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 GREEN, JOHN DOES 1-5, Individually,

Defendants.

Index No.: 04 Civ. 2944 (BSJ)
(ECF Case)

BRIEF IN SUPPORT OF DEFENDANT SCOTT CHESTER'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant Scott Chester ("Chester") submits this memorandum of law in support of his motion for summary judgment.

Plaintiff Harold Baergas ("plaintiff") was employed by Macy's East, Inc. ("Macy's") in the Processing Department of its Herald Square store for approximately five years, almost three of which were under the supervision of Chester. He alleges that, under Chester's supervision, he was subjected to a hostile work environment that demonstrated animus based on race and national origin. Surprisingly, at no time during his employment did he lodge any such complaints with the Human Resources Department, the 800 toll-free hotline number, or any Macy's manager. Plaintiff was terminated on March 6, 2002 for non-discriminatory, non-retaliatory reasons. Following an internal investigation revealed his complicity in a scheme to steal merchandise from the store.

Plaintiff now brings this action asserting a plethora of claims against numerous parties. Distilled to its essence, however, plaintiff's complaint can be divided into two essential categories. First, he alleges that he and a class of employees he seeks to represent were discriminated against on the basis of race and national origin in the form of harassment, disparate treatment, retaliation and difficult physical working conditions. These claims are brought 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.* ("NYC Code"). Second, he asserts federal statutory and state tort claims arising out of his apprehension, arrest and prosecution, which he claims were falsely secured. Those causes of action include claims for false arrest and imprisonment, malicious prosecution, defamation, intentional infliction of emotional distress, and federal civil rights claims under 42 U.S.C. §§ 1983 and 1985(3). Plaintiff's complaint is, at best, inartfully pled, but it appears he is attempting to state all these claims against Chester.

This attempt fails. As more fully explained below, Chester played absolutely no role in plaintiff's apprehension, arrest and prosecution; indeed, Chester was not even aware of the internal investigation into plaintiff's activities. Therefore, all claims based upon those events cannot stand. Moreover, many of the tort claims are in any event untimely.

With regard to plaintiff's State HRL and NYC Code claims, plaintiff's efforts to establish Chester's liability are similarly lacking. First, with regard to plaintiff's claim of harassment, Chester as a matter of law does not meet the definition of employer and, moreover, cannot be held responsible as an aider and abettor because there is no primary liability against the entity (Macy's) Chester is alleged to have aided and abetted. Second, plaintiff's allegations of adverse physical working conditions is not actionable under the State HRL and NYC Code, because he cannot demonstrate any connection between those conditions and his protected status.

Finally, plaintiff's disparate treatment and retaliation claims contain a multitude of deficiencies. Most of the alleged adverse employment actions are nothing more than a laundry list of trivial and race-neutral occurrences that did not result in a materially adverse change in his employment. Chester had no involvement in those actions and therefore cannot be held liable. Moreover, Plaintiff has failed to adduce evidence establishing that his protected status or his so-called protected activity was the motivation for any of these incidents. And lastly, even beyond the *prima facie* case, plaintiff is unable to rebut Chester's legitimate, non-discriminatory and non-retaliatory reasons for these events and prove that these reasons are merely pretext for discrimination or retaliation.

In sum, despite extensive opportunity during discovery, plaintiff has failed to elicit credible, competent evidence to support any of his claims. Accordingly, Chester is entitled to summary judgment and dismissal of the complaint with prejudice.

STATEMENT OF FACTS

For a complete statement of facts that are material to this motion, the Court is respectfully referred to the Macy's Defendants' and Chester's Statement of Undisputed Facts Pursuant to Local Rule 56.1.

LEGAL ARGUMENT

I. Defendant is Entitled to Summary Judgment.

Summary judgment is "a tool for clearing the calendar of doomed lawsuits . . . " *Weinstock v. Columbia Univ.*, 224 F.3d 33, 40 (2d Cir. 2000). Summary judgment is equally appropriate in discrimination cases as in other litigation because its purpose is the same in all cases, *i.e.*, "avoiding protracted, expensive and harassing trials." *Id.* at 41. The United States Supreme Court expressly has stated, "trial courts should not 'treat discrimination differently from other ultimate questions of fact." *Id.* (*citing Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109 (2000)).

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Accordingly, summary judgment may be granted where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Weinstock*, 224 F.3d 33 at 41 (*citing* Fed. R. Civ. P. 56(c)). There is a genuine issue of material fact where "the evidence is such that a reasonable jury could return a verdict for the non-moving party." However, "unsupported allegations do not create a material issue of fact." *Id.* (citations omitted). Plaintiff may not rely upon "mere conclusory allegations or denials. Rather, Baergas must provide "some affirmative indication that [his] version of the relevant events is not fanciful." *Melnyk v. Adria Lab.*, 799 F. Supp. 301, 315 (W.D.N.Y. 1992) (citation omitted)*; St. Pierre v. Dyer,* 208 F.3d 394, 404 (2d Cir. 2000). Plaintiff also may not rely upon inadmissible hearsay evidence, but rather must rely on factual testimony based upon personal knowledge. *See, e.g., Albert v. Loksen*, 239 F.3d 256, 266-67 (2d Cir. 2001); *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp*, 769 F.2d 919, 924 (2d Cir. 1985); *Greaves v. St. Luke's/Roosevelt Hosp. Ctr*, 03 Civ. 7272 (SAS), 2005 WL 627635, *1 n.12 (S.D.N.Y., March 17, 2005).[1] In sum, "[t]here must be more than a scintilla of evidence, ... and more than some metaphysical doubt as to the material facts. ... [Plaintiff] cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, ...or defeat the motion through mere speculation or conjecture." *Jones v. Hirschfeld*, 348 F.Supp.2d 50, 59 (S.D.N.Y. 2004) (citations and internal quotations omitted).

II. Plaintiff Cannot Sustain a Claim of False Arrest and Imprisonment Against Chester Because It is Time Barred and, In Any Event, He Cannot Prove a *Prima Facie* Case.

A. Plaintiff's Claim is Time Barred

Claims for false arrest and imprisonment[2] carry a one year statute of limitations. CPLR §215(3); *Lugo v. Milford*, 956 F. Supp. 1120, 1124 (S.D.N.Y. 1997). The limitations period begins when the imprisonment terminates. *Warren v. Byrne*, 699 F.2d 95, 97 (2d Cir. 1983); *Charnis v. Shohet*, 2 A.D.3d 663, 663, 768 N.Y.S.2d 638, 639 (2d Dept. 2003).

It is undisputed that plaintiff was arrested on the evening of March 6, 2002 and into the early morning hours of March 7, 2002. Furthermore, his imprisonment concluded after approximately one or two days. R. 56.1 St. at ¶ 196. Therefore, his time to sue expired on or

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1 Copies of all unreported decisions are attached as exhibits to the Declaration of Mercedes Colwin, dated April 1, 2005. They are referred to as "Ex. __." *Greaves* is Ex. E.

2 Claims of false arrest and false imprisonment are synonymous causes of action. *Sepulveda v. City of New York*, 01 Civ. 3054 (DC), 2003 WL 21673626, *3 (S.D.N.Y., July 17, 2003) (Ex. I).

about March 8 or 9, 2003, more than a year before he instituted the present lawsuit. The claim must therefore be dismissed.

B. Plaintiff Cannot Demonstrate the Elements of a False Arrest and Imprisonment Claim Against Scott Chester

Even if the false arrest and imprisonment claim were not time-barred, such a claim would nevertheless fail against Chester. The elements of a false arrest and imprisonment claim are:

- Intentional confinement or detention;
- Lack of consent by plaintiff; and
- Without justification or privilege.

Curry v. City of Syracuse, 316 F.3d 324 (2d Cir. 2003); *Curley v. AMR Corp.*, 153 F.3d 5 (2d Cir. 1998).

