UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAROLD BAERGAS, on Behalf of Himself and Others Similarly Situated Plaintiff, v. 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, JR., CHRIS DE SANTIS, MICHAEL GREEN, JOHN DOES 1-5, Individually, Defendants.	04 Civ. 2944 (BSJ) **Order**

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff is a Hispanic male of Puerto Rican origin. Defendants are corporate entities, including Federated Logistics, Federated Department Stores, Inc., Macy's East ("Macy's"), and the Frick Company (the "Macy's Defendants"); private individuals, including Scott Chester ("Chester"), Chris De Santis ("De Santis"), and Michael Green ("Green"), who at all relevant times were employed by Macy's at its Herald Square location in New York; and municipal entities and employees, including the City of New York, the New York City Police Department ("NYPD") and John Does 1 through 5 (presently unknown police officers) (collectively, the "City Defendants").

Plaintiff's complaint contains eight counts. The first four counts are common law tort claims, including false arrest, malicious prosecution, defamation, and intentional infliction of emotional distress, stemming from plaintiff's arrest on March 6, 2002 for larceny. Counts five and six are employment discrimination claims, alleging discrimination and retaliation on the basis of race and national origin under the under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. (the "NYHRL") and the New York City Human Rights Law, N.Y. C. Admin Code § 8-101 et seq (the "NYCHRL").[1] Count seven alleges "municipal liability" for the acts of John Does 1 through 5 in connection with plaintiff's arrest, the details surrounding which are described below. Finally, count eight, which contains the only federal claims in the complaint, alleges liability under 42 U.S.C. §§ 1983 and 1985(3).

With the exception of count seven, municipal liability, plaintiff does not specify which of his claims are asserted against which defendants. Although the blanket language of the complaint suggests that these counts are asserted against all defendants, plaintiff's motion papers indicate otherwise.

Plaintiff's complaint fails to comply with FED. R. CIV. P. 8(a)(1), which requires "a short and plain statement of grounds upon which the court's jurisdiction depends." Diversity

[1] Notably, plaintiff does not bring employment discrimination claims under Title VII of the Civil Rights Act.

jurisdiction is not asserted in plaintiff's complaint or in plaintiff's motion papers. The Court concludes that the only possible basis for this Court's subject matter jurisdiction over this action is federal question jurisdiction under 28 U.S.C. § 1331 arising from plaintiff's eighth and final cause of action, which alleges liability against the defendants under 42 U.S.C. §§ 1983 and 1985(3).

Pursuant to FED. R. CIV. P. 56, the defendants have moved for summary judgment. Pursuant to FED. R. CIV. P. 15, plaintiff Harold Baergas has moved to amend the complaint. Pursuant to FED. R. CIV. P. 23, plaintiff has also moved for class certification with respect to his claims of employment discrimination and retaliation under the NYHRL and the NYCHRL.[2]

In his memorandum of law opposing summary judgment dated June 17, 2005, plaintiff withdrew the first count of his complaint, the common law claim for false arrest.

For the reasons set forth below, plaintiff's motion to amend the complaint is DENIED. The defendants motions for summary judgment are GRANTED. Plaintiff's motion for class certification is DENIED.

Plaintiff's Allegations

[2] Plaintiff also sought class certification with respect to a claim, not included in his original complaint, under 42 U.S.C. § 1981. Plaintiff filed a motion on October 7, 2004 to amend the complaint to add a claim under § 1981; that motion was denied by Order of Magistrate Judge Pitman, dated August 25, 2005.

As contained in his Complaint and his Memorandum in Support of his Motion for Class Certification, plaintiff's allegations are as follows: plaintiff worked as a stock person in the Handling Department (also referred to as "Processing") on the tenth floor at Macy's Herald Square location for approximately ten years. According to plaintiff, the Processing Department consists almost exclusively of minority employees. Plaintiff's supervisors in the Department were Scott Chester and Richard Harris, both Caucasian males.

Plaintiff claims, and defendants dispute, that he was subjected to disparate treatment on account of his race and national origin, a hostile work environment, and retaliation as a result of complaints to his supervisor. With respect to class-wide claims, plaintiff alleges, and defendants dispute, that he and the putative class, consisting of (1) minority employees in the processing department under defendant Chester's tenure as manager of the department from July 1999 to January 2004 and (2) minority employees who worked on the tenth floor, were subject to racial discrimination in violation of NYHRL and NYCHRL in the following ways: (1) enhanced scrutiny and intrusive surveillance from the Macy's Security Department; (2) a hostile work environment, in the form of racist jokes and derogatory remarks by plaintiff's supervisor, Chester; and (3)

unhealthy, unsafe, and unsanitary conditions in the processing department on the Tenth Floor.

Plaintiff was suspended without pay in February 2002. Plaintiff returned to work, but on March 6, 2002, he was approached by employees from Macy's internal security department. The security personnel took plaintiff to a security holding room and detained him for approximately three hours, based on their alleged observations of plaintiff's involvement in the theft of store merchandise. Subsequently, New York City police officers arrived, arrested plaintiff, and removed him from Macy's. Plaintiff alleges that his arrest was based in part on false statements by Chris DeSantis, an employee in Macy's Security Department, and co-worker Michael Green,[3] who are also named as defendants in this action.

