UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| THIERNO S. DIALLO, | : | |
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| | : | 1:16-Civ.-9228 (PAE)(KNF) |
| Plaintiff, | : | |
| | : | |
| -against- | : | |
| | : | |
| WHOLE FOODS MARKET GROUP, INC., | : | |
| | : | |
| | : | |
| | : | |
| Defendant. | : | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Respectfully submitted,

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Defendant Whole Foods Market Group, Inc. ("Whole Foods" or the "Company"), by its attorneys Greenberg Traurig, LLP, submits this Memorandum of Law in support of its motion for summary judgment dismissing Plaintiff Thierno Diallo's Amended Complaint for Employment Discrimination, asserting claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* ("Title VII") for wrongful termination, failure to promote, harassment/hostile work environment, and retaliation on account of his Guinean (West African) national origin.[1] As detailed below, Plaintiff's claims fail as a matter of law, and should be dismissed.

## PRELIMINARY STATEMENT

Whole Foods formerly employed Plaintiff as a Team Member in the Produce Department of its Midtown East store in Manhattan. For nearly four years, from March 2012 until November 2015, Plaintiff performed his job duties without notable incident.

On November 30, 2015, however, Plaintiff committed a "theft-of-time" infraction. Specifically, Plaintiff punched out for his lunch break, took his break, punched back in, and immediately returned to "complete" his break. In other words, Plaintiff stole "Company time." This misconduct constituted a Major Infraction under Whole Foods' policies, for which the Company terminated Plaintiff's employment on December 2, 2015.

Notably, Plaintiff does not deny his misconduct. To the contrary, scarcely six months after Whole Foods properly terminated his employment for this infraction, Plaintiff informed the New York State Division of Human Rights Investigator assigned to his claim that "[h]e admits that he overstayed his break time as he is being accused of." Even now, Plaintiff confesses that immediately after punching back in from his lunch break, he "went to the bathroom and then

[1] Plaintiff's claims under the New York State Human Rights Law, Exec. Law § 290 *et seq.*, and the New York City Human Rights Law, Admin. Code § 8-101 *et seq*. [ECF Doc. No. 5 at p. 1] have been previously dismissed by the Court because "Plaintiff has elected his remedies under the New York State and New York City Human Rights Laws and is therefore barred from pursuing those claims in this Court." [ECF Doc. No. 4 at p. 5].

after that [he] went to pray." Indeed, Plaintiff states in his Amended Complaint that "the time it took me to use the restroom and to pray is the time for which I overstayed my break." In short, Plaintiff does not dispute that he committed precisely the Major Infraction for which Whole Foods terminated his employment.

Nor does Plaintiff contest – because it is incontestable – that Whole Foods consistently terminates Team Members who commit a theft-of-time infraction as Plaintiff did. Over the twelve-month period preceding Plaintiff's termination, and at the Midtown East store alone, Whole Foods terminated at least four other Team Members for the same infraction.

In the face of these undisputed facts, Plaintiff asks this Court to suppose the "real reason" Whole Foods terminated his employment was because of his Guinean national origin. Plaintiff's theories beggar belief. No jury could reasonably conclude that Whole Foods' decision to terminate Plaintiff's employment was motivated by anything other than his admitted theft-of-time infraction. As such, summary judgment is warranted.

Plaintiff's remaining theories of failure to promote, hostile environment, and retaliation scarcely merit consideration. Plaintiff concedes he never applied for (and thus was never denied) any particular promotion – a *sine qua non* of his failure to promote claim. Likewise, Plaintiff's express reliance on unspecified and "very subtle act[s]" fails as a matter of law to demonstrate a hostile work environment. And Plaintiff cannot demonstrate that Whole Foods' legitimate non-discriminatory reason for terminating his employment was a pretext for retaliatory animus.

At bottom, Plaintiff offers no facts to support any of his claims. Rather, Plaintiff asks this Court to invite a jury to pile speculation upon speculation. This is insufficient to sustain Plaintiff's claims, and those claims should therefore be dismissed.

