

# 09-4279-cv

*To Be Argued By:*  
DAVID C. NELSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket No. 09-4279-cv**

—————  
JOSIER JEUNES,

*Plaintiff-Appellant,*

-vs-

JOHN E. POTTER, POSTMASTER GENERAL,

*Defendant-Appellee.*

—————  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Statement of Jurisdiction**

The district court (Fitzsimmons, M.J.) had subject matter jurisdiction over this civil case pursuant to 28 U.S.C. § 1331. The parties consented to Magistrate Judge jurisdiction on February 4, 2009. JA at 4. Judgment entered on October 1, 2009. JA 5. On October 15, 2009, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). JA 5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue  
Presented for Review**

Did the district court properly grant summary judgment in favor of the defendant-employer in a Title VII case when the defendant-employer terminated the plaintiff-employee after the plaintiff-employee swore at and challenged a co-worker to a fight?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-4279-cv**

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JOSIER JEUNES,

*Plaintiff-Appellant,*

-vs-

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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### **BRIEF FOR THE UNITED STATES OF AMERICA**

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#### **Preliminary Statement**

Jeunes was a rural postal carrier working in the New Fairfield Post Office in Connecticut. On October 26, 2007, as Jeunes was walking out the door of the Post Office to deliver mail, Thomas Nichols, one of Jeunes' co-workers, called out to him. Nichols told Jeunes that a parcel had been left behind in a bin. In response, Jeunes snapped and began cursing at him and challenged him to a fight. The Postal Service conducted an investigation, interviewed the witnesses to the incident, and decided to terminate Jeunes' employment. Jeunes filed suit alleging

that the Postal Service discriminated against him on the basis of his race (African-American), color (black), and national origin (Haitian). The district court granted summary judgment in favor of the Postal Service and ruled that Jeunes could not prove discrimination because he could not prove that the Postal Service's legitimate non-discriminatory reason for terminating his employment was a pretext for discrimination. Specifically, the district court found that the Postal Service's investigation showed that Jeunes was the instigator and aggressor in the dispute with Nichols, and that the Postal Service was entitled to rely on its investigation into the incident. Jeunes now appeals, claiming that the district court erred in granting summary judgment to the Postal Service.

For the reasons that follow, the district court properly granted summary judgment.

### **Statement of the Case**

This is a civil appeal from a final judgment granting summary judgment by the United States District Court for the District of Connecticut (Holly B. Fitzsimmons, M.J.). The district court entered summary judgment in favor of the defendant-appellee John E. Potter, Postmaster General, on the Title VII claim. JA at 5.

Jeunes brought this action as a disparate treatment claim under Title VII, 42 U.S.C. § 2000e *et seq.*, against John E. Potter, Postmaster General. This action arises from an incident that occurred during his employment with the United States Postal Service in New Fairfield,

Connecticut. Jeunes alleges that the Postal Service discriminated against him in violation of Title VII. The district court granted the Postal Service's motion for summary judgment and entered judgment on October 1, 2009. JA at 5. Jeunes appealed this decision on October 15, 2009. JA at 5.

### **Statement of Facts and Proceedings Relevant to this Appeal**

The following facts are taken from the district court's opinion unless otherwise noted. The district court held that "Plaintiff admitted to the facts set forth in paragraphs 1-35, 37-56 and 58-63, of defendant's Local Rule 56(a)(1) Statement. Plaintiff 'agreed in part' to information contained in paragraphs 6, 8, 25, 38 and 57 and that information has been included in these findings." JA at 320, fn.1.

#### **A. Background**

Josier Jeunes is a black, African-American male of Haitian origin. JA at 320. He worked for the United States Postal Service ("Postal Service") as a regular rural carrier in the New Fairfield, Connecticut Post Office. JA at 320. He was supervised by Jacob Williams, the manager of customer services, who is a brown-skinned Asian male. JA at 320. Beneath Williams, but above Jeunes, was Walter Gasiewski, the supervisor of customer services, who is a white male. JA at 320-21. Jeunes' co-workers included Wayne Garcia, Patricia Lamson, Vincenzo Gentili, John Coscia, and Thomas Nichols. JA

at 321. Nichols is a white male and works as a rural carrier associate at the New Fairfield Post Office. JA at 321. On October 26, 2007, Jeunes got into a dispute with Nichols.

**B. The October 26, 2007, dispute**

Around 11:00 a.m. on October 26, 2007, Jeunes engaged Nichols in an argument. JA at 321. Williams did not witness the dispute, but he immediately began an investigation to determine what happened. JA at 321. The investigation included interviews and witness statements.

