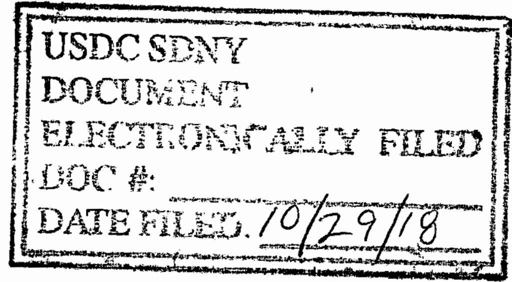

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
THIERNO S. DIALLO, :

Plaintiff, :

-against- : **REPORT AND RECOMMENDATION**

WHOLE FOODS MARKET GROUP, INC., : 16-CV-9228 (PAE) (KNF)

:

Defendant.
---X
KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE PAUL A. ENGELMAYER, UNITED STATES DISTRICT JUDGE

INTRODUCTION

Thierno S. Diallo ("Diallo"), proceeding pro se, commenced this action against Whole Foods Market Group, Inc. ("Whole Foods") asserting employment discrimination based on national origin, namely, "African (Guinean)," under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17, the New York State Human Rights Law ("NYSHRL"), New York Executive Law § 296, and the New York City Human Rights Law ("NYCHRL"), New York City Administrative Code §§ 8-101 to 131. The plaintiff alleges that the defendant terminated his employment, failed to promote him, retaliated against him and harassed and intimated him based on the plaintiff's national origin. Before the Court is the defendant's motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The plaintiff opposes the motion.

DEFENDANT'S CONTENTIONS

The defendant contends that the plaintiff's "claim of discrimination under Title VII require [sic] dismissal because plaintiff cannot establish that his national origin in any way

motivated the decision to terminate his employment." According to the defendant, "[t]he evidence is plain that Whole Foods terminated Plaintiff's employment when he was found to have committed a theft-of-time infraction, warranting immediate separation under the Company's policies," and the plaintiff "conceded to the New York State Division of Human Rights 'that he overstayed his break time as he is being accused of.'" Moreover, in his amended complaint, the plaintiff "confessed that 'the time it took me to use the restroom and to pray is the time for which I overstayed my break,'" and in his deposition he "admitted that after punching back in from his break on November 30, 2015, he 'went to the bathroom and then after that [he] went to pray.'" Even if the plaintiff could establish his prima facie case of discrimination under Title VII, the plaintiff "cannot establish that defendant's legitimate reasons were pretext" because "Whole Foods determined that Plaintiff had committed a theft-of-time infraction, which under Company policies, warrants immediate dismissal" and "Whole Foods' General Information Guide ('GIG') states that Team Members may be subject to immediate termination for '[f]alsifying reports of records, including but not limited to financial and payroll report/timecards[.]'" The defendant maintains that it "has demonstrated that it consistently terminates Team Members who engage in the type of misconduct in which Plaintiff engaged." The defendant asserts that the plaintiff "does not and cannot dispute that he committed the theft-of-time infraction leading to his termination." Since the plaintiff "admits that he 'overstayed [his] break'" in his amended complaint, "the 'sham affidavit doctrine'" prohibits him from disavowing his prior admission to "create a genuine issue of fact to defeat summary judgment." The defendant asserts that the "plaintiff's claims for failure to promote, hostile work environment and retaliation are likewise meritless" because: (a) the plaintiff "admitted that he never actually applied for 'a specific position . . . and was rejected therefrom'"; (b) the plaintiff

failed to identify the "very subtle act [sic] that happens" in connection with his hostile environment claim; (c) "the evidence is overwhelming that Plaintiff's misconduct was the sole reason Whole Foods terminated his employment."

In support of its motion, the defendant submitted a: (i) Local Civil Rule 56.1 statement of undisputed material facts ("Rule 56.1 statement"); and (ii) "Certification of Michael J. Slocum, Esq." ("Slocum"), the defendant's attorney with Exhibit 1, "excerpts of the deposition of Pro Se Plaintiff Thierno S. Diallo taken March 22, 2018," Exhibit 2, "excerpts of the deposition of Nathan Nakhid ['Nakhid'] taken April 6, 2018," Exhibit 3, "Excerpts of the deposition of Ariana Ruiz ['Ruiz'] taken April 11, 2018," Exhibit 4, "documentation Whole Foods produced concerning the separation of Team Member Lamell Jones" ("Jones"), Exhibit 5, "documentation Whole Foods produced concerning the separation of Team Member Thierry Jeanpierre" ("Jeanpierre"), Exhibit 6, "documentation Whole Foods produced concerning the separation of Team Member Jemilla John" ("John"), Exhibit 7, "documentation Whole Foods produced concerning the separation of Team Member Victor Clotter" ("Clotter"), Exhibit 8, "documentation Whole Foods produced concerning the separation of Pro Se Plaintiff Thierno S. Diallo," Exhibit 9, "Event History documents Whole Foods obtained from the New York State Division of Human Rights," and Exhibit 10, "excerpts from Whole Foods' General Information Guide ('GIG')." Slocum states in his certification: "I make this Certification in support of Defendant's motion for summary judgment dismissing the Complaint of Pro Se Plaintiff Thierno S. Diallo." In support of its Rule 56.1 statement, the defendant makes citation to exhibit Nos. 1-8 and 10, attached to Slocum's certification.

