

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

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 GREENE,
JOHN DOES 1-5, individually,

Defendants

04 CV 02944 (BSJ/HGP)

**THE MACY'S DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Plaintiff Harold Baergas, a former employee at Macy's East, Inc.'s ("Macy's") Herald Square store, instituted this suit against Federated Logistics, Federated Department Stores, Inc., Macy's East, Inc., and Chris DeSantis (collectively, the "Macy's defendants"), as well as a host of numerous other defendants.¹ Plaintiff, who is Puerto Rican and identifies himself as half black and half Hispanic, asserts a myriad of statutory and common law claims arising out of: his employment at Macy's; his termination on March 6, 2002 for dishonesty; and, his arrest and criminal prosecution thereafter for theft of Macy's property. Specifically, plaintiff asserts claims against the Macy's defendants of: harassment and disparate treatment based on race and national origin under the New York State Human Rights Law, N.Y. Exec. L. §§ 290 *et seq.* ("State HRL") and the New York City Human Rights Law, N.Y. City Admin. Code §§ 8-101 *et seq.* ("City HRL"), and retaliation under those laws as well; common law false arrest and imprisonment; common law malicious prosecution; intentional infliction of emotional distress; and, defamation. Finally, he alleges a 42 U.S.C. section 1983 claim against the City of New York and New York City Police Department ("City defendants") and appears to claim that all defendants conspired to deprive plaintiff of his civil rights in violation of 42 U.S.C. section 1985.

Notwithstanding the plethora of claims and parties in this case, plaintiff has failed to create a triable issue of material fact on any of his claims against the Macy's defendants. Accordingly, the Macy's defendants are entitled to summary judgment pursuant to Fed. R. Civ. P. 56.

¹ In addition to the Macy's defendants, plaintiff has also names the following additional parties as defendants: Scott Chester, Jr. (plaintiff's former supervisor at Macy's), Michael Green (a former co-worker of plaintiff at Macy's), the City of New York, the New York City Police Department, and the Frick Company.

STATEMENT OF FACTS

For a complete statement of the facts that are material to this motion, the Court is respectfully referred to the Macy's defendants' Statement of Undisputed Facts Pursuant to Local Rule 56.1, dated April 1, 2005 ("R. 56.1 Statement"). All exhibits referenced herein are annexed to the Declaration of Diane Saunders, dated April 1, 2005, and submitted in support of the instant motion.

PROCEDURAL BACKGROUND

Plaintiff filed the instant action against the City defendants, the Macy's defendants, Chester, the Frick Company, and Green on April 16, 2004. The Macy's defendants, Chester, and the City defendants subsequently filed their Answers and the parties proceeded to exchange discovery. Neither Green nor Frick has appeared in the action. (R. 56.1 Statement ¶¶ 7-8.)

On September 2, 2004, the Macy's defendants filed a motion to sever plaintiff's discrimination claims from those claims relating to his apprehension and prosecution for theft of Macy's property. On October 6, 2004, plaintiff opposed this motion and cross-moved to amend the Complaint to add a claim under 42 U.S.C. section 1981. The Macy's defendants' motion to sever was fully briefed as of October 15, 2004, and Chester joined in that motion on December 6, 2004. Plaintiff's motion to amend was fully submitted by October 26, 2004. Both motions are currently *sub judice* before this Court.

Discovery closed on December 15, 2004, except for three depositions which were conducted after that date pursuant to agreement of the parties or Court Order. After several extensions of time permitted by the Court, plaintiff filed a motion for class certification and to amend the Complaint on February 22, 2005. That motion is currently being briefed by the parties, and is scheduled to be fully submitted to the Court on April 25, 2005.

ARGUMENT

Summary judgment should be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party has the burden to show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the non-moving party “must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.” Bickerstaff v. Vassar College, 196 F.3d 435, 452 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000); see also Hogan v. 50 Sutton Place S. Owners, Inc., 919 F. Supp. 738, 742 (S.D.N.Y.1996) (“Speculative and conclusory allegations are insufficient to meet this burden.”) (citing Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir.1995)). Further, “[s]ummary judgment is warranted when the nonmovant has no evidentiary support for an essential element on which it bears the burden of proof.” Williams v. R.H. Donnelley Inc., 199 F. Supp. 2d 172, 176 (S.D.N.Y. 2002), aff’d, 368 F.3d 123 (2d Cir. 2004).

POINT I

PLAINTIFF CANNOT PROVE THE ESSENTIAL ELEMENTS OF HIS DISPARATE TREATMENT AND RETALIATION CLAIMS

In this case, plaintiff claims that he was discriminated against in a variety of ways because of his race and national origin in violation of the State and City HRLs. (Ex. A, Count V and VI.) Plaintiff also claims that he was retaliated against in a variety of ways in violation of those laws. (Id.) Plaintiff claims this disparate treatment and retaliation took the following

forms:² he was not promoted to Team Leader position in June 2001; Chester, Richard Hansen (“Hansen”) and “others” “spied” on him; he was subject to “hyper scrutiny” by Macy’s Security Department personnel; he was suspended without pay in February 2002; he was given unfavorable work assignments and desk relocations; he was given a poor 2001 review, which was delivered to him in March 2002; he experienced a decrease in overtime; he was unfairly criticized for his baggy clothes; he was subjected to unsafe and unsanitary working conditions; and, ultimately, he was terminated in March 2002. (R. 56.1 Statement ¶¶ 58-141.)

Other than the June 2001 promotion he claims he was denied, his suspension in February 2002, his poor 2001 performance review, and his termination on March 6, 2002, plaintiff is unable to provide the date, or even year, in which the foregoing events occurred. (*Id.* ¶ 59.)³ Similarly, plaintiff is unable to provide the date, or even year, in which he allegedly made a complaint of conduct which he reasonably believed constituted discrimination in violation of the State and City HRLs. (*Id.* ¶ 57.)

As explained in detail below, plaintiff is unable to make out a *prima facie* case for either his disparate treatment claims or his retaliation claims. The Macy’s defendants have, moreover, articulated legitimate non-discriminatory reasons for all the specific instances of alleged misconduct about which plaintiff complains. Plaintiff, for his part, has not carried his burden of demonstrating pretext. Thus, the Macy’s defendants are entitled to summary judgment on these claims.

² In his Complaint, plaintiff lumps together his disparate treatment and retaliation claims under the one factual heading “The Hostile Work Environment.” (Ex. A ¶¶ 26-45.) In his deposition, moreover, he also treated as one his disparate treatment and retaliation claims. (Ex. C at 631-33.) Thus, the Macy’s defendants must take the unusual approach in this motion of treating these claims together as well.

³ It is well settled that the statute of limitations for violations of the State and City Human Rights Laws is three years. *See* C.P.L.R. 214(2); N.Y.C. Admin. Code § 8-502(d); *Murphy v. Am. Home Prods.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983). Since plaintiff filed the instant action on April 16, 2004, his claims prior to April 16, 2001 are time barred. Since plaintiff cannot provide the date for the majority of these alleged instances of disparate treatment

A. PLAINTIFF HAS FAILED TO CREATE ANY GENUINE ISSUE OF MATERIAL FACT ON HIS DISPARATE TREATMENT CLAIMS.

To prevail on disparate treatment claims under the State HRL and City HRL,⁴ an employee must prove: (1) membership in a protected class; (2) application or qualification for the position; (3) an adverse employment action; and (4) the action occurred under circumstances giving rise to an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see Petrosino v. Bell Atl., 385 F.3d 210 (2d Cir. 2004); Bandhan v. Laboratory Corp. of Am., 234 F. Supp. 2d 313, 319 (S.D.N.Y. 2002). These elements are flexible and must be tailored, on a case-by-case basis, to differing factual circumstances. McDonnell Douglas, 411 U.S. at 802 n.13.⁵

Once an employer articulates a legitimate, non-discriminatory reason for the adverse employment action, any presumption created by a *prima facie* case “‘completely drops out of the picture.’” James v. New York Racing Ass’n, 233 F.3d 149, 154 (2d Cir. 2000) (internal citation omitted). “Thus, once the employer has proffered its non-discriminatory reasons, the employer will be entitled to summary judgment . . . unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination.” Id. “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated . . . remains at all times with the plaintiff.” McGuinness v. Lincoln Hall, 263 F.3d 49, 55 (2d Cir. 2001) (citations to

and retaliation, the Macy’s defendants submit that they are all time barred.

⁴ Discrimination claims brought under the State HRL and City HRL are analyzed like Title VII claims. See Farias v. Instructional Sys., Inc., 259 F.3d 91, 98 (2d Cir. 2001) (state law claims under the State HRL and City HRL are analyzed like Title VII claims); Miller Brewing Co. v. State Div. of Human Rights, 66 N.Y.2d 937, 489 N.E.2d 745, 498 N.Y.S.2d 776 (1985) (analyzing state law discrimination claim under Title VII framework); Landwehr v. Grey Adver., Inc., 211 A.D.2d 583, 622 N.Y.S.2d 17 (1st Dep’t 1995) (analyzing city law discrimination claim under Title VII framework).

⁵ For example, in a termination case, the plaintiff must demonstrate that he was performing his duties satisfactorily and was discharged under circumstances giving rise to an inference of discrimination. See Graham v. Long Island R.R., 230 F.3d 34, 38 (2d Cir. 2000).

internal quotations omitted). Where a plaintiff fails to do so, summary judgment in favor of the defendant is appropriate. See Schnabel v. Abramson, 232 F.3d 83, 91 (2d Cir. 2000).

Once an employer has offered a legitimate non-discriminatory reason for its employment actions, the employee must offer some evidence to demonstrate that the reason(s) offered is a pretext for discrimination. In meeting his burden to demonstrate pretext, a plaintiff must identify specific evidence that would “permit a rational finder of fact to infer that the defendant’s employment decision was more likely than not based in whole or in part on discrimination.” Stern v. Trustees of Columbia Univ., 131 F. 3d 305, 312 (2d Cir. 1997). The assertion of “mere conclusory allegations of discrimination cannot serve to defeat a motion for summary judgment.” Boyd v. Presbyterian Hosp., 160 F. Supp. 2d 522, 535 (S.D.N.Y. 2001). “[I]n [State and City HRL] actions ... summary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact.” Id. (internal quotations omitted).

Moreover, where a plaintiff alleges that his employer made discriminatory remarks, he must show that those remarks were temporally linked to the adverse employment action(s) he allegedly suffered. Gorley v. Metro-North Commuter R.R., No. 99 Civ. 3240, 2000 WL 1876909 (S.D.N.Y. 2000), aff’d mem., 29 Fed. Appx. 764, 2002 WL 355909 (2d Cir. 2002); accord Grima v. Skidmore College, 180 F. Supp. 2d 326, 339 (N.D.N.Y. 2001) (“stray remarks of a decision-maker, without a more definite connection to the employment decision, are insufficient to prove a claim of employment discrimination.”). “[S]tray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination.” Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir.), cert denied, 534 U.S. 993 (2001). When “‘other indicia of discrimination are properly presented, the remarks cannot no longer be deemed ‘stray,’ and the jury has a right to conclude that they bear a more ominous significance.” Id. at

468 (internal citation omitted).

1. Plaintiff's Failure to Promote Claim Must Fail.

On a failure to promote claim, the fourth element of plaintiff's *prima facie* case requires a plaintiff to demonstrate the action occurred under circumstances giving rise to an inference of discrimination by showing that the person selected for the position was not a member of the protected class. See Petrosino, 385 F.3d 210; Ali v. Bank of New York, 934 F. Supp. 87, 95 (S.D.N.Y. 1996). Here, the individual selected for the Team Leader position at issue was black. (R. 56.1 Statement ¶ 64.) Thus, plaintiff cannot establish a *prima facie* case in connection with his failure to promote claim.

The Macy's defendants, moreover, have articulated a legitimate, non-discriminatory reason for why plaintiff was not selected for the position. Plaintiff was on a disciplinary warning at the time he applied for a promotion and Macy's policy at the time was that individuals who are on a warning are not eligible for a promotion. (Id.) In addition, the individual selected for the open position was well-qualified for the position and had performed the work duties of a Team Leader well during a week-long trial period. (Id.)

Plaintiff has not proffered any admissible evidence to suggest that this explanation is pretextual. Plaintiff has offered no testimony to the effect that the individuals responsible for this decision (Chester and Hansen) ever made any comments to the effect that he was not selected for this position because of his race or national origin. (R. 56.1 Statement ¶ 65.) Instead, plaintiff claims Chester and Hansen told him he was not selected for the position because of "Security issues." (Id.)

Plaintiff's former co-worker, Irving Thorpe ("Thorpe"), who is black and was one of

plaintiff's "group,"⁶ testified that he did not question the individual selected for the promotion because that person was "okay." (R. 56.1 Statement ¶ 66.) He did not, moreover, believe plaintiff was denied the position because of his race. (Id.)

It is, moreover, undisputed that in addition to the individual who was promoted over plaintiff, Chester appointed another black individual for a Team Leader position and recommended yet another black individual for a different promotion. (Id. ¶ 67.)

2. Plaintiff's Suspension Without Pay Claim Must Fail.

Plaintiff's suspension without pay claim references a final warning plaintiff received on or about February 26, 2002 in connection with an incident involving Michael Llewellyn ("Llewellyn"), a Macy's Security employee. (Id. ¶ 122.) In that warning, plaintiff was written up for punching a telephone. (Id.) According to plaintiff, he was suspended for two weeks without pay in connection with this incident. (Id. ¶¶ 128-30.)

The Macy's defendants have demonstrated that plaintiff's alleged suspension and warning in connection with this incident was appropriate. Llewellyn testified that he saw plaintiff punch the telephone. (Id. ¶ 131.) Plaintiff admits that he cursed and punched the telephone (Id. ¶ 124.)

Plaintiff has offered no evidence to demonstrate that either his alleged suspension or the warning was discriminatory, and that the Macy's defendants' explanation is pretextual. Plaintiff admitted that he had never met Llewellyn before this incident. (Id. ¶ 132.) He also admitted that he had no evidence that Llewellyn possessed any discriminatory animus and that he was not aware of Llewellyn making any derogatory remarks concerning plaintiff's race or national

⁶ Plaintiff associated with approximately nine black individuals who he described as the young, outspoken and "disfavored" group. He essentially described everyone else who worked in the Processing Department, mostly black, Hispanic and Indian employees as the "favored" group. (R. 56.1 Statement ¶¶23-25.)

origin. (Id. ¶ 133.)

3. Plaintiff's Discriminatory Discharge Claim Must Fail.

Plaintiff's discriminatory discharge claim fails for similar reasons. Specifically, plaintiff cannot establish a *prima facie* case because there is no evidence that the circumstances of the termination of his employment with Macy's are in any way discriminatory. Plaintiff's employment was terminated by Macy's Security on March 6, 2002, after a thorough internal Security investigation indicated that plaintiff was involved in the theft of over \$2,445.00 in Macy's merchandise. (Id. ¶¶ 137, 164, 186.)

Macy's has submitted a wealth of testimonial and documentary evidence garnered during the Macy's Security investigation to establish plaintiff's dishonest behavior. (Id. ¶¶ 142-86.) This evidence includes: videotape evidence obtained through the use of a covert surveillance camera and a detailed written chronology explaining the activity depicted on the tape (Id. ¶¶ 152-153); personal observations of two Macy's Security employees (Id. ¶¶ 142-44, 157); the apprehension of plaintiff with the stolen merchandise, as well as defeated sensor tags and tools used to remove such tags (Id. ¶¶ 162-65); and, a statement from plaintiff's accomplice, Green, implicating plaintiff in the theft. (Id. ¶ 181.)

Moreover, it is undisputed that when plaintiff was searched by Macy's Security personnel, they discovered that he was in the possession of several bags of marijuana. (Id. ¶ 175.) Possession of illegal drugs was a violation of Macy's rules and regulations and was grounds for his immediate dismissal. (Id. ¶ 138).

As a result of the foregoing, plaintiff was charged with criminal possession of marijuana, as well as grand larceny and criminal possession of stolen property. (Id. ¶ 188, 198.) He was then indicted by a grand jury on the latter charges and was criminally prosecuted. (Id. ¶ 198.)

The case was later dismissed on speedy trial (C.P.L. 30.30) grounds, not based upon the insufficiency of the evidence. (*Id.* ¶ 201).

Plaintiff cannot show that this explanation is pretextual. Plaintiff has offered no evidence supporting the existence of any discriminatory motivation or basis for his discharge. It is undisputed that Chester did not have anything to do with either the Security investigation, or the termination or plaintiff's employment. (*Id.* ¶ 139). Rather, the Security investigation was conducted by Macy's Security and he was terminated by Macy's Security as well. (*Id.* ¶ 137). Plaintiff has no evidence that any of the members of Macy's Security who were involved in the investigation and his termination possessed discriminatory animus. (*Id.* ¶ 140). Instead, plaintiff has suggested that his termination occurred because of the telephone incident with Llewellyn on February 11, 2002, as well as a grievance he allegedly submitted with his union about that incident. (*Id.* ¶ 141.) Plaintiff has not, moreover, offered any evidence that others not in his protected class(es) have been treated differently in similar circumstances.

4. Plaintiff's Complaints about the Working Conditions Are Not Actionable Under the State and City HRLs.

Plaintiff's disparate treatment claim appears to encompass allegations concerning the physical working conditions on the 10th floor. Specifically, plaintiff complains that the 10th floor was not air-conditioned, was poorly ventilated, and had inadequate facilities for drinking water. (*Id.* ¶ 114.) These allegedly harsh conditions, however, are not actionable under the State or City Human Rights Laws.

To prevail on a discrimination claim a plaintiff must establish that the conduct complained of – in this case, the allegedly unsafe and harsh conditions on the 10th floor – constituted discrimination because of his race or national origin. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998). The State and City Human Rights Laws are not

intended as a “general civility code” for the workplace. Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 309, 819 N.E.2d 998, 1010, 786 N.Y.S.2d 382, 394 (2004); see Oncale, 523 U.S. at 80. Only discrimination because of membership in a protected class is prohibited by these laws. Oncale, 523 U.S. at 80; Forrest, 3 N.Y.3d at 309, 786 N.Y.S.2d 382. General assertions of poor treatment without any racial connotation or content do not suffice. Oncale, 523 U.S. at 80; see Jennings v. Health and Hosps. Corp., No. 93 Civ. 2345, 1997 WL 139481, at *3 (S.D.N.Y. Mar. 27, 1997) (alleged assignment of “demeaning jobs” and physical impediments to job performance insufficient), aff’d, 162 F.3d 1148 (2d Cir. 1998); see also Narvarte v. Chase Manhattan Bank, N.A., No. 96 Civ. 8133, 2000 WL 547031, at *10 (S.D.N.Y. May 4, 2000) (overzealous monitoring of her performance insufficient).

Here, no evidence exists to connect the working conditions on the 10th floor to plaintiff’s race or national origin. In fact, the evidence shows that all workers on the 10th floor – Caucasians (including Chester and Hansen), blacks, Hispanics, Puerto Ricans, Indians, processing employees and non-processing employees -- were all subject to the same working conditions. (R. 56.1 Statement ¶ 121.) “[A]n environment that is equally harsh for all workers . . . is not actionable under the civil rights statutes.” Forts v. City of New York Dep’t of Corrections, No. 00 Civ. 1716, 2003 WL 21279439, at *4 (S.D.N.Y. June 4, 2003); see also Brennan v. Metropolitan Opera Ass’n, 192 F.3d 310, 318 (2d Cir. 1999) (holding same in sexual harassment context). Because plaintiff here cannot show that only minority workers such as himself were subject to the allegedly harsh, unsafe, and unsanitary working conditions on the 10th floor, he cannot rely on that conduct in support of any of his discrimination claims.

5. Plaintiff's Other Disparate Treatment Claims Do Not Allege an Adverse Employment Action

Plaintiff's assorted claims of "spying" and "hyper scrutiny," as well as his claims of unfair reviews and discipline, and unfavorable work assignments, are unsupportable as well.⁷ As explained in more detail below, none of these occurrences constitute an actionable adverse employment action. In the Second Circuit, a plaintiff suffers an adverse employment action if he "endures a 'materially adverse change' in the terms and conditions of employment." Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). To be "materially adverse" a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Honey v. County of Rockland, 200 F. Supp. 2d 311, 319 (S.D.N.Y. 2002) (quotation and citation omitted). Rather, a material adverse change exists where there is a "termination of employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Id. (quotation and citation omitted).

Moreover, the Macy's defendants have articulated legitimate, non-discriminatory explanations for each of these remaining allegations of disparate treatment. Plaintiff has not offered a shred of evidence to suggest that the Macy's defendants' proffered reasons are pretextual and that the real reason(s) for the alleged misconduct is discrimination. Plaintiff's disparate treatment claims on these remaining allegations must, therefore, be dismissed.

a. Plaintiff's Claim of "Spying" and "Hyper Scrutiny" Must Fail.

Plaintiff claims that Chester, Hansen and members of Macy's Security Department subjected him to "hyper scrutiny" and "spying" in the form of: Chester peeking through clothes

at plaintiff on one occasion; Chester using Team Leader Stanley Pheeko (“Pheeko”) to “spy” on plaintiff; the installation of increased surveillance cameras on the 10th floor; Chester asking Security to focus on plaintiff; Security checking plaintiff’s bags more than others; Security planting “spies”; and, Security’s use of the Macy’s confidential tip policy to somehow focus on plaintiff. (R. 56.1 Statement ¶¶ 68-95.) These allegations do not, however state a *prima facie* case of disparate treatment.⁸

It is well-settled in this district that “excessive scrutiny” does not constitute an adverse employment action. Bennett v. Watson Wyatt & Co., 136 F. Supp. 2d 236, 247 (S.D.N.Y. 2001); see Scafidi v. Baldwin Union Free Sch. Dist., 295 F. Supp. 2d 235, 239 (E.D.N.Y. 2003). While “close monitoring may cause an employee embarrassment or anxiety, such intangible consequences are not materially adverse conditions.” Castro v. New York City Bd. of Educ. Personnel, No. 96 Civ. 6314, 1998 WL 108004, at *7 (S.D.N.Y. Mar. 12, 1998).

Here, plaintiff cannot point to any evidence that shows that the alleged excessive scrutiny by Security, Chester, or Hansen resulted in any negative repercussions. Indeed, the only “adverse employment action” in evidence is the termination of plaintiff’s employment, which, as set forth above, is well-supported by information and evidence obtained in the Security investigation. See *supra* pp. 10-11. Accordingly, because the alleged “spying” and “hyper scrutiny” do not amount to an adverse employment action, plaintiff cannot show disparate treatment on this basis, and the Court should dismiss the claim.

The Macy’s defendants have, moreover, offered legitimate, nondiscriminatory explanations to rebut plaintiff’s unfounded and unreasonable belief that Chester, Hansen and

⁷ These assorted remaining claims are addressed in sections VIII (B) & (C) of the Rule 56.1 Statement.

⁸ Although plaintiff claims in his Complaint that Hansen would “spy” on him (Ex. A ¶ 72), plaintiff has offered no evidence that Hansen ever spied on him, or treated him differently for that matter. (R. 56.1 Statement ¶¶ 72-73.)

members of Macy's Security Department were "spying" on him and subjecting him to "hyper scrutiny." With regard to the claim that Chester himself, and through others, "spied" on plaintiff, Chester states in his Declaration that he was required to monitor all employees, not just plaintiff, and that the individual whom Chester allegedly used as a "spy," Pheeko, was also required to monitor employee activity as part of his duties as a Team Leader. (R. 56.1 Statement ¶¶ 70-71.)

With regard to plaintiff's claim about increased cameras, the Macy's defendants have established that Chester played no role in the installation of any cameras. (Id. ¶ 76.) Moreover, the number of cameras installed on the 10th floor pales in comparison to the number installed in an area the fraction of the size of the Processing Department, the Men's Store. (Id. ¶ 77.) With regard to plaintiff's claim that Chester asked Macy's Security to focus on plaintiff, the Macy's defendants have explained that Chester was required to interact regularly with Security as part of the normal course of his job. (Id. ¶ 79.) Plaintiff even described the 10th floor as a "hot spot" for Security because of the fact that the 10th floor is the location where sensor tags are placed on the merchandise. (Id. ¶ 81.) Plaintiff has offered no admissible evidence to establish that any conversations Chester may have had with Security concerned him; he even acknowledges that Chester needed to deal with Security frequently about legitimate issues. (Id. ¶ 79, 82.)

With regard to plaintiff's incomprehensible claim that Macy's Security has somehow used the confidential tip policy to "propagate and justify their discriminatory hyper scrutiny of minority employees within Macy's" (Ex. A ¶ 31.), the Macy's defendants have established that employees do not receive money for false tips, and that false or unsubstantiated tips are not a problem because an investigation is conducted every time a tip is received. (R. 56.1 Statement ¶ 95.) Plaintiff has failed to offer any coherent explanation of how he believes the tip policy was misused generally, or in any specific instance, in a way that was discriminatory.

Finally, with regard to plaintiff's claim that his bag was checked more than others, plaintiff himself admits that it was the job of the Security guards posted at the 10th floor to check employee's bags. (Id. ¶ 84.) Plaintiff also admits that he is basing his claim on his own personal observations that the Security guards did not dig as deeply into the bags of other employees. (Id. ¶ 86.) Similarly, with regard to the claim that Security planted "spies," it is clear that plaintiff's claim in that regard is based solely on his own unfounded and unreasonable suspicions about new people being assigned to his table and not based on any admissible evidence of discriminatory intent. (Id. ¶ 90.)

Plaintiff has not, and cannot, offer any evidence of any type to demonstrate that any of these explanations are pretextual. At deposition, plaintiff failed to identify any other non-black, non-Hispanic, non-Puerto Rican employee who was treated better than him by Chester and/or Hansen. (Id. ¶ 59.) Plaintiff's point of comparison for his disparate treatment claims, is the treatment of himself and his "group" in comparison to all the other minorities in the Processing Department, many of whom were black and/or Hispanic. (Id.) Plaintiff also failed to offer any evidence that any discriminatory comments were made by Chester, Hansen, members of Macy's Security, or anyone else that were temporally or causally related to any of these events. Indeed, plaintiff admitted he had never heard any discriminatory comments of any nature at any time made by Hansen or any members of Macy's Security. (Id.)

b. Plaintiff's Claim Regarding His Poor Performance Review Must Fail.

Plaintiff complains that he received a poor review from Hansen. (R. 56.1 Statement ¶ 105.) Negative evaluations standing alone without any accompanying adverse consequences, are not adverse employment actions. Scafidi, 295 F. Supp. 2d at 239; Bennett, 136 F. Supp.2d at 247; Valentine v. Standard & Poor's, 50 F. Supp. 2d 262, 284 (S.D.N.Y. 1999), aff'd, 205 F.3d

1327 (2d Cir. 2000) (“Given that plaintiff’s negative reviews did not lead to any immediate tangible harm or consequences, they do not constitute adverse actions materially altering the conditions of his employment.”). Here, plaintiff does not allege – nor can he prove – a demotion, wage decrease, loss of benefits, or any other materially adverse change in the terms and conditions of his employment as a result of this poor performance review. Thus, a disparate treatment claim based on these reviews necessarily fails, and the Court should grant summary judgment and dismiss the claim.

The Macy’s defendants have, moreover, offered a legitimate, non-discriminatory explanation for the review in question. The review was based upon legitimate criteria and a legitimate assessment of his performance. (R. 56.1 Statement ¶ 106.) Plaintiff’s race and national origin played no part in the assessments contained in the review. (Id.)

Again, plaintiff has offered no evidence to demonstrate that this explanation is pretextual. At deposition, plaintiff failed to identify any other non-black, non-Hispanic, non-Puerto Rican employee who was treated better than him. (Id. ¶ 59) Again, plaintiff’s point of comparison for his disparate treatment and retaliation claims, is the treatment of himself and his “group” in comparison to all the other minorities in the Processing Department, many of whom were black and/or Hispanic. (Id.) Plaintiff also failed to offer any evidence that any discriminatory comments were made by Chester, Hansen, or anyone else that were temporally or causally related to his review. Indeed, plaintiff admitted he had never heard any discriminatory comments of any nature at any time made by Hansen. (Id.)

c. Plaintiff’s Other Complaints About the Reassignment of His Duties and/or Work Station(s), Overtime and Criticism for Wearing Baggy Jeans Must Fail

Finally, plaintiff claims he was disparately treated because: his desk was relocated to a

location right next to Chester's desk; he was assigned to garbage duty; removed from elevator duties, and reassigned from processing leather jackets; he experienced a decrease in overtime hours; and, he was unfairly criticized for wearing baggy jeans. (*Id.* ¶¶ 97-104, 109-112.) As with his claims of excessive scrutiny and poor reviews, plaintiff cannot show that any one of these changes constitutes an adverse employment action. He cannot, therefore, make out a *prima facie* case of disparate treatment based upon these allegations.