Nichols provided a written statement to the Postal Service. JA at 321. The district court found that he made the following statement:

[A]t approximately 11:00AM Josier was loading his vehicle to go on the road . . . . I was casing mail and told him I put a small parcel in the throw-back case that was his, if he wanted to take it out. I didn't think he hear [sic] me . . . . I was standing in front of my case and told him I wasn't sure if he heard me and repeated the information about the small parcel. His reaction was "why you fucking bothering me. Whats [sic] your fucking problem." I told him I simply wanted to let him know. [Josier] said "I already pulled down you fucking asshole" and continued cursing at me. I stood in front of my case in shock, not knowing what this was all about. At this point Wayne [Garcia] stood in front of me trying to calm down

the situation. Wayne and I were at the case and Josier was near the restrooms. I told Josier that I believed there was a zero tolerance for cursing in the Post Office. He said “so report me[.]” I said I would and [Josier] said “do what you gotta do[.]” I said I would.

At this point [Josier] became more threatening egging me on to go outside. When I wouldn't go, he called me a fucking pussy. [Josier] now walked to the stairs, still cursing me and calling me a fucking pussy because I wouldn't go outside. I stood near my case with Wayne [Garcia] letting Josier know I was gonna report this nonsense. He just kept calling me a fucking pussy and telling me “Do what you gotta do.” Then he left.

I'm a 57 year old man being threatened by a 31 year old man simply for doing my job[.] To be cursed and screamed at so loudly in a work place by a co-worker that you never had a problem with is not only strange[] but embarrassing.

JA at 321-322. Nichols was also interviewed by Gasiewski. JA at 322. Gasiewski's statement read as follows.

At approximately 11:00 Friday morning Tom Nichols and Josier Jeunes were involved in an altercation which resulted in a verbal shouting match. I interviewed Tom Nichols at 12:00 this day and Tom told me the following:

Tom received a unscannable small parcel in his parcel hamper that was not for his route, but was for Josier[’s] route. Josier had already pulled down his case and was outside loading his truck. Tom put this parcel in the throwback case. When Josier came back inside . . . Tom told [Josier] that he put a parcel for [Josier’s] route in the throwback case. Josier never acknowledged Tom. Tom, thinking Josier didn’t hear him, again told Josier about this parcel. Josier then told Tom to shut up and mind his own business. Josier told Tom that he already pulled down his case and loaded his truck and exploded into a stream of profanities directed at Tom. Tom stated that Josier got very mad and the two of them came together and Josier told Tom to do what he had to do, and told Tom to step outside. When Tom didn’t Josier continued with . . . the profanity. As the two came together there was no physical contact, just the verbal shouting. Upon hearing this shouting a window clerk Wayne Garcia came running back and stepped in the middle of them and told them both to break it up. Josier then left to go to the street to deliver his mail and Tom went back to his case. Tom Nichols stated that he didn’t do anything to antagonize Josier, but was very courteous, in telling Josier where he put his package. According to Tom, Josier just exploded into a rage at no fault of Tom’s. Tom states he played it cool, and never used any profanity directed or did anything to antagonize Josier during this altercation.

JA at 323.

The other witnesses largely corroborated Nichols' statements. Lampson's written statement read as follows:

Tom [N]ickels [sic] said, "Josier, I found some parcels that are yours, I put them in the throw back case[.]" Josier failed to respond. Tom tried to explain courteously, but the situation continued to escalate. From what I remember, Josier replied by saying the following, "Just leave me alone, why are you fucking with me. You fucking asshole fuck you, you want to bring it on, come on!" Josier continued to engage in a verbal fight with [T]om. Josier repeated multiple times, "bring it on pussy[.]" Josie made it clear he was willing to fight Tom. During this altercation, Tom never left his case and he never proceeded to use foul language. Wayne Garcia asked Josier to, "Quiet down[.]" Josier continued to verbally intimidate [T]om. Wayne Garcia then told Josier to, "Leave the building before you get fired[.]" For everyone's safety, I called the Danbury Post Office to alert them of the event that had occurred. Josier left the building. During this event I was ready to call 911. This behavior is totally uncalled for and is disturbing in the workplace. I feel uncomfortable to work with an individual knowing that a situation like this may occur again.

JA at 324. Williams, upon reviewing Lampson's statement, asked her to elaborate why she felt uncomfortable working with Jeunes "knowing it might happen again." JA at 324. Lampson responded to Williams and explained that

In the past, Josier Jeunes was taken out in handcuffs by the Police and arrested from New Fairfield Post Office because of his behavior outside the post office. When Josier is confronted by the management on different issues at work, he had a tendency to get angry. When he gets angry, he slams mail in to the case hard, argues with the management and walks out. The anger and the body language he projects is disturbing in the work place and has risen to another level.

JA at 325.

Gentili's statement was similar to Nichols's and Lampson's statements. JA at 325-326. He stated:

Tom [Nichols] said ["I found a small parcel it's in [the] throwback case, if you want [it] it's there if you don't want it it's there."] Josier was at the clock and this is what I heard. That I can remember, ["Bring it on."] He said with open arms like he wanted to fight. ["I'm not scared, pussy."] I remember Wayne [Garcia] coming to calm things down. [Garcia] said ["quiet down and leave the building."] Tom never left his

case. Patty [Lamson] called on phone, Josier left the building.

JA at 325-326.

