

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
FESTUS ADELABU,

Complainants

v.

DOCKET NOS. 11-BEM-00604  
11-BEM-03547

TERADYNE, INC.,  
RICK BURNS, and MARTIN SCHWARTZ,

Respondents

Appearances: Marc D. Freiburger, Esq. and Kara Moheban McLoy, Esq. for Complainant  
Stephen T. Paterniti, Esq. and Kevin Sibbersen, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 14, 2011, Complainant, Festus Adelabu, filed a complaint of discrimination against his employer, Respondent Teradyne, Inc., his immediate supervisor, Martin Schwartz, an Engineering Manager, and Rick Burns, then Manager of Hardware Engineering. Complainant alleged that Respondents discriminated against him based on his race (African American) and retaliated against him in violation of G.L. c. 151B §§ 4 (1), (4A), 4(4) and 4(5) and Title VII. Complainant alleged that he was the victim of disparate treatment and was demoted from his management position, relieved of his direct reports and denied an award of restricted stock units. On August 9, 2011, Complainant filed a second charge of discrimination alleging further

discrimination and retaliation including constructive discharge from his employment on July 25, 2011, in violation of G.L. c. 151B, §§ 4(1), (4A), (4) and (5).

The Investigating Commissioner found probable cause to credit the allegations of the complaints and attempts at conciliation were unsuccessful. An eleven day public hearing was convened before me on February 1, 2, 3, 4, 5, 10, 24, 25, and 26, 2016 and on March 28 and 29, 2016. A total of ten witnesses were called to testify and 316 exhibits were introduced in evidence.<sup>1</sup> On July 21, 2016, the parties filed extensive post-hearing briefs. Based on the record before me and considering the post-hearing submissions, I make the following Findings of Fact and Conclusions of Law. Certain proposed findings of the parties have been omitted as not relevant or unnecessary to a proper determination of the material issues presented. To the extent that the testimony of a witness is not in accord with the findings herein, such testimony is not credited. To the extent the proposed findings of the parties comport with my determination, they have been adopted here.

## II. FINDINGS OF FACT

1. Complainant, Festus Adelabu, is African American. He has a Bachelor's degree and a Master's degree in electrical engineering from Rensselaer Polytechnic Institute and a Master's degree in business administration from Babson College. (Tr. I, 35; Ex. C-16) Complainant worked for a number of companies prior to commencing employment with Respondent. (Id.)

2. Respondent, Teradyne, is a product development company that designs and manufactures equipment that tests semiconductor microchips contained in products including lap-top computers, iPhones, and space satellites. Testing components are controlled by computer and contain software with which the customer/end user interacts using a video monitor and a

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<sup>1</sup> Some of the exhibits were duplicates

keyboard. (Tr. 2, 224-225; Tr. 3, 44-47; Tr. 4, 87-88) Teradyne designs the software with which the end user interacts. The software communicates with internal computer circuitry referred to as firmware or FPGA. The firmware interfaces with both the software and the hardware. (Tr. 5, 22-27; Tr. 7, 236-238) The customer interfaces with the software developed by the software group, which has significant interaction with the customer to understand the customer's desires in terms of user interface. The customers do not interface with the FPGA/firmware.<sup>2</sup> (Tr. Vol. 4, 86-91; Tr. 7, 236-237)

3. From 2007 to 2016 Respondent Rick Burns was the manager of the department referred to as Hardware Engineering at Teradyne and reported to Mike Malone, the VP of Engineering.<sup>3</sup> Respondent, Martin Schwartz was the engineering manager of the FPGA/firmware group within the Hardware Engineering Department and he reported to Burns. During Complainant's tenure at Teradyne, he reported directly to Schwartz. (Tr. Vol. 4, 97; Tr. Vol. 7, 220-221, 223; Joint Stipulation No. 3)

4. There are six engineering levels at Teradyne designated as DL1 to DL6. There are a number of manager engineering positions beginning with the designation MG1 through MG6.<sup>4</sup> Schwartz testified that as an MG2 he was responsible for managing DL5 engineers and MG1 manager engineers. (Tr. Vol. 4, 81) MG1 managing engineers are team leaders who coordinate a team of engineers from their respective functional disciplines and who have direct reports, while DL5's do not have direct reports. (Tr. Vol. 4, 99- 101) MG1's are supervised within their functional discipline by MG2's or higher. Schwartz testified that a DL5 engineer is a technical leader who also leads teams, similar to an MG1, but the individuals who comprise the team do

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<sup>2</sup> The testimony regarding the design and manufacture of testing components, while simplified, is highly technical and detailed from the perspective a lay person and is merely summarized here.

<sup>3</sup> In February 2016, Burns was promoted to VP of Engineering. (Tr. 7 220-211)

<sup>4</sup> Burns held the positions designated as MG3 and MG4 prior to becoming VP of engineering. Tr. 7, 221)

not report directly to the DL5 engineer. DL5's also do not have responsibility for representing their team's work product at the project management level. They drive technical decisions but do not deal with budgets, schedules and other non-technical operational issues. Schwartz testified that a DL5 engineer is a prestigious title with significant autonomy and assignments that have a very large impact on the company. (Tr. Vol. 4 99-100; Tr. Vol. 6, 17). According to Schwartz and Burns, these designations are somewhat fluid and it would not be unusual for an individual to move back and forth within these positions. (Tr. Vol. 6, 13; Vol. 4, 76-78; Vol. 9, 86-87) Schwartz testified that a DL5 engineer might fall somewhere between an MG1 and an MG2 managing engineer in terms of compensation and stock awards, and the ceiling of the DL5 salary range exceeds the ceiling of the MG1 salary range. (Tr. Vol. 4, 100-101; Tr. Vol. 6, 10)

5. The company is structured on a matrix management system that includes both functional management organization as well as project management organization. Engineers within each functional discipline (i.e. software, firmware, hardware) have functional managers, which include MG1's, who also serve as team leaders on projects representing their specific discipline. (Tr. Vol. 3, 48-51; Vol. 4, 94-97) Burns testified that the company's model is to build teams comprised of engineers and managers to work on product development projects. A project manager assembles a team of engineers from various functional disciplines to work on a particular project. (Tr. 7, 229-230) Project core teams are comprised of project management, which includes the project manager, the design lead, and team leaders from each of the major disciplines involved in the project. The core team meets frequently in core team meetings to resolve project issues and disputes. (Tr. Vol. 7, 233) Team leaders are expected to be engaged in the project and to work cooperatively in resolving technical disputes. (Tr. Vol. 3, 55) Burns stated that he and other functional managers are responsible for oversight of these project teams.

Their role is to set realistic goals around schedules and budgets and to assess the validity of the project team's plans and to intervene if the project gets off-track. (Tr. Vol. 7, 222-223)

6. In 2007, Complainant was encouraged by a friend to apply for a position as an engineering manager at Respondent, Teradyne. During the hiring process, Complainant's contact in Human Resources at Teradyne was Peter Volonino. Complainant felt that Volonino was dismissive, rude and condescending to him in response to his efforts to negotiate a higher salary. He claimed that Volonino stated words to the effect of "if you were a security guard or a janitor, we wouldn't pay you what you're asking for." (Tr. Vol. 1, 44) When Complainant did not disclose his compensation history or a complete list of former employers on his application, Volonino claimed in an email to Rick Burns that his application raised "red flags," and another Teradyne recruiter stated Complainant was playing "liar's poker" with the company. (Tr. Vol. 3, 14-16; Vol. 8, 109-110; Ex. C-104) Schwartz testified that it was not uncommon for applicants to negotiate their salaries with Teradyne. (Tr. Vol. VI, 94) Vice President of Human Resources Stephan Fagerquist testified that applicants typically will not provide current compensation on their application and that Teradyne does not typically verify prior salary history. (Tr. Vol. IX, 83)

7. Complainant's resume was referred to Schwartz who interviewed Complainant for an MG1 position in the FPGA/firmware group. Schwartz testified that he was very impressed with Complainant, thought he was "brilliant" and was anxious to bring him on board. (Tr. 4 103-104) Complainant was offered an MG1 position with a salary that was near the top of the MG1 range, the highest salary ever offered an MG1 during Schwartz's tenure as the FPGA manager at Teradyne. The offer exceeded those made to the two most recent MG1 hires by some \$20,000. Schwartz testified that Complainant was also offered more stock than the company

typically offers an MG1 at hiring. Schwartz notified Complainant that this was the best the company could do. (Tr. Vol. IV, 106-109,117, 118; Ex.R-3; R-160; R-163) When Complainant sought the salary range of a MG2 engineering manager, the salary negotiations reached an impasse and it appeared as though Complainant would not accept Teradyne's offer. Burns and Schwartz discussed moving on, much to Schwartz's disappointment. (Tr. Vol. IV, 111-112; Ex. C-102; 104)

8. Ultimately, Complainant accepted Teradyne's offer and he began employment at the company's headquarters in North Reading, MA as a full-time employee as an MG1 Engineering Manager in August of 2007. (Joint stipulation No 1.) Complainant was the only African American manager in the Hardware Engineering Group and one of six African American managers at Teradyne which has approximately 350 white managers in North America. (Ex. C-47, C-79, C-80; Ex. 142, p.9-10) In September of 2007, shortly after being hired, Complainant was identified by Burns as a "high potential" ("HIPO") employee, representing the top three to five percent of the Hardware Engineering group who had the potential for great leadership and technical advancement. Schwartz viewed Complainant as a potential candidate to replace him as an MG2 leading the FPGA firmware group. (Tr. Vol. VII, 244-245; Vol. IV, 121-122)

9. From the time of his hire until February 2011, Complainant held the title of Design Manager. (Joint Stipulation No. 2) In that role, Complainant had approximately six direct reports and typically managed seven to fifteen contractors at any given time while supervising at least two to three, and sometimes more, engineering projects. (Tr. Vol. I, 52-54, 124; Ex. C-69, C-92) Complainant proved very adept at managing his direct reports, and according to Schwartz, was the best functional manager in his department at that time. Complainant received very high

ratings from Schwartz in the area of managing people and teams in his 2009 performance evaluation. (Tr. Vol. IV, 121-122; Ex. R-17)

10. Shortly after he began working at Teradyne, Complainant noted that the number of meetings he had to attend was excessive, demanded an enormous amount of his time, and were often, in his view, unproductive. (Tr. Vol. 1, 55-66; Vol. III, 32-33) Complainant voiced his concerns about this "meeting culture" to Schwartz who concurred that it was excessive and not always efficient. Schwartz received similar complaints from other members of his staff that Teradyne was using meetings as the primary way of doing intra-functional project communication. (Tr. Vol. IV, 133-138) Schwartz was supportive of Complainant's concern that he had limited ability to attend all of the scheduled meetings on his many projects, indicating Complainant did not need to attend certain meetings and, on occasion, attending the meetings on Complainant's behalf. (Tr. Vol. 1, 57-61) In August 2008, Schwartz requested that Complainant provide him with a copy of his meeting schedule to demonstrate his "high meeting work load," and his meeting conflicts. Schwartz addressed this issue with Burns. (Tr. Vol. VI, 114-116; Vol. IV, 141-143; Ex. C-111; C-115; C-61) In September 2008, Schwartz indicated to his direct reports that he intended to raise the issue of the meeting culture being out of control at a round table with the VP of engineering. (Ex. C-65)

11. In late 2008 and 2009, Schwartz began receiving some complaints from Program Managers and Project Managers about Complainant's failure to attend certain meetings. (Tr. Vol. IV, 132-133) One of these complaints was escalated to the VP of Engineering which Schwartz stated was very serious. (Ex. R-11) Schwartz voiced concern to Complainant that he might be perceived as not being committed to certain projects because Complainant had unilaterally decided to not attend some meetings that he did not view as worthwhile. (Tr. Vol.

