

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION	)	
AGAINST DISCRIMINATION &	)	
SAID ZAKI YATIM	)	
Complainant	)	
	)	
v.	)	Docket No. 97-BEM-0332
	)	
	)	
BRONNER SLOSBERG HUMPHREY	)	
Respondent	)	

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Appearances:

Robert L. Hernandez, Esq., for Complainant Said Zaki Yatim  
Wilfred J. Benoit, Jr., Esq. and Jeffrey S. Siegel, Esq.,  
for Respondent Bronner Slosberg Humphrey

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 6, 1997, Complainant Said Zaki Yatim filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged Bronner Slosberg Humphrey (hereafter: "Respondent") with discrimination based on Complainant's national origin (Lebanon) in violation of Massachusetts General Laws, Chapter 151B, §4, paragraph 1. Complainant alleged that Respondent discriminated against him because of his national origin when it terminated him on August 12, 1996. (Complaint, dated February 6, 1997).

Attempts to conciliate this matter were unsuccessful. On June 4, 2001, Investigating Commissioner Dorca I. Gomez certified this case for a public hearing.

I held a public hearing in this case on April 22 and 23, 2003. On July 22, 2003, Respondent filed its proposed findings of fact and memorandum of law with the Commission. On July 23, 2003, Complainant filed his proposed findings of fact and conclusions of law with the Commission. On August 13, 2003, Respondent filed a motion to strike portions of Complainant's post-hearing submission and Complainant filed his opposition to Respondent's motion to strike.<sup>1</sup>

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

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<sup>1</sup>I have denied Respondent's motion to strike portions of Complainant's post-hearing submission as of the date of this decision

## II. Findings of Fact

1. Complainant, Said Zaki Yatim, lives in North Grafton, Massachusetts, with his wife and two children (ages four and seven months). (Joint Stipulation No. 1). Complainant was born in Lebanon and came to the United States on January 17, 1985. Complainant speaks English with an accent.

2. In 1985, Complainant enrolled in an English as a second language program at Boston University that lasted one year. In June 1990, Complainant received a bachelor's of science degree in electrical engineering technology from Northeastern University. In June 1993, Complainant received a master's degree of science in information systems from Northeastern University.

3. Respondent is an Internet professional services firm that helps clients with their direct marketing over the Internet. Respondent is currently conducting business under the name of "Digitas" and its principal place of business is Boston, Massachusetts. (Joint Stipulation No. 1). At all times relevant to the instant complaint, Respondent was an employer within the meaning of General Laws, Chapter 151B, §1, paragraph 5.

4. Complainant worked for Respondent from June 6, 1994 until August 31, 1996. (Joint Stipulation No. 2). Respondent hired Complainant to work as a systems developer in the business systems group of its Information Technologies (IT) department at an annual salary of \$29,500.00. (Joint Exhibit No. 9). James Warren, a

project manager, directly supervised Complainant until April 1995 when Joe Pezzulo, then the manager of the business systems group, became Complainant's immediate supervisor. (Joint Exhibit No. 16). Pezzulo directly supervised Complainant until May or June 1996. (Joint Stipulation No. 4).

5. Based on his systems developer's job position, Complainant was expected to provide "expert and innovative systems design solutions which aid in the meeting of client marketing objectives and agency business objectives." Among his responsibilities, Complainant worked as a programmer on software applications, analyzed the effectiveness of current information systems and customized software with detailed computer codes. (Joint Exhibit No. 18 and Complainant's Exhibit No. 1).

6. Prior to working for Respondent, Complainant worked from April 1993 to June 1994, as a technical representative or support engineer for Corporate Software, Inc. in Canton, Massachusetts. During his employment at Corporate Software, it became Stream International, Inc. (Stream). While working at Corporate Software-Stream, Complainant provided technical support, by telephone, to individuals who used Microsoft software products anywhere in the United States. (Respondent's Exhibit No. 2).

7. From June 3, 1996 to November 1998, Scott E. Kitlinski was Respondent's vice president of information systems and services and managed its Information Systems and Services (ISS) Department. (Joint Exhibit No. 17). In this

position, Kitlinski reported to Bob Stoloff, Respondent's Chief Financial Officer.

8. Robert Lem worked for Respondent from 1992 to 1999. From 1992 to early 1996, Lem was the manager of information systems and was responsible for Respondent's IT department that included desktop, network and application services. In early 1996, Respondent promoted Lem to vice president of information technology or information systems. (Joint Exhibit No. 16).

9. Richard Thompson worked for Respondent from 1991 to 1997 as a systems developer and a systems designer. He worked with Complainant in 1995 and 1996 on Respondent's business management model which was designed to enable Respondent's internal and external customers to enter parameters of a direct marketing program. The business management model was a fairly complicated computer program that was written in Foxpro.

10. Peggy Heeg has worked for Respondent since 1989.<sup>2</sup> During the time period relevant to the instant complaint, Heeg was Respondent's senior vice president of human resources. In this position, Heeg oversaw compensation and benefits, recruiting, training and employee relations.

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<sup>2</sup>Heeg is also referred to during the hearing as Peggy Jane Novello. Heeg did not appear at the public hearing and the parties agreed to introduce excerpts of her deposition taken on August 8, 2000.

Complainant's Work Performance at Respondent

11. On September 22, 1994, Warren gave Complainant a positive three-month performance review. (Complainant's Exhibit No. 1). Complainant received an overall rating of "usually meets expectations" on his six-month and annual performance reviews, dated February 9 and March 1, 1995, respectively. (Complainant's Exhibit Nos. 2 and 4). Based on his annual performance ratings, Respondent awarded a merit increase to Complainant, effective March 1, 1995, in the amount of \$1,083.01, or 3.67%, and a bonus in the amount of \$855.04. (Complainant's Exhibit No. 5).