Coscia, another of the co-workers, also provided a written statement to the Postal Service. He wrote that “Tom Nichols informed Josier that he had one of Josier’s parcels, and Josier became very annoyed and belligerent.” JA at 326.

Williams, as part of his investigation, also interviewed Garcia. Williams kept notes of his interview with Garcia, which read as follows:

Wayne [Garcia] stated that he was taking care of a customer at the window and hear loud shouting. He finished the transaction he was working on and came down to the area where the shouting was going on.

Wayne doesn’t know how this got started but heard profanity being used. Wayne also stated that he heard the “F” and “P” word. Wayne didn’t hear Tom Nichols using profanity. Wayne said he got in between the 2 individuals and asked Josier to leave to the street and asked Tom Nichols to face the case.

JA at 326.

Jeunes had no independent evidence to dispute the witness statements. In the Postal Service's Local Rule 56(a)1 statement, the Postal Service stated "28. Outside of his own personal recollection of the incident, Jeunes has no evidence that anyone gave false statements." JA at 53. Jeunes, in his Local Rule 56(a)2 statement, agreed with the Postal Service's statement. JA at 255. The district court explicitly relied on Jeunes agreement, holding that Jeunes had no evidence, outside his personal recollection of the events, that anyone gave a false statement. JA at 327.

### **C. The Postal Service's response**

The Postal Service placed Jeunes in unpaid emergency off-duty status on October 29, 2007. JA at 327. Shortly thereafter, on November 7, 2007, Williams conducted a Pre-Disciplinary Interview ("PDI") regarding the dispute. JA at 328. Jeunes answered Williams' questions and disputed the accuracy of the witness statements. JA at 328. During the PDI, Jeunes admitted that he swore at Nichols. JA at 328-329. He also admitted that he was aware of the Postal Service's Zero Tolerance Policy. JA at 328.

The Postal Service has a written policy regarding violence, which it calls its Zero Tolerance Policy. It states, in relevant part, that "there will be zero tolerance of acts or threats of violence in our workplace" and that "any act of physical violence," "any actual, implied, or veiled threat made seriously or in jest," and "any type of vulgar language which would lead to a hostile workplace" are covered by the policy. JA at 328. A copy of this policy

was permanently placed on the bulletin board of the New Fairfield Post Office on February 26, 2007. JA at 328.

Williams fired Jeunes and issued a notice of removal on November 20, 2007. JA at 329. Williams relied on Jeunes' disciplinary record, including: (1) a 7-day paper suspension on July 26, 2007, for attendance issues, poor work performance, and failure to follow instructions; (2) a 14-day paper suspension on March 3, 2007, for failing to follow instructions; (3) a 7-day paper suspension on November 28, 2006, for attendance issues; and (4) a letter of warning on April 25, 2006, for attendance issues. JA at 329-330. Notably, Williams testified in his EEO affidavit that Jeunes' "next step of progressive discipline was removal, but I would have issued him a removal for these charges regardless of progressive steps because of the seriousness of [Jeunes'] actions in this case." JA at 184.

The district court made a factual finding regarding Williams' motivation for terminating Jeunes' employment. In its opinion, the district court specifically held that:

Williams testified in his EEO affidavit that after reviewing the witness statements, conducting a Pre-Disciplinary Interview with Jeunes, and talking with the supervisor, Walter Gasiewski, who was covering on October 26, 2007, he found that Jeunes used profanity and violated the Zero Tolerance Policy by threatening Nichols with physical violence, while Nichols was neither profane nor threatening towards Jeunes. Williams found no basis for issuing discipline to Nichols.

JA at 329. Williams had set forth these reasons in his EEO affidavit, which was the Postal Service's summary judgment exhibit 4. Williams' reasons were incorporated into the Postal Service's Local Rule 56(a)1 statement as paragraph 36. The district court went on to explain in footnote three that

Although plaintiff denies this Local Rule 56(a)(1) statement [paragraph 36], the Court reviewed defendant's exhibit 4 and the information is accurately stated. Plaintiff offered no evidence to show that Williams provided a false statement to the EEO and plaintiff offered no other evidence to show the facts are disputed. Accordingly, the Court deems paragraph 36 admitted. *See Eiden v. McCarthy*, 531 F. Supp. 2d 333, 338 (D. Conn. 2008).

JA at 329, fn.3.

**D. The district court grants summary judgment to the Postal Service**

By ruling dated September 3, 2009, the district court granted the Postal Service's motion for summary judgment on Jeunes' Title VII disparate treatment claim.<sup>1</sup> The

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<sup>1</sup> The Postal Service had also moved for summary judgment on Jeunes' Title VII hostile work environment claim and on the affirmative defense of failure to mitigate. The district court held that it did not need to reach the issue of  
(continued...)

district court analyzed the claim under the *McDonnell Douglas* burden shifting analysis. JA at 331-332. The district court held that the Postal Service did not contest the first three prongs of the prima facie case and that the Postal Service provided a legitimate, non-discriminatory reason. JA at 332.