IV, 132-133; 140-141; 147) Complainant responded to managers who complained of his absence at certain meetings that he was often double booked and could not be simultaneously in multiple places. (Tr. Vol. 1, 62; Ex. C-61) Burns suggested to Schwartz that they might have to pull some projects off of Complainant's plate. (Ex. R-11)

12. Complainant was otherwise a strong performer and consistently received positive verbal feed-back from Schwartz in 2007 and 2008. (Tr. Vol. 1, 67-68, 71, 91) Schwartz informed Complainant in 2007 and 2008 that he was his best manager and made Schwartz a better manager. (Tr. Vol. 67-68) Schwartz did not conduct a written Manager Assessment Performance Summary (MAP) for Complainant in 2007 or 2008. (Tr. Vol. 1, 68 -71; Vol. IV, 130-131), but confirmed that if he had done so, it would have been generally positive. (Tr. Vol. VI, 137, 139-141)

13. Schwartz began to be concerned in late 2008 to 2009 that Complainant started to voice a lack of patience with co-workers whom he perceived to be incompetent. (Tr. Vol. IV, 147, 170-171) On one project labeled TCIT/TCIJ, when problems arose with the development team in India, Complainant informed Schwartz that the project was "all screwed up," no one on the project team was listening to him, there was nothing he could do about it, and he was not going to work on it anymore.<sup>5</sup> Schwartz testified that it was not acceptable for a manager to simply state, "I'm done with this thing," and that no other manager had made ever made such a statement to him. For this reason, Complainant was rated a "Needs Improvement" on this project in 2009. (Tr. Vol. IV, 164-169; Ex. R-17) Despite the problem with this project, Complainant rated himself "Outstanding" for every single goal in his 2009 MAP. (Ex. R-16, 117

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<sup>5</sup> In a similar vein, one of Complainant's peers, Naim Mark Kahwati, who worked with him on a number of projects testified that Complainant generally did not like being challenged by finite resources and timelines, and if a problem fell outside of his job description, it was someone else's problem. (Tr. Vol. X, 22-24)

at TERA-001507) Despite a “needs improvement” rating on the TCIT/TCIJ project, Schwartz rated Complainant as “exceeding expectations” in three of his six goals in his 2009 MAP. (Ex. C-57) Burns testified that in 2009, despite Complainant being removed from the HIPO list for being dissatisfied with his current level and the matrix management system, Complainant was still in the top 4% of performers in the Hardware Engineering Group and was considered an outstanding employee. (Tr. Vol. VIII, 5-7)

14. Complainant received salary and merit raises for each year of his employment from 2007-2010, except for 2009 due to Company-wide pay-cuts when no one received pay raises. (Tr. Vol. I, 96-97; Ex. C-39) He also received grants of restricted stock units (RSU’s) in 2007, 2009 and 2010. (Tr. Vol. I, 72, 93-94, Vol. VI, 168-169; Ex. C-39; C-40)

15. In March of 2010, Schwartz learned that another internal group at Teradyne intended to make Complainant an offer to join them. Schwartz notified Burns that he wanted to “mount a defense” to keep Complainant because he did not want to lose “his best functional manager,” and he asked Burns for his support. (Tr. Vol. VI, 88-89; 181-183) Burns, who had suggested to Schwartz that Complainant be introduced to this other opportunity, also testified that at that time he viewed Complainant as a high performer, a strong manager and a key employee. (Tr. Vol. VIII, 125-128)

16. In late 2009 or early 2010, Teradyne began a new project, referred to as the Battery Project, which involved the development of equipment for manufacturing and testing batteries, targeting customers like Samsung and Hitachi. This was a new direction for the company and high level management was very interested in the project. Burns was selected as the project manager. His supervisor Mike Malone, Teradyne’s VP of Engineering, was considered the sponsor of the project, demonstrating the project’s significance and visibility. (Tr. Vol. III, 101-

104; Vol. VIII, 12-15; Vol. VII, 235; Vol. V, 7) The Battery Project received monthly scrutiny by the CEO. Burns was required to report to the CEO every quarter and to submit budget requests for the next quarter, so the CEO could determine if the project would continue. (Tr. Vol. VIII, 13-15) Since interested customers wanted a demonstration of the product prior to purchasing, there were some unique time pressures and deadlines for developing a prototype. (Tr. Vol. X, 25) Burns testified, "It was a high profile project with a lot of pressure and a lot of things changing all at the same time." (Tr. Vol. VIII, 63)

17. The Battery Project team leads were a group of Teradyne's high performers. (Tr. Vol. III, 128) In March of 2010, Complainant was assigned to the Battery Project to lead a team responsible for developing the FPGA and embedded firmware for the project. (Tr. Vol. 1, 114, 116, 123) The firmware was designed to communicate with the software being developed by the software team who communicated directly with the customer about product requirements. (Tr. Vol. III, 107-108; Vol. VIII, 15-16, 106-107) The firmware was the "hub" of communication for the project which enabled the hardware and software to interact with the product. (Tr. Vol. X, 28) Burns and Schwartz both felt Complainant was technically a great fit for the Battery Project and considered him a key person on the project. Schwartz testified that he discussed with Complainant the need to be a team player. (Tr. Vol. VIII, 125; Vol. V, 6)

18. The Hardware Lead on the Battery Project was Mark Kahwati, and the Software lead was Jon Rodin. (Tr. Vol. III, 116-118) According to Burns, the core team of the Battery Project was comprised of some the "most opinionated and aggressive people in the organization...who were not afraid to mix it up with each other over issues," and that he valued these attributes in engineers. He also stated there were "some personality clashes" between individuals who all think they know the right thing to do. (Tr. Vol. VIII, 29-30, 63; 127) Complainant had never

worked directly with Burns on a specific project and had never been managed by Burns prior to being assigned to the Battery Project. (Tr. Vol. I, 115; Tr. Vol. VIII, p. 128)

19. During the earliest phase of the Battery Project, Complainant recommended using eInfochips, an out-sourced contractor from India, to work on the development of the firmware. (Tr. Vol. I, 135-136) Schwartz had introduced eInfochips to Teradyne in 2006 and concurred with Complainant's decision to use the company on the Battery Project, based on their success in executing firmware on past projects. (Tr. Vol. I, 136; Vol. V, 8-10; Vol. VI, 184-185) By April 2010, it became apparent to Complainant that eInfochips did not have the capability to perform the work needed on the project, as the firmware and the project itself was becoming more complex than originally anticipated. (Tr. Vol. I, 138-139; Vol. VI, 185-220) Complainant immediately raised his concerns about the capability of eInfochips with Schwartz, who concurred. (Tr. Vol. I, 138-139; Vol. VI, 188-220; Ex. C-120, 121, 122) In May 2010, Complainant admitted that the use of eInfochips was a "bad call," and proposed that Teradyne hire a firmware lead engineer and bring the firmware development for the Battery Project in-house. (Tr. Vol. 147-148, Ex. C-81) Burns rejected Complainant's proposal for financial reasons and accused Complainant of not being upfront with the issues relating to eInfochips. Although Burns admitted that he had been in discussions with Schwartz regarding the problems with eInfochips, he nonetheless wrote to Complainant on May 10, 2010, essentially accusing him of withholding information, and stating, "who have you been telling for the past two months? Until a couple of weeks ago, I had not even heard we were in trouble." (Tr. Vol. VIII, 137-142, Ex. C-81) Burns offered some alternatives that Complainant believed would be ineffective, so Complainant, in an email chain, continued to argue for a full-time firmware engineer. (Ex. C-81) Burns was frustrated with Complainant's response and the fact that Complainant suggested the

budget for the project might be negatively impacted by declining to address the problem. Burns was also concerned about saving face with the CEO. (Tr. Vol. VIII, 21-24) Three months later, in August 2010, Burns approved a proposal similar to Complainant's when presented by Schwartz in a summary presentation of the Battery Project. (Tr. Vol. VI, 215-219; Ex. R-36) However, Complainant was still blamed for mismanaging his part of the project. (Tr. Vol. VI, 219-220)

20. In April 2010 through the summer of 2010, Complainant was asked by Mark Kahwati, and possibly by Burns, to chair the meetings that integrated the software and hardware teams. (Tr. Vol.1, 116, 117) Complainant testified that there had been some communication problems within the team prior to that time and he learned and that certain people, including Software Lead, Jon Rodin, were not attending team meetings. (Tr. Vol. I, 118-119) Complainant wrote in notes to himself at the time that he believed the software team was refusing to consider a new design and that it was "not ok to hide behind existing process." He also expressed concerns to Rodin and others that the software team was designing "on the fly." (Tr. Vol. 1, 115; 121-122;124-125; Ex. C-15) Complainant had met with Rodin and another engineer, Jeff Benagh, in May of 2010 to address communication issues and Benagh characterized their meeting as "discouraging." (Tr. Vol. 1, 126-128; C-17) Complainant testified that Rodin did not attend the meetings when Complainant was chairing them and that this hampered communication around technical and other conflicts. (Tr. Vol. 132-133)

21. During the summer of 2010, tension continued to mount between the software and firmware teams over a number of disputes regarding technical issues. In July of 2010, a dispute arose between Complainant and Rodin on a technical issue. Complainant testified that Rodin yelled at him and berated him in a conversation about this issue and stormed off. Rodin then

drafted an intemperate email to Burns. (Tr. Vol. I, 163-164) After significant technical debate, some of which occurred in emails, the matter was elevated to Burns to make the decision. Burns sided with Rodin, despite an admission that he did not have all the facts. Burns stated that in the absence of facts, his position was to side with the customer. (Tr. Vol. VIII, 32, 35, 144, 146; Ex. C-99; C-83; R-35) In an email to Burns, Rodin characterized Complainant's position as "ridiculous." Burns admitted that this was insulting to Complainant. (Ex. R-33, Tr. Vol. VIII, 147) Burns ultimately responded to Complainant that "in the interest of teamwork, "I'd recommend you raise the white flag and let [Rodin] decide." (Ex. C-83: R-35) Complainant was clearly frustrated by Burns' response and questioned whether Burns had actually reviewed his technical suggestions. He wrote to Burns, "Clearly you haven't read my response." (Ex. R-35; Tr.165-168) Burns then informed both Complainant and Rodin that they were behaving like children arguing over opinions, rather than producing facts to support their positions. In a private email to Schwartz, Burns indicated how disappointed he was by the exchange and stated he "had a suggestion on where to create a firmware lead." Burns was angry at Complainant's response and admitted his email to Schwartz referenced Complainant being ousted from the position of firmware lead, so they could hire someone new. (Ex. R-35, C-105; Tr. Vol. VIII, 35-36, 153-154; Vol. V, 35) Burns acknowledged that when the team later decided to adopt Complainant's approach, he did not apologize to Complainant. (Tr. Vol. VIII, 148)

22. Burns did not express any similarly negative sentiment regarding Rodin. In fact, Rodin was praised in his performance review as doing, "exceptionally well in dealing with conflict in his straight-ahead style[which] leads to open and frank discussion regarding difficult topics." (Tr. Vol. IX, 22-31; Ex. C-127) Complainant testified that he felt that Burns believed Rodin to be superior and that he was being treated in a condescending manner by Burns who was directing

him to defer to Rodin. (Tr. Vol. I, 168-169) Schwartz expressed dismay at Complainant's response to Burns, characterized it as a "prima donna response," and informed Complainant that Burns was very upset. (Tr. Vol. I, 172; Tr. Vol. V, 33) Schwartz tried to convey to Complainant how "pissed off Rick [Burns] was," stated that Burns was "Mr. Cool," and noted that he had never even observed Burns express exasperation prior to that time. (Tr. Vol. V, 36-38) Complainant testified that prior to this incident, he did not have a great deal of interaction with Burns, however after this exchange, Burns's attitude toward him changed, Burns did not acknowledge him in core team meetings, and spoke derisively toward him. Complainant felt there was hostility between him and Burns and between him and Rodin. (Tr. Vol. I, 169-172)

23. Complainant testified that thereafter in core team meetings on the Battery Project, Burns would address questions to others about firmware work for which Complainant was responsible and would not look at Complainant when he offered an answer to Burns's questions. (Tr. Vol. I, 173-175) Complainant stated that Burns would look to Rodin or Kahwati, who would, in turn, look to Complainant to answer, because they clearly had no idea. (Tr. Vol. 1, 173) There would be occasions when Burns would make comments to Complainant such as "use your brain" or "just do your job" in the presence of five to ten other managers and Complainant perceived this treatment as very hostile. (Id.) I credit this testimony.