12. On May 2, 1995, Respondent increased Complainant's annual salary by 20%, or \$6,416.99, effective April 24, 1995. (Complainant's Exhibit No. 3). On May 18, 1995, Respondent increased Complainant's annual salary by an additional \$1,000.00. Effective April 24, 1995, Complainant's annual salary was \$38,000.00.<sup>3</sup> (Complainant's Exhibit No. 6).

13. On October 19, 1995, Pezzulo assigned Complainant an overall rating of "usually meets expectations" on a supplemental performance evaluation. (Complainant's Exhibit No. 7).

14. On March 1, 1996, Complainant's position changed from a systems developer to a systems designer. Complainant's primary responsibilities as a systems designer were to write code, enhance functionality and perform some unit

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<sup>3</sup>Complainant testified that his \$1,000.00 salary increase represented an adjustment to his annual salary because of an error made by Respondent's human resources department.

testing. Complainant's duties did not change significantly when he assumed his systems designer position, except that he had increased contact with internal clients. (Joint Stipulation No. 5).

15. Complainant was "very excited, very energetic, very happy" about his new responsibilities because he would be dealing with more employees throughout Respondent and would be more actively working on various projects. In his new position, Complainant's salary increased from \$38,000 to \$44,000.00. (Complainant's Exhibit No. 9).

#### Stream's Audit and Recommendations in 1995-1996

16. From July 1991 through May 1996, Kitlinski was Stream's manager of IT consulting and managed a team of consultants who provided integration and consulting services for clients. In this position, Kitlinski interviewed Complainant in 1994 and approved him for hire into his technical representative position at Stream. I credit Kitlinski's testimony that he never had any concerns about Complainant's ability to communicate with Stream's customers.

17. In late 1995 or early 1996, Respondent contracted with Stream to audit its entire technology department and IT services. The audit was designed to assess the condition of its IT infrastructure and evaluate how Respondent could use its technology to get a competitive advantage while servicing its clients' needs. Kitlinski managed and directed the Stream audit which was conducted from December 1995 through February 1996. (Joint Stipulation No. 6).

18. Under Kitlinski's direction, Stream's audit proceeded on parallel tracks. One group of consultants assessed Respondent's technology, its infrastructure, made recommendations on how to better manage the technology and identified investments for improvement. Another group conducted interviews with Respondent's employees across business lines to understand their requirements from an information technology perspective, how they were being met and to determine their perspective of the IT department as a service provider.

19. Prior to Stream's audit, Respondent divided its IT Department into two groups: information systems and business systems. The information systems group focused on computer hardware while the business systems group focused on software applications; specifically, developing, implementing and improving computer systems both internally and externally for Respondent's clients. (Joint Stipulation No. 3).

20. Complainant, Thompson, Fay Hou (systems designer) and Brian Kreisinger (systems designer) were in the business systems group under Pezzulo's direction. (Joint Exhibit No. 16). Hou and Complainant were responsible for core development work and building applications while Thompson primarily customized package applications. Prior to Kitlinski's arrival at Respondent, Kreisinger also worked on core development for the IT department. Anthony Tumino was an independent consultant who also worked for the business systems group from 1995 to 1996 and developed databases and applications.

21. Upon completion of its audit, Stream recommended several changes for Respondent's IT department and infrastructure: (1) consolidate the information systems and business systems groups; (2) hire a Chief Information Officer (CIO) or an individual at a vice president level who would have total responsibility for the consolidated groups; (3) improve and centralize the help desk to provide more effective support services within Respondent; (4) provide more collaborative software to allow the advertising and marketing departments to share information, documents and strategies; (5) purchase software from outside vendors and customize or configure it rather than build new software applications. Kitlinski believed that it was more effective strategy to "buy" rather than "build" technology, if Respondent could successfully achieve 85% of its needs through "off-the shelf" programs.

22. In late June or early July 1996, Respondent adopted Stream's audit recommendations and combined the business systems and information systems groups into a single information systems & services (ISS) department. On June 3, 1996, Respondent hired Kitlinski as the vice president of information technology to manage the ISS department.<sup>4</sup> When Kitlinski assumed his new duties, he began to directly supervise Complainant.

23. Under the new organizational structure, Lem became the vice president-director of operations and reported directly to Kitlinski. Lem was responsible for the ISS department's

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<sup>4</sup>Kitlinski's title later changed to vice president of information systems and services.

operations and also directly supervised the three managers who headed up desktop support and services, network services and application services. (Joint Exhibit No. 17).

24. Lem began supervising Complainant in July 1996 and gave him assignments for existing applications, maintenance and administration tasks. Since Respondent had an open floor plan, Lem saw Complainant on a daily basis although he did not have a lot of interaction with Complainant.

25. Lem testified that, in July 1996, Complainant worked on various projects: maintenance of a time sheets program; the True Rewards Program; an application system for one of Respondent's clients; miscellaneous tasks on other existing programs. Complainant also assumed primary responsibility for the time sheets program when Hou left Respondent sometime in August 1996. (Complainant's Exhibit No. 20). I credit Lem's testimony.

26. The ISS' organization chart shows that Lem had supervisory authority over Complainant through the manager of application services position which was vacant in July-August 1996. (Joint Exhibit No. 17).

27. Lem never participated in any client meetings during which Complainant was present.

28. Kitlinks signed Complainant's time sheets for the weeks ending June 14, 1996 through August 23, 1996. (Complainant's Exhibit No. 19).