Plaintiff was indicted on charges of Grand Larceny and Criminal Possession of Stolen Property. Plaintiff was arraigned on two occasions – April 29, 2002 and June 27, 2002. Charges were dismissed on speedy trial grounds on August 13, 2003.

Plaintiff's employment at Macy's was terminated subsequent to his arrest. Plaintiff alleges, and defendants dispute, that his employment was terminated in retaliation for his complaints regarding discriminatory treatment. Plaintiff also alleges that his arrest and prosecution were based on false, biased, and/or

[3] Under plaintiff's motion for class certification, defendant Green, who is African-American, would also be a member of the putative class.

misleading testimony by the Macy's Defendants, who acted maliciously and were motivated by racial animus towards plaintiff based on his race and national origin and in retaliation for plaintiff's previous complaints about discriminatory treatment. Plaintiff further alleges municipal liability against the City of New York for the conduct of New York City police officers named in the complaint as John Does 1 through 5. Finally, plaintiff also brings claims under 42 U.S.C. §§ 1983 and 1985(3) for deprivation of his constitutionally-protected rights.

Discussion

I. Plaintiff's Motion to Amend

On February 25, 2005, plaintiff moved to amend his complaint. Plaintiff seeks to add Macy's employee Michael Lewellyn as an individual defendant, to change the allegations against defendant DeSantis, and to seek new injunctive relief.

Leave to amend a pleading should be granted freely when justice so requires. FED. R. CIV. P. 15(a); Forman v. Davis, 371 U.S. 178, 182 (1962). The Court of Appeals has repeatedly noted that the trial court has "broad" discretion in ruling on a motion to amend. Local 802, Associated. Musicians v. Parker Meridein Hotel, 145 F.3d 85, 89 (2d Cir. 1998); Krumme v. Westpoint Stevens, Inc., 143 F.3d 71, 88 (2d Cir. 1998).

Plaintiff has previously unsuccessfully sought to amend his complaint. By Order dated August 25, 2005 (Pitman Order), Magistrate Judge Pitman denied plaintiff's motion to amend the complaint to add a new cause of action under 42 U.S.C. § 1981. See Pitman Order at 19-24. Judge Pitman noted that plaintiff sought to add a claim under 43 U.S.C. § 1981 more than two months after the deadline to amend the pleadings (August 16, 2004) as set forth in the Magistrate Judge's Scheduling Order dated July 8, 2004. Plaintiff filed the instant motion to amend on February 25, 2005, after the close of discovery, and more than six months after the motion to amend deadline. As with the previous motion, plaintiff offers no satisfactory explanation for his failure to comply with Judge Pitman's Scheduling Order issued in this matter. Under these circumstances, denial of the motion is not an abuse of discretion. See Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000).

Accordingly, plaintiff's motion to amend the complaint is denied.

II. Defendants' Motions for Summary Judgment

A. Legal Standard

A court can grant summary judgment only if "the pleadings, depositions, answers to interrogatories, 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 must "demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). If the moving party does so successfully, the non-moving party must present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). The party opposing summary judgment cannot rely on "conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jang Gan v. City of New York, 996 F.2d 522, 535 (2d Cir. 1993). Nonetheless, the court must draw all reasonable inferences and resolve all ambiguities in favor of the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348 (1986).

B. Local Rule 56.1

Under Local Rule 56.1(a), a party moving for summary judgment pursuant to Fed R. Civ. P. 56 must annex to its motion "a short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion." Under Local Rule 56.1(b), a party opposing summary judgment must include a statement with numbered paragraphs corresponding to the movant's statement, and if necessary, additional paragraphs consisting of

"the material facts as to which it is contended that there exists a genuine issue of material fact."

A non-moving party is not authorized by Local Rule 56.1 to submit its own statement that does not correspond to paragraphs in the moving party's statement. Furthermore, under Local Rule 56.1(d), any statement submitted under Rule 56 "must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

The purpose of Local Rule 56.1 is "to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." Holtz v. Rockefeller & Co., 258 F.3d 62, 74 (2d Cir. 2001). If a party fails to comply with the requirements under Local Rule 56.1, the Court is "forced to scour the record on its own in a search for evidence which may support that party's contention that a certain fact is not in dispute." Archie Comics Publications, Inc. v. Decarlo, 258 F.Supp.2d 315, 317 (S.D.N.Y. 2003) (internal citations omitted).

Here, plaintiff does not contest the City Defendants' Rule 56 Statement, but refers the Court instead to Plaintiff's own Statement. With respect to the Macy's Defendants' Rule 56 Statement, plaintiff has submitted a Counter-Statement, but this Counter-Statement fails to comply with Local Rule 56.1. Plaintiff's Counter-Statement to Macy's Rule 56 Statement does

not consist of correspondingly numbered paragraphs, in violation of Local Rule 56.1(b). Accordingly, because plaintiff does not "specifically" controvert the material facts as set forth in the numbered paragraphs of either the City Defendants' Statement or the Macy's Defendants' Statement, those "facts will be deemed to be admitted for the purposes of the motion." See Local Rule 56.1(c); Minuteman Press Int'l, Inc. v. Matthews, 232 F.Supp.2d 11, 12 (E.D.N.Y. 2002).