24. Burns testified that, during that time, he became "really bothered by Complainant's behavior in core team meetings. He testified that if there was a problem with firmware, rather than accepting the problem and working toward a solution, Complainant would deflect and blame some other group for the problem. He testified that this attitude created a lot of frustration in the core team which intensified over the summer. As it became clear that the state of the

firmware was pacing the delivery date of a demonstration prototype to the customer, there was greater focus on Complainant and his team. (Tr. Vol. VIII, 36-38)

25. In August of 2010, it became evident that the problems with eInfochips, and the significant flaws in the firmware it had developed needed to be fixed before a prototype of the battery machine could be demonstrated to the customer. (Tr. Vol. 1, 79; Vol. V, 23-24) Given the problems with eInfochips, Schwartz and Complainant in late August prepared a presentation targeted at securing an increased budget to hire a firmware engineer. Complainant and Schwartz agreed that the quality of the firmware developed by eInfochips was not high enough to actually go into production. The proposal to hire a lead firmware engineer to work in-house was approved and Complainant was tasked with finding someone. Schwartz felt that Complainant was dragging his feet and could not recall Complainant interviewing any outside candidates. The suggestion of an in-house candidate did not come to fruition. (Tr. Vol. V, 23-27) At some point, two eInfochips engineers from India were brought to North Reading to work on the Battery Project. (Tr. Vol. V, 39)

26. By October 2010, the Battery Project was in the lab stage, where the firmware and software were brought together in the lab for testing, to determine if the software, hardware and firmware would all successfully interface. Kahwati testified that during this time there was lack of communication between the firmware and software, and differing opinions about how things should be done. When problems arose with the integration of the firmware and software, it was not always clear whether firmware, software or hardware was the problem. (Tr. Vol. X, 27, Vol. V, 39-41; Vol. VIII, 48) He testified the bugs were discovered in the firmware, which is the hub of communication for the project, and it was difficult to debug due to limited visibility into the firmware, lack of documentation, and because the development of the firmware had been

outsourced to eInfochips. (Tr. Vol. X, 27-29; 46-47) According to Kahwati, interactions between Complainant and Rodin were contentious and there was some finger-pointing. (Tr. Vol. X, 28-29) The testimony reflects that there were some hostile feelings and that tension within the team was running high. As a result of some of these difficulties, the deadlines for developing a prototype of the product were moved from early fall to the end of November to late January. (Tr. Vol. VIII, 36-38)

27. Complainant felt that complaints about bugs in the firmware were exaggerated and that the firmware was in generally good shape in the fall of 2010. (Tr. Vol. III, 118, 124) However, he agreed that tension between the firmware and software groups was negatively impacting the project. (Tr. Vol. III, 142) Schwartz testified that Complainant informed him that Burns was not soliciting his opinions during Battery Project meetings. (Tr. Vol. VII, 80) In prior deposition testimony Schwartz stated that Complainant also complained to him that Burns and Rodin treated him disrespectfully in these meetings. (Tr. Vol. VII, 83, 84) Schwartz remembered clearly Complainant asserting to him that the problems with the firmware were exaggerated and Complainant felt that he was being unfairly picked on. (Tr. Vol. VII, 82-83)

28. By the end of October, Complainant advised Schwartz that the entire project had become “dysfunctional” (Ex. C-87), that the real problem was in the software group, that Rodin did not know what he was talking about and that Rodin was totally incompetent. (Tr. Vol. VII, 18, 19, 24) Schwartz testified that Complainant also questioned Burns’s competency and thought he was “full of hot air.” (Tr. Vol. V, 69) Schwartz was supportive of Complainant. On October 27, 2010, he wrote to Burns that he was going to meet with Rodin to educate him on the process that was being used by the firmware group to make sure that Rodin understood the root cause of the firmware problems, and to make sure all the data were on the table. (Ex. C-109; Tr. Vol. VII,

10, 12, 13) Schwartz testified that he did not believe that Complainant was being treated unfairly at this time. Schwartz believed that Complainant's concerns were about dysfunction in the project dynamics. Schwartz denied that October of 2010 was when Complainant first mentioned the concept of racial "micro-aggression" to him. (Tr. Vol. VII, 16, 17) Schwartz understood that the focus was on Complainant because he was in charge of the part of the project that was on the "critical path." The firmware was pacing the entire schedule, causing Complainant to get "a lot of heat, "and be "harped on." (Tr. Vol. VII, 18) Schwartz did not speak to Kahwati about the dysfunctional environment as Complainant had suggested. (Tr. Vol. VII, 24-25; Ex C-87)

29. Schwartz denied telling Complainant in October of 2010 that Burns was trying to force him out of the company, despite Complainant's assertion to the contrary. (Tr. Vol. 1, 204; Tr. Vol. V, 38) According to Complainant, Schwartz stated he was going to have to take sides and asked Complainant if they should raise the issue with the VP of Engineering or Human Resources. (Tr. Vol. I, 204) I credit Complainant's testimony that he and Schwartz likely had some discussion about whether Burns was trying to force him out and whether the issues Complainant was voicing needed to be addressed at a higher level. I do not believe Complainant discussed discrimination, but do believe that Complainant clearly voice his frustration with the dysfunction on the team and the fact that he felt unjustly criticized.

30. In October of 2010, Burns was getting information about firmware bugs that were being identified. In an October 27, 2010 email chain Rodin advised Burns that the firmware team had not alerted the software team to a bug and once again the software team was wasting its time testing something known to be broken. Rodin went on to say, " That is bad enough, but on top of that we have to constantly listen to Festus'[Complainant's] claims that Software is holding up the firmware....My team is starting to get pretty PO'ed by Festus' regular harping on

Software...” (Ex. R-50) Burns interpreted this email to mean that Complainant was not accepting responsibility for the defects in the firmware product and was deflecting responsibility. (Tr. Vol. VIII, 72-74) Burns responded to Rodin that he was at the point of threatening to remove Complainant from the project. (Ex. R-50) Burns testified that he understood that such a response was undermining Complainant’s credibility on the project. (Tr. Vol. III, 168)

31. On October 29, 2010, Mark Kahwati forwarded Burns an email exchange, telling him the discussion therein was symptomatic of the recent dynamics between the FPGA and software groups and suggesting they get the two leads together in order to have a more unified productive team rather than the two groups working against each other. (Ex. R-27) After a meeting with Kahwati regarding the firmware integration issue, and the disconnect with the software, Burns called for an open, transparent design review of the source code and architecture of the firmware. Since the software group was familiar with this type of review, Burns directed Complainant to get together with Rodin and to complete the project by the next week. (Tr. Vol. VIII, 53-58; Ex. R-48; Ex. 54; Vol. V, 38-41) Complainant responded by suggesting that Burns start with a review of the documents, a suggestion which was frustrating and upsetting to Burns. (Tr. Vol. VIII, 60) Burns reminded Complainant that Complainant was the functional manager responsible for the firmware and to work with Rodin and get it done. (Ex. R-54) Complainant was insulted and humiliated by Burns’s call for an open review of the firmware. He interpreted Burns’s directive as siding with Rodin and putting Rodin on a pedestal as compared to him. He felt Burns was telling Rodin to show Complainant how to do his job and insinuating that Rodin knew better how to handle the software. (Tr. Vol. II, 197-199, 204; Vol. III, 159,162, 163)

32. Schwartz supported the review and advised Complainant that it could be beneficial in showing that complaints about the firmware were exaggerated and that the program was in pretty good shape. (Tr. Vol. V, 46) Complainant told Schwartz he that felt he was being picked on, that it was a set-up, and that the review would be a waste of his time. (Tr. Vol. V, 44-46) Schwartz testified that since Complainant refused to set up the review, he would set it up, but that Complainant had to attend the review. When Complainant told Schwartz he would not attend the review, Schwartz told him he was self-destructing and that if he wanted a career as a manager at Teradyne, he had to participate in the review. (Tr. Vol. V, 47-48) According to Schwartz, Complainant was not taking ownership of the problems or attempting to resolve them, but was washing his hands of the project. (Tr. Vol. V, 67-68)

33. In late October, Complainant was communicating with the manager of another division at Teradyne about working in that division, believing he needed to get away from the hostility he felt from Rodin and Burns. (Ex. C-84: Tr. Vol. I, 191-194) Complainant asserted that as early as the last week of October, he told Schwartz that he was physically unable to attend Battery core team meetings and that he was experiencing humiliation and disrespect in those meetings. Complainant also suggested to Schwartz that none of the other managers working on the project had ever worked with a black person. Schwartz responded that he had grown up in Harlem and had experience with black folks. He also asked Complainant what he should do, if anything, and asked if he should go to the VP of Engineering or HR. (Tr. Vol. II, 6,-7, 11, 46)

34. On November 1, 2010, Schwartz sent the results of a "bug triage" he had conducted to Complainant and Burns. Schwartz reached that conclusion that their testing process was not really all that bad and that they were catching bugs. (Tr. Vol. V, 58-60; R-58) On November 11, 2010, Complainant sent an email to a number of people, including Burns, informing them that he

would be out of the office from November 11<sup>th</sup> to the 22<sup>nd</sup>. Schwartz asked Complainant why he was taking vacation at the “crunch time” for the Battery Project and asked Complainant what kind of message that would send regarding his commitment to the project, but Complainant indicated he would be taking his vacation. Schwartz attended core team meetings in his absence. (Tr. Vol. V, 62, 63)

35. Complainant stated that from November 1, 2010 until he went on vacation, he attended daily technical team meetings on the Battery Project and was there to support his engineers. (Tr. Vol. II 25, 26) Complainant testified that when he returned from vacation on November 23, 2010, he continued to be harassed and scapegoated by Rodin’s escalation of the dispute over the firmware and Rodin’s continuing to blame the firmware for problems with the software. Complainant stated that given the deficits in the firmware development that he had been complaining about since April, he and another senior engineer, Jeff Benagh, were working double time trying to improve the firmware but received little credit for their efforts. (Tr. Vol. II, 20-22, 27, 28; Vol. III, 144-148) He felt that the software team was not reading the specs his team had written, but instead was publicly blaming and shaming him by telling Burns and others he didn’t know how to do his work. (Tr. Vol. I, 200-201) He also testified that any time Rodin or his team made a claim against Complainant’s team, Burns would defend Rodin, rather than focus on what happened or ask Complainant for an explanation. (Tr. Vol. I, 204)

36. On November 23, 2010, Complainant returned from vacation to the high stress environment where the design of firmware was still being reviewed and daily meetings were being conducted. On that day, Rodin wrote to Complainant in emails cc’d to others, including Burns and Schwartz, that the software team had been held up in its work because the firmware was not ready. Rodin asked Complainant to provide new dates as to when they could

go forward with testing. (Ex. C-101; Tr. Vol. II, 22-24) In this on-going dispute with Rodin, Schwartz continued to be supportive of Complainant asking Rodin for the source of his information. (Ex. C-101; Tr. Vol. II, 24) In his response to Schwartz, Rodin stated that Complainant rarely showed up for the daily meeting although he was still being sent emails regarding the meetings as of November 23. (Ex. C-101; Tr. Vol. II, 22) On that same day, Complainant sent an email declining to attend a meeting of the Battery Project team leads scheduled by Burns for that day. Burns was seeking an update from Complainant and Schwartz on their plans to improve the firmware execution. Complainant stated he could not attend as he had a prior commitment in Boston, but called into the meeting. (Ex. R-63; Tr. Vol. VIII, 68) Burns felt that in Complainant's responses to other emails from Rodin, he was exhibiting poor team behavior and disengaging from the team. (Tr. Vol. VIII, 71-72) Burns was shocked that Complainant did not attend the design review meetings. Burns had been expecting Complainant to lead the review, and when he learned that Complainant had not attended the meetings, he concluded, "He's checked out. He wants out of here." (Tr. Vol. VIII, 77-78) Burns felt that Complainant's failure to accept the firmware design responsibility meant that Complainant was walking away from his responsibilities and that this was an offense that could result in firing. (Tr. Vol. VIII, 78-79)

37. Complainant testified that he reached an agreement with Schwartz in December 2010 that he would no longer be required to attend the daily Battery Team meetings to review the firmware because he could not physically tolerate attending the meetings and being attacked. Complainant testified that Schwartz began attending Battery Team meetings for him in mid-December 2010 or perhaps even earlier and that they agreed as of late November that Schwartz would take on the role of "diplomat," in Battery Project meetings. (Tr. Vol. II, 44-46; Ex. R-

101) A decision had been made to bring an eInfochips engineer over from India to work on the design review and Complainant worked to support him. (Tr. Vol. II, 96-97) Thereafter, Complainant continued to work as the technical lead and attended technical team meetings until December 2010, but did not attend management meetings. (Tr. Vol. II, 28; Vol. III, 169-170)

38. Schwartz testified that Complainant's refusal to participate in the design review team was the last straw for him. He stated that by mid-December 2010 he had "given up" on Complainant because he had been unsuccessful in coaching him. Schwartz testified that this situation weighed heavily on him because he had worked very hard to make Complainant comfortable at the company, but felt he had not been successful in mentoring Complainant. (Tr. Vol. V, 90-91) I credit this testimony and find that Schwartz was truly saddened and disturbed by the turn of events. According to Schwartz, on December 13, 2010, he and Complainant had an informal discussion wherein Complainant said that he did not expect to be around after February once he had collected his restricted stock units and profit sharing. (Tr. Vol. V, 87-88) Schwartz understood Complainant to be saying that he was planning to leave the company after his RSU's vested and he received his profit sharing.