29. Consistent with Stream's audit, Kitlinski decided to change the ISS department's focus; specifically, move from building its applications to buying package applications and customizing them to meet Respondent's IT needs. Kitlinski assigned the systems designers and systems developers, including Complainant, to the application services group. Kitlinski also changed the name of Complainant's work group from "application development" to "application services" to reinforce Respondent's change in direction for the IT department. Since Kitlinski did not hire a manager for application services until early 1997, all of the systems developers and systems designers, including Complainant, reported directly to Lem and Kitlinski. (Joint Exhibit No. 17).

30. Consistent with Respondent's change in its underlying approach to IT services, Kitlinski decided strategically to buy software from outside vendors and not to build applications; thereby, substantially decreasing core development. In June or July 1996, Kitlinski had not yet decided tactically what specific software tools and/or programs to buy.

31. At the end of June or beginning of July 1996, Kitlinski held a department-wide meeting to share his initial thoughts about the current state of the ISS; namely, that the ISS had a poor reputation within Respondent as a service provider and that the other departments at Respondent perceived ISS as not responsive to internal user needs. During the meeting, Kitlinski also discussed his views about the "build/buy" software programming issues and told the entire department that Lem

was responsible for the designer and developer groups on an interim basis.

32. Beginning in June 1996, Kitlinski also held individual meetings with all ISS employees to explain the organization changes Respondent had implemented and the reasons for such changes. Kitlinski also wanted to learn what the employees were working on, what expectations they had of him and get their input on what they could do as a team to better serve Respondent's IT needs.

33. Kitlinski had two meetings with Complainant prior to implementation of the ISS reorganization. In late June 1996, they met to discuss Complainant's job duties and responsibilities and Kitlinski's expectations for the ISS department. Kitlinski told Complainant that he planned to hire an experienced project manager who would supervise Complainant and that Complainant would be able to advance within Respondent. Complainant was very "happy" and encouraged by Kitlinski's comments and offered his support.

34. Kitlinski also met with Complainant over lunch in July 1996. They discussed their prior work at Stream and the progress Kitlinski saw at the ISS department.

35. After these meetings, Kitlinski asked Complainant to find training classes for himself and Thompson. Complainant found training classes in Lotus Notes, Sibase and New Horizon and forwarded them to Kitlinski who did not approve them. Complainant found a class in Sibase because he was assigned to take over some of Hou's duties because she had announced that she was leaving Respondent.

36. Kitlinski had two discussions with Complainant about training on Lotus Notes and Windows NT that Pezzulo had already proposed for Complainant. Kitlinski testified that he told Complainant that he did not see the relevance of Windows NT training and that it was an open issue as to whether the ISS department was going to use Lotus Notes as a platform in the future. Kitlinski also testified that there was a significant market of software providers who prebuild Lotus Notes and sell them for installation. While Complainant believed there was a prior commitment to proceed with the training, Kitlinski felt that it would have been fiscally imprudent to send an employee to training unless absolutely necessary. I credit Kitlinski's testimony regarding training.

37. During the summer of 1995 or 1996, Thompson took a course at Stream on Lotus Notes development. He took the course in anticipation that Respondent would have more Lotus Notes programs to develop and support. Thompson worked on a customized time sheet application which was redeveloped for the web. Thompson testified that Respondent initially developed the time sheet application in Excel and brought in independent consultants to develop a prototype in Lotus Notes. Thompson testified that the prototype did not work in Lotus Notes because it could not handle simultaneous requests for multiple time sheets. Respondent released the contractors and developed the time sheet applications in house without using Lotus Notes. I credit Thompson's testimony.

August 12, 1996 Meeting

38. After his department-wide announcement regarding the ISS organizational changes, Kitlinksi was concerned because he felt that Complainant was a "bit more reserved, withdrawn, wasn't as enthusiastic as he had been" when Kitlinski first joined Respondent.

39. While Complainant's job performance was satisfactory, Lem observed that Complainant "seemed quieter than usual, not as talkative . . . didn't seem happy" and "was especially quiet" in meetings during this period. Lem's opinion was based on his general observations of Complainant and not any specific conversations with him. Lem and Kitlinski discussed their concerns about Complainant's apparent attitude or lack of enthusiasm and decided to meet with him. Both Kitlinski and Lem attributed Complainant's diminished enthusiasm to the ISS department's change in direction from core development.

40. Kitlinski and Lem met with Complainant on August 12, 1996. Kitlinksi began the meeting by discussing the changes in direction for the ISS department, what the changes meant and asked Complainant whether he agreed with the new direction and how he wanted to use his skills. Kitlinski told Complainant that he "didn't seem to be himself" and that he "seemed very--kind of withdrawn from the group and keeping to himself a bit, didn't have quite the energy and enthusiasm about what he was doing."

41. Lem shared similar comments and observations about Complainant's enthusiasm level as Kitlinksi's. Lem

emphasized that, since Respondent was seeking to "set a new tone" for the ISS department, they wanted to ensure that the entire staff was supportive of the new ISS themes or direction when they dealt with internal clients. Lem told Complainant that they were concerned that he might send a "mixed message" to some of Respondent's internal clients about the ISS department's new strategic commitment if he did not agree with or support the new IT direction. Complainant responded by telling Kitlinski that he was uncertain as to his job expectations and to whom he reported.

42. Kitlinski acknowledged that the ISS department's philosophy and structure had significantly changed and offered two options to Complainant. Kitlinski told Complainant that they would develop a career development plan to help him to be a successful employee, if Complainant supported the ISS department's new "direction" for software applications. Alternatively, Kitlinski and Lem told Complainant that they would help him to pursue core development opportunities elsewhere if he felt that the ISS' new direction was not aligned with his professional goals; specifically, to perform core development.