PLAINITFF'S CONTENTIONS

The plaintiff contends that material issues of fact exist concerning whether: (1) "supervisors exhibited discriminatory animus to Plaintiff before his termination"; (2) the plaintiff "committed the infraction that led to his termination"; (3) "termination for this particular infraction was discriminatory in light of how other employees were treated"; and (4) "the reason given for the termination was pretextual." Alternatively, the plaintiff requests that the Court "withhold decision on the motion for summary judgment pursuant to Fed. R. Civ. P. 56(e)(1) and grant Plaintiff the opportunity to specifically respond to any deficiencies in his response, or pursuant to Fed. R. Civ. P. 56(d)(2) and grant Plaintiff opportunity for further discovery." In that case, the plaintiff would ask the defendant to provide discovery identifying: (i) whether any of the defendant's "employees subject to the same disciplinary policies as Plaintiff were accused of 'theft of time' or . . . another 'major infraction' and not terminated as punishment for that specific infraction"; and (ii) "[t]he disciplinary history and national origin of any such employee, and the proffered explanations for not terminating those employees."

The plaintiff contends that he adduced evidence showing he was treated differently by his supervisors from his coworkers who were not born in Africa for years prior to his termination. For example, the plaintiff's supervisor between August 2013 and February 2015, Luis Arango ("Arango"), "made comments and jokes regarding Plaintiff's status as a West African immigrant," regularly and refused to grant the plaintiff's reasonable requests that he granted to other, non-African employees, such as conducting a job dialogue "mandated by company policy" and granting them opportunities to increase their work hours to achieve full-time status or obtain benefits. The plaintiff's supervisor from February 2015 to the plaintiff's termination, Nakhid, subjected the plaintiff to disparaging remarks and unequal treatment relative to his non-African

coworkers, referring to the plaintiff by disparaging nicknames. When the plaintiff asked Nakhid to stop using disparaging nicknames, Nakhid replied that he could "call Plaintiff whatever he wanted, including 'Negro,' since he was Plaintiff's supervisor." The plaintiff asserts that, Nakhid never conducted a mandatory job dialogue with him. Moreover, the plaintiff did not receive pay raises. According to the plaintiff, non-African employees were not denied job dialogues and received pay raises. The plaintiff asserts that "the record supports an inference that he was terminated under circumstances giving rise to an inference of discriminatory intent and that the stated reason for the termination was pretextual" because: (a) "it is not clear that plaintiff in fact committed the infraction in question"; and (b) "even if Plaintiff did commit the infraction in question, the employee records supplied by Defendant illustrate that it was not the company practice to dismiss employees for first-time violations of company policy."

The plaintiff contends that he established a failure to promote claim, since the defendant "failed to meet its burden to demonstrate that there was a publicly available formal promotion application procedure with publicly available postings that Plaintiff failed to apply for" and "there is an issue of material fact as to whether Plaintiff applied for specific promotions" based on "[a]dmissible evidence indicat[ing] that he attempted to apply for promotions" and "was even interviewed for a Produce Supervisor position in February 2015," which was "filled by Nicholas Coffee, a non-African employee who had less experience than Plaintiff, whom Plaintiff had trained, and who had at least one Corrective Action Notice in his employee file."

In support of his opposition to the motion, the plaintiff submitted his: (i) response to the defendant's Rule 56.1 statement; and (ii) declaration based on the plaintiff's "personal knowledge and experience," with Exhibit A, "the initial job Information Sheet of Thierno Diallo with [the defendant]," Exhibit B, "the time sheet indicating [Fadie] Fadel was Diallo's

Supervisor," Exhibit C, the plaintiff's "evaluation forms," Exhibit D "the GIG Book," Exhibit E, "the Northeast final written warning policy change," Exhibit F, "the email from Jean Swaebe dated December 29, 2013," Exhibit G, "the time sheet [showing] Arango as team leader," Exhibit H, "the unsatisfactory work warning for Diallo," Exhibit I, "the emails from Diallo about job promotions," Exhibit J, "the employment records of Nicholas Coffee," Exhibit K, the plaintiff's "final pay stub," Exhibit L, "the employment records of Priya Ewing," Exhibit M, "the employment records of Shannon Campbell," Exhibit N, "the employment records of Kyle Rivers," Exhibit O, "the employment records of Abraham Peralta," Exhibit P, "the email sent by Yulianty Oglesby to Diallo," Exhibit Q, "the correspondence via email Diane Morrisey," Exhibit R, "the separat[ion] form for Diallo," Exhibit S, "the employment records for Lamell Jones," Exhibit U, "the discovery response of Defendant confirm[ing] that the surveillance video of the incident in question no longer exists," Exhibit V, "the employment records of Thierry Jeanpierre," Exhibit W, "the separation form for Jemilla John," Exhibit X, "the separation form for Victor Clotter," Exhibit Y, "selections of the [plaintiff's] deposition" and Exhibit Z, "selections of the deposition of Nathan Nakhid."