The Postal Service's legitimate, non-discriminatory reason for terminating Jeunes' employment was Jeunes' conduct on October 26, 2007. JA at 333. As the district court noted,

Williams concluded, after reviewing the witness statements of the incident, conducting a Pre-Disciplinary Interview with Jeunes, and talking with Walter Gasiewski, the supervisor who was covering on October 26, 2007, that Jeunes had used profanity and violated the Zero Tolerance Policy by threatening Nichols with physical violence, while Nichols was neither profane nor threatening towards Jeunes.

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<sup>1</sup> (...continued)

mitigation because it had found for the Postal Service on the Title VII claim. The district court, therefore, denied the motion for summary judgment on mitigation as being moot. JA at 343-344. As to the Title VII hostile work environment claim, Jeunes clarified in his reply brief that he was not claiming that he suffered a hostile work environment. JA at 343. The district court denied summary judgment on the hostile work environment claim as moot. JA at 343.

JA at 333.

Jeunes made several arguments but the district court ultimately held that none of his arguments proved that the Postal Service's legitimate non-discriminatory reason was a pretext for discrimination. Jeunes argued that an inference of discrimination could be drawn from the fact that Garcia did not give a written statement (he was interviewed by Williams), but the district court held that Jeunes offered no evidence that "Williams' statement inaccurately records the interview with Garcia, nor does plaintiff provide an affidavit from Garcia to suggest that his interview statement is a false or inaccurate record." JA at 334-335.

Jeunes also argued that the Postal Service failed to interview three witnesses, specifically Alan Paradise, Jennifer Figueras and Gilson Almeida. JA at 334. These witnesses were identified by Jeunes for the first time in a affidavit attached to his opposition to the Postal Service's motion for summary judgment. JA at 321. The district court rejected this argument for two reasons. First, the district court found that Jeunes offered no evidence of what the three individuals witnessed. JA at 335. Thus, the district court had no evidence that the three individuals had any different perception than the individuals interviewed by the Postal Service. JA at 335. Second, the district court found that these three witnesses were not disclosed in response to interrogatories and were not disclosed in Jeunes' deposition. The district court specifically held that the Postal Service had asked Jeunes to list all witnesses in the Postal Service's interrogatories

and Jeunes failed to list Paradise, Figueras, or Almeida as witnesses. JA at 335-336. Because these witnesses were not disclosed and because there was no evidence that their perception differed from the other witnesses, the district court rejected this argument.

Jeunes also argued that the district court could draw an inference of discrimination because he was treated differently from Nichols. Jeunes argued that an inference of discrimination could be drawn because he was the only one disciplined for the incident. The district court held that “[t]he first problem with this analysis is that plaintiff has not provided any evidence that Nichols provoked/instigated the incident other than his own self-serving affidavit and conclusory deposition testimony.” JA at 337-338. The district court also noted that Jeunes “had several disciplinary actions against him and termination of employment was the next step in his progressive discipline. There is no evidence that Nichols had a disciplinary record with the Postal Service.” JA at 338. In addition, the district court held that Jeunes admitted to using profanity whereas Nichols did not and no witnesses stated that Nichols was profane. JA at 338-339. The district court held, therefore, that Jeunes failed to prove that he was similarly situated to Nichols such that an inference of discrimination could be drawn. JA at 339.

Jeunes also argued that Dean Perry and Chris Witkosky were comparators. Jeunes alleged that Perry and Witkosky were white men who were involved in an altercation in 2001. JA at 342. Perry and Witkosky were supervised by Marie Saputa. JA at 342. The district court rejected this

argument because Jeunes provided “no information about Perry and Witkosky, their disciplinary histories, the circumstances of the 2001 incident, or the details of the Postal Service investigation, if any. Further, Marie Saputa, a different supervisor, was responsible for disciplining these two men.” JA at 342.

The district court reasoned that “[i]n determining whether a plaintiff has produced sufficient evidence of pretext, the key question is not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred . . . .” JA at 339.<sup>2</sup> The district court concluded:

Plaintiff may disagree with the statements considered by the Postal Service, but the Postal Service is nonetheless entitled to rely upon its investigation in making business judgment determinations. “[F]ederal courts are not in the business of adjudging whether employment decisions are prudent or fair. Instead, [a federal court’s] sole concern is whether unlawful

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<sup>2</sup> In support of this proposition, the district court cited *Macias Soto v. Core-Mark Int’l, Inc.*, 521 F.3d 837, 842 (8th Cir. 2008), as well as *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 496 (D.C. Cir. 2008); *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598 (6th Cir. 2007); *Griel v. Franklin Med. Ctr.*, 234 F.3d 731, 732 (1st Cir. 2000) (per curiam); and *Chinander v. Andersen Windows, Inc.*, No. 07-4565 (DWF/AJB), 2008 U.S. LEXIS 96354, \*12 (D. Minn. Nov. 26, 2008).

discriminatory animus motivates a challenged employment decision.” *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (quoting *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002)). Jeunes argues that the Postal Service should have believed him over the numerous witnesses; however, he is not allowed to substitute his judgment for that of the Postal Service. The witness statements considered during the investigation of the incident provide one version of the event. Apart from Jeunes’ personal recollections of the incident, he has presented no evidence that any of the statements provided by his co-workers were false or that the decision to terminate his employment was linked to the claimed grounds of discrimination. *Id.* There is nothing in the record to indicate that the Postal Service’s investigation and/or the decision to terminate Jeunes’ employment was motivated by his race or ethnicity.

JA at 341.

### **Summary of Argument**

The district court correctly held that Jeunes could not show that the Postal Service’s reason for terminating his employment was false and that discrimination was the real reason. The district court properly held that the issue was whether the Postal Service reasonably believed the version of events disclosed by its investigation and whether the Postal Service was entitled to rely on its investigation.

Because all of the witnesses indicated that Jeunes was the aggressor in the dispute, the Postal Service had a legitimate reason, unrelated to Jeunes' protected categories, for terminating Jeunes' employment. The district court properly disregarded Jeunes' argument that summary judgment was improper because there were three other co-workers who witnessed the incident (Alan Paradise, Jennifer Figueras and Gilson Almeida). There was no evidence in the record demonstrating what these witnesses' testimony would have been, and they had not been disclosed in discovery.

The district court also properly held that Thomas Nichols was not a proper comparator from which an inference of discrimination could be drawn. The eyewitnesses to the events all confirmed that Jeunes was the aggressor and that Nichols was not at fault. Because the Postal Service could reasonably rely on its investigation, it was entitled to discipline Jeunes but not Nichols. There was no evidence to show that this reliance was a pretext for discrimination, and so the district court properly entered summary judgment in favor of the defendant-employer.

## **Argument**

### **I. The district court properly granted summary judgment to the Postal Service.**

#### **A. Relevant facts**

The facts pertinent to consideration of this issue are set forth in the “Statement of Facts” above.

#### **B. Governing law and standard of review**

##### **1. Standard governing summary judgment**

This Court reviews *de novo* a district court’s grant of summary judgment. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 46 (2d Cir. 2007) (citing *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 85 (2d Cir. 2006)).

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when a review of the entire record demonstrates “that there is no genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The relevant question is not whether the non-moving party has provided any evidence, but

whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the

jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (internal quotation marks omitted). In determining whether there is a genuine issue of material fact, the court must resolve ambiguities and draw factual inferences in favor of the non-moving party. *Id.* at 255.

Although the Court has a duty to resolve ambiguities in favor of the non-moving party, “[a] defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial.” *Parker v. Sony Pictures Entm’t, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001). When the moving party points to an absence of evidence regarding an essential element, the non-moving party must “show the presence of a genuine issue by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existence of that element at trial.” *Grain Traders v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998).

On summary judgment, the Court’s “obligation to draw all reasonable inferences in favor of plaintiffs does not mean [the Court] must credit a version of the facts that is belied by the record.” *Tabbaa v. Chertoff*, 509 F.3d 89, 93

n.1 (2d Cir. 2007). “The Supreme Court held in *Anderson* . . . that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant’s denial.” *LaFrenier v. Kinirey*, 550 F.3d 166, 167 (1st Cir. 2008) (citing *Anderson*, 447 U.S. at 252). As such, summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322).

## **2. Standard for Title VII disparate treatment claims**

The plaintiff’s disparate treatment claim is analyzed under the *McDonnell Douglas* burden shifting framework. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To make a prima facie case, the plaintiff must show that (1) he is a member of a protected class; (2) he was competently performing his duties; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination based on the plaintiff’s protected class. *Mario v. P & C Food Mkts.*, 313 F.3d 758, 767 (2d Cir. 2002).

If the employee can make a prima facie case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for its actions. *Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000). The plaintiff is then

given an opportunity to adduce admissible evidence that would be sufficient to permit a rational finder of fact to infer that the employer's proffered reason is pretext for an impermissible motivation. However, merely showing that the employer's proffered explanation is not a genuine explanation does not in itself entitle the plaintiff to prevail; the plaintiff is not entitled to judgment unless she shows that the challenged employment decision was more likely than not motivated, in whole or in part, by unlawful discrimination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

*Id.* (citations omitted; internal quotation marks omitted). Regarding the plaintiff's burden to prove pretext, "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

When evaluating the defendant's legitimate non-discriminatory reasons and the plaintiff's arguments regarding pretext, a court may not substitute its business judgment for that of the defendant. The business judgment rule is well established in this Circuit. *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) ("Our role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments") (quoting *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance*

*Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999)). “[F]ederal courts are not in the business of adjudging whether employment decisions are prudent or fair. Instead, [a federal court’s] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.” *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (quoting *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) (internal quotation marks omitted)). As the court explained in *Chapman v. AI Transport*:

A plaintiff is not allowed to recast an employer’s proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason. . . . [F]ederal courts do not sit as a super-personnel department that reexamines an entity’s business decisions. . . . Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.