As noted above, the plaintiff has appended to his Rule 56 Counter-Statement an additional statement. This Statement of facts contains 579 paragraphs that span over 100 pages. A party's summary of the facts is no substitute for a proper paragraph-by-paragraph statement under Rule 56.1. Rodriguez v. Schneider, No. 95 Civ. 4083 (RPP), 1999 WL 459813 at *1 n.3 (S.D.N.Y. 1999). The Court will not consider this additional statement, as it is improper under Local Rule 56.1. In violation of Local Rule 56.1(d), the Statement is also rife with hearsay, and speculative and conclusory statements that are not based on personal knowledge. The statement also contains citations to testimony that is not supportive of plaintiff's statements. Accordingly, in considering the defendants' motions

for summary judgment, the Court will disregard plaintiff's supplemental Statement.[4]

C. Plaintiff's State Law Tort Claims

1. False Arrest

As noted above, plaintiff has withdrawn count one of his Complaint, a common law claim for false arrest.

2. Malicious Prosecution

Count two of plaintiff's Complaint is a claim for malicious prosecution. There are four elements of a claim for malicious prosecution: (1) the defendant initiated or continued a criminal proceeding against plaintiff; (2) the proceeding was terminated in plaintiff's favor; (3) probable cause for commencement of the proceeding was lacking; and (4) the defendant was motivated by actual malice. Colon v. New York, 60 N.Y.2d 78, 82 (1983).

Here, there is no issue of material fact with respect to the third element, lack of probable cause. It has been admitted that a Grand Jury in the Supreme Court of the State of New York, County of New York indicted plaintiff on two counts, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree. City Defs.' Rule 56 Statement at ¶ 20. A grand jury indictment creates a strong presumption of

[4] When dealing with pro se plaintiffs whose submissions violate Local Rule 56, this Court routinely scours such submissions for admissible evidence which could defeat summary judgment. However, plaintiff here is represented by counsel.

probable cause. Cunny v. City of New York, 99 Civ 04634, 2001 WL 863431 at *4 fn. 3 (S.D.N.Y. July 31, 2001).

This presumption may be overcome by showing "that the indictment was produced by fraud, perjury, the suppression of evidence, or other police conduct undertaken in bad faith." Bernard, 25 F.3d at 104 (quoting Colon, supra, 60 N.Y.2d 78, 83 (1983). This misconduct must have occurred in Grand Jury proceedings. Rothstein v. Carriere, 373 F.3d 275, 284 (2d Cir. 2004) ("[t]he burden of rebutting the presumption of probable cause requires the plaintiff to establish what occurred in the grand jury, and to further establish that those circumstances warrant a finding of misconduct"). Plaintiff does not dispute the validity of the Grand Jury proceedings leading to his indictment. The mere fact that charges were subsequently dismissed against plaintiff is insufficient to rebut the presumption of probable cause created by the indictment. Colon, supra, 60 N.Y.2d at 93. Accordingly, the presumption of probable cause arising from the indictment is unrefuted.

While the existence of probable cause is sufficient to warrant summary judgment for all defendants on plaintiff's malicious prosecution claim, the Court also notes that, with respect to individual defendants Green and Chester, there is no evidence that either played a role in the initiation or

continuation of criminal proceedings against plaintiff.[5] Accordingly, summary judgment on plaintiff's malicious prosecution claim is granted, and count two as to all defendants is dismissed.

3. Defamation and Intentional Infliction of Emotional Distress

The Macy's Defendants' move for summary judgment with respect to plaintiff's claims for defamation (count three) and intentional infliction of emotional distress (count four) on a number of grounds. Plaintiff has not opposed the Macy's Defendants' motion with respect to these two claims, and the Court agrees with defendants that these claims are time-barred.[6]

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[5] Chester has testified unequivocally that he did not provide any information to Macy's security, the police, or the Assistant District Attorney who plaintiff's case to the Grand Jury. See Macy's Defs.' Rule 56.1 Statement at 139, 192, 200. While in his Opposition Memorandum, plaintiff indicates a belief that Chester was involved in his arrest, plaintiff has conceded that he has no proof to support this belief. Pl.'s Dep. Tr. at 74:7-10. Conclusory statements are insufficient to defeat a defendant's motion for summary judgment. Ying Jang Gan, 996 F.2d at 535. Moreover, although Green did provide Macy's security with a written statement, it is uncontroverted that Green's statement played no role in the initiation or continuation of proceedings against the plaintiff. Green's statement was not a factor in the arresting officer's decision to arrest plaintiff. Schick Dep. Tr. at 94. There is also no evidence in the record that either the Grand Jury or the Assistant District Attorney who presented plaintiff's case to the Grand Jury relied in Green's statement in any way.