DEFENDANT'S REPLY

The defendant asserts that the plaintiff cannot defeat summary judgment by: (i) disavowing his admission that he committed a "theft-of-time" infraction, which resulted in his termination; (ii) "professing an inability to remember what occurred"; or (iii) "nit-picking the pay histories of a small handful of other Team Members." According to the defendant, "the uncontested record amply establishes Whole Foods' policy and practice," including that "it consistently terminates Team Members who commit the type of theft-of-time infraction Plaintiff did." The defendant asserts that the plaintiff's argument that he "was unaware of specific

available positions because the employer never posted them" is contradicted by his testimony that his routine, during the thirty minute break, was to spend some time "in the Whole Foods University, a break room where employees could use computers to check their records and apply for new internal positions." The plaintiff did not offer any evidence about the qualifications of the persons who applied for a promotion to produce supervisor in February 2015 or how his qualifications compare to theirs. The defendant asserts that the plaintiff abandoned his claims for hostile work environment and retaliation because he made no argument opposing the defendant's arguments that those claims are meritless, based on "the undisputed record." Moreover, the plaintiff is not entitled to further discovery because he "has been provided all discovery to which he is entitled."

LEGAL STANDARD

A motion for summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A "dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Id. at 255, 106 S. Ct. at 2513. In deciding a summary judgment motion, "[t]here is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be

resolved in favor of either party." Id. at 250, 106 S. Ct. at 2511. Thus, summary judgment is improper "[i]f reasonable minds could differ as to the import of the evidence." Id. On a summary judgment motion, "[t]he court must 'construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.'" Aulicino v. NYC Dep't of Homeless Servs., 580 F.3d 73, 79-80 (2d Cir. 2009) (citation omitted).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
>
> Fed. R. Civ. P. 56(c)(1).

"An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602.

Local Civil Rule 56.1 ("Rule 56.1") of this court provides that, on a motion for summary judgment, the movant must submit a statement "of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Civil Rule 56.1(a). Each statement, pursuant to Local Civil Rule 56.1, "must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)." "The district court has broad discretion in choosing whether to admit evidence." Raskin v. Wyatt Co., 125 F.3d 55, 65 (2d Cir. 1997). "The principles governing admissibility of evidence do not change on a motion for summary judgment" and "only admissible evidence need be considered by the trial court in ruling on a motion for summary

judgment." Id., at 66. "The court performs the same role at the summary judgment phase as at trial." Id. Evidence inadmissible under the evidence rules may be considered by the court on a summary judgment motion if not challenged. See Capobianco v. City of New York, 422 F.3d 47, 55 (2d Cir. 2005). "[A] party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony. . . . Thus, factual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial." Hayes v. New York City Dep't of Corrections, 84 F.3d 614, 619 (2d Cir. 1996).

Title VII provides that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin." 42 U.S.C. § 2000e-2(a)(1). "[A]n unlawful employment practice is established when the complaining party demonstrates that . . . national origin was a motivating factor for any employment practice even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

> Title VII discrimination claims . . . may be proven under a disparate treatment or disparate impact theory of liability. To establish disparate treatment, a plaintiff must show that the defendant's actions were motivated by a discriminatory intent, either through direct evidence of intent or by utilizing the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Alternatively, a plaintiff may proceed on a disparate impact theory by showing that even if a policy or practice is facially neutral or is not motivated by a discriminatory intent, it has a discriminatory effect.
>
> Legg v. Ulster Cty., 820 F.3d 67, 72 (2d Cir. 2016).

> Under the [McDonnell Douglas Corp.] test, a plaintiff must first establish a *prima facie* case of discrimination by showing that: "(1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination." Once a plaintiff has established a *prima facie* case, a presumption arises that more likely than not the adverse conduct was based on the consideration of impermissible factors. The burden then shifts to the employer to "articulate some legitimate,

> nondiscriminatory reason" for the disparate treatment. If the employer articulates such a reason for its actions, the burden shifts back to the plaintiff to prove that the employer's reason "was in fact pretext" for discrimination.
>
> Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 83 (2d Cir. 2015) (internal citations omitted).