43. Complainant asked Kitlinski and Lem why they were giving him an option of one month's severance pay or placement on a career development plan. Complainant testified, at the hearing, that Lem responded by telling him, "You have not shown any enthusiasm in the last two weeks and I do not trust you running meeting[s] with

clients with the way you talk and speak with your accent.”  
I do not credit Complainant’s testimony.

44. In his letter to the Commission, dated April 17, 1997, Complainant referred to Lem’s comments during the August 12 meeting and wrote that . . . “I did not understand why I was being given this option and asked for an explanation. Mr. Lem responded by saying, ‘I haven’t seen any enthusiasm from you in the past two weeks and I can not trust you running a client meeting because of the way you present yourself or talk.’ I took this to be a direct comment about my accent and the impact a speaker with such an accent would have on clients.” (Respondent’s Exhibit No. 1). Complainant testified that he inferred that Lem was referring to his accent. (Respondent’s Exhibit No. 1).

45. Lem and Kitlinski deny that Lem referred to Complainant’s accent during the August 12 meeting or that they discussed his accent before the meeting. Lem testified that his comment focused on his concern about Complainant giving mixed messages to internal clients regarding the new strategic initiatives for the ISS department. Lem and Kitlinski also testified that, in their opinion, Complainant’s accent did not affect his ability to perform his job duties at Respondent. I credit their testimony.

46. Complainant testified that he was “very, very surprised” and “shocked” by Lem’s alleged statement about his accent. Complainant testified that, prior to the meeting, no one at Respondent had discussed a career development plan with him or indicated that his job

performance was deficient and/or needed improvement.

Complainant testified that, immediately prior to the August 12 meeting, he had received positive feedback on the True Rewards Support project-a Foxpro application-that he worked on with Thompson. (Complainant's Exhibit Nos. 10 and 11).

47. Complainant believed that a career development plan was normally used to address an employee's performance deficiencies with monitoring by a supervisor. Heeg described a career development plan as a document that Respondent's employees developed with their managers to identify and discuss their goals and objectives for a performance year. Heeg also testified that Respondent's human resources policy encouraged but did not require employees to have career development plans. I credit Heeg's testimony.

48. Kitlinski did not recall giving Complainant a time deadline or time frame for making a decision. I do not credit Complainant's testimony that, at the end of the meeting, Kitlinski told him that he had to give a response within two days.

49. Complainant testified that he left the meeting and was very upset and was shaking. He met Thompson and told him what had happened to him at the meeting.

50. Thompson testified that Complainant was visibly upset, nervous and was concerned for his job. Complainant told Thompson that he felt Kitlinski and/or Lem "were out to deprive him of his job," probably Lem more than Kitlinski, and that they told him that "he was going on some type of

probation." Complainant told Thompson that Kitlinski and Lem had discussed one employee who gave him less than positive feedback and that there was some personal animosity with Lem or one of his reports. Thompson did not recall whether Complainant told him that Lem had used the term, "communication" or "language" during the meeting. I credit Thompson's testimony.

51. Complainant also talked with Hou, Tumino, Ken Lawrence, Warren and Pezzulo before he left work on August 12. Tumino testified that Complainant initially told him that Kitlinski or Lem were going to fire him because of his performance or lay him off. Tumino also testified that Complainant told him that Lem and Kitlinski made some comments about his "nationality" and told him that some employees did not understand him when he spoke. I credit Tumino's testimony.

52. Thompson testified that he had no trouble understanding Complainant and did not observe or hear Complainant have any language problems. Thompson also testified that Complainant was a good communicator with other employees. Tumino testified that he spoke to Complainant and never found that "his English was not good enough." I credit their testimony.

53. Complainant testified that he was in shock and was very upset when he went home on August 12. Complainant testified that he didn't eat, couldn't sleep all night and smoked the entire night on his balcony. Complainant also testified that he began to feel "very down" and lost his self-confidence a few days later. Complainant testified

that he was withdrawn in his new work and felt like he should not participate in any meetings if his accent was a "problem." Complainant also testified that he felt ashamed of his national origin and felt that he had not accomplished "anything" since he came to the United States. I credit Complainant's testimony.

54. Hou left Respondent sometime in August 1996. Lem and Kitlinski testified that Hou and Kreisinger told them that they decided to resign and leave Respondent because they wanted to focus on core development rather than customizing off-the-shelf applications.<sup>5</sup> I credit their testimony.

55. Lem, Kitlinski and Complainant knew about the pending resignations of Kreisinger and Hou prior to their August 12 meeting.

56. Complainant again met with Kitlinski on August 14 or 15, 1996 to discuss his situation. When Complainant questioned Kitlinski about the one-month severance pay period, Kitlinski offered to extend it to six weeks. Complainant also questioned why Lem attended the August 12 meeting when Lem was not his supervisor. Complainant testified that Kitlinski did not respond to his questions. I credit Complainant's testimony.

57. After his meeting with Kitlinski, Complainant met with Heeg and showed her a memorandum, dated August 8, 1996, to give her an example of his work with other team members. (Complainant's Exhibit No. 10). Heeg told Complainant that

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<sup>5</sup>Heeg testified that Hou and Kreisinger did not receive severance pay upon their separation from Respondent because they voluntarily resigned.

she would set up another meeting between Kitlinski and him to discuss his situation.