[6] Under C.P.L.R. § 215(3), the statute of limitations for both of these claims is one year. A defamation claim accrues on the date of publication of the defamatory statement. Firth v. State, 98 N.Y.2d 365, 369, 747 N.Y.S.2d 69, 70-71 (2002). Similarly, a claim for intentional infliction of emotional distress arises when the plaintiff suffers the alleged emotional distress. Dana v. Oak Park Marina, Inc., 230 A.D.2d 204, 210-11, 660 N.Y.S.2d 906, 910-11 (4th Dep't 1997). Plaintiff claims to have suffered emotional distress as a result of his arrest on March 6, 2002. With respect to defamation, plaintiff alleges that various defendants made defamatory statements on dates including February 11, 2002, March 6, 2002, and "a few days after" March 6, 2002. The statute of limitations for these claims would expire on, or at best several days after, March 6, 2003. This action was filed on April 16,

Accordingly, counts three and four are dismissed as to all defendants.

4. Municipal Liability

Count seven of plaintiff's Complaint alleges "municipal liability." While the Complaint is unclear as to under which state law tort claims it alleges liability against the City, all of plaintiff's state law tort claims have been dismissed. The issue of municipal liability with respect to these claims is therefore moot.[7]

The Court notes that any claim for municipal liability would fail for the additional reason that it is undisputed that plaintiff has not filed a notice of claim in this case. City Defs. Rule 56 Statement at ¶ 6. Under New York law, a notice of claim is a condition precedent to bringing a tort action against a municipality or any of its officers, agents, or employees. N.Y. Gen. Mun. Law §§50-e and 50-i. Moreover, Gen. Mun. Law § 50-e requires that a notice of claim be filed within ninety days of the accrual of the cause of action. These provisions are strictly construed. Shakur v. McGrath, 517 F.2d 983, 985 (2d Cir. 1975). Plaintiff's failure to file a timely notice of a claim requires dismissal of his state tort claims against the

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2004. Accordingly, plaintiff's claims for defamation and intentional infliction of emotional distress are untimely and barred by the statute of limitations.

[7] Plaintiff also has a claim for municipal liability for violations of the Fourth Amendment under § 1983. That claim is addressed below.

City or its employees in this federal action. Robinson v. Matos, No. 97 CV 7144, 1999 WL 225938 at *2 (S.D.N.Y. April 19, 1999) (citing Felder v. Casey, 487 U.S. 131, 151 (1988)).

Furthermore, even if plaintiff could establish some claim against the City, the Court notes that plaintiff has no cause of action against the NYPD as such, because the NYPD is not a suable entity. The capacity of an entity to be sued is determined by State law. See Fed. R. Civ. P. 17(b). It is well-established under the Charter of the City of New York that the NYPD can only be sued in the name of the City of New York. Gonzalez v. City of New York, 98 Civ. 6081, 2002 WL 252564 at *2 (S.D.N.Y. Feb. 21, 2002). Plaintiff's claims with respect to the New York Police Department must be dismissed.

D. Plaintiff's Federal Claims

Count eight of plaintiff's complaint alleges liability under federal law, specifically, under 42 U.S.C. §§ 1983 and 1985.

1. Plaintiff's § 1983 Claims

A § 1983 claim has two essential elements: (1) the defendant acted under color of state law; and (2) as a result of the defendant's actions, the plaintiff suffered a denial of her federal statutory rights, or her constitutional rights or privileges. See Eagleston v. Guido, 41 F.3d 865, 872 (2d Cir.1994). Although plaintiff's Complaint is unclear,

plaintiff's Opposition Memorandum indicates that, with respect to the second element, plaintiff's § 1983 claim stems from his arrest and prosecution for larceny and criminal possession of stolen property on March 6, 2002.

In order to establish the deprivation of a right under § 1983, a plaintiff suing for arrest and prosecution must establish the same elements as those that constitute the common law tort claims for false arrest and malicious prosecution. See Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2d Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1227, 89 L.Ed.2d 337 (1986) (malicious prosecution); Singer v. Fulton County Sheriff, 63 F.3d 110, 118 (2d Cir. 1995) (internal quotations and citations omitted) (false arrest). The Court has already dismissed plaintiff's malicious prosecution claim. Accordingly, The Court will analyze plaintiff's § 1983 claim as based on a Fourth Amendment violation for false arrest.

Under New York law, the elements of a false arrest claim are: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. Id.

Plaintiff has no claim for false arrest because there was probable cause for his apprehension and arrest. As with a claim for malicious prosecution, the existence of probable cause is a

complete defense to a claim for false arrest. Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). As noted above, the facts of defendants' Rule 56 Statements have been admitted for purposes of this motion. According to the Macy's Defendants' Rule 56 Statement, prior to detaining plaintiff, Macy's security personnel observed video footage of the plaintiff along with defendant Michael Green in a stockroom on the ninth floor where stolen merchandise had been stored over the course of several days. Macy's Defs.' Rule 56 Statement at ¶¶ 142-166. On March 5, 2002, plaintiff was observed carrying a large box and wearing a North Face jacket over a leather jacket. Id. at ¶ 156. This merchandise was then stored in a green duffel bag inside of a large box. Id. at 157. On March 6, 2002, plaintiff and Green were observed on that floor speaking to each other, and several minutes later Green removed the duffel bag from the storeroom. Id. at 159-60. Green was apprehended with the bag; among the items inside were a North Face jacket and a Kenneth Cole leather jacket. Id. at 162-63. Macy's security then detained plaintiff on the basis of these observations, which the Court finds were sufficient to constitute probable cause for plaintiff's apprehension. After being searched by security personnel, plaintiff was found to be in possession of six bags of marijuana. Id. at 175.