To satisfy the "pretext" element of a discrimination claim, "the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination." Stern v. Trustees of Columbia Univ. in the City of New York, 131 F.3d 305, 312 (2d Cir. 1997). Claims of discrimination under the NYSHRL are analyzed using the same standards that apply to Title VII discrimination claims. See Song v. Ives Labs., Inc., 957 F.2d 1041, 1046 (2d Cir. 1992) ("New York state courts have adopted the [Title VII] analysis for discrimination actions arising under [NYSHRL]."). However, unlike federal and NYSHRL discrimination claims, NYCHRL discrimination claims are construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." Mihalik v. Credit Agricole Cheuvreux, 715 F.3d 102, 109 (2d Cir. 2013).

> To establish a *prima facie* case of a discriminatory failure to promote, a Title VII plaintiff must ordinarily demonstrate that: (1) she is a member of a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) she was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the plaintiff's qualifications. In all cases, for the plaintiff to avoid an adverse judgment, there must be proof that the plaintiff "was rejected under circumstances which give rise to an inference of unlawful discrimination." If the plaintiff carries that burden, "the burden shifts to the defendant, which is required to offer a legitimate, non-discriminatory rationale for its actions." If the defendant meets this second burden, "to defeat summary judgment . . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination."
>
> Aulicino, 580 F.3d at 80 (internal citations omitted).

Title VII provides that it is "an unlawful 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, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). To establish a retaliation claim under Title VII, a plaintiff must show that: "(1) defendants discriminated—or took an adverse employment action—against him, (2) 'because' he has opposed any unlawful employment practice." Vega, 801 F.3d at 90. Unlike in discrimination claims, it is not sufficient to establish that retaliation was a substantial or motivating factor in the employer's decision; rather, the plaintiff must show "that the adverse action would not have occurred in the absence of the retaliatory motive." Id. at 91.

To establish a hostile work environment claim under Title VII, a plaintiff must establish that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 20 (2d Cir. 2014) (citation omitted). Courts must examine "the totality of the circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim's [job] performance." Id. (citation omitted). "[T]he misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive." Id. (citation omitted). Mistreatment at work "is actionable under Title VII only when it occurs because of an employee's . . . *protected characteristic*." Id. (citation omitted).

APPLICATION OF LEGAL STANDARD

Slocum's Certification with Exhibits

The defendant failed to support its motion with "[a]n affidavit or declaration . . . made on personal knowledge" that "set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated" because Slocum's certification does not: (i) state that it is based on Slocum's personal knowledge; (ii) set out any facts that would be admissible in evidence; and (iii) show that Slocum is competent to testify on the matters stated, as required by Fed. R. Civ. P. 56(c)(4). Except for Exhibit No. 2, "excerpts of the deposition of Nathan Nakhid taken April 8, 2018," during which Slocum was present, no other exhibit attached to Slocum's certification supports a finding that Slocum has personal knowledge of the matter contained therein. Exhibit No. 10, purporting to contain "excerpts from Whole Foods' General Information Guide ('GIG')," is a document the first page of which bears Bates No. WFM00060, and a title that is faint and illegible. The meaning of the content of Exhibit 10 is unclear as no affidavit by the defendant was submitted to explain Exhibit No. 10 or any other exhibit. Moreover, no evidence was submitted establishing that Exhibit No. 10, purporting to contain "excerpts from Whole Foods' General Information Guide ('GIG')" and indicating that it was "REVISED MARCH 2014," is the document containing the defendant's policies in effect at the time relevant to the plaintiff's claims. In his opposition to the defendant's motion, the plaintiff submitted Exhibit D, "a true and correct copy of GIG Book." The plaintiff's Exhibit D is a document bearing the title "General Information Guide Northeast Region" and indicating that it was "REVISED AUGUST 2011." The plaintiff's Exhibit E, a "copy of the Northeast final written warning policy change" indicates that the plaintiff was asked to acknowledge receiving the defendant's "Policy changes" including, inter alia, "[t]he changes

to the Attendance Policy that was effective in September 2014, including the earned Sick Time Act in NYC, excused medical time in NJ, our Westchester, Long Island and Albany stores, and **the procedure and corrective action changes**" (emphasis added). The plaintiff's Exhibit E suggests that the defendant's Exhibit 10, "REVISED MARCH 2014" was superseded, at minimum, by "Policy changes" "effective September 2014," including "the procedure and corrective action changes." In light of the defendant's mention of "the Northeast Region" in its Rule 56.1 statement, the plaintiff's Exhibits D and E and the absence of any affidavit by the defendant identifying and explaining the defendant's policies in effect at the time relevant to this action, it is unclear whether the "General Information Guide," REVISED MARCH 2014," excerpts of which are contained in the defendant's Exhibit No. 10, or the "General Information Guide Northeast Region," "REVISED AUGUST 2011," excerpts of which are contained in the plaintiff's Exhibit D, or some other document, such as the one in effect on "September 2014," was in effect at the time relevant to this action. Denying the defendant's motion for summary judgment is warranted as it is unsupported by admissible evidence. However, the plaintiff did not challenge the authenticity of the defendant's exhibits attached to Slocum's certification. Thus, the Court deems Exhibit Nos. 1-10 attached to Slocum's certification authenticated for the purpose of the defendants' motion for summary judgment. See Capobianco, 422 F.3d at 55.