## FACTUAL BACKGROUND[2]

Plaintiff commenced employment with Whole Foods on September 12, 2012, in the Company's Midtown East, Manhattan, store. (Diallo Dep. 35:12-21). Plaintiff began with Whole Foods as a part-time "night employee" in the store's Produce Department. (Diallo Dep. 35:22-23, 37:12-15, 38:5-6). In late 2013, Whole Foods granted Plaintiff's request to switch from the night shift to a daytime schedule. (Diallo Dep. 36:23 to 37:7, 37:16-19, 38:7-10). In or about March 2014, Plaintiff became a full-time Team Member in the Produce Department. (Diallo Dep. 39:22 to 40:8).

Although Plaintiff "had a conversation with [his] superiors" about possible promotion opportunities, Plaintiff "could not confirm with certitude" that he ever applied for any particular promotion or position. (Diallo Dep. 51:18-23, 54:16 to 55:10).

Plaintiff's Produce Team Leader ("TL," i.e., department manager) was Nathan Nakhid. (Diallo Dep. 76:5-6). Diane Morrisey was Store Team Leader ("STL," i.e., store manager) of the Midtown East store. (Diallo Dep. 47:9-14). Plaintiff acknowledged that he had a "good relationship" with Ms. Morrisey, and "didn't have any problems with her." (Diallo Dep. 92:2-6).

On November 30, 2015, Plaintiff worked the closing shift. (Diallo Dep. 64:3-8). During his shift that day, Plaintiff punched out for his 30-minute lunch break at 7:18 p.m. (Diallo Dep. 64:11 to 65:7, 66:5-8). It was later brought to Whole Foods' attention by Plaintiff's Supervisor that Plaintiff did not return to work after his break. (Nakhid Dep. 40:14-23). Instead, Plaintiff punched back in at 7:47 p.m., and "[a]fter that [he] went to the bathroom and then after that [he] went to pray." (Diallo Dep. 68:7-10). In other words, Plaintiff misrepresented to Whole Foods that he was working as of 7:47 p.m. – when in reality, he effectively remained "off the clock."

[2] Whole Foods respectfully refers the Court to its accompanying Rule 56.1 Statement of Undisputed Material Facts ("SOF") for a more detailed recital of the relevant facts.

Whole Foods considers such "theft-of-time infractions" – which are essentially stealing from the Company – to be Major Infractions warranting immediate termination of employment. (Ruiz Dep. 49:15-20, 50:11-16); (Nakhid Dep. 36:23 to 37:23, 44:13-22). Whole Foods' General Information Guide ("GIG") states that Team Members may be subject to immediate termination for "[f]alsifying reports or records, including but not limited to financial and payroll reports/timecards[.]" (Slocum Cert. Ex. 10). 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. (Slocum Cert. Exs. 4 to 7).

After confirming that video surveillance footage established Plaintiff's violation of this rule, Mr. Nakhid discussed the matter with STL Diane Morrisey. (Nakhid Dep. 41:6-9). They decided, consistent with Company policy and practice, to terminate Plaintiff's employment. (Nakhid Dep. 37:19 to 38:2).

On December 2, 2015, Mr. Nakhid found Plaintiff on the store floor and asked that Plaintiff accompany him to the STL's office. (Diallo Dep. 75:18 to 76:10). 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). Ms. Morrisey also issued Plaintiff a Team Member Separation Form on December 2, 2015. (Slocum Cert. Ex. 8). In it, she recounted Plaintiff's theft-of-time infraction as follows: "On 11/30 Thierno punched out for lunch at 7:18am. He punched back in at 7:47pm + proceeded to enter WFMU [Whole Foods Market University] Room. He left WFMU at 7:58, went to the bathroom + didn't go back upstairs until 8:11. That was 24 minutes of misrepresented time worked." *Id.*

Plaintiff signed the Separation Form and dated it December 2, 2015. *Id.* Ms. Morrisey signed it as the responsible STL, and Mr. Nakhid signed it as a witness. *Id.* *See also* (Nakhid Dep. 34:11 to 35:16).

## LEGAL ARGUMENT

### I. Defendant Is Entitled to Summary Judgment Because Plaintiff Cannot Demonstrate a Genuine Issue of Material Fact on His Claims of Discrimination, Failure to Promote, Harassment or Retaliation.

Summary judgment is warranted where "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). *Accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In short, "'[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *Howard v. City of New York*, 62 F. Supp. 3d 312, 318 (S.D.N.Y. 2014) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)) (internal quotations and citations omitted).

To survive a summary judgment motion, a party "must establish a genuine issue of fact by 'citing to particular parts of materials in the record.'" *Delaney v. Bank of America Corp.*, 908 F. Supp. 2d 498, 503 (S.D.N.Y. 2012) (Hon. Engelmayer, U.S.D.J.) (quoting Fed.R.Civ.P. 56(c)(1)). Moreover, "'[a] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment[.]'" *Id.* (quoting *Hicks v. Baines*, 593 F.3d 159, 166 (2nd Cir. 2010)). Rather, "[o]nly disputes over 'facts that might affect the outcome of the suit under the governing law' will preclude a grant of summary judgment." *Id.* (quoting *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)).

Importantly, it is "beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases," *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2nd Cir. 2001), and "trial courts should not 'treat discrimination differently from other

ultimate questions of fact[.]'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 503 (1993)). Thus, "[a]t summary judgment in an employment discrimination case, a court should examine the record as a whole, just as a jury would, to determine whether a jury could reasonably find an invidious discriminatory purpose on the part of an employer." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 102 (2nd Cir. 2001). And as the Court admonished in *McDonnell v. Schindler Elevator Corp.*, No. 12–CV–4614, 2014 WL 3512772, at *4 (S.D.N.Y. July 16, 2014), "even in the employment discrimination context, a plaintiff must do more than advance conclusory allegations to defeat a motion for summary judgment."

Here, Plaintiff's employment discrimination and retaliation claims are meritless, and are based solely on Plaintiff's own speculative beliefs. Summary judgment is therefore required.

## II. Plaintiff's Claim of Discrimination under Title VII Require Dismissal Because Plaintiff Cannot Establish that His National Origin in Any Way Motivated the Decision to Terminate His Employment.

Courts analyze Title VII claims "under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)." *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2nd Cir. 2012). "Under *McDonnell Douglas*, a plaintiff bears the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination; it is then the defendant[s'] burden to proffer a legitimate non-discriminatory reason for [their] actions; the final and ultimate burden is on the plaintiff to establish that the defendant[s'] reason is in fact pretext for unlawful discrimination." *Abrams v. Dept. of Pub. Safety*, 764 F.3d 244, 251 (2nd Cir. 2014). Ultimately, it is Plaintiff's burden to prove that his national origin "was a motivating factor" in Whole Foods' decision to terminate his employment. *Shultz v. Congregation Shearith Israel of City of New York*, 867 F.3d 298, 304 (2nd Cir. 2017).

### A. Plaintiff Cannot Establish a Prima Facie Case of Discrimination, Requiring Dismissal of His Title VII Claims.

To establish his prima facie case of discrimination under Title VII, Plaintiff must present evidence showing (1) his membership in a protected class, (2) his qualification for his position, (3) that he suffered an adverse employment action, and (4) "that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent." *Abrams*, 764 F.3d at 251-52. Here, Plaintiff cannot show that his termination "occurred under circumstances giving rise to an inference of discriminatory intent."

To the contrary, the 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. Importantly, Plaintiff does not dispute his misconduct. Plaintiff conceded to the New York State Division of Human Rights "that he overstayed his break time ***as he is being accused of***." (Slocum Cert. Ex. 9, NYSDHR Event History at WFM00026) (emphasis added). In his Amended Complaint, Plaintiff again confessed that "the time it took me to use the restroom and to pray is the time for which ***I overstayed my break***." [ECF Doc. No. 5] at 6 (emphasis added). And at deposition, Plaintiff 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." (SOF ¶ 13) (Diallo Dep. 68:7-10) (emphasis added).

In short, Plaintiff cannot establish a prima facie case because he cannot plausibly show he was terminated "under circumstances giving rise to an inference of discriminatory intent." *Abrams*, 764 F.3d at 251-52. Summary judgment is therefore warranted.

**B. Plaintiff Cannot Establish that Defendant's Legitimate Reasons Were Pretext, Requiring Dismissal of His Title VII Claims.**

Even if Plaintiff could establish his prima facie case of discrimination, his Title VII claim nonetheless requires dismissal because Plaintiff cannot "establish that the [D]efendant['s] reason is in fact pretext for unlawful discrimination." *Abrams*, 764 F.3d 251.

"It is not a court's role to second-guess an employer's personnel decisions, even if foolish, so long as they are nondiscriminatory." *Dorcely v. Wyandanch Union Free Sch. Dist.*, 665 F. Supp. 2d 178, 193 (E.D.N.Y. 2009). Under settled Second Circuit law, "[f]ederal courts do not have a 'roving commission to review business judgments[.]'" *Brierly v. Deer Park Union Free School Dist.*, 359 F. Supp. 2d 275, 291 (E.D.N.Y. 2005) (quoting *Mont. v. First Fed. Sav. & Loan Ass'n of Rochester*, 869 F.2d 100, 106 (2nd Cir. 1989)).

It is therefore insufficient for a plaintiff alleging discrimination or retaliation under Title VII merely to cast doubt upon the wisdom of the employer's decision. Rather, a plaintiff must "demonstrat[e] 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Brierly*, 359 F. Supp. 2d at 291 (citations omitted). *Accord Joseph v. Owens & Minor Dist., Inc.*, 5 F. Supp. 3d 295, 319 (E.D.N.Y. 2014); *Barney v. Con. Edison Co. of New York*, No. CV–99–823, 2009 WL 6551494, at *9-10 (E.D.N.Y. Oct. 1, 2009).

Critically, "to rebut an employer's proffered non-discriminatory rationale for its actions and withstand summary judgment, a plaintiff must present more than allegations that are 'conclusory and unsupported by evidence of any weight.'" *Brierly*, 359 F. Supp. 2d at 292 (quoting *Smith v. Am. Exp. Co.*, 853 F.2d 151, 154-55 (2nd Cir. 1988)). This is so because "[t]o allow a party to defeat a motion for summary judgment by offering purely conclusory allegations

of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases." *Meiri v. Dacon*, 759 F.2d 989, 998 (2nd Cir. 1985). The plaintiff instead has the ultimate burden to prove that the employer's reason was false and that discrimination was the real reason for the termination or action. *St. Mary's*, 509 U.S. at 511.

It is well established that a plaintiff's subjective beliefs regarding the causes of adverse employment actions are "wholly insufficient evidence to establish a claim of discrimination as a matter of law." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992). It is equally well established that an employer is not required to prove that its business decision was wise or fair as long as the decision at issue was not based upon discrimination. *See Regel v. K-Mart Corp.*, 190 F.3d 876, 880 (8th Cir. 1999) ("the employment-discrimination laws have not vested federal courts with the authority to sit as a super personnel department reviewing the wisdom or fairness of the decision except to the extent they were made for unlawful reasons") (citation omitted); *Stern v. Trustees of Columbia Univ.,* 131 F.3d 305, 315 (2nd Cir. 1997) (holding that under the business judgment rule, courts do not second-guess the reasons for an employer's employment decision absent a discriminatory reason).