229 F.3d 1012, 1030 (11th Cir. 2000) (internal quotation marks omitted).

Because of the business judgment rule, courts focus on what an employer reasonably believed at the time it made its decision, not post-hoc proof of what might have happened. See *Middleton v. Metro. College of N.Y.*, 545

F. Supp. 2d 369, 376 (S.D.N.Y. 2008). In *Soto v. Core-Mark Int'l, Inc.*, the plaintiff's co-workers observed him sleeping at his workstation. 521 F.3d 837, 840 (8th Cir. 2008). Both co-workers gave statements to managers indicating that they observed the plaintiff sleeping. *Id.* The defendant-employer terminated the plaintiff for sleeping on the job. *Id.*

At summary judgment, the plaintiff argued that the employer's reason for terminating him was a pretext for discrimination. He relied on his deposition testimony to prove that he was not sleeping. *Id.* at 841-42. The court explained:

[The plaintiff] misunderstands which facts are material to the district court's determination of the last prong of the *Burdine* analysis. Even if he presented sufficient evidence to show he was not actually sleeping during the December 26, 2003, incident, such does not equate to sufficient evidence of pretext. *In determining whether a plaintiff has produced sufficient evidence of pretext, the key question is not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred. . . .* In this case, the evidence that he claims the district court disregarded – his deposition testimony about his stretching his back, not sleeping – does not create a factual dispute about the employer's good faith belief he was sleeping on the job nor does it in any other

way call into question the employer's stated reason for terminating him.

*Id.* at 842 (emphasis added). The court noted that the employer made its decision based on the statements of two witnesses and information from a manager and that the plaintiff's deposition testimony did not change the employer's good faith reliance on the witnesses. *Id.* Thus, a plaintiff cannot prove pretext by quibbling with the underlying factual basis for an employer's decision. *Id.* A plaintiff's evidence challenging an employer's reliance on certain facts is not material to the issue of the employer's motive; rather, the question is whether the employer believed the evidence available at the time it made its decision. *Id.* Other courts have followed this approach. For example:

- *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 634 n.4 (7th Cir. 2009) ("The parties dispute whether [the plaintiff] actually caused the problems in the terminal. What is important for our analysis, however, is the fact that [the employer] *believed* that the problems at the terminal were caused by [the plaintiff] disguising late and damaged deliveries.");
- *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 496 (D.C. Cir. 2008) ("But [the plaintiff] misunderstands the relevant factual issue. The question is not whether the underlying sexual harassment incident occurred; rather, the issue is whether *the employer honestly and reasonably believed* that the underlying sexual harassment incident occurred. [The

- plaintiff] himself acknowledges that [the employer] believed the incident occurred.”) (citations omitted).
- *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 398 (6th Cir. 2008) (“We thus agree with the Hospital that, in determining if the plaintiffs have raised a genuine issue of material fact as to pretext, we should consider not whether [the plaintiffs] actually breached patient confidentiality, but rather whether the Hospital had an honestly held belief that they had committed a Group I offense.”);
  - *Griel v. Franklin Med. Ctr.*, 234 F.3d 731, 732 (1st Cir. 2000) (per curiam) (“If the question in this case was whether [plaintiff’s] medical choices were defensible, quite possibly the expert evidence she offered would have created a jury issue. But the ultimate issue in a discrimination case is whether the hospital’s *reason* for discharging her was because it *believed* that she was not a safe nurse . . . .”);
  - *Uribe v. Kellogg’s Snacks*, No. 05 Civ. 02959 (PGG), 2009 U.S. Dist. LEXIS 33924, at \*26 (S.D.N.Y. Apr. 22, 2009) (“The undisputed facts are that [the employer] believed that [the plaintiff] had violated [the employer’s] workplace violence policies and the collective bargaining agreement, based on [the employer’s] investigation and her interviews of [the plaintiff], [a co-worker] and two witnesses. . . . Regardless of [the plaintiff’s] account of what happened, [the employer] ‘was entitled to rely on’ the witnesses’ statements ‘and to terminate [the plaintiff] . . . based on the reports of . . . [his] misconduct.”);
  - *Middleton*, 545 F. Supp. 2d at 376 (“[The employer] was entitled to rely on these reports and to terminate

[the plaintiff] based on the reports of [the plaintiff's] misconduct, because, as a general matter, it is not the province of the courts to function as a super-personnel department and second-guess an employer's business judgment.");

- *Adia v. MTA Long Island R.R.*, No. 02-CV-6140 (DLI)(MDG), 2006 U.S. Dist. LEXIS 51045, at \*26 (E.D.N.Y. Jul. 26, 2006) ("Even if the [employer's] investigation's findings are incorrect, when an employer relies on information in good faith in making an employment decision, there is no statutory violation."); and
- *Chinander v. Andersen Windows, Inc.*, No. 07-4565 (DWF/AJB), 2008 U.S. Dist. LEXIS 96354, at \*12 (D. Minn. Nov. 26, 2008) ("[Plaintiff] concedes that the relevant inquiry here is whether [the employer] *believed* [plaintiff] was guilty of the conduct justifying his discharge, namely his alleged theft from the cafeteria.").

To show pretext under the *McDonnell Douglas* framework, therefore, the plaintiff must show that the defendant's stated reason was false and that the reason was discrimination. *See St. Mary's Honor Ctr.*, 509 U.S. at 515. The plaintiff must show that the defendant acted (or failed to act) because it wanted to discriminate against the plaintiff, not merely that other courses of action were available or even preferable to the defendant's actions or inactions. *Chapman*, 229 F.3d at 1030. Whether the plaintiff did or did not commit a violation of company policy is not the issue; the questions are whether the employer had a reasonable belief that the plaintiff

committed the violation and whether that reasonable belief motivated the employer to take action. *Soto*, 521 F.3d at 840; *Brady*, 520 F.3d at 496.

### **C. Discussion**

The district court's decision was correct: Jeunes cannot prove that the Postal Service's reason for terminating his employment was a pretext for discrimination. To prove pretext, Jeunes must show that the reason for the termination was false *and* that discrimination was the real reason. *St. Mary's Honor Ctr.*, 509 U.S. at 515. Jeunes cannot satisfy either requirement.

Williams explained the Postal Service's reason for the termination. Williams testified in his EEO affidavit that he made the decision to terminate Jeunes' employment with the Postal Service after reviewing the witnesses' statements, conducting a Pre-Disciplinary Interview with Jeunes, and speaking to the supervisor, Gasiewski, who was covering for him that day. JA at 54, 183-84, 329. Williams found that Jeunes had used profanity and violated the Zero Tolerance Policy, *see* JA at 53-54, while Nichols was neither profane nor threatening towards Jeunes. JA at 54, 183-84, 329.

Courts have found that employers and managers are entitled to conduct investigations and rely on reasonable determinations based on those investigations. The key inquiry in a discrimination case is not whether the incident in question actually occurred; the question is whether the employer believed that the incident occurred. *Soto*, 521

F.3d at 842. Thus, a plaintiff cannot prove pretext simply by disagreeing with the facts discovered by an employer's investigation. *Allen*, 545 F.3d at 397.

In *Soto*, the Eighth Circuit upheld the district court's grant of summary judgment in favor of the employer. There, the court held

notwithstanding Mr. Soto's contentions, the district court did not err in concluding Core-Mark had a good faith belief he was sleeping on the job. The evidence in the record shows Core-Mark's determination was based on the statements of two witnesses and information provided by Mr. Laliberte. Contrary to his suggestions, the witnesses did not state they were unable to determine whether he was asleep; they stated they were reasonably certain, although not positive, he was asleep.

*Soto*, 521 F.3d at 842. Similarly, in *Allen*, the court explained how to analyze the issue of pretext when an employer terminates an employee after an investigation:

in determining if the plaintiffs have raised a genuine issue of material fact as to pretext, we should consider not whether [the plaintiffs] *actually* breached patient confidentiality, but rather whether the [defendant] had an honestly held belief that they had committed a Group I offense.

This court has explained that

the key inquiry in assessing whether an employer holds such an honest belief is whether the employer made a reasonably informed and considered decision before taking the complained-of action. An employer has an honest belief in its rationale when it reasonably relied on the particularized facts that were before it at the time the decision was made. [W]e do not require that the decisional process used by the employer be optimal or that it left no stone unturned.

*Allen*, 545 F.3d at 398 (internal quotation marks omitted).  
The result of this case is guided by *Soto* and *Allen*.

Every witness, with the exception of Jeunes, told the Postal Service that Jeunes was the aggressor. JA at 321-26. The witnesses were interviewed within days of the incident, while the events were still fresh in their minds. JA at 321-26. Jeunes had no evidence outside of his own recollection to show that these witnesses were lying. JA at 53, 255, 327. When Williams interviewed Jeunes, Jeunes admitted that he cursed at Nichols and called him a “pussy.”<sup>3</sup> JA at 232. Williams relied on this information

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<sup>3</sup> It is unclear why, if Jeunes “fear[ed] for his safety,” he would call Nichols “a pussy.” JA at 8. The colloquial use of that word is usually an insult that tends to escalate a situation  
(continued...)

when making the decision to terminate Jeunes' employment. JA at 54, 183-84, 329. "Regardless of [the plaintiff's] account of what happened, [the defendant] was entitled to rely on the witnesses' statements and to terminate [the plaintiff] . . . based on the reports of . . . [his] misconduct." *Uribe*, 2009 U.S. Dist. LEXIS 33924, at \*29 (internal quotation marks omitted). Jeunes cannot prove that the Postal Service's reason for terminating his employment was false.

Jeunes also cannot prove that discrimination was the Postal Service's real motivation for the termination. The Postal Service relied on the "particularized facts" before it at the time it made the decision. Williams relied on the information gathered from the witnesses on scene and the information he learned from Jeunes. JA at 54, 183-84, 329. Jeunes has no evidence from which to draw an inference of discrimination.