The record is lacking in any reference to Chester being a participant in the physical confinement or detention of plaintiff. To the contrary, plaintiff himself has described the circumstances of his apprehension and arrest, and has demonstrated by his description that Chester: was nowhere near the 9th floor locker room when plaintiff was apprehended; did not escort plaintiff to the security office; was not responsible for keeping plaintiff in the security office; did not hand plaintiff over to the police; and certainly did not jail plaintiff. See R. 56.1 St. at ¶¶ 139, 192, 200. See also Point III below.

However,

> For false imprisonment liability to attach to one who causes or directs an arrest or imprisonment in New York, "(t)he defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal to the point where the officer is not acting of his own volition."

Curley, 153 F.3d at 13-14 (citations omitted). *See also King v. Crossland Savings Bank*, 111 F.3d 251, 257 (2d Cir. 1997) (defendant must have "intended or instigated the confinement of the plaintiff").

Because Chester was in no way responsible for the confinement and detention that forms the basis for plaintiff's claim, it must be dismissed.[3]

III. Plaintiff Cannot Sustain a Malicious Prosecution Claim Against Chester Because Chester Had No Role in the Criminal Proceeding Underlying the Claim.

To sustain a claim for malicious prosecution, plaintiff must prove:

- Initiation or continuation of a criminal proceeding;
- Termination of the proceeding in plaintiff's favor;
- Lack of probable cause for commencing the proceeding; and
- Defendant was motivated by actual malice.

Colon v. City of New York, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453, 455 (1983); *Preston v. State of New York*, 223 F.Supp.2d 452, 466 (S.D.N.Y. 2002), aff'd 87 Fed.Appx. 221, 2004 WL 303944 (2d Cir. 2004). In addition, proof of special injury is required. *Engel v. CBS*, 689 N.Y.S.2d 411 (1999), *conformed to* 182 F.3d 124 (2d Cir. 1999).

The first element – initiation or continuation of a criminal proceeding – requires the defendant to have either instituted the proceeding or have taken a very active role in pressing its continuation. *Preston*, 223 F.Supp.2d at 466; *Kurschus v. PaineWebber Inc.*, 16 F.Supp.2d 386, 392 (S.D.N.Y. 1998). However, the testimony in this litigation uniformly demonstrates that Chester had absolutely no role in (1) the investigation into plaintiff's activities leading to his apprehension, (2) plaintiff's apprehension and arrest, or (3) the prosecution against plaintiff. Those in a position to know clearly testified to this:

1. Chester himself stated unequivocally that he did not did not talk to the ADA or police regarding allegations of theft against plaintiff, his apprehension and arrest, or the prosecution, nor did he provide any information to any Macy's employee leading to plaintiff's detention. R. 56.1 St. at ¶¶ 139, 192, 200 [195-96, 290]. Indeed, Chester had no knowledge of any security investigation regarding plaintiff or the 10th floor

[3] Summary judgment on this claim is also appropriate pursuant to N.Y. Gen. Bus. Law § 218. In order to avoid unnecessary duplication, Defendant relies upon the Macy's Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment for his arguments relating to this basis for summary judgment as if fully set forth herein.

in the months before plaintiff's termination, nor did he have any discussions about such an investigation. R. 56.1 St. at ¶ 139 [291, 293].

2. Michael Grasso, a Regional Investigator at Macy's who was personally involved in the apprehension of plaintiff on March 6, 2002, testified that he never had discussions with Chester about plaintiff and Chester contributed no information leading to plaintiff's arrest. R. 56.1 St. at ¶ 139 [72, 239-40].

3. Chris DeSantis, a Regional Investigator at Macy's who was personally involved in the investigation into and apprehension of plaintiff, testified he only "vaguely" knew Chester, met with him "rarely, if ever. Maybe in passing," and stated he never at Herald Square commenced an investigation against an employee based upon a manager's recommendation. R. 56.1 St. at ¶ 77 [103-04, 120-21].

4. Police officer Thomas Schick, the arresting officer, testified he did not know Chester, never had any contact with him, was not aware if Chester had any involvement with the investigation leading up to plaintiff's arrest, and had no knowledge of whether Chester assisted the ADA prosecuting plaintiff. R. 56.1 St. at ¶ 192 [130-32].

5. Michael Llewellyn, the Regional Special Investigations Unit Director at Macy's, testified he could recall no discussions between Chester and himself or his security colleagues about plaintiff and, to his knowledge, Chester provided no information or documentation to either Llewellyn or his security department colleagues that led to the investigation into plaintiff or plaintiff's apprehension, nor was Chester involved in any way in plaintiff's apprehension. R. 56.1 St. at ¶ 139 [102-03, 272-74].

The documentary evidence surrounding plaintiff's apprehension, arrest and prosecution further highlights Chester's lack of involvement. Not a single document produced by the City of New York, which was responsible for shepherding plaintiff's arrest and prosecution, even mentions Chester. Further, a March 8, 2002 memorandum written by DeSantis to Wendy Weiss in the Human Resources department, which outlines how the investigation was initiated and carried out (a merchandise stash found by DeSantis and Llewellyn, followed by covert surveillance by the security department), demonstrates Chester was not a participant. R. 56.1 St. at ¶ 139, Ex. H [M0035-36].

Indeed, plaintiff's own testimony demonstrates he cannot show a connection between Chester and his arrest or criminal prosecution. While Plaintiff holds a personal belief that Chester contributed in some way to these events by speaking with members of the security department about him (see R. 56.1 St. at ¶ 139 [64-65, 74]), that belief is not based on any credible facts; it is just supposition. Plaintiff had no choice but to admit:

- he had "no idea what [Chester's] role was" in his arrest and did not "know what Scott Chester contribute[d] to [his] arrest" R. 56.1 St. at ¶ 139 [64-65];
- he did not know "if Scott Chester spoke to the police" R. 56.1 St. at ¶ 139 [70];
- he "wouldn't know" if Chester spoke to representatives of the security department in connection with the events that led up to his arrest R. 56.1 St. at ¶ 139 [70];
- he has "no idea" if Chester spoke with the district attorneys prosecuting his case R. 56.1 St. at ¶ 200 [81].

Plaintiff went so far as to testify as follows:

> Q: Do you think that Scott Chester ever spoke to Security about you individually?
>
> A: Yes, I believe it. Can I prove it? No, I can't.

R. 56.1 St. at ¶ 139 [74].

This testimony demonstrates unequivocally that Chester had no involvement, either by initiation or continuation, in the criminal prosecution against plaintiff. Certainly, this evidence falls far short of plaintiff's burden to demonstrate this essential element of a malicious prosecution claim. Summary judgment on this claim is therefore appropriate.[4]

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[4] Summary judgment on this claim is also appropriate because plaintiff has not demonstrated a lack of probable cause or the existence of malice by Chester. (Indeed, it is not possible to find malice by Chester, considering that he had no role in the apprehension, arrest or prosecution.) In order to avoid unnecessary duplication, Defendant relies upon the Macy's Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment for their arguments relating to these prongs of a malicious prosecution claim as if fully set forth herein.