58. On August 19, 1996, Kitlinski prepared and e-mailed a memorandum to Complainant, entitled, "Position requirements and expectations," so that he would have a record of their discussion on August 12. Kitlinski drafted the memorandum to "provide direction and definition [to Complainant] as a system developer on the Application Services team" and discussed it with Lem before he sent it to Complainant. In his memorandum, Kitlinski attached an organization chart for ISS and a revised position description that listed Complainant's key responsibilities and reporting relationships.<sup>6</sup> One job duty that Kitlinski described in the memorandum was to "customize off-the-shelf software solutions as needed." Kitlinski's memorandum also described Complainant's current and proposed projects and noted that Complainant reported to Lem in the absence of a manager of application services. (Joint Exhibit No. 2).

59. In his memorandum, Kitlinski also set up a weekly schedule for Complainant to meet with Lem and Kitlinski to review his projects. Kitlinski also attached a template for a weekly status report. (Joint Exhibit No. 2). Kitlinski testified that he prepared a weekly status report form to ensure that Complainant understood his work assignments, including his new work. Kitlinski did not recall requiring any other member of Complainant's group to

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<sup>6</sup>Kitlinski's memorandum mistakenly identifies Complainant as a systems developer rather than a systems designer. Kitlinski testified that he did not know about Complainant's title change. Kitlinski also testified that he did not make any distinction between these titles and did not intend to convey anything negative to Complainant in using his former title. I credit Kitlinski's testimony.

use a weekly status report. I credit Kitlinski's testimony.

60. Complainant testified that Kitlinski told him that his memorandum represented Complainant's career development plan. Complainant also testified that he had used a weekly status report at a group meeting but had never been directed to complete one. I credit Complainant's testimony.

61. The August 19 memorandum does not include any comments about Complainant's job performance nor does it describe any proposed actions for improvement. The memorandum also does not describe any potential disciplinary action nor does it refer to Complainant's accent or communication skills. (Joint Exhibit No. 2).

62. On August 22, 1996, Complainant met with Heeg and Kitlinski to discuss Complainant's job description and what he wanted "to do within the company." Heeg had never met Complainant prior to this meeting. At this meeting, Kitlinski told Complainant that he would not place a time limit on his career development plan and would give it "two, three, four months." Complainant told Kitlinski and Heeg that he was afraid to work with Lem because he felt Lem might fire him based on his "personal" attack and what he said about Complainant's national origin. Heeg testified that Complainant told them that he didn't feel that he could work with Lem and that Lem "had it out for him." Heeg and Kitlinski disagreed with Complainant's perception and Heeg urged him to "work that out and put everything behind us." I credit Heeg's testimony.

63. Kitlinski did not recall Complainant making any allegations of discrimination at the August 22 meeting. Heeg testified that Respondent did not investigate a discrimination allegation against Lem based on the August 12 meeting because "there was nothing to investigate." I credit Heeg's testimony.

64. Heeg never met with Lem to discuss Complainant's situation or concerns.

65. On August 23, 1996, Complainant met with Heeg and signed a severance agreement that Heeg had prepared. The agreement provided for: (1) four month's severance pay; (2) continuation of health, dental, vision, life insurance, disability and AD&D medical benefits through December 31, 1996; (3) continuation of his voice mail privileges until December 31, 1996. Under the agreement, Complainant's last day of work was August 31, 1996. (Joint Exhibit No. 3). Complainant's annual salary on August 31, 1996 was \$44,000.00. (Joint Stipulation No. 8).

66. Complainant requested and received a recommendation letter from Respondent, dated September 1996. (Joint Exhibit No. 12). In the letter of recommendation, Heeg wrote that the ISS department's shift "away from developing applications into purchasing more products 'off the shelf'. . . effected Complainant's responsibilities as well as his ability to grow, which is extremely important to him." (Joint Exhibit No 12). Complainant did not object to the contents or language included in his recommendation letter.

67. In 1996, Respondent paid \$47,016.43 in wages to Complainant. (Joint Exhibit No. 13).

68. Within two weeks of resigning from Respondent, Complainant received a job offer from Lotus to work as a technical support representative. Complainant declined the Lotus offer but accepted one from Lightbridge, Inc. to work as a software engineer. On September 30, 1996, Complainant began working at Lightbridge for an annual salary of 46,000, with benefits.<sup>7</sup> (Joint Exhibit No. 5). Among his responsibilities at Lightbridge, Complainant worked on developing software applications, writing code and technical specifications, enhancing systems applications and programming. At Lightbridge, Complainant had very little contact with outside clients—less than 5%.

69. Complainant progressed at Lightbridge, earning multiple salary increases and periodic bonuses through the fall of 2001. (Joint Exhibit Nos. 4-7). Complainant testified that his experience at Respondent affected his work at Lightbridge because it caused him to stay by himself and hold off speaking in meetings because of what he thought individuals might say about his accent.

70. Complainant testified that the technology he used at Lightbridge was obsolete and outdated and, as a consequence, his technological skills are no longer needed. He also testified that he only took the Lightbridge position because he needed financial security. Lightbridge laid off Complainant in November 2001 as part of a

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<sup>7</sup>Complainant does not seek back pay as part of his claim for damages in this case. (Complainant's oral stipulation at the public hearing).

reduction-in-force. Complainant has been unemployed since he left Lightbrige.

71. Complainant made several unsuccessful efforts to leave Lightbridge including posting his resume on Monster.com and other Internet sites, forwarding his resume to various headhunters who contacted him and looking through job listings in the Boston Globe.

72. Lem testified that Hou's accent was "heavier" and was a "little bit more difficult to understand" than Complainant's. Lem also testified that Respondent offered Hou some language classes although he did not believe her job performance suffered because of her accent or communication. I credit Lem's testimony.