Defendant's Rule 56.1 Statement

The defendant makes citation to Exhibit Nos. 1-8 and 10 in its Rule 56.1 statement in support of its motion. Exhibit No. 9 is not referenced in the Rule 56.1 statement, although it is referenced in the defendant's memorandum of law in support of the assertion that it is undisputed that "Plaintiff conceded to the New Yok State Division of Human Rights 'that he overstayed his break time as he is being accused of.'" However, the defendant did not include in its Rule 56.1

statement the assertion that "Plaintiff conceded to the New Yok State Division of Human Rights 'that he overstayed his break time as he is being accused of.'" Thus, the defendant failed to establish that it is undisputed that "Plaintiff conceded to the New Yok State Division of Human Rights 'that he overstayed his break time as he is being accused of.'"

In its Rule 56.1 statement the defendant asserts that facts are undisputed, making citation to evidence that does not support the asserted facts. For example, the defendant asserts: "During his shift [on November 30, 2015], Plaintiff punched out for his 30-minute lunch break at 7:18 p.m. (Diallo Dep. 64:11 to 65:7, 66:5-8)." The referenced page Nos. 64:11 to 65:7 from the plaintiff's deposition indicate as follows:

Q. Did you take a break at some point?
A. No.
Q. Is it possible that you punched out for your break at 7:18 p.m.?
A. I don't recall.
Q. How long was your break supposed to be?
A. I have two breaks usually. One is thirty minutes, which is not paid, and one of fifteen minutes, which is paid.
Q. If you were working closing shift, which break would you be taking in the seven hour?
A. I don't understand what you mean to say.
Q. If you took a break around 7:15 or 7:30 p.m., would that generally have been considered a lunch break?
MR. SWAYZE: Objection to form. You can answer.
A. In fact, it could be both.

The referenced page Nos. 66:5-8 indicate:

Q. Is it possible you took your first break at 7:18 p.m.?
A. I can't either confirm or deny that time because I cannot remember the time.

The defendant's assertion that "[d]uring his shift [on November 30, 2015] Plaintiff punched out for his 30 minute lunch break at 7:18 p.m." is not supported by the cited evidence, namely, "Diallo Dep. 64:11 to 65:7, 66: 5-8." The plaintiff's testimony contained in the cited pages shows that: (a) when asked if he "punched out for your break at 7:18 p.m." he answered "I don't

recall"; and (b) when asked if he "took a break around 7:15 or 7:30 p.m., would that generally have been considered a lunch break," he answered "it could be both," namely the "thirty minutes [break], which is not paid, and [the] one [break] of fifteen minutes, which is paid." Thus, Diallo's testimony shows that: (1) he does not remember what time he "punched out" for his break on November 30, 2015; and (2) "**generally**," "a break around 7:15 or 7:30 p.m." could be both, an unpaid 30-minute break or a paid 15-minute break. The plaintiff was not asked whether the break he took on November 30, 2015, was an unpaid 30-minute break or a paid 15-minute break. Although the plaintiff does not dispute the defendant's Rule 56.1 statement that "[d]uring his shift [on November 30, 2015], Plaintiff punched out for his 30-minute lunch break at 7:18 p.m.," the Court finds that the statement is not supported by the evidence cited and no other evidence exists in the record supporting it; thus, it is not undisputed.

Another example of a Rule 56.1 statement unsupported by the evidence is the following: "Plaintiff punched back in from his break at 7:17 p.m. and '[a]fter that [he] went to the bathroom and then after that [he] went to pray.' (Diallo Dep. 68:7-10)." The referenced page No. 68:7-10 from the plaintiff's deposition indicates as follows:

> Q. And then once you punched back in on November 30, 2015 at 7:47 p.m., where did you go?
> A. Well, I'm not sure. After that, I went to the bathroom and then after that I went to pray.

The plaintiff's answer "I'm not sure. After that, I went to the bathroom and then after that I went to pray" was followed by testimony on page No. 68:11-12 that the defendant omitted from its Rule 56.1 citation:

> Q. After you punched back in?
> A. I don't recall if it was before or after.

The defendant's selective citation to page No. 68:7-10 does not support the assertion that "Plaintiff punched back in from his break at 7:17 p.m. and '[a]fter that [he] went to the bathroom and then after that [he] went to pray.'" The plaintiff testified at page No. 66:5-8 as follows:

Q. Is it possible you took your first break at 7:18 p.m.?
A. I can't either confirm or deny that time because I cannot remember the time.