39. Complainant testified that he had discussions with Schwartz on December 13, 14, and 15, 2010. According to Complainant, on December 13<sup>th</sup>, he asked Schwartz for assistance in finding another position within the company. He denied telling Schwartz that he wanted to leave the company. (Tr. Vol. II, 29-31) Complainant testified that on December 14<sup>th</sup>, Schwartz told him he had given up on him, could no longer help him, that he was not a good fit for Teradyne, and that he should consider leaving the company. Complainant testified that he was shocked to hear that Schwartz had given up on him and felt like he was being fired. (Ex. C-18; Tr. Vol. II, 31, 32) While I credit Complainant's testimony that he sought to transfer within the company, I

also believe that he conveyed to Schwartz that he would likely not be around after February 2011. Based on Schwartz's understanding that Complainant would likely leave the company after February of 2011, Schwartz made the decision not to assign Complainant any restricted stock units. (Tr. Vol. V, 93; Ex. R-98) Schwartz testified that he made this decision because only a limited number of RSUs could be granted to his direct reports, and because RSU's do not immediately vest and have no value if the employee leaves within one year. He believed that the RSU's were too precious to grant to someone who indicated he would be leaving the company. (Tr. Vol. 5, 87-89)

40. In notes of December 13, 2010 made in preparation for a meeting with Burns, Schwartz stated that, "Complainant wants to be taken off the battery project and shows little interest in what else I can assign to him." (Ex. R-98)<sup>6</sup> His notes also reflected his belief that Complainant had significant talents to contribute to the company, and that he was the best functional manager in Schwartz's group, a great team leader, motivator and problem solver, and was very well respected by his direct reports. He noted that Complainant was often in a defensive posture and refused to accept responsibility for negative outcomes; resisted in taking direction on projects from those who did not meet his expectations for competency, typically project managers; and had little tolerance for weak individual contributors, believing that weak contributors should be scrubbed. He noted that Complainant viewed "the meeting centric culture of Teradyne as dysfunctional, doesn't like it and sometimes attends meetings by phone in his cubicle, even if the meeting is next door." Schwartz concluded that this resulted in difficult project dynamics, the breakdown of relationships and teamwork on the project, and negative reactions from some of

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<sup>6</sup> These notes are contained in a December 20<sup>th</sup> email Schwartz sent to himself stating that he wrote them the previous Monday which would have been December 13<sup>th</sup>. The notes do not mention unfair treatment, micro-aggression or discrimination, or that Complainant was seeking a transfer. Schwartz denied Complainant sought a transfer at that time. (Ex. R-98, Tr. Vol. VII, 58-60) Schwartz emailed himself two articles on micro-aggression that same day.

Complainant's peers and superiors. Schwartz testified that this ultimately caused difficulty in the cross-functional parts of Complainant's job. (Tr. Vol. V, 95-101) Prior to meeting with Burns, Schwartz also spoke to Kahwati for his impression of the situation. Kahwati told Schwartz that Complainant was his, "own worst enemy."

41. On December 14, 2010, Schwartz met with Burns to discuss Complainant's failure to attend the firmware design review meetings and his disengagement from the Battery Project. Schwartz told Burns that Complainant had indicated that it was unlikely he would stay with the company. Burns was concerned that if Complainant left the company, the Battery Project would suffer because Complainant had significant knowledge regarding the firmware that they did not want to lose. (Tr. Vol. V, 105-106) They discussed possible role changes for Complainant, including a transfer to a high level technical position, which would mitigate the problematic team dynamics and focus on Complainant's strengths. They also discussed the option of Complainant continuing to work for Teradyne as a contractor, if he had made the decision to leave company. (Tr. Vol. V, 106-107) Schwartz and Burns agreed that the company had to devise a way to retain individuals with great technical talent. (Tr. Vol. V, 107-108) Burns testified that Schwartz convinced him that Complainant was the individual who had the technical expertise on the Battery Project and that it was important to get Complainant re-engaged and "back in the game." (Tr. Vol. VIII, 79, 80)

42. Burns made the decision to involve Human Resources in any discussions about Complainant's future with the company, and he contacted George Gray, the human resources representative assigned to the Hardware Engineering group. Burns and Schwartz spoke with Gray and informed him that Complainant was a very talented MG1 who was, in their view, self-destructing and who might leave the company. They asked Gray to contact Complainant to

more clearly discern his intentions. (Tr. Vol. V, 108-111; Vol. VIII, 78-82) In an email to Gray on December 14, 2010, Burns wrote the following about Complainant: "Very poor team behavior, degrading rapidly," and "the behavior is bad enough, can't let it continue. Not showing up for his own design review." (Ex. R-91; Tr. Vol. VIII, 80-82) That same day, Burns and Schwartz also discussed Complainant's situation with the VP of Engineering, Mike Malone. (Tr. Vol. V, 109-110)

43. Schwartz sent Complainant a meeting invitation for December 15, 2010, entitled, "What's best for you and me." (Ex. R-92, 93) Schwartz stated that he hoped in that meeting to introduce the idea of a role change for Complainant, a change he believed would emphasize Complainant's strengths and downplay his weaknesses. (Tr. Vol. V, 114) According to Schwartz, when he presented the options for a role change to Complainant, including the option of a contractor position if Complainant decided he wanted to leave, Complainant responded that his wife had a theory that he was being subjected to "micro-aggression." Schwartz asked if he was referring to the disputes with Rodin and the resulting stress. Complainant responded affirmatively and told Schwartz to look up the definition of "micro-aggression."<sup>7</sup> (Tr. Vol. V, 115-116) Schwartz testified that he did not associate the word "micro-aggression" with discrimination in that conversation, but believed it was a reference to the low-level conflict Complainant was describing in meetings. (Tr. Vol. V, 116) Schwartz told Complainant that his attitude was a problem and Complainant responded that there were others who exhibited similar attitude who got very different reactions than he did. (Tr. Vol. V, 118) Schwartz agreed that

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<sup>7</sup> There is a dispute about when Complainant first mentioned to Schwartz that he might be a victim of micro-aggression. I credit Schwartz' testimony that this occurred in mid-December 2010, because Schwartz testified credibly that he was unfamiliar with the term and that weekend researched the concept and emailed himself two articles about micro-aggression. (Tr. Vol. V, 131-133) He also informed Burns around this time that Complainant raised the issue of micro-aggression and explained it was "low level bias or discrimination." (Tr. Vol. VIII, 194-196)

others had attitude issues but received different responses.<sup>8</sup> When Complainant told Schwartz he was admitting that white guys could have an attitude, but Complainant could not, Schwartz responded, "Let's not bring race into it." (Tr. Vol. II, 35-36) I credit Complainant's testimony.

44. Since the company planned to propose a role change for Complainant, rather than risk losing his technical talent and expertise, it is not credible that Schwartz advised Complainant on December 14<sup>th</sup> to leave the company. However, according to Complainant, on December 15<sup>th</sup>, Schwartz informed him of his meeting the night before with Burns and the VP of Engineering Mike Malone and despite their wish that Complainant remain on the Battery Project, Burns and Malone wanted to set a date for his departure, so as not to leave things hanging. Complainant testified they would allow him to remain on the employment rolls until February 2011 so that he could collect some benefits due in that period, and then would convert him to a contractor and he could continue to work on the Battery Project. (Tr. Vol. II, 32-34) According to Complainant, Schwartz informed him that he no longer needed to attend Battery Project meetings because Schwartz would assume that role, but that Schwartz needed his technical expertise. (Tr. Vol. II, 34, 36-37)

45. The following day, Complainant received a communication from George Gray of the Human Resources department. Since Complainant did not know George Gray and did not know why Gray contacted him, he asked Schwartz about it. Schwartz informed Complainant that Gray was in Human Resources and that he had been a party to the previous night's meeting with Burns and Malone.<sup>9</sup> According to Complainant, Schwartz advised Complainant to be careful what he

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<sup>8</sup> Schwartz testified that he told Complainant that other's attitudes did not create team dysfunction, but clearly this was not the case with Rodin, whose criticisms of Complainant and his team contributed significantly to the Battery team tensions.

<sup>9</sup> Burns' notes of that meeting state Complainant planned to resign the following quarter and that he is not interested in transferring internally at Teradyne. (Ex. R-87; Tr. Vol. VIII, 191-192) Schwartz did not inform HR that

said to Gray because “he works for the company.” (Tr. Vol. II, 39-40) Schwartz denied saying this but testified that Complainant asked him repeatedly if Gray worked for Teradyne. (Tr. Vol. V, 124, 125) Complainant spoke with Gray and testified that Gray indicated he understood from a meeting with Schwartz that Complainant was leaving Teradyne sometime around the first of the year. Gray sought to confirm that he was leaving and the date of his departure. Complainant advised Gray that he did not tell Schwartz he was leaving the company. They did not discuss an internal transfer or Complainant’s allegations of “micro-aggression.”<sup>10</sup> (Tr. Vol. II, 42) When Schwartz learned of this conversation he was shocked that Complainant denied his expressed intent to leave the company and felt as if he had been made to look like a “liar.” (Tr. Vol. V, 123-124)

46. On December 17, 2010, the Program Manager for the Battery Project sent Burns an email asking who the project lead was, expressing the need “to get FPGA management re-engaged,” and complaining that there had been no representation at the morning meeting for a couple of days and no representation at a recent core team meeting. (Ex. R-97; Tr. V, 125-126) The Program Manager expressed the view that the FPGA group was not being led and no one was providing the group with the big picture. (Ex. R-97) Burns forwarded this email to Schwartz telling him he needed to attend Battery Project core team meetings and meet with the firmware team every day. Schwartz responded on December 22, 2010 that he “would turn this around.” (Id.; Tr. Vol. V, 130) Schwartz concluded that Complainant had completely “checked out” and Burns was asking him to take on Complainant’s role. (Tr. Vol. V, 130)

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Complainant had complained about micro-aggression or discrimination based on his race, or mistreatment by Burns. (Tr. Vol. VII, 106-109)

<sup>10</sup> Gray is deceased and there is nothing in the record regarding his version of the telephone call with Complainant.

47. Thereafter, one of the eInfochips engineers working on the Battery Project sent an email seeking clarification of Complainant's role, and asking who would be managing the FPGA team since it appeared a number of individuals were involved. On December 22, 2010, Schwartz responded that Complainant was the technical lead, Jeff Benagh was the architect, and Schwartz was "the diplomat" providing interface and attending cross-functional and higher management meetings on the project. (Ex. C-101; Tr. Vol. V, 143-144) Thereafter Schwartz attended all the Battery team meetings and Complainant continued to do technical work and supported the technical team of firmware engineers. (Tr. Vol. II, 45-46)

48. Schwartz testified that in mid-December 2010, he researched and read articles on the topic of "micro-aggression" because he wanted to understand the issue Complainant had raised. He concluded from the articles that "micro-aggression" was low level bias that was prone to occur in any interracial inter-action, that it often occurs at the subconscious level, and is largely in the eyes of the recipient. (Tr. Vol. V, 129-131;133-136) One of the articles he read noted that micro-aggression is non-actionable in the legal sense. (Ex. R-99) After reading articles on the subject, Schwartz approached Complainant directly during the week of December 20, 2010 to discuss his allegations of "micro-aggression." He suggested that Complainant speak to two of his MG1peers in the group about their perception of the treatment they received on projects in the critical phase. Complainant declined saying he didn't need to hear their impressions. They did not discuss the issue again. Schwartz stated that things then went into "quiet mode" for a while and Complainant seemed less stressed working primarily on the technical issues on the Battery Project. (Tr. Vol. V, 137-140; Tr. Vol. II, 49-50; Vol. III, 170) Burns was aware of Complainant's charge of "micro-aggression" and likely understood that it was made in the context of Battery Team meetings. (Tr. Vol. VIII, 200) He stated there were strong dynamics in

the battery team meetings and acknowledged that Rodin could be testy, describing Rodin as a ...”rough- around- the- edges kind of guy,” a “New Englander kind of guy.” He had no recollection of directly addressing Rodin’s behavior with him. (Tr. Vol. VIII, 62-63) Neither Schwartz nor Burns reported to Teradyne’s Human Resources department or General Counsel that Complainant had made a complaint about discrimination, as is called for by company policy. (Ex. C-78, p. 13; Tr. Vol. II, 89-90; Vol. VIII, 208; Vol. XI, 15, 20)

49. Complainant testified that Schwartz continued to press him for a date as to when he would be leaving the company and if he would agree to some consultant arrangement. Schwartz had previously told Complainant that this is what Burns and Malone wanted. (Tr. Vol. II, 51) On January 6, 2011, Burns sent Schwartz an email asking him for an update about Complainant and if he had a copy of Complainant’s MAP (performance evaluation). (Ex. R-102) Burns expected Schwartz to document in writing concerns about Complainant’s performance on the Battery Project. (Tr. Vol. V, 146) He reviewed Schwartz’s draft because he wanted to make sure they were being direct about the problems and how to resolve them, and not sugarcoating anything. (Tr. Vol. VIII, 91-92, 99) Schwartz responded that he had another meeting scheduled with Complainant to discuss a time frame for his voluntary departure, (probably the end of February) and told Burns that Complainant expected the company to terminate him if he did not leave on his own. (Id.) Schwartz testified that he and Complainant had agreed to continue to discuss Complainant’s plans after the holidays. (Tr. Vol. VI, 5-6) Schwartz stated that he didn’t know how to interpret the ambiguous and conflicting messages Complainant was sending about whether he intended to leave, that Complainant was not “always upfront,” and that he wasn’t sure if Complainant was just buying time because he hadn’t yet made up his mind about

leaving.” (Tr. Vol. II, 147-148) I credit his testimony that Complainant was not entirely forthright about his intentions in their communications.

50. Complainant stated he felt compelled to clarify in writing that he wasn't leaving the company. (Tr. Vol. II, 51) On February 4, 2011, he conveyed his sentiments on this subject to Schwartz in an email, stating it was his understanding from conversations with Schwartz and the company's HR representative that there was “a strong desire to end his employment with the company.” Complainant stated this was not his wish, but he was “amenable to having a discussion as to how to do this in an amicable and professional manner.” He stated he expected something in writing from the company and “reaching a mutually satisfactory separation agreement.” (Ex. C-76) Schwartz did not respond to this email. He stated he was surprised by, and disagreed with, Complainant's suggestion that the company had a strong desire to end his employment. He stated that management had engaged HR as an “intermediary,” and not a “hit man,” to discuss the issues that were driving Complainant's desire to leave the company, and that Complainant had turned it around. (Tr. Vol. VI, 8, 9; Vol. VII, 108)

51. The Battery Project was cancelled on February 14, 2011 due to market conditions, limited engineering resources, and management's conclusion that the “potential returns do not warrant further investment.” (Ex. C-114) The Battery Project team was congratulated by a number of managers, including the Vice President of Engineering, for their good work and significant accomplishments in a short time. (Ex. C-114) Burns, Schwartz and Rodin all received very positive reviews in 2010 for their work on the Battery Project. Complainant received a “needs improvement,” rating for his role in the project. (Tr. Vol. VIII, 11,12; Vol. IX, 22-45; Ex. C-58, C-127; C-128; C-129)

52. On February 17, 2011, before Complainant left for a vacation, Schwartz informed him that because the Battery Project had been cancelled, the offer of a contract consulting position was no longer on the table. According to Complainant Schwartz told him that he was being demoted to a DL4 or DL5 level engineer and would no longer have direct reports. (Tr. Vol. II, 58-60) Schwartz testified that he tried to come up with a solution that would best address Complainant's difficulties as an MG1 level manager who, when challenged by his management peers at the project level, reacted in ways that were disruptive to the team by withdrawing, disengaging and not going to meetings. He also considered Complainant's aversion to meetings and having to deal with peers who he viewed as not competent. Schwartz sought a solution that would allow Complainant to remain engaged as a technical leader and that would address his compensation in a fair manner. He testified that the maximum salary of a DL5 engineer was around \$200,000, while Complainant was then at the top of the MG1 salary scale at around \$173,000. (Tr. Vol. VI, 11, 12) Burns confirmed that a DL5 position for Complainant had been discussed as a solution as early as December. (Tr. Vol. VIII, 94-95) Schwartz envisioned himself as a buffer between Complainant and project level "middle-management politics," and stated he was willing to make that investment to retain Complainant. (Tr. Vol. VI, 12) Schwartz did not consider the transfer to a DL5 level engineering position to be a demotion, because DL5's are given high level goals and the ability to leverage a team to accomplish those goals, and their assignments have a significant impact on the organization. (Tr. Vol. VI, 14-15, 18) He testified it was also common for individuals to move between DL4 and DL5 positions and MG1 positions. (Tr. Vol. VI, 12, 14) Another option would have been for Complainant to remain as an MG1 and be placed on a performance improvement plan for his failure to attend the firmware design review meetings but Schwartz believed that would have failed and guaranteed

Complainant would quit. (Tr. Vol. VI, 10-13; Vol. VIII, 100) I credit Schwartz's testimony and that his intentions were genuine.

53. On February 22, 2011, Schwartz sent an email to his group along with a new organizational chart, describing the changes in the ASPI/FPGA group, including the change in Complainant's role. (Ex. R-113) He stated that this email was merely formalizing the changes that had already been discussed with Complainant. He had also previously informed Complainant's direct reports in one-on-one meetings that Complainant was moving "into a role that would allow him to lead technical teams and leverage his technical talents to the max," and that Schwartz and Complainant had "an understanding that he was going to be much happier." (Tr. Vol. VI, 20-21; VII, 137, 138) Despite the fact that Schwartz had discussed the role change with Complainant and it was not a surprise, Complainant was shocked that this new organizational chart was sent out while he was on vacation because he had not received advance notice of its distribution. (Tr. Vol. II, 63) Complainant viewed the transfer as a demotion because he was no longer a manager with direct reports, and had lost certain "compensation opportunities." (Tr. Vol. II, 59-60) However, he admitted the transfer resulted in no change to his salary or his variable compensation. (Tr. Vol. II, 60-61) Complainant stated that after the transfer, colleagues treated him differently and were less inclined to involve him in discussions or project work because they didn't know how long he would stay. He testified that he no longer had hundreds of emails a day and invites to meetings and felt "cut out" and "like [a] dead man walking." (Ex. R-128; Tr. Vol. II, 64-66)

54. On February 23, 2011, the MG1 who was now Complainant's functional manager sent an email to Schwartz lobbying for Complainant to receive a severance package. He stated that he had just spoken to Complainant and it was "pretty clear [Complainant] does not intend to

stay...” (Ex. R-115) Schwartz understood this to mean that Complainant had told this manager he did not intend to remain at the company, consistent with his previous representation to Schwartz in December. (Tr. Vol. VI, 24) Schwartz stated that it would not be appropriate to grant Complainant a severance package because he was not being laid off. (Tr. Vol. VI, 25-27)

55. Sometime in late February 2011, Schwartz made entries into Complainant’s 2010 MAP. Complainant was rated as “Needs Improvement” for the Battery Project. In March of 2011, Schwartz wrote that: “[Complainant] ran into some serious integration issues on battery during the second half of 2010” and “his working relationship with the SW lead, Jon Rodin, and the project’s engineering manager, Rick Burns, fell apart.” (Ex. C-58; C-93; Vol. VII, 147, 148) In contrast, Rodin’s MAP stated that [Jon does exceptionally well in dealing with conflict in his straight ahead style--leads to open and frank discussion regarding difficult topics.” Rodin was rated “highly effective” at building trust,” and he was described as a “Role Model” for managing conflicts. (Ex. C-127) Schwartz testified that he primarily faulted Complainant for this breakdown in communication, and that it was his responsibility to figure out a way to communicate effectively with the software lead and the engineering manager. (Tr. Vol. VII, 148,149)

56. Complainant provided a detailed response to the MAP and he and Schwartz debated the issues in emails. (Ex. R-20; R-120) Complainant testified that since he hadn’t received a written review in several years, he pressed Schwartz for comments because it was clear to him that he was being forced out of the company. (Tr. Vol. II, 73-74, 76-77) Complainant wrote a rebuttal conveying his disagreement with the entire review. (Tr. Vol. II, 79) He felt there were a lot of inaccuracies and mischaracterizations that were intended to support a decision to terminate him. (Id.) As to the Battery Project, Complainant testified that management refused to

recognize that the India team could not do the job, that Complainant had pointed this out to management much to their displeasure, and that management held him responsible for their inability to perform. (Tr. Vol. II, 83)

57. In late February, Complainant's counsel sent a demand letter to Teradyne detailing Complainant's allegations against the company. The letter was received by Teradyne's Vice President and General Counsel, Charles Gray, who proposed a meeting at his office with HR representative, George Gray. According to Charles Gray, the purpose of the meeting was to be responsive to the claims raised and to establish a process for Complainant to raise any issues going forward, since he remained an employee of the company. (Tr. Vol. XI, 5-6) According to Gray, Complainant stated in that meeting that he had no concerns about retaliation at that time. He also stated that he was working on a project that he considered important, supervising outside contractors. (Tr. Vol. XI, 7) Gray testified that he checked in with Burns and Schwartz thereafter and they were not aware of any further complaints from Complainant. (Tr. Vol. XI, 8, 9)

58. Schwartz testified that in the March 2011 time frame, he assigned high level early phase project work to Complainant as a DL5 level engineer. Complainant was assigned to take the lead on several subprojects of the Tomahawk project, which was a new version of a very profitable tester for the company. Schwartz expected Complainant to deliver these systems by forming a team under Complainant's direction to accomplish the tasks and to reach out to engineers to pull a team together. Schwartz testified these projects were in the Phase 1 conceptual and development stage. Complainant was charged with conceptualizing the architecture at a high level and determining what engineering processes and methods were appropriate. (Tr. Vol. VI, 47-48, 50-51) Schwartz assigned Complainant three out of five sub-

systems on the Tomahawk project and viewed this as a significant amount of work that was estimated to require 13 people working together full time for a year. (Tr. Vol. VI, 46, 48-49) Schwartz believed Complainant was doing fine and stated that things calmed down in this time frame. He stated that Complainant did a good job in presentations of his work at a meeting in April 2011. (Tr. Vol. VI, 51) Neither Messrs. Gray received any further communication from Complainant's attorney. (Tr. XI, 7)

59. On March 14, 2011, Complainant filed his first claim of discrimination against Teradyne with the MCAD naming Rick Burns and Martin Schwartz personally as Respondents in his Complainant. Schwartz testified that after the MCAD complaint was filed, his relationship with Complainant changed and they met more formally only to discuss business and were not socializing or stopping by each other's cubicle. He and Complainant spoke and agreed they would focus on the present and the future and that it made sense not to discuss the issues surrounding the law suit which the lawyers were handling. (Tr. VI, 49, 50) Schwartz stated that after the MCAD charges were filed, he was directed to be very sensitive to any issues that might arise regarding Complainant, and that he would go into meetings with Complainant with all his radar antennas up looking for any sign of problems or issues which he would immediately relay to Human Resources. He was personally concerned of saying or doing the wrong thing that might lead to more charges. (Tr. Vol. VI, 62, 63)

60. Discussions regarding resolution of Complainant's MCAD charges began in March of 2010 and continued until sometime in early July of 2010. Thereafter, Schwartz heard from Complainant for the first time that Complainant had significant issues with his work assignments. In the July, 2011 time frame, Schwartz had removed Complainant from one sub-project and replaced it with Communications/Infrastructure work, which was something brand

new for Teradyne. Schwartz testified this was a bigger project that would leverage Complainant's technical ability. On July 5, 2011, Schwartz memorialized conversations he had been having with Complainant in an email. The project was heading into Phase 2, a more advanced phase that required work typically assigned to a DL5 or MG1 engineer. The project also required formulating a strategy for a prototype and developing the prototype. (Ex. R-128; Tr. Vol. VI, 52-58)

61. In a meeting with Schwartz on July 7, 2011, Complainant complained for the first time that Schwartz had assigned him work that was not appropriate to his level, was trivial and beneath him. Schwartz testified that it was "like a switch had been flipped." He stated that they had a big debate about the issue in which he denied assigning Complainant low level work and told Complainant that his allegation was "just not objectively true." (Tr. Vol. VI, 61-65.) Complainant memorialized his position in emails to Schwartz on July 11<sup>th</sup> and July 25<sup>th</sup>. (Ex. R-128) In response to Complainant's July 11<sup>th</sup> email complaining, among other things, that the work being assigned to him was trivial, Schwartz stated that this was not the case and that Schwartz expected him to take a leadership role on the projects assigned. Schwartz suggested they discuss the matter further on July 21<sup>st</sup> when Complainant was scheduled to return from an overseas vacation. (Ex. R-128; Tr. Vol. VI, 66-69) He notified Burns and George Gray of his discussion with Complainant and stated he felt Complainant was "withdrawing" from the DL5 role, and "coming up with excuses for not contributing, and why the work is beneath him." (Ex. R-125) Schwartz understood that HR intended to set up a meeting with Complainant when he returned from vacation. (Tr. Vol. VI, 73) On July 22, 2011, Schwartz sent an invitation to Complainant and Gray for a meeting to be held on August 1, 2011 to discuss the issues Complainant had raised about work assignments. (Tr. Vol. VI, 75-77; Ex. R-127) The meeting

did not take place because on July 25, 2011, Complainant submitted his resignation to Schwartz by email while still on vacation. (Ex R-128; Tr. Vol. VI, 77-80)

62. In his July 25, 2011 email Complainant stated that the work assigned to him was not meaningful, would take only a matter of days, and was a significant career step down for him. He also claimed in the July 25<sup>th</sup> email that his colleagues continued to ask if he should be included in any projects since he was not expected to stay, and that no meetings had been scheduled on his calendar for the past several weeks. He stated his job had been effectively gutted and he was “excluded from the flow of information.” (Ex. R-128) At the end of the email Complainant stated that he had “no choice but to submit his involuntary resignation based on an intolerable environment.” He stated his resignation would be effective August 11, 2011. Schwartz forwarded Complainants July 25<sup>th</sup> email to Rick Burns and George Gray in HR. (Ex. R-128) Complainant returned from vacation on August 2, 2011, and indicated he would not attend the meeting with Gray and Schwartz. (Tr. Vol. VI, 78-79)

63. Complainant’s work on a number of projects was reassigned by Schwartz to other individuals in his group. The work was assigned to DL5 or MG1 level engineers. One of the engineers assigned to the work as an MG1 testified that it was high level work suitable for an MG1 or a DL5, that it required significant amounts of time of one DL5 engineer who worked on it, and required another six months of work by an MG1 and DL5. (Tr. Vol. X, 141-144, 144-151, 159, 162-164) Schwartz testified that certain project work originally assigned to Complainant took 18-20 man hours of work to complete. (Tr. Vol. VI, 80-83) Despite Complainant’s assertion that the work assigned him would take only days, Complainant did not complete this work in the one month that he remained at the company. Complainant continues to

assert that he was completely marginalized and not assigned any meaningful work as of July, 2011. (Tr. Vol. II, 149, 152; Vol. IV, 61)

64. Mark Kahwati, a peer of Complainant's who worked on the Battery Project testified he did not observe any unusual behavior by Burns toward Complainant in Battery Team meetings. He did not perceive that Burns unfairly took one side. (Tr. Vol. X, 30) Kahwati also testified that he did not have any problems with Complainant on the projects they worked on together. (Tr. Vol. X, 35) Elisa Woo, who reported to Rodin, also testified that she did not have any issues with Complainant on the projects they worked on. (Tr. Vol. X, 73-74) Woo, who attended Battery core team meetings had a memory that Complainant was not physically present at meetings. (Tr. Vol. X, 78) Neither of these co-workers admitted to being aware of the fact that Complainant had made charges about unfair treatment on the Battery Project. (Tr. Vol. X, 43, 101, 106)

65. Complainant testified that he did not receive an equity award from Teradyne in January 2009 but believed that he had earned, and was entitled to, a grant of restricted stock units (RSU's based on his performance in 2010. (Tr. Vol. II, 49) Burns reviewed and approved the denial of RSU's based on Complainant's performance and the expectation that he was going to resign. (Tr. Vol. VIII, 209-210) The other managers who reported to Schwartz received RSU grants in January 2011. (Tr. Vol. II, 49, Vol. VII, 64) Respondent's payroll documents show that in calendar year 2010, Complainant received RSU payments of \$12,548.00 (Ex. R-151 at 000178) In 2011 he received RSU payments of \$18,765.00. (Id. @ 000179) Complainant is claiming RSU payments of approximately \$150,000 for RSU's not granted him in 2011 due to his alleged constructive discharge, but which remained unvested at the time he left the company. (Tr. Vol. II, 185-186)

66. Complainant's compensation at Teradyne consisted of "model compensation" which is base salary plus variable compensation, profit-sharing bonuses, discretionary grants of Restricted Stock Units (RSU's) and participation in an employee stock purchase program, and an employer sponsored 401(k) plan. (Tr. Vol. IX, 98; Vol. VI, 47-50, 98-100; Vol. II, 188) Variable compensation is based on the company meeting profitability or revenue goals. (Tr. VI, 49; Vol. IV, 118-119) Complainant's base salary at the time of his termination was \$163,783. (Ex. C-39; Tr. Vol. II, 182) Complainant's model compensation was \$178,523 at the time he left Teradyne. (Ex. C-39; Tr. Vol. II, 182)

67. In August of 2011, Complainant started his own company, a retail establishment called the Build Station, where he worked full time until he closed the business in August 2012 due to financial losses. Complainant testified that he spent 100% of his time on this business and that he did not pursue other job opportunities immediately. (Tr. Vol. II, 163, 169 Vol. III, 212, 216-217, Vol. X, 17) Complainant did not earn any income from the Build Station but had business losses totaling \$57,761 in 2011 and \$49,119 in 2012. (Tr. Vol. II, 165-167; Ex. C-22, C-23) Complainant began his job search in late 2011, but did not start a "more intensive search" until January 2012. (Tr. Vol. II, 172, 214-216) He stated that he met with recruiters, submitted applications, and applied for unemployment, which included meeting with a job counselor and looking at job data bases. (Tr. Vol. II, 170) In November of 2012, Complainant interviewed for a position and accepted an offer in December 2012, to begin employment in January 2013. He earned more than his base salary at Teradyne in 2013, and significantly more in subsequent years. (Tr. Vol. II, 178-180; Ex. R-145, R-147, R-148)

68. Complainant testified that he suffered significant emotional distress as a result of Respondents' conduct and the oppressive atmosphere he was subjected to after he commenced work on the Battery Project. He testified that he was emotionally exhausted by having to confront this environment on a daily basis and that his health suffered dramatically. (Tr. Vol. II, 144-149, 153-154; Ex. C-20) He stated that he felt depressed, oppressed and humiliated when in meetings with Burns and Rodin and when he was subjected to Rodin's barrage of email criticism of the firmware which was sent to Burns and other colleagues. (Tr. Vol. II, 146-147, Ex. C-20) He also testified that he experienced tremendous anxiety, headaches, elevated blood pressure, and difficulty sleeping and focusing as a result of the disparate treatment. (Id.) Schwartz confirmed that Complainant told him he was experiencing a great deal of stress and emotional upset and that he felt unable to attend Battery Project team meetings. Complainant also told Schwartz he was having trouble sleeping and having stomach aches. (Tr. Vol. V, 52-53, 145-147) Complainant testified that his distress also took a toll on his family life and participation in social activities outside of work. (Tr. Vol. II, 146-147) Complainant's wife, Detris Adelabu testified that he was less engaged in family, social, and church activities. (Tr. Vol. X, 6-15) She testified that Complainant lost weight, was more restless at night, appeared less confident and seemed to be carrying around a heavy weight" on his shoulders. (Tr. Vol. X, 6-15, 9-11) There is evidence that Complainant was under a great deal of stress during the summer of 2010 related to the Battery Project work and the criticism he endured. There is also evidence that he suffered from high blood pressure and sleep problems as early as 2007 and 2009. (Tr. Vol. III, 207-209) Both Complainant and his wife testified that the symptoms Complainant described have improved. (Tr. Vol. III, 209, Vol. X, 12-16)

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B s. 4(1) makes it an unlawful practice to discriminate in employment based upon race. Such discrimination includes subjecting an employee to adverse actions that constitute disparate treatment based on race and may include a hostile work environment. Complainant alleges that he was subjected to adverse actions by Burns and Schwartz while working on the Battery Project and that he complained about the disrespect and hostility he was experiencing from Burns and the Battery Project Software Manager Jon Rodin in 2010. Complainant alleges that he complained repeatedly to Schwartz, his immediate manager, in the Fall of 2010, about harassment by Rodin and unfair treatment and disrespect by Burns while working on the Battery Project. He claims that he was treated adversely by Burns during the Battery Project, that his and his team's work was unfairly scrutinized and that he felt scapegoated by Burns. Complainant asserts that Schwartz is personally liable because he did not take adequate measures to ease or remedy the disparate treatment and the hostile work environment to which Complainant was subjected. He also claims that when it became apparent to management that he was complaining about disparate treatment because of his race, he was subjected to retaliation by being demoted from his MG1 management position to a DL5 senior engineering position, and was thereafter marginalized with no constructive work, and ultimately constructively discharged in July of 2011.

#### A. Disparate Treatment/ Hostile Work Environment

Complainant's allegations that he was subjected to a number of adverse actions during the Battery Project give rise to claims of disparate treatment and a hostile work environment based on race. Complainant bears the initial burden of establishing a prima facie case of discrimination. To prove a claim of disparate treatment, Complainant must establish that he is

(1) a member of a protected class; (2) that he was performing his job adequately; (3) that he suffered an adverse employment action, and (4) that similarly situated individuals not of his protected class were not treated in a like manner, giving rise to an inference of discrimination. *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107 (2000); *Blare v. Husky Molding Systems*, 419 Mass. 437 (1995). To establish a claim for a racially hostile work environment, Complainant must demonstrate that he (1) is a member of a protected class, (2) was the target of speech or conduct based on his race, (3) that the conduct was sufficiently severe or pervasive as to alter or interfere with the conditions of his employment and, (4) the hostility was perpetrated by an employee in a supervisory or management position. *College-Town Division of Interco, Inc., v. MCAD*, 400 Mass. 156, 162 (1987) The elements of a hostile work environment as developed in sexual harassment cases, have been extended to other protected classes, such as race and disability. See *Beldo v. UMass Boston*, 20 MDLR 105, 111(1998); *Connors v. Luther and Luther, Enterprises*, 32 MDLR 71, 77 (2010).

#### Burns' Conduct

Complainant alleges that he was treated adversely by Burns on a number of occasions during the Battery Project and that Burns disrespected his opinions, treated him dismissively and took issue with the manner in which he communicated his opinions. Complainant asserts that when technical disputes arose between the firmware and software groups on the Battery Project, Burns repeatedly resolved those disputes in favor of a white manager, Jon Rodin. He claims that the unwarranted criticism and unrelenting scrutiny of his and his team's work, along with Burns's derision of him, made attending Battery team meetings unbearable for him. Complainant believed that Burns's responses and reactions to the work place conflicts he experienced with Rodin constituted disparate treatment based on his race. He demonstrated that

Burns treated other managers, most notably Rodin, who voiced opposing opinions in a more lenient and less critical fashion, while singling out Complainant for having attitude problems and belittling him in the presence of his colleagues. Complainant was one of a very few African American engineers/managers at Teradyne and he believed that Burns and other managers had little experience working with an African American engineer/manager. Complainant asserts that Burns and Rodin exhibited a certain bias, perhaps unconscious, about his abilities, the propriety of expressing his opinions forthrightly, and the deference Complainant owed them. There is sufficient evidence, as discussed below, to support this assertion.

As early as April of 2010, when Complainant raised serious concerns about the capability of the Indian contractor, eInfochips, and recommended hiring an in-house firmware lead engineer, Burns rejected his proposal and accused Complainant of not being upfront with information about eInfochips. Complainant continued to argue his position in emails to Burns, but his recommendation was dismissed by Burns largely for financial reasons. Complainant was directed to accept options that he considered inadequate to resolve the problems. Complainant felt strongly that his views on the matter were disrespected, particularly when he ultimately was vindicated on this issue. Burns testified that he was frustrated by Complainant's suggesting that the budget for the project might be negatively impacted by management's refusal to address the problem and was concerned about bringing this news to the company CEO.

Complainant asserts that throughout the Summer and Fall of 2010, as he attended meetings to integrate the firmware and software on the Battery Project, he had to endure a hostile work environment perpetrated by Burns and Rodin. Complainant and Rodin, who led the software team, had disputes about whether the firmware design was defective and whether it was causing problems with the software and disrupting the schedule on the Battery Project. While

Respondent suggested that such disputes were commonplace, Complainant believed the criticisms of the firmware were entirely exaggerated and that his team was being scapegoated by Rodin, whose technical expertise Complainant did not respect. He asserted that software was being designed on the fly and that Complainant's team's specs were being ignored. I conclude that Complainant's view on these matters had some validity, as Schwartz confirmed, after a review, that the firmware was in decent shape.

More importantly, these disputes led to harsh criticism of Complainant by Rodin in vituperative emails to Burns. In one email Burns characterized Complainant's position as "ridiculous," clearly insulting Complainant's intelligence and technical expertise. Burns ultimately sided with Rodin on a technical issue telling Complainant to "raise the white flag," in the interest of teamwork. Complainant questioned whether Burns had actually read his technical suggestions. While Burns articulated in an email that he believed both were "behaving like children," he was very angry at Complainant's response and expressed his anger at Complainant in a private email to Schwartz suggesting that he had ideas about where to get a new firmware lead. He admitted that he was referring to Complainant being ousted from the position of firmware lead. Burns did not express similar upset or anger about Rodin's intemperate communications or Rodin's behavior in this dispute and did not contact Rodin's manager in writing to complain.

I conclude that Burns' view of Complainant as divisive, un-cooperative and failing to work in the interest of the team was likely colored by Complainant's race. Burns's disproportionate reaction to Complainant's suggestion that perhaps Burns had not read his technical views was to consider firing Complainant. Burns's reaction supports a conclusion that he viewed Complainant's behavior as unacceptably arrogant and superior, and insufficiently

deferential to higher management, despite his assertion that he valued engineers who were highly opinionated and aggressive in expressing those opinions. Given Complainant's superior technical abilities and his history of strong performance with positive feedback, there is sufficient evidence to conclude that Burns expected a greater degree of deference from a black subordinate than he might have expected from a white subordinate. His behavior suggests the existence of racial bias toward Complainant, perhaps unconscious, and raises the question of whether he would have greeted similar behavior from a white subordinate so harshly.

As stated earlier, the Battery team was comprised of the most opinionated and aggressive engineers, attributes Burns claimed to value. However, he took issue with Complainant when Complainant expressed his opinions forthrightly or undiplomatically. In contrast, Burns treated Rodin as a respected peer and did not criticize Rodin for acting in an opinionated, insulting and aggressive manner towards Complainant. In an October 2007 email to Burns, Rodin complained that his staff was "wasting its time" because of Complainant's failure to alert the software team of bugs in the firmware and that they were getting "pretty PO'd" at listening to Complainant "harping on the software." Despite the fact that Rodin treated Complainant in a rude and disrespectful manner, there is no evidence to suggest Burns was similarly critical of Rodin's behavior. Rodin was direct and opinionated in his emails. Burns described him as a ... "rough-around-the-edges kind of guy, [a] New Englander kind of guy." Rodin's style of communication, which was less than diplomatic, gruff, and abrasive, was validated in his performance evaluation, where he was praised as doing "exceptionally well in dealing with conflict" with a "straight ahead style that leads to frank discussion regarding difficult topics." While Burns did not conduct Rodin's evaluation, it was clear that Burns did not take exception to Rodin's conduct, while he was highly critical of Complainant's similarly forthright approach to

problems. He was unhappy with Complainant's frank expression of divergent views that challenged other managers' positions. Complainant's early advice to Respondents about the limitations of the contractor eInfochips was met with resistance and, ultimately, he received no validation from Burns for identifying the India group's problems correctly and early on, nor did he receive credit for proposing alternative solutions.

I credit Complainant's testimony that after that disagreement, Burns stopped soliciting his opinions and ignored or treated him derisively in team meetings. Complainant stated that Burns would address his questions about Complainant's work to others and did not seek input from him. According to Burns, he was really bothered by what he viewed as Complainant's deflecting and blaming others for problems with the firmware. Meanwhile, Rodin engaged in similar behavior towards Complainant without reproach. Complainant claims he and Benagh were not given credit for their long hours of hard work on the firmware during this time period. I conclude that Burns exhibited a more negative reaction to Complainant and treated him in a disparate fashion from Rodin. Burns admitted not considering whether his siding with Rodin over a series of technical disputes undermined Complainant's position on the team and stated he was not focused on Complainant's feelings. His lack of concern for how Rodin treated Complainant is illustrative of his own attitude toward Complainant.

I also credit the testimony of Complainant and Schwartz that Schwartz confirmed that certain white managers could have an "attitude" and not get the same negative reaction as Complainant. A fact-finder may interpret subjective comments such as "Complainant was too confident for his own good," and other evidence of "attitude" issues to "reflect a subconscious sense that the plaintiff, as a black man and a foreigner, did not 'know his place.'" *Bulwer v. Mount Auburn Hospital, et al.* 473 Mass. 672, 686 (2016). The evidence in this case permits me

to draw the inference that similar sentiments were lurking beneath the surface with Burns and Rodin as manifested in their treatment of Complainant.

Once Complainant establishes a prima facie case, Respondents must demonstrate a legitimate non-discriminatory reason for the disparate treatment. In hostile work environment claims if the discriminatory harassment is found to have been perpetrated by a manager, Respondent is subject to vicarious liability. *See College-Town supra.* at 165-167. Respondents' position is that Complainant's challenges to management, and his poor attitude as a team member justified Burns' treatment of him. However, I conclude that the Complainant has sufficiently demonstrated pretext since similar behavior was tolerated by Rodin who was not a member of Complainant's protected class. Moreover, Schwartz concurred that Complainant was treated differently than his white colleagues for having attitude issues.

The evidence supports a conclusion that Burns's reactions to and treatment of Complainant during the Battery Project constituted disparate treatment based on his race and created a racially hostile work environment for Complainant. This environment, especially in Battery Project meetings, adversely affected Complainant's working conditions and caused him significant distress. The evidence also supports the reasonable inference that Burns' perception of Complainant not behaving as a team player and exhibiting unacceptable attitude problems partially resulted from racial bias. It is not uncommon to encounter subjective criticisms such as having poor attitude, being abrasive, or not acting as a team player to be leveled against minorities and women, particularly in subjective areas such as interpersonal communications in the workplace. Such criticism may be reflective of bias that is oftentimes not overt, but unconscious and subtle. *See Bulwer v. Mt. Auburn, supra.* at 686-687.

The courts have recognized that such unconscious bias is actionable. *Thomas v. Eastman Kodak Company*, 183 F.3d 38 (1st Cir.1999) citing *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (D.C. Cir. 1987) Even if Burns did not act with conscious awareness of his motivation in demonstrating bias based on Complainant's race, "this neither alters the fact of its existence, nor excuses it." Unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination." *Id.* I conclude that Burns's actions render him individually liable for disparate treatment that contributed to the creation of a hostile work environment.

#### Schwartz's Conduct

Complainant claims that Schwartz was on notice of his allegations of disparate treatment and hostility based on his race as early as October 2010 and failed to take meaningful steps to remedy the harassment. He claims that he repeatedly voiced his concerns to Schwartz and raised the issue of "micro-aggression" in October of 2010. I credit Complainant's testimony that he complained to Schwartz repeatedly during the summer and fall of 2010 about the dysfunctional team interactions on the Battery Project and about the firmware being unfairly scrutinized. At that time, Schwartz asked Complainant about discussing the conflict with Human Resources. I do not believe that Complainant raised the issue of "micro-aggression" or that he complained about race discrimination until discussions with Schwartz in mid-December, 2010.

Schwartz believed that Complainant's dissatisfaction resulted from the significant pressure he was under in October and November as the Battery Project was at a critical phase. According to Schwartz, Complainant was upset at what he perceived as unwarranted criticism of the state of the firmware, which was exacerbated by Complainant's lack of respect for the abilities of certain team members. Schwartz testified that Complainant did not always communicate his disagreements diplomatically, particularly if he was challenged or frustrated by

colleagues whom he viewed as less competent. I credit his testimony that Complainant had a tendency to withdraw or disengage in these situations. For these reasons, Schwartz may have resisted believing that the conflict had a racial component, but nonetheless, he acted in good faith to resolve Complainant's issues. When Complainant voiced his concerns about project interactions, Schwartz was supportive and wrote to Burns that he was going to meet with Rodin to educate him on the firmware team's process and to ensure all the data was on the table. He continued to validate Complainant by challenging Rodin's assumptions about the quality of the firmware. Schwartz also repeatedly attempted to assist complainant in navigating the company culture, constantly offering advice on how to handle the conflicts that arose. The evidence demonstrates that Schwartz took a number of proactive measures to abate the problems Complainant brought to his attention about dysfunction on the team, unfounded complaints about the firmware, and what Complainant viewed as unfair treatment.

I am persuaded that Schwartz wanted Complainant to succeed because he greatly respected Complainant's superior technical abilities, liked and respected him personally, and considered him a friend. Unfortunately, Schwartz's good faith interventions on Complainant's behalf did not dispel the conflict between Complainant and Rodin. When Burns called for an open review of the firmware in late October 2010 and directed Complainant to seek advice from Rodin on how to proceed with the review, Complainant was grievously insulted and humiliated. He told Schwartz that participating in the review would be a complete waste of his time. Schwartz remained supportive telling Complainant that the transparent review might vindicate Complainant's position. He also counseled Complainant that his failure to participate was self-destructive and likely to endanger his career as a manager at Teradyne. I do not credit Complainant's testimony that Schwartz absolved him of his responsibility to attend all Battery

Team meetings at that time, but did counsel him about the negative impression a failure to attend would create about his commitment to the project.

#### Complainant's Withdrawal from the Battery Project

Complainant's refusal to attend the firmware review meetings and his scheduling a vacation for two weeks in November during a critical phase of the Battery Project led Schwartz to conclude that he had been unsuccessful in mentoring Complainant. Burns was shocked that Complainant had not attended the design review meetings and, as predicted by Schwartz, concluded that Complainant had "checked out," was walking away from his responsibilities, and was signaling he wanted to leave. Complainant also declined to attend a meeting called by Burns on November 23, 2010, where Burns sought an update on the group's plans to improve the firmware execution. There is no dispute that Complainant was disengaging from the Project and not attending team meetings at that time. While I have concluded that Complainant was feeling greatly distressed by the disparate treatment he was experiencing, the evidence does not support a conclusion that the work environment so intolerable as to justify a complete abdication of his obligations as a manager and project team leader. His doing so resulted in Schwartz having to assume the managerial aspects of Complainant's job by attending Battery Project Meetings for Complainant, interacting with the other team leads, and accepting the role of "diplomat," in cross-functional activities. During this time, Complainant continued to work as the technical lead and attended technical team meetings.

#### Events of December 2010

The events of October and November led to critical discussions between Complainant and Schwartz in mid-December 2010. They discussed the fact that Schwartz had "given up" on his ability to coach Complainant. Schwartz testified that coming to this realization was very

painful for him and I credit this testimony. Nonetheless, Complainant felt abandoned by Schwartz and was also distressed by the admission that Schwartz felt unable to help him.

I credit Schwartz's testimony that in one of these mid-December discussions Complainant strongly insinuated to him that he intended to leave the company in February after certain of his benefits vested. Although Complainant denied telling Schwartz he intended to leave, and claims he only asked for Schwartz' help in transferring to a different job at the company, I credit Schwartz's testimony that Complainant indicated he would be leaving. I credit Schwartz in part because he considered this revelation so significant given the critical stage of the Battery Project, that he immediately relayed the information to Burns and Malone.

The evidence supports Schwartz's testimony that in mid-December Complainant also raised the issue of possible discrimination for the first time, telling Schwartz that his wife had a theory that he was being subjected to "micro-aggression." Schwartz had a very strong memory of the timing of this discussion because he researched the concept of "micro-aggression," which he understood to entail communication of low level bias that was largely an issue of perception and perhaps not legally actionable. Schwartz was sufficiently concerned with the allegation that he immediately advised Burns and Malone that Complainant had raised the issue of possible race discrimination, whereupon the decision was made to involve the Human Resources Department.

The discussions with Human Resources by both sides were less than forthright. Burns advised Human Resources that Complainant was unhappy, disengaging, and separating from the company. Neither party raised the issue of discrimination. In his communication with Human Resources, Complainant denied ever stating that he intended to leave the company. Schwartz was shocked by this disclosure and felt he had been made out to be a liar. An irrevocable breakdown of their relationship ensued as each felt betrayed by, and no longer trusted, the other.

Complainant testified his distress was compounded by the fact that he believed he no longer had an ally in Schwartz and because colleagues began to inquire if he was leaving the company. Notwithstanding, I conclude that Schwartz acted in good faith throughout this time to adequately address Complainant's concerns and charges. There is insufficient evidence to find Schwartz individually liable for his actions or failure to act in this matter.

B. Transfer to DL5 Level Engineering Position/ Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (2000) quoting *Ruffino v. State Street Bank and Trust Co.*, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in *Wheelock College v. MCAD*, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case of retaliation by demonstrating that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See *Mole v. University of Massachusetts*, 442 Mass. 82 (2004); *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (2000). Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable belief that unlawful

discrimination has occurred. See *Guazzaloca v. C. F. Motorfreight*, 25 MDLR 200 (2003) citing *Trent v. Valley Electric Assn. Inc.*, 41 F.3d 524, 526 (9<sup>th</sup> Cir. 1994); *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208 (2000).

Complainant engaged in protected activity when he raised internally, the prospect that his treatment by Burns and Rodin in Battery Project interactions might be “micro-aggression,” based on his race. He asserts that once he raised this issue, Schwartz began to discuss his leaving and transferring him out of his MG1 manager position. Schwartz did tell Complainant that if he was intent on leaving, Burns and Malone were seeking a date for his departure. I conclude that this was a reaction to Complainant’s ambiguous assertions regarding his continued employment. Complainant denied stating that he intended to leave the company but was convinced that Respondents wanted him to leave. However, I am not persuaded that Respondents acted with intent to terminate Complainant’s employment.

Respondents recognized that they needed Complainant’s expertise and were anxious to retain his considerable technical talent on the Battery Project. To that end, management discussed alternative options for retaining Complainant, which included a transfer to a high level technical engineering position or offering him a contract position as a consultant, if he decided to end his tenure as an employee. I credit Schwartz’s testimony that he discussed these options with Complainant. Schwartz disfavored placing Complainant on a performance improvement plan for disengaging from team duties on the Battery Project, an option they discussed if Complainant remained an MG1, because Schwartz believed PIPs often end in failure and termination. I believe that Schwartz sought a constructive option that was not punitive and convinced others in management to approve it.

Despite their problems and the scrutiny placed on Schwartz's group, Schwartz remained Complainant's staunch advocate with higher management. He actively pursued the option of transferring Complainant to a DL5 engineering position, a solution that he genuinely believed to be in Complainant's and the company's best interests. He testified credibly that this would allow Complainant to remain at the company doing high-level meaningful work while retaining his high level of compensation. I am not persuaded that the option of a transfer was considered to punish the Complainant for complaining about discrimination, but instead to accommodate his technical strengths and relieve him of the unpleasant aspects of the manager's job which had resulted in conflict and his disengaging from the project. Schwartz had observed Complainant struggle from the outset with what he viewed as the dysfunctional "meeting" culture at Teradyne and Schwartz attempted to coach him to acclimate to this aspect of the company's culture. I credit that Schwartz had a genuine belief that Complainant would be happier in the new position. The transfer to a DL5 was also justified by Complainant's abdication of his managerial responsibilities when his work was challenged, notwithstanding the hostility he was feeling. Being subjected to disparate treatment or even a hostile work environment does not necessarily permit an employee to ignore critical job duties. While I credit Complainant's testimony that criticism of his work caused him great distress, I do not credit the assertion that it was so unbearable as to justify his complete disengagement from the Battery Project management team.

Complainant continued to perform the technical work on the Battery Project until the project was cancelled in February of 2011, for reasons unrelated to his role or the instant complaint. Complainant asserted that Schwartz continued to repeatedly press him for a departure date, while Schwartz claimed that Complainant continued to send ambiguous messages about whether he intended to leave, and Schwartz remained unsure of his intentions. I conclude that

Schwartz did ask about Complainant's intentions because management was concerned about Complainant's commitment to staying on and to his work, and because Complainant remained somewhat coy about his intentions. Despite Respondents' desire for a clarification of Complainant's intentions, I conclude that Respondents did not intend to terminate his employment, nor did they act to do so. They surely also had some awareness that to do so could be construed as retaliation for Complainant having raised allegations of race discrimination.

In late February of 2011, around the time Complainant sent a demand letter detailing his allegations against the company, Burns directed Schwartz to make sure he noted in Complainant's 2010 MAP evaluation that Complainant had experienced problems on the Battery Project. Schwartz wrote that Complainant had difficulties with team integration issues on the Battery Project that led to a breakdown in his relationships with Rodin and Burns. Complainant claims that this criticism of his performance was an act of retaliation, but I conclude the review genuinely reflected management's view that he had disengaged from the project, whether justifiably or not, by neglecting his obligations to attend firmware design review meetings and Battery Project team meetings. Schwartz evaluation contained a fair balance of criticism and praise for Complainant. I am not persuaded that the criticism in one area of Complainant's performance review was an act of retaliation, since receiving a "needs improvement" in one area is not considered discipline at the company and did not place his job in jeopardy.

With the demise of the Battery Project in February 2011, Schwartz informed Complainant that he was being removed from his MG1 manager position and being transferred to a DL5 level engineering position. Schwartz sent a new organizational chart to his group outlining the changes. Complainant asserts that his transfer was a demotion in retaliation for his having raised the issue of discrimination. Complainant asserted that there was a stigma attached

to being relieved of his manager title and losing his direct reports. He claims that he suffered loss of prestige and the respect of his peers who were uncertain whether to engage with him on existing and future projects. This caused Complainant significantly more distress.

Respondents assert that Complainant's transfer was not a demotion, since a DL5 was a high level engineering position. There was ample evidence that it was not uncommon for employees to move to and from high level engineering and MG1 positions. Respondents established by credible testimony that a DL5 position was considered equally prestigious to an MG1 and that the change was more akin to a lateral transfer than a demotion. For a transfer to constitute an adverse employment action it must materially disadvantage the employee. *Kraft v. Boston Police Dept.*, 28 MDLR 1, 21, 2006, citing *Bain v. City of Springfield*, 424 Mass 758, 765-766 (1997).

Adverse employment actions generally involve changes to one's "salary, grade or other objective terms and conditions of employment." *MacCormack v. Boston Edison Co.*, 423 Mass. 652, 663 (1996). "Subjective feelings of disappointment and disillusionment," without "objective evidence" of a disadvantage in tangible working conditions, are insufficient to establish that an "adverse employment action" has occurred. *Id.* at 663. Other than Complainant's subjective feelings, which are generally not sufficient to support a claim of adverse action, there was no evidence that the transfer caused Complainant to suffer any tangible economic loss. In fact, the DL5 position had a salary range with higher ceiling than the MG1 position.

Even if a reasonable fact-finder could conclude that Complainant's transfer was a demotion and that the loss of the title "manager" and loss of his direct reports constituted adverse actions, there is insufficient evidence of causation, i.e. that it was motivated by his complaint of

discrimination. The evidence does not suggest that his complaint of “micro-aggression” was the reason for the transfer or that it was undertaken with retaliatory intent. As stated above, there is credible evidence that the decision to transfer Complainant was motivated by Schwartz’s good faith efforts to alleviate the conflicts arising from the cross-functional parts of the MG1 job, to permit Complainant focus on the technical work that played to his strengths, and to relieve him of the stressful and unpleasant aspects of the MG1 position. Given this evidence, I conclude that the transfer was not an act of discrimination and not motivated by retaliation.

C. Constructive Discharge

Prior to filing a formal complaint of discrimination, Complainant communicated his allegations against the company through a letter from his counsel in late February 2011. Thereafter, the parties had discussions to address the charges. In a meeting with Human Resources and the General Counsel, Complainant was asked about and did not articulate any concerns about retaliation. In March of 2011, Complainant filed a formal complaint of discrimination with the Commission naming Burns and Schwartz individually. Complainant testified that his relationship with Schwartz changed after that. Schwartz testified that they agreed not to discuss the law suit, only discussed business and did not chat socially. Schwartz stated he was on guard that anything he said or did might result in further charges. I am not persuaded that Schwartz’s reaction to being sued personally was retaliatory, but that he was motivated instead by a justifiable concern that he not do, or say, anything that might exacerbate the situation or result in further charges against him or the company. The situation was clearly difficult and uncomfortable for both Complainant and Schwartz who had enjoyed a collegial and friendly relationship.

Schwartz testified that during that time frame he assigned Complainant to a number of important high level projects that were in the conceptual design phase and for several months he heard no complaints about the work. There was testimony from another engineer that the work Complainant was assigned was commensurate with an MG1 or DL5 level. It was a significant amount of work that later occupied 100% of another DL5's time for many months and two other employees' (an MG1 and a DL5) time for an additional six months. On July 7, 2011, presumably after negotiations with the company over Complainant's MCAD complaint had ceased, Complainant asserted for the first time that the work assigned him was not appropriate to his level, was trivial, and beneath him. Schwartz denied this allegation and according to him, he and Complainant vigorously disputed this issue. Complainant testified that his colleagues stopped communicating with him and that he was not on email distribution lists for projects and had no events on his calendar. Schwartz stated he expected, that commensurate with Complainant's responsibilities as high level (DL5) engineer, Complainant would take the lead on these assignments, reach out to his colleagues and develop a team. Complainant asserts that Schwartz assigned him trivial work to instigate his departure from the company, but the evidence does not support this assertion. I credit Schwartz's testimony that he assigned this work to similarly high level employees after Complainant's departure, and credit the testimony of these employees that the work was significant, high level, and time-consuming. I credit Schwartz's testimony that he acted in good faith and was not seeking to diminish Complainant's role at the company by generating meaningless assignments.

Schwartz and Complainant agreed to discuss the issues further after Complainant returned from an overseas vacation, and Schwartz notified Burns and Human Resources about this new complaint. A meeting was scheduled with Complainant, Schwartz and Human

Resources for August 1, 2011, to discuss the issue of work assignments, but in the interim

Complainant submitted his resignation to Schwartz via email while still on vacation.

Complainant asserted that his job had been “guttled,” and that he had no choice but to submit his involuntary resignation based on an intolerable environment. Complainant essentially alleged in this correspondence that he had been constructively discharged.

A constructive discharge occurs when the employee’s working conditions are so intolerable, that a reasonable employee would be compelled to resign. *GTE Products Corp. v. Stewart*, 421 Mass. 22, 33-34 (1995) (dissatisfaction with the nature of assignments, *inter alia*, is insufficient to create a triable question of constructive discharge) The Commission has long recognized the high standard of proof necessary to establish a constructive discharge. Proof of constructive discharge requires “[a] showing that the employer deliberately made the employee’s working conditions so intolerable that the employee was forced into an involuntary resignation. A mere act of discrimination absent aggravating circumstances is not sufficient to find constructive discharge.” *Mills & Ronan v. A.E. Sales, Inc.*, 35 MDLR 163, (2103); *Donovan v. Chelsea School Committee*, 7 MDLR 1575, 1593-94 (1985).

The evidence does not support a conclusion that the Complainant’s employment situation was so intolerable that a reasonable person in his position would have been compelled to resign. As stated above, Respondents did not transfer Complainant to a DL5 position to force him from the company or to diminish his role, but rather to retain his considerable technical talent in a prestigious position that preserved his high level of compensation. While Complainant’s situation from his perspective might not have been ideal, his talents continued to be acknowledged with important work and his job was not in jeopardy. There is no indication that he was treated in a manner other than cordial and professional. Complainant’s argument that he

was stripped of all meaningful work is not supported by the evidence. His claims that his new assignments were beneath him are without merit given the credible testimony that the work was later assigned to similarly high level employees and that the effort associated with these assignments was significant. Moreover, Complainant had worked as a DL5 for several months absent any complaints. Finally, Complainant made no efforts to resolve his concerns about the work assignments prior to resigning by attending the meeting scheduled with Schwartz and Human Resources, but sent his letter of resignation by email while still on vacation. Complainant's resignation referenced the legal standard for constructive discharge, and was written not long after discussions about resolution of his complaint ceased. The circumstances of his resignation lead me to conclude that he determined the time was ripe for him to leave the company and to embark on his new business venture. There is scant evidence to suggest that Complainant was subjected to intolerable working conditions that would have forced him to resign in July of 2011 and I therefore conclude that he was not constructively discharged in violation of G.L. c. 151B ss. 4 (1) or 4(4).

#### IV. REMEDY

Upon a finding that Respondents have committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. *See Stonehill College v. MCAD*, 441 Mass 549 (2004). Having found that Complainant was not constructively discharged from his employment, but voluntarily left the company in July of 2011, I find that he is not entitled to the considerable lost wages and other benefits he claims are due him. This includes awards of restricted stock units that he asserts would have vested had he

remained working at the company. I also conclude that, had he proven constructive discharge, Complainant did not take measures to mitigate his damages, particularly lost wages, by seeking comparable employment. He chose instead to start his own business which operated at a loss and resulted in no income to him for over a year. Complainant's salary in subsequent years at a new employer demonstrates that he had significant earning potential that likely would have been realized had he sought employment with another company, a route he chose to forego.

Having concluded that Complainant was subjected to disparate treatment and a hostile work environment based on his race which caused him to suffer considerable emotional distress, humiliation and embarrassment, I find that he is entitled to damages therefor. Complainant offered compelling testimony that he was emotionally exhausted by the criticisms he faced in the Battery Team meetings and felt humiliated and oppressed by Burns's and Rodin's treatment of him. He justifiably believed his opinions and expertise were discounted and disregarded and that he encountered lack of professional respect for his technical abilities because of his race. He was also singled out for having a bad attitude and not being a team player, while he believed he was acting in the best interest of advancing the Project. Having to endure this disparate treatment caused Complainant to suffer depression and anxiety, headaches, stomach aches, and difficulty sleeping. Schwartz confirmed that Complainant was experiencing great stress and emotional upset in the summer and latter part of 2010 and that he communicated this to Schwartz. Both Complainant and his wife testified that he disengaged from family and social activities, lost confidence and seemed to be carrying a heavy weight during this time. I credit this testimony. While some of the stress and anxiety Complainant suffered may be attributable to the critical timing of the project and his team's work being closely scrutinized, I conclude that he suffered significant stress from the disparate treatment he was subjected to while working on the Battery

Project. However, I must also consider and discount the considerable distress Complainant claims he suffered from what he viewed as a demotion and constructive discharge. Any award of emotional distress damages must focus on the time period and actions I have found to be discriminatory. In light of these considerations, I conclude that Complainant is entitled to an award of \$75,000 for the emotional distress he suffered as a direct consequence of the discriminatory treatment he endured while working on the Battery Project.

#### V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law, Respondent Martin Schwartz is hereby dismissed as a party Respondent.

Respondents Teradyne and Rick Burns are hereby Ordered:

- 1) To cease and desist from any acts of discrimination in the workplace based upon race.
- 2) To pay to Complainant, Festus Adelabu, the sum of \$75,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of

receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 30<sup>th</sup> day of November, 2016.

A handwritten signature in black ink, appearing to read "Eugenia M. Guastaferrri". The signature is written in a cursive style with a large initial 'E'.

Eugenia M. Guastaferrri  
Hearing Officer