73. In late May or early June 1996, Respondent hired Jose Milanes as the manager of network services. Kitlinski testified that Milanes is from Columbia and speaks with a "somewhat heavy" accent, although his accent did not pose a problem for Respondent. I credit Kitlinksi's testimony.

74. In the fall of 1996, Lem and Kitlinski hired Nader Djafari as a manager for desktop services, a position that requires a significant amount of communication with end-users, managers and business units. Kitlinski testified that Djafari is from Iran and speaks with an accent that is "similar" to and a "little heavier" than Complainant's. Lem testified that Djafari's accent was the same as Complainant, "no more or less noticeable." Both testified that they had no problem with or concerns about Djafari's

ability to perform his job duties with his accent. I credit their testimony.

75. After Complainant left Respondent, Thompson worked mostly on an application called Budget Builder which allowed account management staff to put together fee budgets and estimated fees for clients.

76. After Complainant left, Respondent hired John Macklin, an experienced web developer, for a systems developer position. Macklin had also worked as a software support representative at Stream from June 1, 1994 until December 1, 1995. (Joint Exhibit No. 8). Thompson worked with Macklin to on the time sheet application project and a groupware product called Live Link—an off-the-shelf groupware or document management platform that required customization.

77. On January 12 and February 4, 1997, Respondent advertised in the Boston Sunday Globe and Boston.com, respectively, for a systems designer position. (Complainant's Exhibit Nos. 12 and 13). Complainant believed these postings were for systems designer positions that were similar to the one he held at Respondent. (Complainant's Exhibit Nos. 12 and 13).

### III. CONCLUSIONS OF LAW

General Laws, Chapter 151B, §4, paragraph one, provides that it shall be an unlawful practice for an

employer, because of an individual's national origin<sup>8</sup> to "refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or terms, conditions or privileges of employment, unless based on a bona fide occupational qualification." Abramian v. President & Fellows of Harvard College, 432 Mass. 104 (2000)(unlawful discrimination where a complainant's co-workers and supervisors subjected him to derogatory references and demeaning slurs about his national origin). Since language is intimately connected to cultural and ethnic identity, an individual's accent or linguistic characteristics are generally recognized as a manifestation of national origin and, historically, a potential trigger for unlawful discrimination based on national origin. See Manon v. Rosewood Nursing and Rehabilitation Center and Nolan, 24 MDLR 281 (2002); Lochard v. Provena Saint Joseph Medical Center, 367 F. Supp. 2d 1214 (N. Dist. Ill. 2005); Fragante v. City & County of Honolulu, et. al., 888 F.2d 591 (9<sup>th</sup> Cir. 1989); Daly v. Runyon, Postmaster General, United States Postal Service, No. 01933547 (1995)(the United States Equal Employment Opportunity Commission held that an employment decision may be predicated upon an employee's foreign accent only where it materially interferes with his or her job performance). See also Matsuda, Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329, (1991).

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<sup>8</sup>In Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 88 (1973), the United States Supreme Court held that the term "national origin" as used in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16, refers "to the country where a person was born, or more broadly, the country from which his or her ancestors came."

In the absence of direct evidence of an unlawful motive based on national origin, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).<sup>9</sup> See also Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001)(Chapter 151B has four elements that an employee must prove to prevail on a claim of discrimination in employment: membership in a protected class, harm, discriminatory animus, and causation); Abramian v. President & Fellows of Harvard College, supra.; Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

Complainant contends that Respondent constructively discharged him, on August 12, 1996, when Lem allegedly told him that he had no confidence in his ability to run client meetings because of his accent and Kitlinski and Lem falsely accused him of a "lack of enthusiasm" for the ISS department's new direction. (Complainant's post-hearing memorandum, page 26). A constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Morrissey v. Holiday Inn, 23 MDLR 74 (2003). Accordingly, a constructive discharge is "legally regarded

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<sup>9</sup>Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

as a firing rather than a resignation." GTE Products Corp. v. Stewart, 412 Mass. 22, 33-34, citing Turner v. Anheuser-Busch, Inc., 7 Cal. 4<sup>th</sup> 1238, 1244-1245 (1994). The test for whether Complainant was constructively discharged is objective, not subjective. GTE Products Corp., 421 Mass. at 35 (dissatisfaction with the nature of work assignments, inter alia, is insufficient to create a triable question of constructive discharge).

To establish a constructive discharge claim, Complainant must show that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to resign. See Holt v. Minutemen Flames Minor Hockey Association, 22 MDLR 373 (2000); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171; Rosado v. Santiago, 562 F.2d 114, 119 (1<sup>st</sup> Cir. 1977) ("the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign"). A constructive discharge can occur even if the employer does not act with the specific intent of forcing an employee to resign. See Langford v. Department of Employment & Training, 17 MDLR 1043, 1063 (1995), aff'd 18 MDLR 36 (1996)(Full Commission). However, a claim of constructive discharge under Chapter 151B does not arise, as in this case, when an employee resigns because of a general dissatisfaction with the workplace or as a result of other conduct by the employer that does not violate Chapter 151B. See GTE Products, 421 Mass. at 35.

The crux of Complainant's constructive discharge claim is that Lem allegedly made a negative comment about his

accent during their August 12 meeting such that he "was left with no choice but to resign." (Complainant's post-hearing memorandum, page 26). However, I do not credit Complainant's testimony that Lem told him that he did not trust Complainant to run a client meeting because of his accent. Based on the totality of the evidence in the record, I find that Lem did not refer to or make a comment about Complainant's accent and/or national origin during their August 12 meeting.