IV. Plaintiff's Claim for Defamation is Time-Barred.

Defamation is an intentional tort that carries a one year statute of limitations, which runs from the date the statement is published. See CPLR § 215(3); *Shanley v. ITT Corp.*, 869 F.2d 167, 172 (2d Cir. 1989); *Knoll v. Merrill Corp.*, 02 Civ. 566 (CSH), 2003 WL 22682271, *3 (S.D.N.Y., Nov. 12, 2003) (Ex. F). Therefore, to be actionable, plaintiff must allege Chester made defamatory statements about him on or after April 16, 2003, one year before he instituted the present lawsuit.[5]

Plaintiff has failed to elicit any statements regarding him, defamatory or otherwise, made by Chester within the relevant time period. The majority of plaintiff's deposition testimony regarding statements made by Chester pertain to comments during plaintiff's employment, which ended on or about March 6, 2002 when he was apprehended and arrested for theft.[6] With regard to statements made by Chester after his termination, plaintiff testified to only one specific statement: approximately one to two months after his termination, plaintiff called Macy's to speak with Eduardo Perez, a former co-worker who was still working on the Tenth Floor. Perez told him Chester asked with whom Perez was speaking, and when Perez stated it was plaintiff, Chester told Perez plaintiff was not supposed to be calling the store because he had been caught stealing. R. 56.1 St. at ¶ 230. Without even reaching the substantive evaluation of whether such a statement could constitute defamation, it is clear it was made well outside the appropriate time frame and is therefore not actionable.

Because plaintiff can point to no defamatory statements, or any statements at all, made by Chester about him within the limitations period, plaintiff's claim of defamation against Chester must be dismissed.

V. Plaintiff's Claim for Intentional Infliction of Emotional Distress is Time Barred, and In Any Event the Allegations Fail to Sustain A Claim.

Like all other intentional torts, plaintiffs are barred from bringing claims for intentional infliction of emotional distress ("IIED") more than one year after the cause of action accrues. *See* N.Y. CPLR § 215(3) (McKinney 2002); *Mariani v. Consolidated Edison Co. of New York,*

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5 A defamatory statement is a false statement of fact made to a third party in a situation that constitutes fault and which results in special harm or defamation *per se*. *See, e.g.*, *Peters v. Baldwin Union Free School District,* 320 F.3d 164, 169 (2d Cir. 2003).

6 Of course, Chester does not believe that any of those statements would be considered defamatory in any event.

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Inc., 982 F. Supp. 267, 273 (S.D.N.Y. 1997), *aff'd without opinion,* 172 F.3d 38 (2d Cir. 1998). When applying a statute of limitations requirement to an intentional infliction claim, "[a]ll acts occurring before the limitations period are excluded from consideration." *Santan-Morris v. New York University Medical Center*, 96 Civ. 0621 (MGC), 1996 WL 709577, *2 (S.D.N.Y., Dec. 10, 1996) (Ex. G) (*quoting Koster v. Chase Manhattan Bank*, 609 F. Supp. 1191, 1198 (S.D.N.Y. 1985)).

Thus, to sustain a claim, plaintiff must allege that, on or after April 16, 2003, Chester engaged in conduct directed toward plaintiff that meets the standard for IIED, *i.e.*, extreme and outrageous conduct intended to cause (or in reckless disregard of the likelihood to cause) severe emotional distress, and that did in fact cause such distress. *Conboy v. AT&T*, 241 F.3d 242, 258 (2d Cir. 2001); *Howell v. New York Post,* 81 N.Y.2d 115, 122, 596 N.Y.S.2d 350, 353 (1993), aff'd 82 N.Y.2d 690, 619 N.E.2d 650, 601 N.Y.S.2d 572 (1993). The first element requires conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* Stating such a claim under New York law is "nearly impossible." *Idema v. Wager,* 120 F. Supp.2d 361, 370 (S.D.N.Y. 2000), aff'd 29 Fed..Appx. 676, 2002 WL 243119, 30 Media L. Rep. 1439 (2d Cir 2002). Such claims are "highly disfavored under New York law." *Nevin v. Citibank, N.A.,* 107 F. Supp.2d 333, 345 (S.D.N.Y. 2000).

In the present case, plaintiff has alleged almost no conduct directed at him within the limitations period, let alone any conduct that could even remotely qualify as the extreme and outrageous conduct necessary to meet the stringent requirements for such a claim. Indeed, the record is devoid of evidence of ***any*** contact between plaintiff and Chester during the relevant time frame or any activities by Chester directed at plaintiff.

The only activity regarding plaintiff subsequent to his arrest that plaintiff alleges about Chester is the alleged statement described in Point IV, *supra*. However, aside from the fact that the statement is time-barred, it is clear this statement does not meet the standard necessary for an IIED claim. Far more egregious conduct has been held by the courts not to be sufficient. *See, e.g., Murphy v. American Home Products, Corp.,* 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983) (no IIED claim where plaintiff transferred and demoted for reporting fraud, told he would never advance, and terminated in vicious and insulting manner designed to humiliate); *Louden v. Hayek*, 756 F. Supp. 107, 108-09 (S.D.N.Y. 1989) (no IIED claim where, *inter alia*, plaintiff was called a "swindler" at a company-wide meeting, libeled in an industry magazine, and black-balled in the industry); *see generally Mariani*, *supra*, 982 F. Supp. at 278-79 *and cases cited therein*.

Accordingly, this cause of action must be dismissed.

VI. Plaintiff is Unable to Establish Essential Elements for His Constitutional Claims Pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985, and They Must Therefore Be Dismissed.

Under a generous reading of plaintiff's complaint, he appears to attempt to state claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 against Chester. Because plaintiff falls far short of his burden to prove either of these claims, they must be dismissed.

To prevail on a claim under 42 U.S.C. § 1983, plaintiff must demonstrate that Chester, while acting "under color of state law," proximately caused plaintiff to be denied federal statutory rights or constitutional rights or privileges. *Gierlinger v. Gleason*, 160 F.3d 858, 872 (2d Cir. 1998). Where, as here, the defendant is a private party, the cause of action must fail unless that private individual's actions can be "fairly attributable to the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S. Ct. 2764, 2769 (1982) (citations omitted). Clearly, plaintiff has not met this standard. Chester, a private individual employed by a non-governmental entity, has engaged in no action that could conceivably be viewed as "under color of state law." Plaintiff has failed to demonstrate any connection between Chester and the government such that any of his actions can be viewed as actually having been taken by the state. Accordingly, this claim must be dismissed.

The same holds true for plaintiff's claim against Chester under 42 U.S.C. § 1985(3). The elements of such a claim are (1) a conspiracy; (2) with the purpose of depriving plaintiff equal protection, privileges and/or immunities under the law; (3) an overt act in furtherance of the conspiracy; and (4) proximate injury. *United Brotherhood of Carpenters v. Scott,* 463 U.S. 825, 829, 103 S. Ct. 3352, 3356 (1983). Moreover, plaintiff must demonstrate "some racial, or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Katz v. Klehammer,* 902 F.2d 204, 208 (2d Cir.1990) (*quoting Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S. Ct. 1790, 1798 (1971)). Plaintiff has not met this standard. Noticeably absent from the record is any evidence that Chester participated in a conspiracy to deprive plaintiff of his equal protection rights. Indeed, there is no allegation or evidence that Chester deprived plaintiff of *any* equal protection rights covered by this statute, whether as part of a conspiracy or otherwise. Plaintiff has not even alleged in his complaint (or otherwise) what this alleged conspiracy was, the equal protection rights implicated, or any overt act in furtherance of the conspiracy. Thus, this claim must be dismissed.

VII. Plaintiff's Claims of Race/National Origin Disparate Treatment Discrimination Must Be Dismissed.

A. The Burden of Proof Is Ultimately on Plaintiff

Discriminatory discharge and other disparate treatment claims are analyzed at the outset under the standard set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973).[7] Plaintiff first must make out the elements of a *prima facie* case. If he does so, the burden shifts to Chester to present a legitimate, non-retaliatory or non-discriminatory reason for the adverse employment action. Once Chester offers a legitimate reason for his action, then all presumptions drop out of the case, and plaintiff again bears the burden of coming forward with evidence that the proffered reason is merely a pretext for retaliation or discrimination. *Gallagher v. Delaney*, 139 F.3d 338, 349 (2d Cir. 1998) (citations omitted).

At the pretext stage, plaintiff "must produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action]." *Weinstock*, 224 F.3d at 42 (citations and internal quotations omitted). "It is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *James v. New York Racing Ass'n*, 233 F.3d 149, 156 (2d Cir. 2000) (citations omitted).