Thus, the plaintiff's testimony does not support the defendant's assertions concerning the time the plaintiff: (i) "punched back in from his break"; and (ii) went to the bathroom, and then to pray, and no other evidence in the record supports the defendant assertions that "Plaintiff punched back in from his break at 7:17 p.m. and '[a]fter that [he] went to the bathroom and then after that [he] went to pray.'"

Another example of the defendant's factual assertions that are unsupported by evidence is its Rule 56.1 statement: "During the twelve-month period from December 2014 through November 2015 alone, Whole Foods terminated at least four other Team Members from its Midtown East store as a consequence of their committing a theft-of-time infraction." The defendant makes citation to Exhibit Nos. 4, 5, 6 and 7 attached to Slocum's certification. Exhibit No. 4 is a Team Member Separation form for Jones indicating, under section "B. Reason for Separation (please mark one reason only)," that the marked reason for Jones's separation is "RVP – Rule/Policy Violation." Exhibit No. 5 is a Team Member Separation form for Jeanpierre indicating, under section "B. Reason for Separation (please mark one reason only)," that the marked reason for Jeanpierre's separation is "OMC – Other Misconduct." Exhibit No. 6 is a Team Member Separation form for John indicating, under section "B. Reason for Separation (please mark one reason only)," that the marked reason for John's separation is "RFL - Record Falsification." Exhibit No. 7 is a Team Member Separation form for Clotter indicating, under section "B. Reason for Separation (please mark one reason only)," that the marked reason for

Clotter's separation is "WPI – Work Performance." Thus, none of the exhibits cited supports the defendant's assertion that "[d]uring the twelve-month period from December 2014 through November 2015 alone, Whole Foods terminated at least four other Team Members from its Midtown East store as a consequence of their **committing a theft-of-time infraction**" because the reasons marked for the separations of Jones, Jeanpierre, John and Clotter are not "committing a theft-of-time infraction." Although: (1) Exhibit No. 4, Jones's Team Member Separation Form indicates, under "C. Explanation of Reason Checked Above," that Jones's "original break represents 18 minutes of stolen time"; and (2) Exhibit No. 5, Jeanpierre's Team Member Separation Form indicates, under "C. Explanation of Reason Checked Above," that "[t]he first 2 instances were time theft & falsifying document/timekeeper," the meaning and relevance, if any, of the words "stolen time" and "time theft" is unclear in light of the fact that "theft-of-time" is not listed as an example of misconduct under the defendant's MAJOR INFRACTIONS contained in Exhibit No. 10.

Throughout its Rule 56.1 statement, the defendant uses the phrase "theft-of-time infraction" without explaining what that means or identifying any part of the defendant's "General Information Guide," Exhibit No. 10, containing "a theft-of-time infraction." Exhibit 10 indicates, as an example of "conduct that may lead to discharge" under the heading "MAJOR INFRACTIONS": "Theft of any kind, including but not limited to violation of the Team Member *Theft* policy; violation of the *Team Member Purchases* policy; violation of the Team Member *Product Sampling* policy," all of which appear to concern property-related misappropriations. However, "[t]heft of any kind" does not appear to contemplate or include "a theft-of-time" because: (a) none of the examples of misconduct listed under "MAJOR INFRACTIONS" indicates "a theft-of-time"; (b) "[t]heft of any kind" includes and appears to contemplate

property theft; and (c) the defendant does not contend that "a theft-of-time infraction" is an example of misconduct that may lead to discharge under the "[t]heft of any kind" infraction.

The defendant asserts in its Rule 56.1 statement that "Whole Food's Team Member Service Coordinator for the Northeast Region, Ariana Ruiz ('Ruiz'), testified that 'time theft' is considered a 'major infraction' under Company policies, and even a single infraction is deemed sufficient grounds for immediate termination. (Ruiz Dep. 49:15-20, 50:11-16)." The referenced page Nos. 49:15-20, 50: 11-16 indicate:

> Q. Would time theft be described as a major infraction?
> A. It would be.
> Q. Does Whole Foods terminate employees for time theft?
> A. Yes.
> * * *
> Q. Okay. Is it then policy to terminate an employee based on one instance of time theft?
> A. Correct.
> Q. It is?
> A. It is. Sorry.

The cited pages do not support the defendant's assertion that Ruiz is "Whole Food's Team Member Service coordinator for the Northeast Region." Ruiz's testimony that "time theft [is] described as a major infraction under Company policies" is contradicted by Exhibit No. 10, assuming that the defendant's "Company policies" are contained in the defendant's "General Information Guide," because Exhibit 10 does not contain "time theft" under the heading "MAJOR INFRACTIONS." No document entitled "Company policies" or "policy" was submitted by the defendant and no affidavit by the defendant was submitted in support of the motion explaining the defendant's exhibits, including Exhibit No. 10, presumably containing "Company policies."