First, I credited Lem's denial, as corroborated by Kitlinski's credible testimony, that he did not refer to Complainant's accent or ability to speak English during their August 12 meeting. I also credited Lem's testimony that he merely told Complainant what he reasonably believed were his legitimate concerns about Complainant's apparent lack of enthusiasm for Respondent's new IT direction and its potential impact on his communication with internal clients. Their testimony is corroborated by Kitlinski's August 19 memorandum which does not refer, in any manner, to Complainant's job performance, his accent or his alleged difficulty effectively communicating with clients because of his accent. In addition, there is no evidence in the record that Lem, Kitlinski or any other manager or supervisor of Respondent referred to or commented upon Complainant's accent or ability to speak English at any time before or after the August 12 meeting.

Second, I do not credit Complainant's testimony that Lem explicitly referred to his accent during their August 12 meeting. Complainant's testimony at the hearing is clearly inconsistent with his statement in his letter to the

Commission, dated April 9, 1997, or less than eight months after the August 12 meeting. In his April 9 letter, Complainant wrote that Lem told him that he did not trust Complainant to run a client meeting "because of the way you present yourself or talk." Complainant also testified that he merely inferred Lem was talking about his accent and that Lem did not explicitly refer to his accent or his ability to speak English during their August 12 meeting.

I find that Complainant's description of Lem's statement in his letter more fairly characterizes what Lem said at the meeting than Complainant's testimony and is consistent with the credible testimony of Lem and Kitlinski. I also find that Complainant's written statement in April 1997 is consistent with the testimony of Lem and Kitlinski regarding the nature of Lem's comment as it related to the purpose of the August 12 meeting—to determine whether Complainant wanted to continue working at Respondent given the change in direction in its ISS department. I conclude that Complainant mistakenly and unreasonably inferred that Lem commented on his accent or ability to speak English during their August 12 meeting when he raised his concern about the impact of Complainant's apparent lack of enthusiasm for Respondent's IT changes on his communication with internal clients.

I also find that the testimony of Thompson and Tumino was equivocal, unclear and does not support Complainant's contention that Lem specifically commented on Complainant's accent. Thompson did not recall whether Complainant told him that Lem had referred to Complainant's "communication" or "language." Tumino also testified that Complainant told

him that Lem and Kitlinski made comments about his "nationality" and not his accent although Complainant never asserted or testified that they mentioned his "nationality" on August 12. Both Thompson and Kumino also testified that Complainant told them that Lem and Kitlinski had taken disciplinary action against him, allegedly for poor performance, which is plainly unsupported by any evidence in the record.

Third, Complainant produced no evidence at the hearing from which he could have reasonably concluded that his accent or ability to speak English was a concern for Lem or Kitlinski regarding his job performance at Respondent. I credited the testimony of Lem and Kitlinski that Complainant's accent never adversely affected his ability to satisfactorily perform his job duties at Respondent. Complainant did not establish that Kitlinski or Lem had expressed any concerns to him or any other employee of Respondent about his accent or ability to speak English prior to their August 12 meeting. There is also no evidence in the record to establish that Kitlinski and Lem discussed Complainant's ability to communicate with clients or his co-workers, given his accent, although they also met on August 14 and 22, 1996 to review his job description, duties and a career development plan.

I also credited Kitlinski's testimony that he had no concerns about Complainant's ability to effectively communicate, by telephone, with Stream's customers during 1993 to 1994. It is highly unlikely that Kitlinski was motivated by a discriminatory animus in 1996 based on Complainant's accent when he interviewed and hired

Complainant in 1993 for a Stream customer service position that primarily required telephone contact with customers throughout the United States. See LeBlanc v. Great American Insurance Co., 6 F.3d 836, 847 (1<sup>st</sup> Cir. 1993), citing Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (8<sup>th</sup> Cir. 1992) ("it is incredible that . . . the company officials who hired [the plaintiff] at age fifty-one had suddenly developed an aversion to older persons less than two years later). In addition, Thompson and Tumino both credibly testified that they had no difficulty understanding Complainant and that his accent did not interfere with his work performance in any respect. Based on the totality of the evidence in the hearing, I find that it was unreasonable for Complainant to infer that Lem's ambiguous comment on August 12 meant that Lem believed his accent or ability to speak English adversely affected his job performance.

Finally, Lem and Kitlinski's treatment of other employees in the ISS department who had accents does not support Complainant's contention that they were motivated by a discriminatory animus based on his accent. In 1996, Lem and Kitlinski hired two employees who had similar or comparable accents to Complainant. They hired Milanes in May or June of 1996 and Djafari in the fall of 1996 to work as the manager of network services and desktop services, respectively. Complainant produced no evidence to establish that Djafari's or Milanes' accents affected their ability to perform their job duties or were a concern for Kitlinski or Lem in any manner. In addition, Complainant did not prove that Hou, whose accent was "heavier" and "more noticeable" than Complainant's, had any job

difficulties related to her accent or that she resigned based, in part, on her adverse treatment by Lem and Kitlinski because of her accent.<sup>10</sup>

A single or isolated act of discrimination will usually not support a constructive discharge claim, even if it involves humiliating and disparate treatment or an act of retaliation. To constitute a constructive discharge, the adverse working conditions must be unusually aggravated or amount to a "continuous pattern." Turner v. Anheuser-Busch, *supra*. at 1247. Even if I find that Lem made a single comment or remark about Complainant's accent, which I do not, such comment is not sufficient, by itself, to establish a discriminatory intent under the circumstances of this case. While one incident of a racial or ethnic slur may be sufficiently egregious to constitute unlawful harassment,<sup>11</sup> Complainant did not establish that a reasonable person would have found Lem's alleged comment or remark to be sufficiently offensive or pervasive, given the context of the August 12 meeting, to alter his working environment or interfere with his ability to perform his job duties. Massachusetts Commission Against Discrimination and Rogers v. Massachusetts Department of Correction, \_\_\_ MDLR \_\_\_ (2005)(use of racially derogatory

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<sup>10</sup>I recognize that Lem offered language classes to Hou although he credibly testified that he did not believe that her accent affected her job performance.