Subsequently, as set forth in the City Defendants' Rule 56 Statement, Police Officer Thomas Schick arrested plaintiff after being informed that plaintiff had stolen merchandise from Macy's and was in possession of marijuana. City Defs.' Rule 56 Statement at ¶¶ 13-17. Furthermore, as noted above, a Grand Jury indictment was issued in plaintiff's case, which creates a strong affirmative presumption of probable cause for plaintiff's arrest. Cunny, supra, 99 Civ 04634, 2001 WL 863431 at *4 fn. 3. This presumption has not been overcome by any showing of misconduct during Grand Jury proceedings. Rothstein, 373 F.3d at 284. Based on these facts, the Court finds that there was probable cause, both for plaintiff's apprehension by store security (including defendant DeSantis) and for plaintiff's arrest by Officer Schick.

However, even if there were no probable cause for plaintiff's arrest, plaintiff's § 1983 claim would fail for additional reasons. With respect to the City, a municipality and its supervisory officials may not be held liable under § 1983 for violations of federal rights by a lower-echelon employee solely on the basis of respondeat superior. Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978). In order to establish liability of a municipality for acts by its employees, a plaintiff must show that the violation of his rights resulted from a municipal custom or

policy. See, e.g., Pembaur v. City of Cincinnati, 475 U.S. 469, 478-79, 106 S.Ct. 1292, 1297-98 (1986); Monell, 436 U.S. at 690, 694; Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986); Vippolis v. Village of Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985), cert. denied, 480 U.S. 916, 107 S.Ct. 1369, (1987); Turpin v. Mailet, 619 F.2d 196 (2d Cir.), cert. denied,449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). Though this does not mean that the plaintiff must show that the municipality had an explicitly stated rule or regulation, see Villante v. Department of Corrections, 786 F.2d 516, 519 (2d Cir. 1986), the single incident alleged in plaintiff's complaint, which involves only actors below the policy-making level, does not suffice to show a municipal policy. See, e.g., City of Canton v. Harris, 489 U.S. 378, 387, 109 S.Ct. 1197, 1203 (1989); Fiacco v. City of Rensselaer, 783 F.2d at 328.[8]

Finally, plaintiff can have no § 1983 claim against the Individual and Macy's Defendants because they did not act under the color of law. § 1983 does not apply, except in special circumstances not presented by this case, to private employees

[8] An inference that a policy existed for the purpose of municipal liability may be drawn from circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction, see, e.g., City of Canton, 489 U.S. at 388-92, 109 S.Ct. at 1204-07, or evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had violated complainants' civil rights, see, e.g., Fiacco, 783 F.2d at 328. However, while in his Complaint plaintiff suggests that such failures by the City occurred, plaintiff has presented absolutely no evidence on this motion for summary judgment to support this contention.

including store security guards. The Second Circuit stated in Tancredi v. Metropolitan Life Ins. Co., 316 F.3d 308, 312-13 (2d Cir. 2003), that a "plaintiff pressing a claim of violation of his constitutional rights under § 1983 is required to show state action," and in "order to satisfy the state action requirement where the defendant is a private entity, the allegedly unconstitutional conduct must be fairly attributable to the state" (citation and quotation marks omitted).

The mere fact that statements from Macy's employees formed the basis for plaintiff's arrest by the police does not render the store personnel's activity "under the color of state law" for § 1983 purposes. See Guiducci v. Kohl's Dept. Stores, 320 F.Supp.2d 35, 37 (E.D.N.Y. 2004); Josey v. Filene's, Inc., 187 F.Supp.2d 9 (D.Conn. 2002). Unless there is some form of joint action, the role of security personnel in such a situation is no different from that of any other civilian witness to a crime. See Guiducci, 320 F.Supp.2d at 38; Johns v. Home Depot, U.S.A., Inc., 221 F.R.D. 400, 405 (S.D.N.Y. 2004). There is no evidence of such joint action here.[9]

[9] Cases cited by plaintiff in this regard are from different Circuits and are inapposite to the matter currently before the court. For instance, in Murray v. Wal-Mart, Inc., 874 F.2d 555 (8th Cir. 1989), a security guard was found to be acting under color of state law because he was also an employee of the local police department and had a close relationship with the prosecuting attorney. Similarly, Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381 (5th Cir. 1985) involved a private security company that "jointly planned and jointly executed" allegedly unconstitutional activities with a State Trooper. While plaintiff contends in his Opposition Memorandum that there was some sort of "prearranged plan" between Macy's and the NYPD with regard to the

2. Plaintiff's § 1985 Claim

42 U.S.C. § 1985(3) creates civil liability for any individual who conspires to deprive any person or class of persons of equal protection of the law, or of equal privileges and immunities under the law. While plaintiff's complaint implies that plaintiff's §1985(3) claim is asserted against all defendants, in his motion papers, plaintiff only claims that the Individual and Macy's defendants were involved in a conspiracy to deny plaintiff of his constitutionally protected rights by engaging in the alleged racially discriminatory adverse employment actions described previously. Pl.'s Mem. Opp. Summ. J. at 77-80. While the Court will address the substance of plaintiff's employment claims below, plaintiff's § 1985 claim fails independently as a matter of law.