Indeed, an employer's rationale may prove factually incorrect and ***still*** the plaintiff cannot survive summary judgment on this basis alone. The Second Circuit has long instructed that "[i]n a discrimination case, … we are decidedly not interested in the truth of the allegations against plaintiff. We are interested in what '*motivated* the employer,' [and] the factual validity of the underlying imputation against the employee is not at issue." *McPherson v. New York City Dept. of Educ.*, 457 F.3d 211, 216 (2nd Cir. 2006) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)) (emphasis in original). *Accord Toussaint v. NY Dialysis Services, Inc.*, 706 Fed.Appx. 44, 45-46 (2nd Cir. 2017) (affirming summary judgment dismissing race discrimination claim where plaintiff "failed to adduce any evidence that [employer] did not

sincerely believe [witness]'s account or that otherwise would permit a reasonable factfinder to conclude that race was the real reason for [plaintiff]'s termination"); *Howell v. Montefiore Medical Ctr.*, 675 Fed.Appx. 74, 75 (2nd Cir. 2017) (affirming summary judgment dismissing Title VII claim where "[t]he evidence on which [plaintiff] relies does not bear on [employer]'s motivation and does not suggest that [employer]'s investigation was conducted in bad faith"); *Vasquez v. New York City Dept. of Educ.*, 667 Fed.Appx. 326, 327 (2nd Cir. 2016) (affirming summary judgment dismissing employment discrimination claim where plaintiff merely "takes issue with a number of the allegations levied against him").

Here, Whole Foods determined that Plaintiff had committed a theft-of-time infraction which, under Company policies, warrants immediate dismissal. Whole Foods' General Information Guide ("GIG") states that Team Members may be subject to immediate termination for "[f]alsifying reports or records, including but not limited to financial and payroll reports/timecards[.]" (Slocum Cert. Ex. 10). Indeed, Whole Foods has demonstrated that it consistently terminates Team Members who engage in the type of misconduct in which Plaintiff engaged. Specifically:

a. On December 17, 2014, Whole Foods terminated Lamell Jones for a theft-of-time infraction. (Slocum Cert. Ex. 4, Lamell Jones Team Member Separation Form). Whole Foods recounted Jones' infraction as follows: "On 12.13 … [a]t 6:07am, Lamell left the department, left the store and went to McDonalds to get some food. He came back to the store at 6:21 and didn't return to the department until 6:40. He was gone from the department for 33 minutes. Lamells [sic] lunch punches were 10:46-11:13 so this original break represents 18 minutes of stolen time." *Id.*

b. On March 9, 2015, Whole Foods terminated Thierry Jeanpierre for a theft-of-time infraction. (Slocum Cert. Ex. 5, Thierry Jeanpierre Team Member Separation Form). Whole Foods recounted Jeanpierre's infraction as follows: "On 3/2 Thiery [sic] was scheduled for 2am. He did not punch in. He walked in at 2:13 + filled timekeeper out for 2am. On 3/3 he was scheduled for 2am. He did not punch in. He walked in at 2:13 + filled timekeeper for 2am. …

[These] instances were time theft + falsifying document/timekeeper – subject to separation." *Id.*[3]

c. On July 30, 2015, Whole Foods terminated Jemilla John for a theft-of-time infraction. (Slocum Cert. Ex. 6, Jemilla John Team Member Separation Form). Whole Foods recounted John's infraction as follows: "On 7/23/15 Jemilla was scheduled to come in at 6:00am. Jemilla did not punch in and handed a timekeeper stating she came in at 7:00am but in fact came in at 7:41am. According to the GIG falsifying reports or records, including financial and payroll reports/timecard, is a major infraction and grounds for separation." *Id.*

d. On November 4, 2015, Whole Foods terminated Victor Clotter following a theft-of-time infraction. (Slocum Cert. Ex. 7, Victor Clotter Team Member Separation Form). Whole Foods recounted Clotter's infraction as follows: "[H]e was seen using his phone while on the clock and taking extra time on his breaks." *Id.*.