Plaintiff asserts that, on several occasions, he was treated in a discriminatory fashion, based on his race and/or national origin. Specifically, as it pertains to Chester and viewing his claims expansively in that regard, he alleges disparate treatment in the following actions: his failure to receive the promotion to Team Leader; being the subject of "spying" or "hyper-scrutiny"

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[7] Although plaintiff's claims are brought under the New York City and State Human Rights Laws, as opposed to Title VII, in determining whether the conduct alleged states a claim New York courts apply the same standards as required in Title VII cases because "the language of the two statutory provisions is almost identical." *Pace v. Ogden Serv. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220, 223 n.1 (3d Dep't 1999) (discussing Title VII and NYSHRL). *See also Farias v. Instructional Sys. Inc.*, 259 F.3d 91, 98 (2d Cir. 2001) (applying Title VII standards to claims under NYSHRL and NYCHRL); *Sowemimo v. D.A.O.R. Security, Inc.*, 43 F.Supp.2d 477, 484 (S.D.N.Y. 1999) (same). Accordingly, both state and federal law are applicable.

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by Chester;[8] receiving poor performance evaluations; receiving less favorable work assignments or stations (*i.e.*, the table to which he was assigned); receiving less overtime, being terminated; and being subjected to the "harsh working conditions" on the Tenth Floor.

To state a *prima facie* case for discrimination, plaintiff must demonstrate: (1) membership in a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) circumstances surrounding the adverse employment decision that give rise to an inference of discrimination. *Gregory v. Daly,* 243 F.3d 687, 689 (2d Cir. 2001). Plaintiff's claims all fail due to lack of admissible evidence regarding the second, third and/or fourth elements. Plaintiff's claims also fail at the third stage of the *McDonnell Douglas* standard.

B. Plaintiff's Failure to Promote Claim Must Fail Because Plaintiff Cannot Demonstrate He Was Qualified or That He Was Denied the Promotion Due to His Protected Status, and He Also Cannot Demonstrate Pretext

Plaintiff claims he was treated in a discriminatory fashion when he was not given the promotion to team leader. However, there can be no inference of discrimination in the decision, as the position went to another minority. Plaintiff also cannot demonstrate he was qualified for the position, or that the reason behind Chester's decision was pretext for discrimination. Accordingly, this claim must be dismissed.

1. Plaintiff Cannot Demonstrate Any Racial Motivation in the Decision to Give the Promotion to Another.

One essential element of a disparate treatment claim is that plaintiff must demonstrate circumstances surrounding the failure to promote that gives rise to an inference of discrimination, *i.e.*, that indicates plaintiff's protected status was the reason he failed to receive the position. See Point VII.A, *supra*. However, the record is completely devoid of any such evidence. To the contrary, the record demonstrates Chester ultimately gave the position to Richard Brooks, a black male. Indeed, plaintiff testified that Chester sought out and encouraged Brooks to apply for the position (although he incorrectly referred to him as Richard "Harris" in his deposition). Chester confirmed he sought out Brooks upon the recommendation of Chester's junior manager, Richard Hansen, as well as his own personal observations of Brooks' work performance. Moreover, Chester on another occasion sought out and selected Sidney Charles for a team leader promotion. Charles was also African-American. R. 56.1 St. at ¶¶ 62, 63, 67.

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[8] Plaintiff also alleges excess scrutiny by the Security Department at Macy's. Because Chester was not a security employee, we presume that claim is not alleged against him.

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A lack of racial motivation is further demonstrated by Chester's explanation for his failure to select plaintiff for the position. Chester had been informed by two members of the Human Resources department that it was Macy's policy not to permit promotions for any employee on warning. In reliance upon that understanding, Chester believed plaintiff to be ineligible for the promotion. R. 56.1 St. at ¶ 64.

Plaintiff is unable to dispute either Chester's conduct in selecting two minority employees for the team leader position or Chester's understanding regarding plaintiff's ineligibility for the promotion. He therefore cannot sustain even a *prima facie* case of a discriminatory failure to promote and the claim must be dismissed.

2. Plaintiff Was Not Qualified For the Position.

Another essential element of a discriminatory failure to promote claim is that the plaintiff must demonstrate he was qualified for the position. However, as described further above, he was not. It was Macy's policy that an employee on warning was not entitled to receive a promotion. This was a uniform policy that had existed before the team leader position became available. At the time plaintiff expressed an interest in filling the team leader vacancy, he was on an open-ended warning. Therefore, he was ineligible for the position. R. 56.1 St. at ¶¶ 64.

Because plaintiff cannot demonstrate he was qualified for the position, his claim for failure to promote must be dismissed.

3. Chester Has Proffered a Legitimate, Non-Discriminatory Reason for the Decision Which Plaintiff Cannot Demonstrate to be Pretext.

As explained above, Chester has offered a legitimate, non-discriminatory reason for his decision not to select plaintiff for the team leader position – Chester's understanding that, according to Macy's policy, plaintiff was ineligible for the promotion. Plaintiff cannot demonstrate that this reason is actually pretext for discrimination. He has produced no evidence to prove this policy did not exist[9] or that Chester was considering his race, not this policy, when making the decision not to give plaintiff the team leader position. Indeed, given the fact that Chester eventually offered the position to another minority individual, it is not possible for plaintiff to demonstrate pretext for discrimination. Accordingly, this claim must be dismissed.

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[9] Indeed, plaintiff's co-worker testified that when a person is on warning, s/he cannot transfer out of his/her position. R. 56.1 St. ¶ 64. Certainly, if a person cannot transfer laterally, they are not eligible for promotion.

C. <u>Plaintiff's Discriminatory Discharge Claim Must Fail Because Plaintiff Cannot Demonstrate He Was Terminated Due to His Protected Status or That Chester Participated in any Way</u>

Reading plaintiff's Complaint expansively, he apparently attempts to state a claim for discriminatory discharge against Chester. However, as explained further below, such a claim must fail, because the established and credible record evidence demonstrates Chester was in no way responsible for plaintiff's termination. Moreover, plaintiff cannot demonstrate that his termination was in any way related to his protected status or that Macy's reason for terminating him is pretextual.

1. Chester Cannot Be Held Liable for Plaintiff's Termination Because He Did Not Participate in any Way.

It is axiomatic that, in order to state a claim against a defendant, the individual or entity must have taken the adverse employment action against the plaintiff. In a claim of discriminatory discharge, this translates into the defendant being responsible for the decision to terminate.

However, in the present case, Chester was in no way associated with plaintiff's termination. R. 56.1 St. at ¶¶ 139. Plaintiff was terminated by Security Department personnel after they determined plaintiff had been attempting to steal Macy's merchandise, and that termination was processed directly through the Human Resources Department. *Id.* Nor was Chester even involved in any of the activity and investigation leading up to plaintiff's apprehension and termination. R. 56.1 St. at ¶¶ 139.

As there is no evidence to connect Chester in any way to plaintiff's termination, Chester cannot be held liable for that action. This claim must therefore be dismissed.

2. Plaintiff Cannot Establish That His Termination Was Due to His Protected Status or That Macy's Explanation is Pretext for Discrimination.

Although Chester cannot be held liable for an action he did not take, it is also worth noting that plaintiff cannot establish circumstances giving rise to an inference of discrimination surrounding his termination, nor can he rebut the legitimate, non-discriminatory reason offered by Macy's. In order to avoid unnecessary duplication, Defendant relies upon the Macy's Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment for his arguments relating to these issues as if fully set forth herein.

D. Plaintiff's Claim of Discriminatory Denial of Overtime Must Fail Because Plaintiff Cannot Demonstrate That Any Such Denial Was Due to His Protected Status, Nor Can He Demonstrate Pretext[10]

1. Plaintiff Cannot Demonstrate Any Racial Motivation in the Decision to Give Overtime to Others.

It is incumbent upon plaintiff to demonstrate his protected status was the reason he was denied overtime. See Point VII.A, *supra*. However, plaintiff cannot demonstrate this, and in fact, his deposition testimony demonstrates exactly the opposite.

Plaintiff's complaints regarding overtime were not that any denials or reductions were based upon racial animus; rather, he was concerned that overtime hours were being given to other minorities, particularly the Indian employees. Plaintiff submitted a grievance on the agency issue in February 2000, which contained no reference to any racial implications of the decisions regarding overtime. Rule 56.1 St. at ¶ 110.

With regard to the apportionment of overtime within the group of full-time Processing employees when such time was authorized by management, plaintiff provides no evidence, other than his own subjective belief, that overtime was not divided fairly and evenly. However, conclusory statements, without any support, are not credible evidence that can sustain the denial of summary judgment. See Point I, *supra*. Moreover, plaintiff's own testimony demonstrates his concern with overtime in this regard was that it was cut for his "group," but not for the rest of the full-time Processing employees. Plaintiff clearly testified that the remaining employees consisted predominately of minorities as well. R. 56.1 St. at ¶ 110. Thus, even if plaintiff's "group" received less overtime than other employees in the Processing Department, race could not have been the reason.

Because plaintiff cannot demonstrate race was in any way related to the alleged reduction in his overtime hours, this claim must be dismissed.

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[10] It should be noted that Chester, for the most part, was not responsible for the actual canvassing of employees when it came time to distribute overtime; those duties fell to Hansen. R. 56.1 St. at ¶ __. For those times Chester did not distribute overtime personally, he cannot be held liable for any alleged discriminatory actions. However, Chester stated he occasionally did the canvassing himself. While plaintiff has provided no evidence that any alleged instances of a denial or reduction of overtime were due to Chester's personal actions, Defendant will nevertheless show plaintiff cannot sustain a claim, even if he were deemed to somehow overcome this causal hurdle.

2. *Chester Has Proffered a Legitimate, Non-Discriminatory Reason for the Decision Which Plaintiff Cannot Demonstrate to be Pretext.*

Although the Court need not reach this issue, as plaintiff has failed to establish a *prima facie* case, plaintiff's claim also must fail because he cannot rebut, as a pretext for discrimination, Chester's explanation regarding the distribution of overtime.

Chester devised a system, together with Hansen, to ensure that overtime was offered in accordance with seniority. They created a list of all Processing employees, in descending order of seniority, which was canvassed in a continuous loop whenever overtime was authorized. While Hansen most often conducted the survey and determined who would work overtime, Chester specified that, to his knowledge, Hansen followed the procedure. Moreover, whenever Chester engaged in that task, he adhered to the system. R. 56.1 St. at ¶ 111. Plaintiff cannot demonstrate this explanation to be incorrect and pretext for discrimination. As explained *supra*, plaintiff offers nothing more than his personal, unsupported belief that overtime was not distributed evenly, which cannot rebut the detailed explanation of Chester, an individual with personal knowledge, of how overtime was apportioned. Indeed, plaintiff cannot point to any particular instances of when he failed to receive overtime, let alone who did receive overtime on those particular occasions.

Because Chester has offered a legitimate, non-discriminatory reason for the manner in which extra hours were distributed, which plaintiff cannot demonstrate to be pretext for discrimination, this claim must be dismissed.

E. <u>Plaintiff's Harsh Working Conditions Claim Must Fail Because Plaintiff Cannot Demonstrate The Conditions Existed Due to His Protected Status or That Chester Was Responsible for Those Conditions</u>

It appears plaintiff is attempting to blame Chester, who arrived in the Processing Department after plaintiff did, for the physical working conditions on the Tenth Floor. This attempt is untenable for several reasons. First, Chester was not responsible for those working conditions, and the discrimination laws therefore do not permit plaintiff to hold Chester liable. And second, plaintiff has failed to demonstrate, as he must do, that the Tenth Floor physical working conditions existed as a result of his protected status.

1. *Chester Cannot Be Held Liable for the Physical Working Conditions on the Tenth Floor Because He Was Not Responsible for Those Conditions.*

As described *supra* in Point VII.C.1, an individual or entity cannot be held responsible under the discrimination laws unless they engaged in the adverse employment action at issue. Thus, to hold Chester responsible for the physical working conditions on the Tenth Floor, plaintiff must somehow demonstrate Chester was the individual responsible for creating those conditions.

Plaintiff is unable to make such a demonstration. The working condition issues about which plaintiff complains (see generally R. 56.1 St. at ¶¶ 116) existed prior to Chester's arrival and were not issues over which Chester had any final control. To the contrary, Chester endured exactly the same conditions as plaintiff and the rest of the Processing Department and assisted in rectifying some of the problems. He requested air conditioning, although that request was denied, participated in the purchase and installation of fans, and made efforts to repair any broken fans as quickly as possible. R. 56.1 St. at ¶¶ 115.

Plaintiff has offered no evidence that Chester was responsible for creating the conditions on the Tenth Floor. This claim must therefore be dismissed.

2. *Plaintiff Cannot Establish That the Physical Working Conditions on the Tenth Floor Were in any Way Connected with His Protected Status.*

Although Chester cannot be held liable for a condition he did not create, it is also worth noting that plaintiff cannot establish the physical working conditions on the Tenth Floor arose under circumstances giving rise to an inference of discrimination, nor can he rebut the legitimate, non-discriminatory reason offered by Macy's. In order to avoid unnecessary duplication, Defendant relies upon the Macy's Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment for his arguments relating to these issues as if fully set forth herein.

F. <u>Plaintiff's Claim That Chester "Spied" on Him Must Fail Because the Complained-Of Conduct Does Not Constitute an Adverse Employment Action, Plaintiff Cannot Connect Those Events to His Protected Status, and He Cannot Demonstrate Pretext</u>

Plaintiff alleges as part of his discrimination claim that Chester "spied" on him, either personally or through other individuals, such as Stanley Pheeko. This claim must be dismissed.

Plaintiff is unable to state a *prima facie* case, and he also unable to prove that Chester's legitimate, non-discriminatory reasons for his close supervision was a pretext for discrimination.

1. "Spying" is Not an Adverse Employment Action.

An employee suffers an adverse employment action when he sustains a "materially adverse change" in the terms and conditions of his employment. *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). Mere inconveniences or actions making an employee unhappy do not qualify. *Id.; Phillips v. Bowen*, 278 F.3d 103, 117 (2d Cir. 2002) (Martin, J. dissenting). To rise to the level of a materially adverse change, the change must have "an attendant negative result, a deprivation of a position or an opportunity." *Figueroa v. City of New York*, 198 F. Supp. 2d 555, 568 (S.D.N.Y. 2002) (citing *Campbell v. Grayline Air Shuttle, Inc.*, 930 F. Supp. 794, 802 (E.D.N.Y. 1996)), *recons. granted* by, *Figueroa v. City of New York*, No. 00 Civ. 7559 (SAS), 2002 WL 31163880 (Sept. 27, 2002) (Ex. C).

Based upon this standards, courts have uniformly held that close, or even excessive, scrutiny does not constitute an adverse employment action. Although "close monitoring may cause an employee embarrassment or anxiety, such intangible consequences or not materially adverse alterations of employment conditions." *Castro v. New York City Bd. of Educ. Pers.*, 96 Civ. 6314 (MBM), 1998 WL 108004, *7 (S.D.N.Y., Mar. 12, 1998) (Ex. A). *See also Bennett v. Watson Wyatt & Co.*, 136 F.Supp.2d 236, 248 (S.D.N.Y. 2001), aff'd 51 Fed. Appx. 55, 2002 WL 31628399 (2d Cir. 2002) ("unfair[]" and "excessive scrutiny do not constitute adverse employment actions").

Plaintiff's complaint of "spying" amounts to nothing more than an allegation of intense scrutiny on the part of Chester. As demonstrated by the above cases, this does not amount to an adverse employment action. This claim must therefore be dismissed.

2. Plaintiff Cannot Demonstrate Chester "Spied" on Him Due to His Protected Status.

Plaintiff fails to allege any evidence from which a reasonable juror could conclude the so-called "spying" took place because of plaintiff's race or national origin. This conclusion is clearly based upon several pieces of credible evidence (or the lack thereof). First, it should be noted that plaintiff has alleged no race or national origin-based statements in connection with Chester's spying activity. He thus has no actual evidence to support a relationship between his race or national origin and Chester's conduct.

Second, in describing the various types of spying, plaintiff explained that the focus of the spying was plaintiff and his "group," as opposed to the remainder of the Processing employees. However, as plaintiff himself testified, the majority of those other employees were minority as well. Therefore, whatever the motivation for the alleged spying may be, it was clearly not race or national origin. R. 56.1 St. at ¶¶ 21, 90.

Finally, several minority employees engaged in this supervision as well. Chester explained that team leaders were responsible for assisting the managers in ensuring the smooth flow of work on the processing floor. This obligated them, during their normal course of duties, to report any issues on the processing floor regarding productivity, conduct, or absence from a work station that required addressing. Therefore, as part of his duties, Brooks, an African-American male, would bring to Chester's attentions any such issues. R. 56.1 St. at ¶¶ 71. This certainly detracts from the already negligible racial or national origin implications.

Plaintiff is unable to establish his race or national origin had any relationship to Chester's alleged "spying" activity. Accordingly, this claim must be dismissed.

3. Chester Has Proffered a Legitimate, Non-Discriminatory Reason for His Close Supervision Which Plaintiff Cannot Demonstrate to be Pretext.

Although plaintiff characterizes Chester's conduct as "spying," his somewhat sparse description of that conduct reveals Chester was doing nothing more than performing his supervisory duties over the Processing employees to ensure the department's operations ran smoothly. It is well-established that "it is the role of a supervisor to ensure that the supervised employees are properly performing their jobs." *Boyd v. Presbyterian Hospital in the City of New York*, 160 F.Supp.2d 522 (S.D.N.Y. 2001).

While this is a function of all management employees, as noted by the court in *Boyd*, *supra*, and thus is sufficient by itself to establish a legitimate basis for his conduct, Chester explained that close supervision is especially critical in the Processing Department for several reasons. First, the Processing Department is the gatekeeper of merchandise for the entire floor, and any problems can create a bottleneck, disrupting the flow of merchandise to the selling floor. Second, because the merchandise in the Processing Department is untagged, Chester felt he needed to be especially vigilant to ward off shortages and possible damage to merchandise from improperly secured sensor tags. Chester would ultimately be held responsible for any problems in the Processing Department, and so he felt it was important to monitor all the employees closely. Moreover, team leaders such as Stanley Pheeko were expected to advise Chester and Hansen of any employee problems on the processing floor requiring their attention. Brooks, an African-American team leader, engaged in just such reporting. R. 56.1 St. at ¶¶ 69, 70.

Plaintiff cannot demonstrate this reasonable explanation to be pretext for discrimination. Plaintiff can contest neither the central role the Processing Department played in moving merchandise onto the selling floor nor the additional shortage risk created by the untagged nature of the merchandise; indeed, plaintiff himself testified to the latter consideration. R. 56.1 St. ¶ 81. Plaintiff and his co-workers also acknowledged the semi-supervisory position held by team leaders. R. 56.1 St. ¶ __. Accordingly, this claim must be dismissed.

G. <u>Plaintiff's Claim That He Received One Negative Evaluation Must Fail Because the Complained-Of Conduct Does Not Constitute an Adverse Employment Action, Plaintiff Cannot Connect Those Events to His Protected Status, and He Cannot Demonstrate Pretext</u>

Plaintiff alleges as a basis for disparate treatment the fact that he received a negative performance evaluation two days before he was apprehended for theft. As demonstrated below, this ultimately inconsequential document cannot sustain a claim.

1. Negative Performance Evaluations, Without More, are Not Adverse Employment Actions.

Negative performance evaluations, without more (such as suspension, demotion, docking of pay, *etc.*), do not constitute adverse employment actions. "It hardly needs saying that a criticism of an employee (which is part of training and necessary to allow employees to develop, improve and avoid discipline) is not an adverse employment action." *Weeks v. New York State*, 273 F.3d 76, 86 (2d Cir. 2001), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S.101, 122 S. Ct. 2061 (2002). *See also Gordon v. New York City Bd. of Educ.*, 01 Civ. 9265 (SAS), 2003 WL 169800, *6 (S.D.N.Y., Jan. 23, 2003) (Ex. __) ("[i]t is well-settled that negative evaluations alone, without any accompanying adverse consequences, such as a demotion, diminution of wages, or other tangible loss, do not constitute adverse employment actions"); *Bennett v. Watson Wyatt & Co.*, 136 F.Supp.2d 236, 248 (S.D.N.Y. 2001) ("negative evaluations, standing alone without any accompanying adverse results, are not cognizable").

Plaintiff alleges he was discriminated against because he received a single poor performance evaluation. However, he has provided no evidence from which to discern any tangible, negative consequences flowing from that evaluation. Indeed, the negative performance evaluation was issued on March 4, 2002, only two days before plaintiff was terminated for an entirely separate and unrelated reason. R. 56.1 St. ¶ 141. There was thus no time in which this evaluation could even have had a detrimental consequence. This performance evaluation is therefore not considered an "adverse employment action," and any discrimination claim based on it cannot stand.

2. *Plaintiff Cannot Demonstrate He Received The Evaluation Due to His Protected Status.*

Plaintiff has offered no evidence to connect the March 2002 poor evaluation with his race or national origin. To the contrary, plaintiff testified his review scores decreased only after he became a shop steward and began participating in the grievance process. Nothing on the face of the evaluation connects it with plaintiff's protected status. Further, the evaluation was drafted by Hansen, to whom plaintiff has attributed no discriminatory animus or actions. R. 56.1 St. ¶ 105. While plaintiff may hold a personal belief that his race or national origin motivated the 2002 evaluation, such beliefs are not competent evidence. "An employee's opinion that a performance review was unfair, supported only by [his] own conclusory statements to that effect, cannot bootstrap [his] claims into a [discrimination] claim." *Khan v. Abercrombie & Fitch, Inc.*, 01 Civ. 6163 (WHP), 2003 WL 22149527, *6 (S.D.N.Y., Sept. 17, 2003) (Ex. K) (citations and internal quotation marks omitted). Accordingly, this claim must be dismissed.

3. *Chester Has Proffered a Legitimate, Non-Discriminatory Reason for the Evaluation Which Plaintiff Cannot Demonstrate to be Pretext.*

As explained by Chester in his declaration, Hansen, with Chester's approval, gave plaintiff a "below expectations" rating on his 2001 Annual Performance Appraisal. This assessment was based upon plaintiff's failure to meet expectations with regard to his team skills, professional work characteristics, time and attendance. He also required more supervision than should have been necessary. These are legitimate criteria upon which to base an assessment of an employee's performance. Moreover, "courts must refrain from intruding into an employer's policy apparatus or second-guessing a business's decisionmaking process." *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985).

Having established a legitimate, non-discriminatory basis for the evaluation, Chester must prevail unless plaintiff can demonstrate this explanation to be a pretext for discrimination. This he cannot do. Plaintiff has offered no evidence – statements, objective measurements, *etc.*

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– to prove Hansen's evaluation was arbitrary or illegitimate. All plaintiff presumably offers is his disagreement with those assessments. However, a plaintiff's "subjective disagreement with [his] reviews is not a viable basis for a discrimination claim." *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). Because plaintiff can offer nothing more than his own "opinion that a performance review was unfair, supported only by [his] own conclusory statements to that effect," (*Khan*, *supra*, 2003 WL 22149527 at *6), his claim must be dismissed.