§ 1985(3) does not create a private right of action for plaintiff's employment discrimination claims. The Supreme Court has held that "the deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)." Great Am. Federal Savings & Loan Ass'n. v. Novotny, 442 U.S. 366, 378 (1999). Although plaintiff raises his employment

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treatment of suspected shoplifters (Pl's Opp. Mem. at 76.), plaintiff has presented no evidence whatsoever to support this contention. A plaintiff "cannot resist a summary judgment motion by alleging a conspiracy without presenting specific factual allegations of conspiracy." McPartlant v. ABC, Inc., 623 F.Supp. 1334, 1341 (S.D.N.Y. 1985) (citations omitted). Accordingly, even if there were no probable cause for plaintiff's arrest, plaintiff's § 1983 claim against the Macy's and Individual Defendants would still fail.

claims under the NYHRL and the NYCHRL, the Second Circuit has ruled that relief is not available under § 1985(3) for claims based on a "state law version of Title VII." Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 591 (2d Cir. 1988). § 1985(3) was designed to create a private right of action for violations of fundamental rights protected by the Constitution, not for statutory violations. Novotny, 442 U.S. at 379 (Powell, J., concurring).[10] Plaintiff's claim of a conspiracy to discriminate against him by the Macy's defendants is not actionable under § 1985(3).[11]

For the forgoing reasons, defendants are entitled to summary judgment on count eight of plaintiff's complaint.

E. Plaintiff's Employment Claims under the NYHRL and the NYCHRL

Plaintiff's sprawling complaint makes a host of employment discrimination claims, which are explained with varying levels

[10] Unlike claims for deprivations of Constitutionally-protected rights, employment discrimination claims pursuant to Title VII or analogous state laws generally require exhaustion of administrative remedies. The use of § 1985(3) as a private right of action in employment disputes is impermissible, as it could be used as a method of bypassing those procedures. Ladson v. Ulltra East Parking Corp., 853 F.Supp. 699, 704 (S.D.N.Y. 1994).

[11] Plaintiff's § 1985(3) fails for an additional reason: the Second Circuit rejects claims of conspiracy within a corporate entity. In his Opposition Memorandum, plaintiff claims that the Macy's Defendants, along with the Individual Defendants (who were employees of Macy's), conspired to deny plaintiff of his constitutional rights. However, the "intracorporate conspiracy" doctrine provides that "there can be no actionable conspiracy where the persons alleged to have engaged in the conspiracy are a corporation and one or more of its agents within the scope of their employment." Crudele v. City of New York Police Dept., 2004 WL 1161174 at *5 (S.D.N.Y. May 24, 2004). See also Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 70-71 (2d Cir. 1976); Agugliaro v. Brooks Bros., 802 F.Supp. 956, 962 (S.D.N.Y. 1992).

of clarity and are alleged under counts five and six of the Complaint. These employment claims can be divided into three categories: disparate treatment, hostile work environment, and retaliation.

1. Disparate Treatment

Faced with a motion for summary judgment, plaintiff making a claim of disparate treatment must meet the initial burden of submitting evidence establishing a prima facie case, thereby creating a presumption of discrimination which, if unrebutted, would require a verdict in plaintiff's favor. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). The elements of a prima facie case for disparate treatment are that plaintiff (1) belongs to a racial minority or is a member of a protected class, (2) was qualified for the job and/or was satisfying the employer's normal requirements in his or her work, (3) that despite those qualifications or performance, plaintiff suffered an adverse employment action, and (4) that the action occurred under circumstances giving rise to an inference of discrimination. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); Feingold v. New York, 366 F.3d 138, 152 (2d Cir. 2004); Collins v. New York City Transit Auth., 305 F.3d 113, 118 (2d Cir. 2002).

Plaintiff alleges that he suffered from disparate treatment on account of his race and national origin in three primary ways: that he was passed over for promotion, that he was subjected to heightened and intrusive surveillance, and that minority employees generally are and were subjected to harsh working conditions on the Tenth Floor.

a. Promotion

Plaintiff alleges that he was passed over for a promotion in 2001 on account of his race and national origin. This allegation lacks two elements of a claim. First, it is uncontested that plaintiff was not qualified for the promotion he sought. Plaintiff was on disciplinary warning at the time he sought promotion, and Macy's policy was that employees on disciplinary warning are not eligible for promotion. Macy's Defs.' Rule 56.1 Statement at ¶ 64. Second, the circumstances surrounding plaintiff's failure to obtain a promotion do not give rise to an inference of discrimination. The position plaintiff sought was filled in June 2001 by Richard Brooks, who is black. Id. at ¶¶ 63-64.

b. Work Assignments

Plaintiff's work assignments do not give rise to an inference of discrimination. It is uncontested that reassignments to particular tables in the Processing Department were made according to productivity, and that such standards

applied equally to all employees regardless of race or national origin. Id. at ¶ 100. Furthermore, employees of all races and national origins had tasks such as garbage duty from time to time. Id. at ¶¶ 102, 104.

c. Harsh Working Conditions

It is also clear that the allegedly harsh working conditions on the Tenth Floor do not give rise to an inference of discrimination. It is uncontested that all employees on the Tenth Floor, regardless of race or national origin, suffered from the same conditions, including individual defendants Chester and De Santis. Id. at 121. While the Tenth Floor lacked air conditioning, it was not the only place in the store without it. Id. at ¶ 116. Although a water cooler was removed from the Tenth Floor, it was replaced by water fountains. Id. at 119. Plaintiff has not demonstrated that the harsh conditions on the Tenth Floor were related in any way to the race or national origin of the employees who worked there. "[A]n environment that is equally harsh for all workers ... is not actionable under 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).