Whole Foods' witnesses consistently – and without rebuttal – testified that a theft-of-time infraction is in and of itself grounds for immediate discharge. Plaintiff's Produce Team Leader at Midtown East, Nathan Nakhid, testified that theft of time is "a major infraction, which is listed in our GIG [General Information Guide] book policy. This is misrepresentati[on] of time. … It's black and white in the GIG book." (SOF ¶ 18) (Nakhid Dep. 36:23 to 37:23). Whole Foods' Team Member Services Coordinator for the Northeast Region, Ariana Ruiz, likewise testified that the Company considers "time theft" to be a "major infraction" for which it consistently terminates employees, even for a single infraction. (SOF ¶ 17) (Ruiz Dep. 49:7-20, 50:11-16).

Moreover, Plaintiff ***does not and cannot dispute*** that he committed the theft-of-time infraction leading to his termination. At deposition, Plaintiff repeatedly conceded that he cannot contest Whole Foods' conclusion that he punched back in from his break, and proceeded to take 24 additional minutes of personal time before returning to work. Plaintiff testified:

[3] Whole Foods anticipates Plaintiff will seek to argue that Jeanpierre was not terminated as a result of his first theft-of-time infraction. Any such argument is misplaced. The record is undisputed that Jeanpierre was terminated within one week of his committing his first theft-of-time infraction, during which week he was caught committing a second such infraction.

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.

Q. After you punched back in?

A. I don't recall if it was before or after.

(Diallo Dep. 68:7-12).

Q. So is it possible that you went to pray after you had already punched back in?

A. As I said earlier, I don't recall. Either way, I could have done it before or after. Both cases are possible, but as I said, I don't recall.

Q. Do you recall if you entered the Whole Foods Market U room before or after you punched in?

A. I could not say exactly, but I do recall that I went there because that's where I take my break – that's where I went when I took my break.

Q. Do you recall if you went to the bathroom before or after you punched back in?

A. I did go to the bathroom. I can't recall if it was before or after. I cannot confirm because I have some doubt and it was a long time ago. I cannot deny or confirm.

(Diallo Dep. 69:18 to 70:12).

Q. Is it your position that you did all of those things during your break?

…

A. In fact, what I want to say is I don't recall exactly, but I know that's what I've done.

(Diallo Dep. 73:7-11).

Q. Did you, in fact, do all of those things before punching back in?

…

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Moreover, there is no evidence to suggest that Whole Foods would not have terminated Jeanpierre absent his committing a second theft-of-time infraction.

> A. I cannot say with certitude that I did before or after because it's been two years. These are not experiences that I want to ruminate in my mind. I just want to forget about them.
>
> (Diallo Dep. 78:15-22).

Notably, Plaintiff's reliance on the passage of time appears to be wholly self-serving. Event History notes prepared by the New York State Division of Human Rights investigator reflect that on June 1, 2016 – a mere six months following his termination – Plaintiff "admits that he overstayed his break time ***as he is being accused of***." (Slocum Cert. Ex. 9, NYSDHR Event History with Comments, at WFM00026) (emphasis added). Even in his Amended Complaint, Plaintiff admits that he "overstayed [his] break." [ECF Doc. No. 5] at 6. Should Plaintiff now try to disavow these prior admissions, under the "sham affidavit doctrine" such disavowals cannot create a genuine fact issue to defeat summary judgment. *See, e.g., Brown v. Henderson*, 257 F.3d 246, 252 (2nd Cir. 2001) ("factual allegations that might otherwise defeat a motion for summary judgment will not be permitted to do so when they are made for the first time in the plaintiff's affidavit opposing summary judgment and that affidavit contradicts h[is] own prior deposition testimony").

Against the undisputed evidence, Plaintiff cannot remotely meet his burden to demonstrate that Whole Foods' legitimate non-discriminatory reason is merely a pretext to mask the Company's discriminatory animus against Plaintiff because of his national origin. Plaintiff offers no evidence from which a jury could reasonably find in his favor. Dismissal of his Title VII claim is therefore warranted.

