre Corp., 949 F. Supp. 943, 949 (D. Mass. 1997), and that employees are protected when they "refuse to participate in activity that presents a threat to public health or safety." Elliott-Lewis v. Abbott Laboratories, Inc., 411 F. Supp. 3d 195, 208 (D. Mass. 2019).

Plaintiff's vacation request was not approved, and Allen told staff that other such requests would not be approved if they were issued in order to stay home due to COVID-19. SOF ¶ 147. Krome testified to this under oath, and contemporaneously recorded her recollection in a diary-type entry.[12] See Exhibits S and T. Allen's statement is not hearsay where it is an admission, and Krome's written statement is a recorded recollection, an exception to hearsay. Further, Allen cannot deny that he made the statements; his mere lack of memory as to these statements and in these circumstances does not serve as a denial, but rather confirmation that the statements were in fact made. Where the undisputed testimony establishes that Plaintiff's termination was retaliatory in violation of G.L. c. 149, § 148C, summary judgment should enter in Plaintiff's favor as to Count IV.

A. Statements Attributed To Plaintiff's Manager By Krome's Are Not Hearsay.

"[T]he Federal Rules of Evidence define admissions by a party-opponent as 'not hearsay.'" Vazquez v. Lopez-Rosario, 134 F.3d 28, 34 (1st Cir. 1998), citing Fed. R. Evid. 801(d)(2). Statements "by a party's agent or servant within the scope of the agency or employment" qualify as admissions under Rule 801(d)(2) Id., citing Woodman v. Haemonetics Corp., 51 F.3d 1087, 1093–94 (1st Cir. 1995).

It is undisputed that Allen was Defendant's manager and Plaintiff's direct supervisor, even though that would not be required to qualify as an admission. Union Mut. Life Ins. Co. v. Chrysler Corp., 793 F.2d 1, 8 (1st Cir. 1986) ("nothing in Rule 801(d)(2)(D) that requires an admission be made by a management level employee."). It is undisputed Allen's statements

[12] Krome's email is not offered as a business record under Rule 803(6), but there is no evidence that Krome's email was "prepared for litigation" in any event. In fact, Krome never brought a claim against Defendant, even though she felt she was retaliated against, because it was her "first job," she decided to "move on" and didn't want the "headache" of reliving her retaliatory termination. Krome Depo., 116: 1-13.

were made during a company meeting and during work hours, at Defendant's Medway location—in other words, within the scope of his employment. Krome's testimony as to what Allen said is unquestionably admissible as non-hearsay admissions.

B. Krome's Email Is A Recorded Recollection.

An adverse party may admit as an exhibit "a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable h[er] to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in h[er] memory and to reflect that knowledge correctly." See Fed. R. Evid. 803(5). "The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." See Notes to Fed. R. Evid. 803(5), citing Owens v. State, 67 Md. 307, 316 (1887).

Here, it is undisputed that Krome had personal knowledge of the statements made by Allen, as they were made to her (and others) in a company meeting. When asked if her memory of events was better in April 2020 or when she gave her deposition (November 16, 2021), Krome testified "100 pecent, it was better when I drafted this email." Krome Depo., 60: 8-13. As a virtually contemporaneous diary of the events on March 2020, Krome's email bears the trustworthiness guarantee that provides justification for the long-recognized hearsay exception.

C. Defendant Admits The Statements Were Made Where It Cannot Deny Them.

Massachusetts law recognizes that "[t]here are instances where the failure of one to deny a statement adversely affecting his rights may constitute an admission provided the statement is of such a nature and is made in such circumstances as to call for a reply." Mendelsohn v. Leather Mfg. Corp., 326 Mass. 226, 238 (1950). "The trial judge plays a screening role in ruling whether a party (or, as here, its agent) has adopted an admission by

silence." Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 67 (1st Cir. 2002). "In making the evaluation, the trial judge considers the nature of the statement, the identity of the person offering the testimony, the identity of the maker of the statement, the context, and whether the circumstances as a whole show that the lack of a denial is so unnatural as to support an inference that the undenied statement was true." Id.

Lack of memory does not constitute a denial; in fact, jurisprudence from the United States Supreme Court provides that "[n]o legal alchemy can transmute such wholly equivocal testimony into a denial or refutation of…specific recitation of events." Haynes v. State of Wash., 373 U.S. 503, 510 (1963) (detective "did not deny….said merely that he could not 'remember'"). "The mere routine answer of 'I don't remember' is not enough to shield a man from the consequences of some statement that he had made a previous time." Langan v. Pianowski, 307 Mass. 149, 152 (1940).

Here, there has been a specific recitation of events concerning statements made by Allen. With respect to the statements attributed to him by Krome, Allen testified "I don't remember saying them. I just don't recall that. I recall telling them that [Plaintiff] was terminated and that is all I recall from that conversation. I don't recall any of this other stuff." Allen Depo., 148: 21-23; 149: 2-6. Allen did not deny that he made the statement, only stated (repeatedly) that he did not recall and "can't honestly say." Allen Depo., 146: 19-24; 147: 1-24; 148: 1-24; 149: 2-6. Allen made clear that he was not denying the statements:

> Q: Just to be clear, with these statements, you are saying you don't recall; you are not testifying under oath that you did not make those statements. Correct?
>
> A: Correct, I am saying I don't remember making those statements.

Allen Depo., 151: 4-9.

Considering the nature of the statement ("making an example" of Plaintiff), the identity of the person offering the testimony (an employee who was present), the identity of the maker of the statement (Defendant's manager), and the context (sending a message to all other employees at a time when Defendant wanted to reign in employees requesting time off when Allen had been given "no latitude" from corporate headquarters), Allen's silence through lack of memory should not shield Defendant from liability. Allen's failure to deny such consequential statements is so unnatural so as to support an inference that the undenied statements are true—Defendant terminated Plaintiff to make an example of him, immediately after he took his last sick day, to send a message to other employees about not requesting time off, be that sick, vacation or otherwise.

III. REQUEST FOR RELIEF

WHEREFORE, Plaintiff, Yiyu Lin, respectfully requests that this Honorable Court GRANT his Motion for Partial Summary Judgment as to Counts I and IV, and issue an order scheduling a trial on damages only as to these claims.

Respectfully submitted,
YIYU LIN,
By his attorney,

/s/Mark D. Szal_____
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Dated: January 13, 2023

Certificate of Service

I, Mark D. Szal, hereby certify that on January 13, 2023, a true and correct copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/Mark D. Szal
Mark D. Szal

EXHIBIT PP

DEFENDANT'S RESPONSE TO OSHA
TO BE FILED UNDER SEAL