2. Hostile work environment

Plaintiff claims that he was subject to a hostile work environment, through intrusive surveillance techniques and racially derogatory remarks and insults from Chester.

a. Standard for a Hostile Work Environment Claim

In order to prevail on a claim that racial hostility caused a hostile work environment in violation of Title VII or the NYHRL, a plaintiff must establish two elements. First, plaintiff must show that her workplace was permeated with "discriminatory intimidation, ridicule, and insult ... that [wa]s sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (internal citations and punctuation omitted). Second, plaintiff must show that a specific basis exists for imputing the conduct that created the hostile environment to the employer. Mack v. Otis Elevator Co., 326 F.3d 116, 122 (2d Cir. 2003); Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002); Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997).

b. Abusive Work Environment

With respect to the first element of a harassment claim, the Court concludes that there does not exist a triable issue of fact with respect to whether or not plaintiff’s workplace was so

permeated with harassment based on race or national origin so as to create an abusive working environment.

First, even if plaintiff had supported his allegations of heightened surveillance with admissible evidence, their existence, without more, does not establish that plaintiff suffered from a hostile work environment. Moreover, it is uncontested that part of the job of a manager or supervisor in the processing department is to watch employees, monitor productivity, and to speak with store security. Id. at ¶¶ 69-70, 82. There were four to five security cameras on the tenth floor, which is actually below average for a department at Macy's. Id. at ¶ 77. Furthermore, plaintiff does not contest that not all minority employees in Processing were subject to alleged heightened scrutiny, Id. at ¶ 86, which suggests that any additional scrutiny plaintiff may have received was not some form of "discriminatory intimidation." Finally, Macy's policy on employment tips to security was race-neutral; no evidence has been submitted that the policy was implemented or enforced in such a manner that non-minority employees were not subject to the exact same treatment. Id. at ¶ 94.

Second, plaintiff has not sufficiently supported his allegations of racially derogatory insults by his supervisor, Chester, to establish the existence of a hostile work environment. The Macy's Defendants note in their Rule 56

Statement that the only evidence of such insults is plaintiff's allegation that Chester made a remark to the effect that all Puerto Ricans carry razor blades. Macy's Defs' Rule 56 Statement at ¶ 42. Chester denies making such a remark. Id. at ¶ 43. Regardless, isolated instances of harassment ordinarily do not rise to the level required to establish a hostile work environment. See, e.g., Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992). The plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were "sufficiently continuous and concerted" to have altered the conditions of her working environment. Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997) (quoting Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir. 1989)) (internal quotation marks omitted). Plaintiff has not satisfied this standard.

c. Macy's Liability

The Court further notes that, even if, arguendo, plaintiff had demonstrated the existence of an issue of material fact as to whether or not Chester's alleged harassment rose to the level of creating a hostile work environment, plaintiff would still have no claim against the Macy's Defendants. Unlike under Title VII, which essentially contains a respondeat superior standard for workplace harassment, under § 296 of the NYHRL and § 8-107 of the NYCHRL an "'employer cannot be held liable ... for an

employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it.'" Franklin v. City of New York, 01 Civ. 10574, 2003 WL 21511932 at *8 (S.D.N.Y. July 1, 2003) (quoting State Div. of Human Rights ex rel. Greene v. St. Elizabeth's Hosp., 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411, 412, 487 N.E.2d 268 (1985), aff'd, No. 03-7769, 99 Fed. Appx. 315, 2004 WL 1157729 (2d Cir. May 25, 2004); accord, e.g., 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). Condonation "contemplates a knowing, after-the-fact forgiveness or acceptance of an offense." State Div. of Human Rights ex rel. Greene v. St. Elizabeth's Hosp., 66 N.Y.2d at 687, 496 N.Y.2d at 412.

Plaintiff has not established that Macy's encouraged, condoned, or approved of Chester's alleged harassment of him. To the contrary, plaintiff has not even demonstrated that Macy's had actual notice of Chester's alleged harassment. While plaintiff maintains that he complained to Chester himself, it is uncontested that plaintiff did not report the alleged harassment to anyone in Macy's Human Resources Department, or call the confidential hotline listed on Macy's harassment policy. Macy's Defs.' Rule 56.1 Statement at ¶ 47. Nor did plaintiff complain

about alleged discriminatory harassment by Chester either to Chester's supervisor, Grady, or to lower level managers. Id. at ¶ 55-56. Instead, as noted by the defendants, plaintiff testified during his deposition that he made only "general" complaints to Grady about Chester, but did not make any complaints about Chester's alleged harassment based on race or national origin.[12] Id. at 48. Similarly, plaintiff's co-workers who were deposed also gave testimony that they did not complain to Macy's Human Resources about racial or national origin harassment. Id. at ¶ 164, 298, 321.