## III. Plaintiff's Claims for Failure to Promote, Hostile Work Environment and Retaliation Are Likewise Meritless.

### A. Plaintiff Cannot Sustain His Failure to Promote Claim.

Plaintiff's failure to promote theory requires that he establish "'[that] he applied for a specific position or positions and was rejected therefrom, rather than merely asserting that on

several occasions … he generally requested promotion.'" *Moore v. Metropolitan Transp. Auth.*, 999 F. Supp. 2d 482, 496 (S.D.N.Y. 2013) (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981)). As the Second Circuit explained in *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2nd Cir. 1998), "[t]his general mandate ensures that, at the very least, the plaintiff employee alleges a particular adverse employment action, and instance of alleged discrimination, by the employer." *Accord Kinsella v. Rumsfeld*, 320 F.3d 309, 314-15 (2nd Cir. 2003) (plaintiff failed to establish failure to promote claim where he alleged "merely that he repeatedly requested a promotion" but did not demonstrate "that he applied for specific positions"); *Lalanne v. Begin Managed Programs*, 346 Fed. Appx. 666 (2nd Cir. 2009) (affirming summary judgment for employer where plaintiff "asserts only that he sent a resume to the human resources department; he identifies no position for which he actually applied and was rejected").

Here, Plaintiff cannot advance a failure to promote claim. At deposition, Plaintiff admitted that he never actually applied for "a specific position … and was rejected therefrom." Plaintiff testified that, at most, he "had a conversation with [his] superiors" about the possibility of promotion generally. (SOF ¶ 8). But Plaintiff admitted that he never actually applied for (let alone was denied) any particular promotion. Plaintiff testified:

> Q. Did you ever apply by specifically filling out an application for any other position?
>
> A. Not to fill out, but – in fact, I'm not sure. I'm not sure if I filled it out or not, but I know that I had a conversation with my superiors as I should have.
>
> Q. About what kind of position?
>
> A. For a while I wanted to change to work in the department of Whole Body.
>
> …
>
> Q. Did you ever fill out an application?
>
> A. I don't recall but there's a process for that.

…

Q. Were there any other positions that you applied for or wanted to apply for besides this Whole Body position?

A. I don't recall exactly. I must have applied for some other position but I could not confirm with certitude that I did.

(Diallo Dep. 51:18 to 54:21).

This is insufficient. *Brown*, 163 F.3d at 710; *Kinsella*, 320 F.3d at 314-15; *Lalanne*, 46 Fed. Appx. 666. Plaintiff's failure to promote claim warrants dismissal.

**B. Plaintiff Cannot Establish His Hostile Work Environment Claim.**

To advance his hostile work environment claim, Plaintiff "must produce enough evidence to show 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 (2nd Cir. 2014) (internal quotations omitted). *Accord Shultz Congregation Shearith Israel of City of New York*, 867 F.3d 298, 309 (2nd Cir. 2017). "In considering whether a plaintiff has met this burden, courts should 'examin[e] 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.'" *Rivera*, 743 F.3d at 20 (quoting *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745 (2nd Cir. 2003)).

Plaintiff must meet both an objective and a subjective component. In other words, "'the 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.'" *Rivera*, 743 F.3d at 20 (quoting *Alfano v. Costello*, 294 F.3d 365, 374 (2nd Cir. 2002)). *Accord Feingold v. New York*, 366 F.3d 138, 150 (2nd Cir. 2004). And "[o]f course, '[i]t

is axiomatic that mistreatment at work, whether through subjection to a hostile environment or through [other means], is actionable under Title VII only when it occurs because of an employee's … protected characteristic,' such as race or national origin." *Rivera*, 743 F.3d at 20 (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2nd Cir. 2001)).

Plaintiff falls woefully short of meeting his heavy burden to establish a hostile work environment. Plaintiff testified at deposition that he bases his claim on supposed "very subtle act [sic] that happens." When asked to identify the particular "subtle acts" he alleges, he could not even do so: "[T]hose are things that I would prefer to forget and I don't think it's good for me to have to relive those things all the time." (Diallo Dep. 105:5-14). This is patently insufficient to support Plaintiff's hostile work environment claim. *See, e.g., McDonald v. U.S. Postal Service Agency*, 547 Fed. Appx. 23, 26 (2nd Cir. 2013) (affirming summary judgment for employer where plaintiff offered no evidence alleged "remarks were 'sufficiently continuous and concerted in order to be deemed pervasive'"); *Kouakou v. Fideliscare New York*, 920 F. Supp. 2d 391, 398-99 (S.D.N.Y. 2012) (allegation that supervisor "once called [plaintiff] an 'Africano Negro'" were insufficient to "create an inference" of discriminatory animus based on plaintiff's national origin); *Katzev v. Retail Brand Alliance, Inc.*, 2010 WL 2836159 * 3 (S.D.N.Y. July 7, 2010) (granting summary judgment for employer where "the conduct alleged does not objectively create an environment that a reasonable person would find hostile or abusive"). Plaintiffs' hostile work environment claim thus fails.

**C. Plaintiff Cannot Establish His Retaliation Claim.**

Claims of retaliation are analyzed under the same *McDonnell Douglas* burden-shifting framework applicable to Plaintiff's underlying discrimination claim. *See Tomka v. Seller Corp.*, 66 F.3d 1295, 1308 (2nd Cir. 1995) (applying the *McDonnell Douglas* test to retaliation claim under Title VII); *Hicks v. Baines*, 593 F.3d 159, 164 (2nd Cir. 2010). In order to establish a claim

of retaliation, each Plaintiff must demonstrate that: (1) he engaged in protected activity; (2) his employer was aware of this activity; (3) he suffered an adverse employment action; and (4) there exists a causal connection between the protected activity and the adverse employment action. *Gordon v. New York City Bd. of Educ.,* 232 F.3d 111, 116 (2nd Cir. 2000); *Sarmiento v. Queens College CUNY*, 2005 WL 2840269, * 2 (2nd Cir. Oct. 28, 2005); *Chan v. NYU Downtown Hospital*, 2006 WL 345853 (S.D.N.Y. Feb. 14, 2006). In other words, to prevail on his Title VII retaliation claim, Plaintiff must ultimately prove that "retaliation was a substantial reason" for his being separated. *Hicks*, 593 F.3d at 164. *Cf. Jute v. Hamilton Sundstand Corp.*, 420 F.3d 166, 173 (2nd Cir. 2005). Under the burden-shifting framework, "after the defendant has articulated a non-retaliatory reason for the employment action, the presumption of retaliation arising from the establishment of the prima facie case drops from the picture." *Zann Kwan v. Andalex Group LLC,* 737 F.3d 834, 845 (2nd Cir.2013).

Then, in order to survive summary judgment, Plaintiffs would need to provide enough evidence for a reasonable jury to find that retaliation was the "but-for" cause of these disciplinary actions. *Univ. of Tex. Sw. Med. Ctr.,* 133 S.Ct. at 2533–34. This "burden requires [the plaintiff] to show more than the possibility of retaliatory animus." *Puglisi v. Town of Hempstead, Dep't of Sanitation,* No. 12–cv–3815, 2013 WL 5663223, at *1 (2nd Cir. Oct. 18, 2013) (citing *Univ. of Tex. Sw. Med. Ctr.,* 133 S.Ct. at 2528). No reasonable jury could find that Plaintiffs' evidence meets this substantial burden.

Plaintiff cannot establish that any allegedly protected activity in which he engaged somehow motivated the Company's decision to terminated Plaintiff for his admitted theft-of-time infraction. As detailed above, the evidence is overwhelming that Plaintiff's misconduct was the sole reason Whole Foods terminated his employment. This claim too thus fails.

## CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its motion for summary judgment, and dismiss Plaintiff's Amended Complaint, in its entirety and with prejudice.

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Respectfully submitted,
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