<sup>11</sup>To establish a hostile work environment claim based on his national origin, Complainant must show that: (1) he was subjected to unwelcome conduct based on his national origin; (2) the unwelcome conduct and the purpose or effect of creating an intimidating, hostile humiliating or offensive work environment; (3) the conduct was sufficiently severe or pervasive as to unreasonably interfere with his work performance or altered the terms and conditions of his employment; (4) the harassment was carried out by an employee with a supervisory relationship to Complainant or respondent knew or should have known of the harassment and failed to take prompt remedial action. See Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass. 673, 67-79 (1993).

language and offensive racial imagery was not sufficiently frequent or widespread to constitute a racially hostile work environment). See Blue and Massachusetts Commission Against Discrimination v. Aramark Corporation, \_\_\_ MDLR \_\_\_ (2003)(a single use of a racial slur by a supervisor in a public forum was particularly demeaning and embarrassing and constituted racial harassment). I also conclude that Lem and Kitlinksi's inquiry about Complainant's "lack of enthusiasm" was reasonable given Respondent's new strategic plan for the ISS department and the impending departures of Hou and Kreisinger, the other systems designers.

Not only has Complainant failed to prove that Lem's comment manifested a discriminatory animus based on his accent, he has not shown that Lem and/or Kitlinski subjected him to an adverse employment action based on his national origin. An adverse employment action occurs where Complainant shows that he was "the victim of a change in working conditions which materially disadvantaged [him]." MacCormick v. Boston Edison Co., 423 Mass. 652, 662 (1996). See also, Blackie v. State of Maine, 75 F.3d 716, 725 (1<sup>st</sup> Cir. 1996)(the employer must "either (1) take something of consequence from the employee. . . by discharging or demoting [him], reducing [his] salary or divesting [him] of significant responsibilities. . . or (2) withhold from the employee an accouterment of the employment relationship, . . . by failing to follow a customary practice of considering [him] for promotion").<sup>12</sup>

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<sup>12</sup>A voluntary resignation is not an adverse employment action. See Radvilas v. Stop & Shop, Inc., 18 Mass. App. Ct. 431, 439-440, n. 14 (1984).

In this case, there is no evidence that Kitlinksi or Lem threatened Complainant with termination or discipline during or after their August 12 meeting. In addition, Kitlinski's August 19 memorandum did not discipline Complainant in any manner but merely informed him about his current and proposed job duties and described the supervisory reporting structure consistent with the ISS department's reorganization in July 1996. Kitlinksi's memorandum also did not criticize or even comment on Complainant's performance nor did it refer to Complainant's communication skills or accent.<sup>13</sup> There is also no evidence that Respondent materially changed Complainant's job duties or his salary or benefits during and after the August 12 meeting.<sup>14</sup> While Complainant may have been sensitive to or dissatisfied with Lem's apparent criticism of his lack of "enthusiasm" for the ISS department's new direction, he has not proved that his working conditions at Respondent were so egregious that a reasonable person would have felt compelled to resign. See Massachusetts Commission Against Discrimination and Rogers v. Massachusetts Department of Correction, supra.

Finally, to prove his constructive discharge claim, Complainant must also establish that he exhausted every reasonable opportunity to continue working as a systems designer with Respondent. See Massachusetts Commission Against Discrimination & Malone v. City of Boston Public

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<sup>13</sup>Given the informational nature of Complainant's "career development plan," I reject his contention that Respondent's use of it showed a discriminatory animus because it did not give a similar one to other systems designer or systems developers.

<sup>14</sup>I conclude that Kitlinski's reference to Complainant's prior position as a "systems developer" rather than a "systems designer" in his August 19 memorandum was inadvertent and was without any practical consequences.

Facilities Department, 28 MDLR 31 (2004). Alternatively, Complainant must show that such possibilities were untenable and that abandoning his position at Respondent was his final and only alternative. See Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1241 (the complainant failed to exhaust the possibility of continuing to work for the employer, including seeking an accommodation for his stress).

In this case, Complainant has not shown that he exhausted all possibilities to continue working at Respondent and that resignation was his final and only reasonable alternative. Massachusetts Commission Against Discrimination & Murray v. Northeast Aquatic Design & Supply, Inc., \_\_\_ MDLR \_\_\_ (2005). I conclude that it was unreasonable for Complainant to believe that his employment at Respondent would be terminated in August 1996, given that Heeg, Lem and/or Kitlinski continued to meet with him on August 14 and 22, 1996, to discuss his ongoing job duties, reporting responsibilities and a career development plan at Respondent. I am persuaded that continuing to work under Lem and/or Kitlinski would not have been so difficult for Complainant that a reasonable person in his situation would have felt compelled to resign. Complainant did precisely what GTE Products Corp., supra. counsels against; namely, he assumed the worst of Lem and/or Kitlinski and jumped to an erroneous and unreasonable conclusion without fully exploring the alternative to his resignation that was discussed during their meetings after August 12, 1996. I am also persuaded that Complainant voluntarily resigned for reasons that were unrelated to conduct by Respondent that was prohibited under Chapter 151B. Accordingly, I conclude

that Complainant was not constructively discharged in August 1996.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the complaint is hereby dismissed. This decision constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 2<sup>nd</sup> day of September, 2005.

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Kenneth B. Grooms  
Hearing Officer