An adverse employment action must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Galabaya*, 202 F.3d at 640. Thus, Courts have found that simple changes in job duties or job stations, without any accompanying significant change in employment status (like termination of employment, failure to promote, reduction in pay or benefits, etc.) are insufficient to establish a *prima facie* of disparate treatment. *See, e.g., Chandler v. AMR Am. Eagle Airline*, 251 F. Supp. 2d 1173, 1183-84 (E.D.N.Y. 2003) (change in job duties and reassignment do not constitute adverse employment actions in the absence of showing that pay, hours, or position was affected); *Staff v. Pall Corp.*, 233 F. Supp. 2d 516, 532-34 (S.D.N.Y. 2002) (inter-department transfer is not an adverse employment action), *aff'd*, 76 Fed Appx. 366 (2d Cir. 2003). None of these assorted complaints of plaintiff's amount to anything more than annoyances to plaintiff.

Moreover, the Macy's defendants have offered legitimate, non-discriminatory explanations for each of these allegations. With regard to plaintiff's complaint about the relocation of his desk and his changed duties, the Macy's defendants have established that work assignments and locations in the Processing Department were changed to enhance productivity. (R. 56.1 Statement ¶ 99.) Plaintiff himself acknowledges that Chester would reassign tables when he believed processors weren't working hard enough. (*Id.* ¶ 100.) Garbage duty was,

moreover, the responsibility of all processors. (Id. ¶ 102.)

With regard to his claim that he was denied overtime, the Macy's defendants have established that overtime was assigned pursuant to a uniformly applied policy of assigning overtime on a seniority basis. (Id. ¶ 111.) Macy's also had a uniformly applied dress code policy that disallowed baggy jeans. (Id. ¶ 112.)

As with his other claims, plaintiff has offered no evidence to demonstrate that these explanations are pretextual. At deposition, plaintiff failed to identify any other non-black, non-Hispanic, non-Puerto Rican employee who was treated better than him. (Id. ¶ 59.) Again, plaintiff's point of comparison for his disparate treatment and retaliation claims, is the treatment of himself and his "group" in comparison to all the other minorities in the Processing Department, many of whom were black and/or Hispanic. (Id.) Plaintiff also failed to offer any evidence that any discriminatory comments were made by Chester, Hansen, or anyone else that were temporally or causally related to his review. Indeed, plaintiff admitted he had never heard any discriminatory comments of any nature at any time made by Hansen. (Id.)

The Macy's defendants have, moreover, offered evidence to demonstrate that these events were not discriminatory. For example, they have established that other elevator operators during Chester's tenure were minorities and that Chester removed a non-minority operator from elevator duty for poor performance. (Id. ¶ 100.) They have also established that members of all racial groups were required to perform garbage duty. (Id. ¶ 102.) Plaintiff's co-workers during their depositions also confirmed this fact. (Id. ¶ 104.)

B. PLAINTIFF HAS FAILED TO CREATE ANY GENUINE ISSUE OF MATERIAL OF FACT ON HIS RETALIATION CLAIMS.

Plaintiff also asserts State and City HRL retaliation claims against the Macy's defendants based upon the same allegations as those alleged on his disparate treatment claims. See supra pp.

4-6. Plaintiff is, however, unable to make out a *prima facie* case for his retaliation claims, and accordingly, these claims should be dismissed on this motion.

The standards for retaliation claims under the State HRL and City HRL are also governed by the McDonnell Douglas framework: to establish a *prima facie* case of retaliation a plaintiff must prove (1) he was engaged in a protected activity; (2) the defendant was aware of this activity; (3) the defendant took adverse action against the plaintiff; and (4) a causal connection exists between the protected activity and adverse action. Distasio v. Perkin Elmer Corp., 157 F.3d 55, 66 (2d Cir. 1998); Hill v. Citibank Corp., 312 F. Supp. 2d 464, 477-78 (S.D.N.Y. 2004). Plaintiff here has failed to make out the required elements of a *prima facie* retaliation claim for a number of reasons.

1. Plaintiff has not proven that he engaged in any protected activity of which the Macy's defendants were aware.

The term “protected activity” refers to action taken to protect or oppose statutorily prohibited discrimination. N.Y. Exec. L. § 296(1)(g); N.Y. City Admin. Code § 8-107(7); see Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990). Here, plaintiff cannot show that he was engaged in any protected activity that was known to Macy's.

Plaintiff admitted during his deposition that he never complained about any harassment of him to Macy's Human Resources department or to the confidential hotline number. (R. 56.1 Statement ¶ 47.) He further testified that he did not complain to anyone in a supervisory position within Macy's management higher than Chester, for example Chester's supervisor, Tom Grady, about any harassment of him. (Id. ¶ 48-49.) Instead, plaintiff maintains that he complained in the form of written Union grievances. (Id. ¶ 49.)

However, discovery in this case has revealed no evidence that any such union grievances were ever submitted by plaintiff to his Union, or that any such grievances were ever

communicated to Macy's. (Id. ¶ 53.) Neither plaintiff nor the Union, in response to the Macy's defendants' subpoena, produced any written grievances from plaintiff regarding any alleged discrimination or harassment. (Id.) Even if the Court were to assume that such grievances were submitted, moreover, plaintiff has still failed to ever proffer the dates when these grievances were allegedly submitted or substance of the alleged grievances he submitted to his Union that he believes constitute protected activity. (Id. ¶ 54.) Thus, plaintiff cannot prove the first two elements of the required *prima facie* case.

Plaintiff's vague testimony about alleged complaints to Chester and Hansen cannot assist plaintiff in making out his *prima facie* case. Plaintiff claims he complained to Hansen about a razor blade comment made by Chester and the fact that all employees in the Processing Department were required to wear tight jeans. (Id. ¶ 55.) The Macy's defendants submit that the substance of these complaints do not constitute protected activity. The razor blade comment was an isolated incident and the jeans reference was, on its face, to a uniformly applied policy. Nevertheless, even if this alleged complaint were viewed as protected activity, it would nonetheless be insufficient to make out a *prima facie* case here because plaintiff has no idea when this alleged complaint was made. (Id. ¶ 57.) He cannot, moreover, provide any exact time frame for when the majority of the alleged adverse employment actions took place. (Id. ¶ 59.) Thus, he cannot establish that he was subjected to an adverse employment action *after* he allegedly complained to Hansen.

The same is true with regard to his ambiguous alleged complaint to Chester himself -- "I don't appreciate the comment you made to him [a co-worker]. Or what you talking about as far as black people and clothes they wear. . . . Do you have a problem with Mexican people as far as my wife is Mexican. You want to rephrase what you said." (Id. ¶ 56.) The Macy's defendants

submit that plaintiff's statement to Chester is simply too ambiguous to constitute protected activity. Moreover, as with the alleged complaint to Hansen, plaintiff has no idea when he supposedly said this to Chester. (*Id.* ¶ 57.) He cannot, moreover, provide any exact time frame for when the majority of the alleged adverse employment actions took place. (*Id.* ¶ 59.) Thus, he cannot establish that he was subjected to an adverse employment action *after* he allegedly complained to Chester.

Finally, it is important to note that plaintiff has not demonstrated that anyone within Macy's Security was aware of his alleged protected complaints. (*Id.* ¶ 88.) Thus, plaintiff cannot demonstrate that they had any notice of his alleged complaints prior to engaging in the actions which plaintiff claims were retaliatory, particularly his termination.

2. Plaintiff has not shown that he suffered adverse employment actions.

As set forth above, *supra* p. 13, only a material adverse change such as "termination of employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation" establishes an adverse employment action. *Honey*, 200 F. Supp. 2d at 319 (quotation and citation omitted). And, as explained fully above, *supra* pp. 8-19, the majority of the actions about which plaintiff complains do not constitute adverse employment actions for the purpose of establishing a *prima facie* case of discrimination or retaliation. Accordingly, plaintiff cannot prove a *prima facie* of retaliation, and the claim should be dismissed.

3. Plaintiff has failed to establish a causal connection.

Plaintiff has failed to establish that a causal connection exists between any protected activity in which plaintiff allegedly engaged and the alleged adverse employment actions taken

against him by the Macy's defendants. To establish the requisite causal connection, a plaintiff must provide either: (1) direct evidence of "retaliatory animus directed against . . . plaintiff by the defendant;" or (2) indirect circumstantial evidence "showing that the protected activity was followed closely by the discriminatory treatment," or other evidence "such as disparate treatment of fellow employees who engaged in similar conduct." DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir.), cert. denied 484 U.S. 965 (1987). While a plaintiff's burden of establishing a causal connection is, generally, a light one, plaintiffs have failed to establish such a connection in cases where, as here, they have provided no evidence whatsoever of retaliatory motive. See Ponniah Das v. Our Lady of Mercy Med. Ctr., No. 00 CIV. 2574(JSM), 2002 WL 826877, at *12 (S.D.N.Y. Apr. 30, 2002) (granting summary judgment in favor of defendant on plaintiff's New York state law retaliation claims where plaintiff "presented no admissible evidence, other than temporal proximity, to support the claim that his dismissal from his employment was retaliatory"); Cook v. CBS, Inc., No. 99 CIV. 2897, 2001 WL 897181, at *6 (S.D.N.Y. Aug. 9, 2001) (granting summary judgment in favor of defendant on plaintiff's Title VII retaliation claim where there was a "complete absence of evidence of retaliatory motive"). Compare DeCintio, 821 F.2d at 116 (finding that plaintiff established a causal connection where adverse employment action occurred within one year of protected activity and plaintiff provided evidence that fellow employees were not disciplined for engaging in identical behavior).

In the instant case, and as noted above, plaintiff cannot demonstrate that there exists any temporal proximity between any protected activity and the alleged adverse employment actions to which he was allegedly subjected. See supra pp. 8-19. Plaintiff has no idea when he complained or when most of the alleged adverse employment actions took place. (R. 56.1 Statement ¶¶ 57 & 59.) He also has no evidence of retaliatory animus or disparate comparative

treatment either. (Id. ¶ 59.) Accordingly, plaintiff cannot establish the requisite causal connection, and thus he fails to establish a *prima facie* case of retaliation.

4. The Macy's Defendants have offered legitimate explanations for all their challenged actions.

Even assuming *arguendo* that this Court should find that plaintiff has satisfied the elements of the *prima facie* case for retaliation, plaintiff's retaliation claim still must fail as a matter of law as the Macy's defendants have provided legitimate, non-discriminatory reasons for all their challenged actions. Ordinarily, once a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for its actions. Sumner, 899 F.2d at 209 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)). If the defendant is able to do so, the burden then shifts back to the plaintiff "'to demonstrate that the proffered reason was not the true reason' for the decision, i.e. that the articulated reason is a pretext." Id.

Here, the Macy's defendants have provided legitimate, non-discriminatory reasons for all their challenged actions as discussed above, supra pp. 8-19.

5. Plaintiff has not shown pretext.

Finally, as with his disparate treatment claims, plaintiff fails to provide any evidence that the Macy's defendants' legitimate, nondiscriminatory explanations are pretextual. See Alston v. New York City Transit Auth., 14 F. Supp. 2d 308, 314 (S.D.N.Y. 1998) (finding that plaintiff failed to establish pretext where plaintiff presented no evidence of disparate treatment). Plaintiff has presented no evidence that any employees who did not complain were treated better than him. He has also presented no evidence that any retaliatory remarks were ever made by Chester, Hansen, Macy's Security personnel or anyone else at any time.

Accordingly, for all these reasons, plaintiff's retaliation claims must be dismissed.

POINT II

PLAINTIFF CANNOT ESTABLISH A BASIS FOR IMPUTING LIABILITY FOR CHESTER’S ALLEGED HARASSMENT TO MACY’S

While it is well-settled that the State and City HRLs follow Title VII in determining what circumstances constitute actionable sexual harassment, the standards for employer liability under the State and City HRLs are both different from, and stricter than, the Title VII standards. Under the State and City HRLs, an “employer cannot be held liable . . . for any employee’s discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it.” State Div. of Human Rights ex rel. Greene v. St. Elizabeth’s Hosp., 66 N.Y.2d 684, 687, 47 N.E.2d 268, 687 N.Y.S.2d 411, 412 (1985); accord, e.g., Franklin v. City of N.Y., 01 Civ. 10574, 2003 WL 21511932 at *8 (S.D.N.Y. July 1, 2003), aff’d, 99 Fed. Appx. 315 (2d Cir. 2004); Jordan v. Cayuga County, No. 5:01 CV 1037, 2004 WL 437459 at *4 (N.D.N.Y. Feb. 9, 2004); DeWitt v. Lieberman, 48 F. Supp. 2d 280, 293 & n.10 (S.D.N.Y. 1999); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 311, 786 N.Y.S.2d 386, 395 (2004). Such condonation or approval “contemplates a knowing, after-the-fact forgiveness of an offense.” St. Elizabeth’s Hosp., 66 N.Y.2d at 687, 687 N.Y.S.2d at 412. Under the State and City HRLs, a plaintiff cannot show employer condonation unless the employer had *actual notice* of the offense and failed to investigate and/or take corrective action. Sowemimo v. D.A.O.R. Security, Inc., 43 F. Supp. 2d 477, 486 (S.D.N.Y. 1999) (emphasis added) (quotation and citation omitted).

A. MACY’S PREVENTATIVE EFFORTS

Macy’s has long had a policy that forbids harassment based on, *inter alia*, race and national origin. (R. 56.1 Statement ¶ 27.) This policy was posted in a conspicuous place both on the 10th floor and outside of the Human Resources office at Macy’s Herald Square and distributed to associates and executives throughout the company. (Id. ¶¶ 28-31.) In addition,

Macy's had made numerous other efforts to educate its workforce about its harassment policy, including training and classes on discrimination and harassment. (Id. ¶ 34.) Indeed, it is undisputed that Macy's had conducted extensive anti-harassment training of its managers, including Chester, in a further effort to prevent harassment. (Id.)

Plaintiff was well aware that Macy's prohibited discrimination and that it had a procedure for receiving complaints of discrimination and harassment. First, plaintiff signed an acknowledgment form confirming that he had read and understood the company Standards of Conduct. (Id. ¶ 32.) The Standards of Conduct includes a statement informing employees that discrimination or harassment based on, *inter alia*, race or national origin would subject an employee to immediate discharge. (Id.) Second, plaintiff testified that he knew that at least one other Macy's employees had complained of harassment to Human Resources. (Id. ¶ 36.) Third, plaintiff recalled attending sessions conducted by representatives of Macy's Human Resources department about harassment. (Id.) His co-workers, including his friends in his "group," testified that they also recalled participating in harassment training. (Id. ¶ 35.) Fourth, plaintiff testified that his Union also encouraged its members, such as himself, to complain about harassment and the collective bargaining agreement also contained a specific section prohibiting harassment and discrimination based on race or national origin. (Id. ¶ 37.) Last, plaintiff himself had complained both to Human Resources and his manager about sexual harassment while employed by Macy's in the Éclair Bakery Café in 1992 or 1993. (Id. ¶¶ 38-39.) Thus, not only did Macy's have an effective anti-harassment policy that was disseminated to its employees and posted in visible locations in the store, but plaintiff was well-aware of the company's prohibition of discrimination and avenues provided by the company to complain about harassment or discrimination.

B. PLAINTIFF FAILED TO PROVIDE MACY'S WITH ACTUAL NOTICE OF THE ALLEGED HARASSMENT

Despite Macy's extensive preventative efforts and its broad dissemination of its harassment policy, plaintiff here did not utilize any of the complaint procedures to complain about the alleged harassment by Chester. He did not complain to Human Resources and he did not call the 1-800 confidential hotline number. (*Id.* ¶ 47.) Nor did he complain about any race- or national origin-based harassment to any upper-level managers, for example Chester's supervisor, Tom Grady. (*Id.* ¶ 48.) While he did speak to Grady about Chester, plaintiff only made "general" complaints about the management structure on the 10th floor and "the way Scott Chester talks." (*Id.*) He did not complain of race- or national origin-based harassment. (*Id.*)

Plaintiff did not complain about harassment to his lower level managers either. His only complaint to Chester was one occasion when he told Chester that he did not "appreciate" a comment made by Chester and advised him to "rephrase" his comment. (*Id.* ¶ 56.) And although plaintiff claims that he "constantly" complained about Chester's alleged harassment to Hansen, the only specific items he brought to Hansen's attention were a comment about Puerto Ricans carrying razor blades and a complaint that all Processing employees (minority and non-minority) were not allowed to wear "tight jeans." (*Id.* ¶ 55.) None of these alleged "complaints" to Chester or Hansen concerned harassment, however. Thus, they are insufficient to place Macy's on notice of the alleged harassment of plaintiff based on his race or national origin. See Heskin v. Insite Adver., Inc., No. 03 Civ. 2598, 2005 WL 407646, at *23 (S.D.N.Y. Feb. 22, 2005) (granting summary judgment to employer dismissing State HRL and City HRL claims because plaintiff failed to complain of harassment, thus employer had no actual notice); DeWitt, 48 F. Supp. 2d at 285, 293-94 (granting summary judgment to employer dismissing State and City HRL claims because, *inter alia*, plaintiff failed to complain of harassment).

Indeed, plaintiff explained that he did not complain to Human Resources, management, or the individuals identified by the harassment policy because his “practice” was to submit a grievance to the Union instead. (R. 56.1 Statement ¶ 49.) Plaintiff however, is unable to provide copies of any such grievances and he has not offered any evidence as to the substance of those grievances. (Id. ¶¶ 53-54.) And, even if these grievances did exist, there is no evidence that anyone within Macy’s management above Chester was aware of their existence or their content. Thus, plaintiff’s claimed “complaints” and “grievances” concerning the alleged harassment are also insufficient to provide actual notice of the harassment to Macy’s. Summary judgment dismissing the harassment claims under the State and City HRLs is therefore appropriate.