Another example of a Rule 56.1 statement unsupported by the evidence is: "The Produce Supervisor at the time witnessed Plaintiff's infraction and brought it to the attention of Mr. Nakhid. (Nakhid Dep. 40:14-23)." The referenced page No. 40:14-23 from Nakhid's deposition indicates as follows:

> Q. In this case, when you watched the DVD, was that random or was there a reason that you watched Mr. Diallo?
> A. It was a reason.
> Q. Can you tell me what that reason was?
> A. Someone, which is my supervisor at the time, or team member at the time, or someone in power, witnessed it and brought it to my attention.

Nakhid's testimony on the cited page No. 40:14-23 does not establish that "[t]he Produce Supervisor at the time witnessed Plaintiff's infraction"; rather, Nakhid testified that an unidentified person, whose employment rank or position he was unable to specify, "witnessed" something referenced as "it." Nakhid also testified that he: (1) did not see "personally" the plaintiff "engage in the actions that are [described] in [part] C" of the plaintiff's Team Member Separation Form; (2) watched a "DVD" that is "supposed to be attached to this form" "show[ing]" the plaintiff; and (3) does not recall whether "any other team member witness[ed] the action in - - - that are described in part C personally, not watching the DVD." No evidence exists showing that Nakhid has personal knowledge of whether "[s]omeone" "witnessed it," assuming that by "it" Nakhid meant "the actions that are [described] in [part] C" of the plaintiff's Team Member Separation Form.

Another example of a Rule 56.1 statement unsupported by the evidence is: "When they arrived at the STL's office, Ms. Morrisey explained that 'as a result of' his theft-of-time infraction on November 30, Plaintiff 'would be fired.' (Diallo Dep. 76:11-22)." The referenced page No. 76:11-22 indicates:

> Q. What did Diane Morrisey say to you?

A. She told me she received a report. She explained herself. She had a paper like this - - I wouldn't say something like that, but paraphernalia paper just like that, and then she presented that paper to me. She explained to me what was written on it and as a result of that I would be fired. I explained to her what had happened. Well, she had already taken - - made up her mind and made a decision. They asked me to just give the apron back and my ID and my employee card.

The cited testimony does not indicate that "Ms. Morrisey explained that 'as a result of' his theft-of-time infraction on November 30, Plaintiff 'would be fired'"; rather, the plaintiff testified that "Ms. Morrisey" "explained to me what was written on [the paper]" she presented to the plaintiff. Assuming that the referenced "paper" was the plaintiff's Team Member Separation Form, that document does not indicate that the reason for separation is the plaintiff's "theft-of-time infraction." The plaintiff's Team Member Separation Form indicates that the reason for separation was "OMC – Other misconduct," explained as "[m]isrepresented time worked," which is listed under examples of conduct constituting MAJOR INFRACTIONS in the defendant's Exhibit No. 10, not "theft-of-time infraction," which is not listed in or contemplated by examples of misconduct identified under the MAJOR INFRACTIONS section of Exhibit No. 10.

Undisputed Facts

Plaintiff Thierno S. Diallo was born in Guinea, Africa. The plaintiff commenced his employment with Whole Foods in 2012, as a part-time night employee in the produce department of the Midtown East, Manhattan, store. In 2013, the defendant granted the plaintiff's request to change his part-time work schedule from the nighttime shift to the daytime shift. The plaintiff became a full-time employee in 2014. On November 30, 2015, the plaintiff worked the closing shift. On December 2, 2015, Diane Morrisey, a Store Team Leader, issued the plaintiff's Team Member Separation Form.

Title VII Claims of Discrimination Based on National Origin

The defendant does not dispute that the plaintiff: (1) is a member of protected class, namely, of Guinean national origin; (2) was qualified for his position; and (3) suffered an adverse employment action, namely, termination of his employment. The defendant contends that the plaintiff cannot establish that: (1) "he was terminated 'under circumstances giving rise to an inference of discriminatory intent'" because "Whole Foods terminated Plaintiff's employment when he was found to have committed a theft-of-time infraction, warranting immediate separation under the Company's policies"; and (2) the defendant's "reasons [for termination of his employment] were pretext" because it is undisputed that (i) the plaintiff "committed the theft-of-time infraction leading to his termination" and (ii) "the Company considers 'time theft' to be a 'major infraction' for which it consistently terminates employees, even for a single infraction."

As explained above, the defendant failed to establish that it is undisputed that the plaintiff "committed the theft-of-time infraction leading to his termination" because undisputed evidence shows that "theft-of-time" is **not** an infraction that "may lead to discharge" indicated in the defendant's policy styled "MAJOR INFRACTIONS." The defendant also failed to establish that it "consistently terminates employees" for "theft-of-time" as "a single infraction" because evidence shows that the "Reason for Separation" for: (a) Jones is "RVP – Rule/Policy Violation"; (b) Jenapierre is "OMC –Other Misconduct"; (c) Jon is "RFL – Record Falsification"; and (d) Clotter is "WPI Work Performance," none of which is "theft-of-time" or consistent with one another.