Accordingly, because plaintiff has failed to demonstrate the existence of an issue of material fact with respect to whether Macy's encouraged, condoned, or approved of Chester's alleged harassment, the Macy's Defendants are entitled to summary judgment of plaintiff's hostile work environment claim.

3. Retaliation

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1982), provides that "[i]t shall be an unlawful

[12] Moreover, while plaintiff claims that he and others filed union grievances regarding Chester, evidence of grievances alone is insufficient to sustain plaintiff's claims. Actual notice by the employer, rather than constructive notice, is required under the HRL. Sowemimo v. D.A.O.R. Sec., Inc., 43 F.Supp.2d 477, 486 (S.D.N.Y. 1999); Ponticelli v. Zurich American Ins. Group, 16 F.Supp.2d 414, 433. Furthermore, plaintiff has produced no grievances specifically showing that he complained to his union about harassment or discrimination based on race or national origin by Chester. Id. at 53. A union grievance about general conduct is not in itself sufficient to put an employer on notice of discriminatory harassment. Forrest, supra, 3 N.Y.2d at 309, 819 N.E.2d at 1010. Plaintiff has only produced evidence of a single union grievance by a co-worker relating to Chester's alleged racial harassment, which is not sufficient to establish condonation, approval, or encouragement by Macy's.

employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter...." The objective of this section is obviously to forbid an employer from retaliating against an employee because of the latter's opposition to an unlawful employment practice. The elements of a prima facie case of retaliation are (1) that plaintiff was engaged in a protected activity, (2) that the employer was aware of that activity, (3) that plaintiff suffered an adverse employment action, and (4) that there was a causal connection between the protected activity and the adverse employment action. Reed v. Lawrence, 95 F.3d 1170, 1178 (2d Cir. 1996).

Plaintiff contends that he suffered retaliation as a result of his complaints to Chester regarding the alleged discriminatory treatment described above. This retaliation allegedly took several forms: negative evaluations, reduction in overtime opportunities, a suspension in early 2002, and plaintiff’s arrest and termination.

a. Negative Evaluations, Reduction in Overtime

Plaintiff received negative evaluations and claims that his opportunities for overtime were reduced in retaliation for the complaints he allegedly made to Chester. However, plaintiff has failed to demonstrate a causal connection between these adverse actions and any protected activities. Defendants maintain, and

it is uncontested, that plaintiff's evaluations and overtime opportunities were not retaliatory in nature, but rather are explainable in terms of ordinary, non-discriminatory practices. Plaintiff's evaluations were based on legitimate criteria and an assessment of plaintiff's work performance; his race and national origin played no part in that assessment. Macy's Defs.' Rule 56 Statement at 106. With respect to overtime, opportunities were assigned on the basis of seniority and has nothing to do with plaintiff's race or national origin. Id. at 111.

b. Suspension; Subsequent Arrest and Termination

Although plaintiff has alleged that he complained to Chester, he was not suspended or terminated by Chester. As noted above, Chester was not involved in plaintiff's suspension, arrest, or termination. Plaintiff has not alleged that those individuals responsible for the decisions to suspend and subsequently terminate his employment were aware that he made any complaints about discrimination or workplace harassment. Id. at 47. Plaintiff therefore cannot make out any claim of a causal connection between his alleged complaints to Chester and the adverse employment actions from which he suffered. There is no evidence that any of the individuals involved in his suspension in February 2002 were motivated by discriminatory animus, or that the suspension was retaliatory. Id. at ¶¶ 132-

35. Plaintiff never heard anyone involved in the investigation leading to his arrest and termination make any derogatory remarks or otherwise indicate that the investigation was retaliatory in nature. Id. at ¶ 140. Plaintiff has not sufficiently demonstrated the essential elements of a retaliation claim.

Accordingly, defendants are entitles to summary judgment on counts five and six of the complaint.

III. Class Certification

Plaintiff seeks class certification with respect to his employment discrimination claims. As all of plaintiff's underlying claims have been dismissed, this motion for class certification is moot. See, e.g., Schweizer v. Trans Union Corp., 136 F.3d 233, 239 (2d Cir. 1998) ("The decision to award summary judgment before acting on class certification was well within the discretion of the district court"); Hernandez v. Affiliated Group, Inc., No. 04 CV 4467 (JG), 2006 WL 83474 (E.D.N.Y. Jan. 12, 2006).

Conclusion

For the reasons forgoing reasons, plaintiff's motion to amend is DENIED. The City Defendants' motion for summary judgment is GRANTED. The Macy's Defendants' motion for summary judgment is GRANTED. Individual defendant Scott Chester's motion for summary judgment is GRANTED. For the reasons above,

the individual defendants Chris DeSantis (who joined in Macy's motion) and Michael Green are also entitled to summary judgment. Plaintiff's motion for class certification is DENIED as moot. The Clerk of the Court is directed to close this case.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
March 13, 2006