H. Plaintiff's Claim That Chester Changed His Work Assignments and Stations Must Fail Because the Complained-Of Conduct Does Not Constitute an Adverse Employment Action, Plaintiff Cannot Connect Those Events to His Protected Status, and He Cannot Demonstrate Pretext

Despite the fact that all the tasks were those designated for Processing Department stock persons, plaintiff claims his assignment to certain tasks and removal from others was somehow discriminatory. As demonstrated below, this claim must fail.

1. Changing an Employee's Work Assignment or Station is Not an Adverse Employment Action.

As a general matter, a change in working conditions is not "materially adverse" if it is merely "an alteration of job responsibilities." *Galabya*, 202 F.3d at 640. Thus, an alteration in job assignment is not an adverse employment action "unless it results 'in a change in responsibilities so significant as to constitute a setback to the plaintiff's career.'" *Loucar v. Boston Market Corp.*, 294 F.Supp.2d 472, 481 (S.D.N.Y. 2003) (*citing Galabya*, 202 F.3d at 641). To be materially adverse, "the challenged action must affect employment in a way that is both detrimental and substantial." *Satterfield v. UPS*, 00 Civ. 7190 (MHD), 2003 WL 22251314, *9 (S.D.N.Y., Sept. 30, 2003) (Ex. H) (citations and internal quotation marks omitted).

Plaintiff can hardly meet this standard with regard to the changes he alleges in his work assignment or location. At all times, plaintiff was performing tasks necessary to the role of the Processing Department and that were performed by other individuals in the department (either simultaneously with plaintiff or at different times). As Chester explained, all these tasks were part of the job of stockperson, and any processing employee could be expected to perform any of those tasks at any time. R. 56.1 St. at ¶ 20. The fact that plaintiff was not pleased with his various assignment changes and would have preferred to be, for example, operating the elevator or working at a table with his friends, does not make the action adverse. "Not everything that makes an employee unhappy is an actionable adverse action." *Gordon v. New*

York City Bd. of Educ., 01 Civ. 9265 (SAS), 2003 WL 169800 (S.D.N.Y., Jan. 23, 2003) (Ex. D) (citations and internal quotation marks omitted). Plaintiff cannot demonstrate that the minor changes in work assignment or location resulted in an alteration to his job that made it "materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement." *Evans v. City of New York*, 00 Civ. 4197 (BSJ), 2003 WL 22339468, *9 (S.D.N.Y., Oct. 14, 2003) (Ex. B) (citations and internal quotation marks omitted). This claim must therefore be dismissed.

2. *Plaintiff Cannot Demonstrate Chester Altered His Work or Table Assignment Due to His Protected Status.*

Once again, plaintiff is unable to show that any alterations in his particular work assignments or table location had any relationship to his race or national origin. Analysis of the facts offered by plaintiff demonstrates that, for the most part, the job changes about which he complains were isolated instances, that changed depending on the day. For example, he claims on one occasion, he was assigned to lift boxes, and every now and then he was assigned to garbage, or trash, duty. R. 56.1 St. ¶ 20. This does not show any consistent practice directed at plaintiff.

The record also demonstrates that many of the tasks that plaintiff disdained were performed by individuals of all races. Trash duty was most often performed by Teddy Goldstein and Michael Lovric, who were both Caucasian. Elevator duty was performed by individuals of all races within the Processing Department – Hispanic, African-American, Indian, and Caucasian. Moreover, one of the Caucasian employees was removed from elevator duty for failure to perform in a satisfactory fashion. R. 56.1 St. ¶ 20. Therefore, there is no evidence that race or national origin had any impact on task assignment.

Furthermore, plaintiff himself testified he believed the reason for his table reassignments were unrelated to race or national origin. Specifically, plaintiff stated he believed Chester would reassign tables if he believed the processors were not working fast enough, and also testified that a few of his relocations were due to plaintiff either being a "Security issue" or to "opening [his] mouth" toward Chester after plaintiff became a shop steward. R. 56.1 St. ¶ 23. The first reason is itself legitimate and non-discriminatory, and none of these offered bases have anything to do with race or national origin.

It is clear plaintiff cannot even sustain a *prima facie* case of discrimination based upon his work assignments. This cause of action must therefore be dismissed.

3. *Chester Has Proffered a Legitimate, Non-Discriminatory Reason for His Work Decisions Which Plaintiff Cannot Demonstrate to be Pretext.*

While there is no need for the Court to reach this prong in the analysis, summary judgment is also appropriate on the grounds that Chester has offered a legitimate, non-discriminatory reason for his work decisions which plaintiff cannot demonstrate to be a pretext for discrimination. Chester explained that, at the outset of his employment, he determined it was necessary for all employees be prepared to perform any of the tasks required of Processing Department stock persons. These duties included placing sensors on merchandise, collecting and disposing of the trash, delivering tagged merchandise to the various selling floors, lifting boxes onto the Processing tables, working with different employees at various tables, and operating the elevators. R. 56.1 St. ¶ 20. Plaintiff himself testified that duties of this nature were part of a processor's job. R. 56.1 St. ¶ 20.

Chester further testified that changes in work assignments were made in accordance with the needs of the business. Changes might be needed depending upon, for example, the merchandise that had come in, whether there were any absences, if there were personality conflicts at tables that required table-mates to be shuffled, and whether the appropriate personnel were available for certain physically demanding tasks. Adjustments were also warranted if, in the managers' assessment, a particular employee was not performing a task up to par. R. 56.1 St. ¶ 20. Even plaintiff himself testified to a legitimate, non-discriminatory reason on Chester's part for changing table assignments – Chester's belief that the employees were not working fast enough. R. 56.1 St. ¶ 20.

It would seem elementary that a manager's decision to take a certain action because it is in the best interests of the business is a legitimate, non-discriminatory reason. *Cf. Boyd*, *supra*, 160 F.Supp.2d at 543 (supervisor's role is to ensure employees properly performing). All the explanations Chester provided regarding his and Hansen's conduct in shifting assignments – diversification of employee skills, ensuring a cooperative and productive work environment, coverage of all necessary tasks – clearly and logically aim toward the goal of managing the business properly.

Moreover, plaintiff neither has offered nor can offer any evidence to rebut this explanation and demonstrate it is merely pretext for discrimination. Plaintiff has offered no statements or actions connected with any change in work assignment that would implicate race or national origin. In addition, Chester explained his policy that processing employees be prepared to perform all stock person functions applied uniformly to all employees under his supervision. R. 56.1 St. ¶ 20. While plaintiff (without support) claims otherwise, he has offered no evidence to prove his claim. Moreover, the evidence in the record supports Chester's statement that he applied this policy without regard to race or national origin. See Point VII.H.2, *supra*.

Because plaintiff cannot rebut Chester's legitimate, non-discriminatory reason for the various work assignment alterations, this claim must be dismissed.

VIII. No Individual Liability for Race/National Origin Hostile Work Environment Harassment, Disparate Treatment and Retaliation Claims.

A. Because Plaintiff Fails to Establish Employer and Accessorial Liability Claims For Harassment, Discrimination and Retaliation Under the State HRL and the NYC Code Must Be Dismissed

Under the local discrimination laws, the State HRL and the NYC Code liability attaches to employers and to co-employees as aiders and abettors. HRL § 296(6); NYC Code § 8-107(6). The State HRL provides in pertinent part as follows:

> *It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.*
>
> § 296 (6)

Similarly, the NYC Code provides as follows:

> *Employment. It shall be an unlawful discriminatory practice: . . . For an employer, or an employee, or agent thereof . . .*
>
> *Aiding and abetting. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so. §8-107(6).*

B. Employer Liability

The inclusion of the word "employee" in the body of the NYC Code does not create a new category of defendants which allows for a separate cause of action against co-workers or supervisors for their contribution to the hostile environment. *Priore v. The New York Yankees*, 307 A.D.2d 67 (2d Dep't 2003). This slight difference between the statutes has little meaning as the Courts have held the wording of the statutes is virtually the same and thus they are to be interpreted and applied in the same manner. *Ettinger v. State University of New York College of Optometry*, 1998 WL 91089 (S.D.N.Y. 1998); *Mohammed v. Marriott Int'l, Inc.*, 905 F.Supp. 141 (S.D.N.Y. 1995) ("The wording of the city ordinance and the manner in which it has been applied show a clear intent to parallel the obligations and remedies provided by the State of New York).

In order to establish employer liability under these statutes, the plaintiff must show the defendant employee has an "ownership" interest in the corporation with the "power to do more than carry out personnel decisions made by others." *Lee v. Overseas Shipholding Group*, 2002 WL 1929490 (S.D.N.Y. 2002), citing to *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995). There must be a showing the employer encouraged, condoned or approved the discriminatory or retaliatory conduct in order for a violation of law to exist. An employer or its agent thereof, must have the authority to change the terms and conditions of the employment including hiring, firing, and paying the employees or administering the benefits within the organization. *Franklin v. The City of New York*, 2003 WL 21511932 (S.D.N.Y. 2003) *aff'd* 2004 WL 1157729 (2004); *Dewitt v. Lieberman*, 48 F.Supp. 280 (S.D.N.Y. 1999); *State Division of Human Rights v. St. Elizabeth's Hospital*, 66 N.Y.2d 684 (1985).

In the present case, plaintiff seeks to render Chester individually liable for claims of retaliation, discrimination and harassment. Under the first criteria, plaintiff cannot establish Chester is an "employer" for purposes of liability. It is undisputed, Chester had no power or authority to engage in any personnel decisions including disciplinary warnings or termination. Indeed, Chester had to refer all of these personnel matters to Macy's Human Resources Department. Rule 56.1 ¶ 15. As such, Plaintiff fails to establish employer liability.

C. Accessorial Liability

In order to demonstrate aider and abettor liability, there is "a requirement that liability must first be established as to the employer/principal before accessorial liability can be found as to an alleged aider and abettor." *DeWitt v. Lieberman*, 48 F.Supp.2d 280, 293 (S.D.N.Y. 1999). If the plaintiff fails to establish the employer became a party to the challenged behavior, the individual co-employee is absolved of liability. *Tomka, supra*, at 1317. Moreover, since the thrust of individual liability under the aiding and abetting principle rests solely upon the employer's culpability, the focus is on whether the employer engaged in unlawful conduct in the first place.

Aside from failing to show Chester as an "employer" within the meaning of the statutes, plaintiff cannot establish accessorial liability either. Binding precedent requires the plaintiff to demonstrate Macy's liability first before Chester could be held responsible as aider and abettor. As set forth fully in the Macy's Defendants' memorandum of law concerning employer liability, there is no evidence Macy's encouraged, condoned or approved Chester's purported conduct underlying plaintiff's complaint. Therefore, without a showing of Macy's culpability, Chester cannot be held liable. For these reasons, plaintiff's claims of liability against Chester under the local discrimination laws must be dismissed.

IX. Retaliation Claim.

Retaliation claims utilize the same *McDonnell Douglas* burden-shifting standard as disparate treatment claims. However, the *prima facie* case contains different elements. To establish a *prima facie* case of retaliation, plaintiff must show: (1) participation in a protected activity known to Chester; (2) an adverse employment action; and (3) a causal connection between the two. *Gallagher*, 139 F.3d at 349 (citations omitted).

Plaintiff claims he endured the following conduct as retaliation for his protected conduct, *i.e.*, for allegedly complaining to Chester about Chester's purported discriminatory treatment: his failure to receive the promotion to Team Leader; being the subject of "Spying" or "hyper-scrutiny" by Chester, receiving poor performance evaluations; receiving less than favorable work assignments or stations; receiving less overtime; and being terminated. Plaintiff's retaliation claim must fail because he can establish neither an adverse employment action nor a causal connection between any adverse employment action and his alleged complaints to Chester.[11]

A. <u>Plaintiff Cannot State a Claim Against Chester Regarding Those Actions for Which Chester is Not Responsible</u>

Plaintiff apparently claims his apprehension and arrest on March 6, 2002, which resulted in his termination, was in retaliation for protected activity. However, as explained *supra* in Points

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[11] For purposes of this motion only, Defendant will assume plaintiff can satisfy the protected activity element. Plaintiff has offered no written evidence to support his claim that he complained to Chester or filed grievances with Chester regarding claims of discriminatory treatment based on protected status. Further, plaintiff has not provided any testimony describing the specific complaints he brought to Chester's attention. However, he did state in his deposition, in response to his own attorney's leading questions, that he complained verbally to Chester about what he thought were racist and discriminatory actions. While it is questionable whether plaintiff has satisfied his burden to demonstrate protected activity known to Chester, it is unnecessary to expend effort on this point, because it is clear there are several other deficiencies on which to base summary judgment of plaintiff's retaliation claims.

II, Chester did not participate in any way in plaintiff's apprehension (or the investigation leading up to it), arrest or termination. He therefore cannot be held to have "retaliated" against plaintiff in this manner, since he did not take the action at issue. Logically, Chester can not be held responsible for conduct he did not commit and thus, this retaliation claim against Chester must be dismissed.

B. Plaintiff Can Establish No Adverse Employment Action

The standard for determining whether conduct rises to the level of an adverse employment action is the same whether the cause of action is one for disparate treatment or retaliation. *See Gregory v. Daly*, 143 F.3d 687, 701 (2d Cir. 2001). The issue of adverse employment action has already been fully briefed in Point VII, *supra*. As demonstrated in those sections, the alterations in plaintiff's job duties, a negative performance evaluation and any scrutiny of him by Chester do not constitute adverse employment actions. Therefore, those retaliation claims must be dismissed on this basis alone.

C. Plaintiff Can Establish No Causal Connection

The remaining retaliation claims of failure to promote and diminished overtime are equally defective because they have no nexus to any protected activity. In determining if a causal connection occurred between protected activity and an adverse employment action, the Courts generally look for the existence of temporal nexus between the two. *Lindy v. OOCC*, 1999 WL 58676 (S.D.N.Y. 1999); *City Mansharan v. Columbia Univeristy*, 842 F.2d 590 (2d Cir. 1988) (causation element established when twelve days passed between protected activity and adverse employment action). Since the plaintiff has only provided a vague recollection of these purported complaints and failed to provide a chronology detailing when they were divulged, his retaliation claims must fail. The first step in the analysis in determining the existence of a causal connection is whether the aggrieved party engaged in protected activity. The instant Plaintiff fails to provide any documentation memorializing his purported complaints to Chester. More importantly, during his deposition, Plaintiff could not recall when these complaints were made to Chester, thus extinguishing any possibility of establishing a time frame within which to create the required temporal nexus. Thus, his retaliation claims must fail.

D. Plaintiff Cannot Establish Pretext

Since all the legitimate non-pretextual business reasons disputing the retaliation allegations were fully discussed in the disparate treatment section, Point VII supra, they will not be repeated here to avoid duplication. The Court is respectfully referred to Point VII for a full analysis.

CONCLUSION

For all the foregoing reasons, Defendant respectfully requests that the Court grant Defendant's motion for summary judgment, dismiss plaintiff's Complaint in its entirety and grant such other relief and/or remedies as deemed appropriate.

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Respectfully submitted,

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