The defendant contends that, "under the 'sham affidavit doctrine,'" the plaintiff "cannot create a genuine fact issue to defeat summary judgment" by "disavow[ing]" his "admi[ssion]"

that he overstayed his break in his amended complaint and before the New York State Division of Human Rights. However, the defendant failed to identify any part of the plaintiff's declaration that contradicts the plaintiff's prior statements made under oath or penalty of perjury. The only paragraph of the plaintiff's declaration respecting the relevant events occurring on November 30, 2015, states: "On November 30, 2015 I spent some time in the Whole Foods University room before preparing for and engaging in prayers." This statement does not contradict any of the plaintiff's prior statements made under oath or penalty of perjury. Since the defendant failed to identify any statement in the plaintiff's declaration in opposition to the motion that contradicts the plaintiff's prior statements made under oath or penalty of perjury, the defendant's "sham affidavit doctrine argument" is rejected as meritless.

The plaintiff stated in his declaration in opposition to the motion that: (1) Arango subjected the plaintiff to comments and jokes on the basis of his African origin, including that he "looked Ethiopian" and needed to eat more and become bigger; (2) Nakhid called the plaintiff, but not non-African employees, disparaging nicknames to which the plaintiff objected, unsuccessfully; (3) Nakhid told the plaintiff "I am your supervisor. I could call you Negro if I wanted to"; (4) the plaintiff was denied full-time status and a promotion because he is African, while non-African employees were not denied the same; (5) the plaintiff was denied opportunities to advance, including mandatory job dialogues and pay raises, because he is African, while non-Africans were not denied the same; (6) the plaintiff complained to the defendant about its failure to provide him opportunities provided to non-African employees; and (7) the plaintiff was disciplined differently from non-African employees who engaged in the same type of misconduct of which the plaintiff was accused. In support of his opposition to the motion, the plaintiff submitted exhibits, including those showing that: (i) on December 3, 2014,

the plaintiff received an e-mail message from the defendant, confirming his interview for another position; and (ii) on February 22, 2015, the plaintiff received an e-mail message from Nakhid stating "As you all know we have a lot of people applying and we need to prescreen and narrow down candidates[.] So based on these questions we will make our decision."

In reply to the plaintiff's opposition to the motion, the defendant denies that; (a) the plaintiff was subjected to comments and jokes based on his African origin; (b) Nakhid called the plaintiff nicknames to which the plaintiff objected and told him "I am your supervisor. I could call you Negro if I wanted to." Concerning the plaintiff's statements about the defendant's denial to him of full-time status, promotion, opportunities to advance, and its imposition of discipline with respect to which he was treated differently from non-African employees, the defendant replies that they are "[d]isputed." Since the plaintiff's testimony that he was: (a) subjected to comments and jokes based on his African origin; and (b) treated differently from non-African employees are facts disputed by the defendant that are material to the fourth element of the prima facie Title VII discrimination claim, namely, "the circumstances give rise to an inference of discrimination," as well as whether the defendant's action was a pretext for discrimination, see Vega, 801 F.3d at 83, granting summary judgment on the plaintiff's Title VII discrimination claims is not warranted. Summary judgment is also not warranted on the plaintiff's Title VII claim of discrimination based on failure to promote, because the defendant's contention that the plaintiff "never actually applied for 'a specific position'" is not undisputed, in light of the plaintiff's evidence. It is also disputed whether the defendant took an adverse employment action against the plaintiff "because" the plaintiff has opposed the defendant's employment practices, given the record evidence that the plaintiff complained to the defendant about the defendant's treatment of him. Similarly, evidence is disputed that is material to the elements of the plaintiff's Title VII hostile environment claim, namely whether "the workplace is permeated with

discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." Rivera, 743 F.3d at 20. Since evidence is disputed with respect to whether the reason for the plaintiff's termination was pretext, the defendant failed to establish that summary judgment is warranted on the plaintiff's claim of retaliation, in light of the evidence in the record that the plaintiff complained about the defendant's discriminatory treatment of him. Accordingly, because summary judgment is not warranted on the plaintiff's Title VII claims, it is also not warranted on his state and municipal-law claims.

RECOMMENDATION

For the foregoing reasons, I recommend that the defendant's motion for summary judgment, Docket Entry No. 41, be denied.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Paul A. Engelmayer, 40 Centre Street, Room 2201, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Engelmayer. ***Failure to file objections within fourteen (14) days will result in a waiver of objections and will***

preclude appellate review. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

Dated: New York, New York
October 29, 2018

Respectfully submitted,

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE