

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HAROLD BAERGAS, on Behalf of Himself and
Others Similarly Situated,

04 Civ. 2944 (BSJ)
(ECF Case)

Plaintiff,

-against-

**CLASS ACTION
COMPLAINT
AND JURY DEMAND**

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, FEDERATED LOGISTICS,
FEDERATED DEPARTMENT STORES, INC.,
MACY'S EAST, THE FRICK COMPANY, and
SCOTT CHESTER, CHRIS DE SANTIS, MICHAEL
GREEN, JOHN DOES 1 – 5, Individually,

Defendants.

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PRELIMINARY STATEMENT

1. This is an action for monetary damages (compensatory and punitive) against Defendants arising out of the false arrest, malicious prosecution, defamation and other violations of the constitutional, statutory and legal rights of Harold Baergas ("Baergas" or "Plaintiff"), including violations of section 1983. Plaintiff brings this action on behalf of himself and others similarly situated for discrimination on the basis of race and/or national origin with respect to harassment, hostile work environment, retaliation, promotion, termination and other terms and conditions of employment, and retaliation, pursuant to the New York State Human Rights Law, Executive Law §290, *et seq.* (the "State Human Rights law") and the New York City Human Rights Law, §8-107, *et seq.* (the "City Human Rights law") of the Administrative Code.

2. On March 6, 2002, various police officers, acting under color of state law, intentionally and willfully subjected Plaintiff to, *inter alia*, false arrest and imprisonment, detention, and malicious prosecution for acts of which Plaintiff was innocent, and thereby violated Plaintiff's constitutional rights.

PARTIES

3. Plaintiff, a Hispanic male of Puerto Rican descent, is a citizen of the United States and resides in Glendale, New York.

4. Defendants FEDERATED LOGISTICS, FEDERATED DEPARTMENT STORES, INC., MACY'S EAST, THE FRICK COMPANY (collectively "Macy's") are upon information and belief, corporations incorporated under the laws of the State of New York. Macy's has a principal location at Herald Square, New York.

5. Defendant Scott Chester is Caucasian and was at all relevant times herein the Senior Supervisor of Macy's Handling Department, and as such was a managerial and supervisory employee of Macy's.

6. Defendant Chris De Santis is Caucasian and was at all relevant times herein a Director of Macy's Security Department, and therefore was a managerial and supervisory employee of Macy's.

7. Defendant Michael Green is an African-American former employee of Macy's.

8. The City of New York is a municipality duly incorporated under the laws of the State of New York.

9. The New York Police Department is a subdivision of the City of New York.

10. Defendants "John Does 1 through 5" (presently unknown police officers) were, at

all times relevant hereto, employees of the Defendant City of New York as police officers. At all times mentioned herein, Defendants John Does 1 – 5 were acting under color of state law, to wit, under color of the statutes, ordinances, regulations, policies, customs and usages of the City and State of New York.

11. All the matters complained of herein occurred within this district.

FACTUAL ALLEGATIONS

12. Plaintiff worked for Macy's from 1992 until his unlawful termination on March 6, 2002.

13. Plaintiff was hired in the position of Stock person and worked in Macy's Handling Department, located on its tenth floor, and at all relevant times Plaintiff's work performance was excellent.

14. Plaintiff remained in that entry level position throughout his employment and was passed over for promotion.

The Employment Discrimination

15. Plaintiff's supervisors throughout his employment were Defendant Chester, the Senior Supervisor of the Handling Department and Richard Harris ("Harris"), who was, upon information and belief, the Junior Supervisor of Macy's Handling Department. ("the Department")

16. Defendant Chester and Harris both had direct hiring and firing responsibilities over Plaintiff and other employees within the Department, directed and supervised their work, and decided promotions within their department.

17. Despite his qualifications and his seniority, Plaintiff was passed over for

promotion for the position of Team Leader in the Handling Department due to his race in 2001.

18. Plaintiff was discriminated against also because he associated with and was friends with other minority employees within his department. Defendants similarly passed over other similarly situated minority employees within Macy's.

19. Plaintiff was not promoted to the next promotional level, Team Leader of the Handling Department, despite his seniority of 10 years' unbroken employment with Defendants.

The Hostile Work Environment

20. Plaintiff and other minorities were subjected to a hostile and discriminatory work environment, which was created and fostered by Defendant Chester and Harris.

21. This hostile work environment was created in part by regular comments that were derogatory towards minorities, including Hispanics. These derogatory comments would be stated by Defendant Chester and Harris, as well as other employees of Macy's, in front of Plaintiff and other minorities.

22. For example, on one occasion when Plaintiff asked Defendant Chester for a razor blade, he responded sarcastically that he thought "all Hispanics carried their own razor blades."

23. Chester would often make comments about Hispanics and other minorities stealing cars. During one conversation about cars, Chester told Plaintiff that getting a nice car "shouldn't be a problem for you... you'll just steal it."

24. Chester also made numerous comments about African Americans during Plaintiff's employment, likening them to gorillas.

25. Chester stated that he believed minorities have a propensity to steal, take drugs and engage in other criminal activity.

26. Defendant Chester, Harris, and others would often spy on Plaintiff and other minorities, ostensibly because they believed that they were stealing items from the store in accordance with their discriminatory belief that minorities were more likely to steal.

27. Plaintiff's work environment was thus one fraught with hostility, insecurity and suspicion.

28. Defendants had instituted a policy under the umbrella term "Shortage Awareness."

29. Under this policy, employees were encouraged to report illegal activities on the part of other employees of Defendants.

30. In return for the apprehension of any alleged perpetrators, the employees would be rewarded with a payment of \$500.

31. This policy was often used by Macy's Special Investigations Unit to propagate and justify their discriminatory hyper scrutiny of minority employees within Macy's.

32. Macy's did not scrutinize its Caucasian employees in the same way.

33. This policy also encouraged unscrupulous individuals to make false allegations for the economic incentive it entailed.

34. This policy also furthered the atmosphere of suspicion and hostility felt overwhelmingly and disproportionately by Macy's minority workforce.

35. Many minorities, including Plaintiff, complained about this hostile environment and filed grievances with their union, but to no avail, and the discrimination continued.

36. Moreover, some minorities, including Plaintiff, who complained of improper treatment would be the subject of retaliatory adverse action on the part of Defendants.

37. Plaintiff heard many of these comments derogatory to minorities and was offended by them.

38. Throughout his employment, Plaintiff complained to Chester regarding Defendants' employment practices and filed grievances including during the last year of his employment in 2002.

39. Plaintiff also complained that Chester was unfairly targeting minorities.

40. The frequency of Plaintiff's complaints increased when he became union shop steward for Macy's Handling Department, and therefore was charged with raising any employment related complaints of union member co-workers.

41. Plaintiff became union shop steward in 2001.

42. Plaintiff's and his co-workers' union is Local 1-S Department Store Worker's Union. ("the Union")

43. Despite Plaintiff's complaints to Defendant Chester, to Harris, and to other managerial employees in Macy's, Defendants failed to take remedial and preventative action, and the discrimination and hostility continued unabated throughout Plaintiff's employment.

44. In addition, in retaliation for making these complaints as shop steward, Plaintiff was subjected to intensified hostility and retaliatory action, which included hyper scrutiny and suspension without pay in early part of 2002.

45. The retaliation culminated in Plaintiff's false arrest and malicious prosecution, and the unlawful termination of Plaintiff's employment.

The Unlawful Arrest and Malicious Prosecution

46. On March 6, 2002, Plaintiff was falsely and maliciously accused by Macy's

Security Personnel of stealing merchandise.

47. While Plaintiff was in the locker room in the process of leaving work at the end of his shift, five of Defendants' employees from its internal security department appeared from both sides of the locker room, and ran towards both Plaintiff and a co-worker, Michael Green ("Green")

48. One of these individuals, the head of Macy's Internal Security department, yelled "I've got you!" while pointing at Plaintiff.

49. These internal security employees then handcuffed Plaintiff and escorted him to the security holding room, in full view of Macy's employees and Plaintiff's co-workers.

50. Plaintiff felt humiliated and emotionally distressed.

51. Plaintiff was then handcuffed to a bench in the security room where he remained for approximately 3 hours.

52. Plaintiff asked why he was being handcuffed and why Macy's own internal procedures were being violated.

53. Green was then taken into another room where his bag was searched.

54. Plaintiff asked for but was refused assistance from his union representative.

55. Plaintiff demanded, but was refused, legal assistance.

56. Plaintiff remained handcuffed against his will for approximately three hours.

57. A security guard then approached Plaintiff and asked him to sign a statement that he was caught stealing Macy's merchandise and that he was not to return to the store.

58. Plaintiff refused to sign this document because he had not stolen anything.

59. Director of Internals, Defendant Chris DeSantis ("DeSantis"), entered the holding

room carrying a book bag and a coat.

60. DeSantis falsely claimed that these alleged stolen items were recovered from Plaintiff's locker.

61. In fact, the items were not recovered from Plaintiff's locker and DeSantis knew this.

62. Defendants, including DeSantis, knew that Plaintiff had not stolen these items.

63. Plaintiff's only locker, which had remained locked throughout, contained only Plaintiff's jacket, home keys, book bag and his identification tag.

64. Plaintiff told a member of security to go to his locker and check for himself.

65. DeSantis then stated that he could not find Plaintiff's locker.

66. Plaintiff requested that security escort him to his locker in order to prove that his locker had been locked throughout and therefore could not have contained the alleged stolen items.

67. The security employees refused to escort Plaintiff to his locker, upon information and belief, because they knew that the alleged stolen items had not been recovered from Plaintiff's locker.

68. Then in further breach of Macy's own procedures, Plaintiff was uncuffed and frisked by DeSantis.

69. Plaintiff stated that DeSantis had no right to frisk him and that he should be released.

70. DeSantis falsely claimed that Macy's had videotape in which Plaintiff was seen stealing the merchandise and in which he was seen selling drugs.

71. DeSantis said this knowing that it was false and that there was no videotape that showed what he alleged.

72. DeSantis again handcuffed Plaintiff again to the bench, where Baergas remained until the police arrived.

73. When the police arrived, Plaintiff was arrested and escorted him from Macy's premises in handcuffs.

74. At this time, Plaintiff requested legal representation, but was denied.

75. Plaintiff was taken to the Midtown South Precinct where he was charged with theft of Macy's property and questioned for 6 hours.

76. Plaintiff was released after 24 hours of police custody, much of which was spent in a holding cell.

77. Plaintiff's employment was unlawfully terminated by Macy's on or about March 7, 2002.

78. On March 8, 2002, Plaintiff filed a grievance with his union for unlawful termination, false arrest, and for Defendants' refusal to provide Plaintiff with assistance from a shop steward while he was being detained and searched without his consent.

79. Plaintiff appeared before Hon. Judge E. Coin for his arraignment on or about April 29, 2002, and was charged with two counts of larceny/theft of Macy's property, counts PL 155.30 and PL 165.45. No other charges were preferred against Plaintiff.

80. Plaintiff refused to accept a guilty plea in return for a two years' suspended sentence and probation.

81. Plaintiff appeared for a second hearing on October 28, 2002, and again refused to

accept a guilty plea.

82. The Assistant District Attorney prosecuting the criminal case against Plaintiff (the “Assistant District Attorney”) represented to the court at these hearings that Macy’s had evidence that implicated Plaintiff, including a videotape of Plaintiff committing the theft.

83. Defendants never produced any of this evidence to the court or to Plaintiff’s attorney.

84. On May 5, 2003, Judge E. Coin dismissed both charges PL 155.30 and PL 165.45 against Plaintiff for lack of evidence.

85. On or about June 27, 2003, Plaintiff was forced to appear for yet another arraignment before Hon. C. Berkman for the same charges that had been dismissed by Hon. Coin on May 5, 2003.

86. Based on the Assistant District Attorney’s representations, Plaintiff was again charged with two counts of larceny/theft of Macy’s property, counts PL 155.30 and PL 165.45.

87. At this second arraignment of Plaintiff, at which Plaintiff again plead not guilty, the Assistant District Attorney, again represented to the court that Defendants had videotape evidence of committing the theft for which he was being accused/charged.

88. Plaintiff and his criminal defense attorney were approached by an agent of Macy’s, who urged Plaintiff to plead guilty and then accept a lesser or deferred sentence.

89. This individual threatened Plaintiff that he would face a prison term based on the “evidence” against him if he did not accept a plea bargain.

90. Despite this coercion, Plaintiff refused to plead guilty to a crime he did not commit.

91. Despite the court's increasingly urgent demands for Defendants to produce the claimed evidence, and numerous court hearings, they failed to present the evidence.

92. Finally Defendants had to concede that they did not have the evidence they claimed.

93. On August 13, 2003, Hon. Berkman dismissed both theft charges a second time for lack of evidence.

94. Plaintiff's arrest and prosecution was procured by Macy's on the basis of Defendants' false, biased, and/or misleading testimony, including the testimony of Defendants Chester and DeSantis.

95. Upon information and belief, this false testimony included stating that the allegedly stolen items were recovered from Plaintiff's locker and claiming that Defendants had videotape evidence of Plaintiff committing theft and selling drugs.

96. Upon further information and belief, Plaintiff's arrest and prosecution were procured on the basis of the testimony of Michael Green, which testimony was obtained by the use of coercion on the part of Defendants.

97. Defendants knowingly fabricated these allegations of criminal activity on the part of Plaintiff in order to procure his arrest and subsequent prosecution and were successful in so procuring his arrest and malicious prosecution.

98. In addition, upon information and belief, Defendants submitted false and/or misleading documentation to the District Attorney that was prosecuting Plaintiff's criminal case.

99. Defendants had no probable cause to arrest and detain Plaintiff on Macy's property.

100. Defendants acted maliciously and intentionally.

101. Defendants' acts were motivated by discriminatory animus towards Plaintiff because of his race and ethnicity and in retaliation for complaining of discrimination and filing union grievances against Defendants.

102. Defendants unlawfully terminated Plaintiff and then proceeded to conduct a smear campaign against Plaintiff, falsely alleging criminal acts and impropriety on the part of Plaintiff, thus defaming him.

103. Defendants' unlawful and retaliatory actions towards Plaintiff continue to this day.

104. As a direct and proximate result of the acts of Defendants, Plaintiff suffered mental suffering, anguish, shame, humiliation, psychological and emotional distress, loss of wages, deprivation of physical liberty, and detriment to his career and loss of career opportunities.

FIRST CAUSE OF ACTION

(FALSE ARREST AND IMPRISONMENT)

105. Paragraphs 1 through 104 are incorporated herein by reference.

106. Defendants subjected Plaintiff to false arrest, imprisonment, and deprivation of liberty without probable cause.

107. Defendants intended to confine Plaintiff, Plaintiff did not consent to the confinement and Plaintiff arrest and confinement were not privileged.

108. As a result of the false arrest, imprisonment, and deprivation of liberty, Plaintiff was damaged in an amount as yet undetermined but exceeding One Million (\$1,000,000.00)

Dollars.

SECOND CAUSE OF ACTION

(MALICIOUS PROSECUTION)

109. Paragraphs 1 through 108 are incorporated herein by reference.

110. Defendants caused two false criminal accusatory instruments to be filed against Plaintiff.

111. Said criminal instruments were dismissed with prejudice on May 5, 2003 and August 13, 2003, respectively.

112. Plaintiff was damaged in an amount as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars as a result of the malicious prosecution implemented by the defendants.

THIRD CAUSE OF ACTION

(DEFAMATION)

113. Paragraphs 1 through 112 are incorporated herein by reference.

114. Defendants intentionally defamed Plaintiff's character and reputation by publishing false statements about Plaintiff.

115. Plaintiff has been damaged as a result of Defendants' wrongful acts in an amount as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars.

FOURTH CAUSE OF ACTION

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

116. Paragraphs 1 through 115 are incorporated herein by reference.

117. Defendants intentionally committed acts against Plaintiff that were shocking and outrageous and transcended the bounds of civilized society.

118. Plaintiff has been damaged as a result of defendants' wrongful acts in an amount as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars.

FIFTH CAUSE OF ACTION

(STATE HUMAN RIGHTS LAW)

119. The allegations of paragraphs 1 through 118 are repeated here as if fully stated.

120. Defendants intentionally retaliated against and discriminated against Plaintiff and others similarly situated to Plaintiff on the basis of race and ethnicity in violation of the State Human Rights Law.

121. Defendants subjected Plaintiff and other similarly situated members of the putative class to a racially hostile work environment.

122. The above described class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable, and their identities are presently unknown.

123. Plaintiff claims of employment discrimination are typical of the claims of the above described class, in that the interests of the named Plaintiff are co-extensive with the interests of the other members of the class, and there is a lack of adverse interests between the named Plaintiff and the other members of the putative class.

124. There are questions of law and fact common to the class, which predominate over any questions affecting only individual members: Were class members passed over for promotion and regularly kept in lower level positions? Did Defendants allow to exist in Macy's a racially hostile work environment, including hyper scrutiny and false allegations of theft?

125. The named Plaintiff will fairly and adequately protect the interests of said class.

126. A class action is superior to other available methods for the fair and efficient adjudication of the class claims under the State Human Rights Law.

127. As a result of the foregoing, the named Plaintiff seek judgment against Defendants on his own behalf and on behalf of other members of the class for compensatory damages, together with an award of costs, interest, and attorney's fees, as provided for under the State Human Rights Law.

128. Plaintiff has thereby been damaged in an amount as yet undetermined, but exceeding \$1,000,000.

SIXTH CAUSE OF ACTION

(CITY HUMAN RIGHTS LAW)

129. The allegations of paragraphs 1 through 128 are repeated here as if fully stated.

130. Defendants intentionally retaliated against and discriminated against Plaintiff and others similarly situated to Plaintiff on the basis of race and ethnicity in violation of the City Human Rights Law.

131. Defendants subjected Plaintiff and other similarly situated members of the putative class to a racially hostile work environment.

132. The above described class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable, and their identities are presently unknown.

133. Plaintiff claims of employment discrimination are typical of the claims of the above described class, in that the interests of the named Plaintiff are co-extensive with the interests of the other members of the class, and there is a lack of adverse interests between the

named Plaintiff and the other members of the putative class.

134. There are questions of law and fact common to the class, which predominate over any questions affecting only individual members: For example, were class members passed over for promotion and regularly kept in lower level positions? Did Defendants allow to exist in Macy's a racially hostile work environment, including hyper scrutiny and leveling false allegations of theft against minority employees?

135. The named Plaintiff will fairly and adequately protect the interests of said class.

136. A class action is superior to other available methods for the fair and efficient adjudication of the class claims under the City Human Rights Law.

137. As a result of the foregoing, the named Plaintiff seeks judgment against Defendants on his own behalf and on behalf of other members of the class for compensatory damages, together with an award of costs, interest, and attorney's fees, as provided for under the City Human Rights Law.

138. Plaintiff has thereby been damaged in an amount as yet undetermined, but exceeding \$1,000,000.

SEVENTH CAUSE OF ACTION

(MUNICIPAL LIABILITY)

139. Paragraphs 1 through 138 are incorporated herein by reference.

140. Defendants City of New York knew or should have known of the police officers' propensity to engage in the illegal and wrongful acts detailed above.

141. Upon information and belief, Defendants have in the past falsely arrested

individuals, and solicited improper prosecutions of such individuals, and allowed police officers to make false entries in official police department records.

142. Defendant City of New York has failed to take the steps to discipline, train, supervise or otherwise correct the improper, illegal conduct of defendant officers.

143. Defendant City of New York has damaged the Plaintiff by its failure to properly supervise, train, discipline, review, remove, or correct the illegal and improper acts of defendants.

144. As the employers of the defendant police officers, Defendant City of New York is liable for the damages suffered by plaintiff as a result of the conduct of Defendant police officers (John Does 1 – 5).

145. Plaintiff has been damaged as a result of the wrongful and illegal acts of the Defendant City of New York in an amount as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars.

EIGHTH CAUSE OF ACTION

(Section 1983 and 1985)

146. Paragraphs 1 through 145 are incorporated herein by reference.

147. Defendants have deprived Plaintiff of his civil, constitutional and statutory Rights and have conspired to deprive him of such rights and are liable to plaintiff under 42 U.S.C. Section 1983 and 1985 and the N.Y. State Constitution.

148. Plaintiff has been damaged as a result of defendants' wrongful acts in an amount as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally,

as follows:

- A. In favor of Plaintiff in an amount as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars on each of Plaintiff's Causes of Action;
- B. Awarding Plaintiff punitive damages as yet undetermined but exceeding One Million (\$1,000,000.00) Dollars
- C. Awarding Plaintiff reasonable attorneys' fees, costs and disbursements of this action; and
- D. Granting such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: New York, New York
April 16, 2004

MICHAEL SHEN & ASSOCIATES, P.C.

By: _____ /s/

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