Jeunes argues that the district court "appears to hold that it is never possible for a plaintiff to rebut an employer's colorable explanation by his or her own testimony." Pl. Br. 14. This is inaccurate. The district court did not make new law or reach a new conclusion; rather, the court followed established precedent. The cases cited by the district court, and herein, demonstrate that a plaintiff cannot prove pretext by arguing that the

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<sup>3</sup> (...continued)  
and provoke a fight. Jeunes is either dissembling when he claims that he feared for his safety or is horribly ineffective at defusing tense moments.

factual predicate for discipline did not occur when the employer has conducted a reasonable investigation into the factual predicate and honestly relies on that investigation in determining discipline. *See Soto*, 521 F.3d at 842; *Cracco*, 559 F.3d at 634 n.4; *Brady*, 520 F.3d at 496; *Allen*, 545 F.3d at 397; *Griel*, 234 F.3d at 732; *Uribe*, 2009 U.S. Dist. LEXIS 33924, at \*26; *Middleton*, 545 F. Supp. 2d at 376; *Adia*, 2006 U.S. Dist. LEXIS 51045, at \*26; *Chinander*, 2008 U.S. Dist. LEXIS 96354, at \*12. All of these cases are consistent with the established rule that courts do “not . . . act as a “super personnel department” that second guesses employers’ business judgments,” *Byrnie*, 243 F.3d at 103 (quoting *Simms*, 165 F.3d at 1330); nor are they “in the business of adjudging whether employment decisions are prudent or fair,” *Alfano*, 294 F.3d at 377 (internal quotation marks omitted). The district court’s decision was in line with the existing law in the Second Circuit and throughout the country.

Jeunes attempts to prove pretext by arguing that the Postal Service allegedly failed to interview Paradise, Figueras, or Almeida, but this argument is unavailing. Pl. Br. 14. Jeunes failed to disclose these witnesses in his written discovery and during his deposition. JA at 173-75 (discovery); 88-96 (description of October 26, 2007), 117-22 (alleged discrimination by Williams). The district court noted Jeunes’ failure in its opinion. JA at 335-36. The Federal Rules of Civil Procedure restrict the ability of a party to use undisclosed witnesses. Rule 37(c)(1) states, in relevant part, “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to

supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Jeunes did not argue in any of his briefs that his failure to disclose these witnesses was harmless or justified. Pl. Br. 14-15; JA at 244, 248, 281. Even if Jeunes could use these witnesses, however, he has not provided any evidence that they witnessed anything, much less anything different from the other witnesses.

There is nothing in the records that shows that the Postal Service refused to interview them. None of the witnesses’ statements identify Paradise, Figueras, or Almeida as present when the incident happened. *See* JA at 192-210. Jeunes did not depose the three individuals, nor did he submit their affidavits in response to the Postal Service’s motion for summary judgment. There is no evidence, therefore, of what (if anything) Paradise, Figueras, and Almeida knew about the incident in question.

Jeunes further argues that he did not have access to Paradise, Figueras, or Almeida. He never tried, however, to get access to them. There is no evidence in the record that he contacted them and that they refused to speak with him. He did not notice their depositions. He did not subpoena them. Paradise, Figueras, and Almeida, are not “missing witnesses,” as Jeunes claims, they were simply ignored by Jeunes.<sup>4</sup>

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<sup>4</sup> Paradise, Figueras, and Almeida are actually “uncalled witnesses.” As this Court explained:

(continued...)

Jeunes goes on to assert that, regarding Paradise, Figueras, and Almeida, “[i]t would be permissible, albeit not mandatory, for a jury to make the reasonable inference that the employer only wanted to interview the witnesses who would say what it wanted to hear.” Pl. Br. 15 (emphasis deleted). This assertion, however, is unsupported by the evidence and is illogical. First, how would an employer know which employees would tell it what it wanted to hear? Quite obviously, it would not know what an employee would say until it spoke to the employee. Second, what evidence demonstrates specifically what “the employer wanted to hear”? The tautology of Jeunes’ argument thus is revealed. The

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<sup>4</sup> (...continued)

[W]e have also outlined options available to the trial court where a witness is equally available to both sides, but is not called by either side. In such circumstances, the court has discretion to (1) give no instruction and leave the entire subject to summations, (2) instruct the jury that no unfavorable inference may be drawn against either side, or (3) instruct the jury that an adverse inference may be drawn against either or both sides. Such an instruction is sometimes referred to as an “uncalled witness” charge. Prof. Wigmore expressed the view that permitting an inference against either party is the “more logical view,” a view that we have more recently doubted. Indeed, we have suggested that where a witness is equally available to both sides, a missing witness charge is “inappropriate.”

*United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997) (citations omitted).

ultimate question is whether the employer discriminated against Jeunes. Jeunes simply assumes the answer: The employer wanted to discriminate. He then assumes that the employer failed to interview certain witnesses because those witnesses would have interfered with its discrimination. He then claims that the failure to interview these witnesses answers the ultimate question: Did the employer discriminate? To get to this point, however, Jeunes has to already assume the answer to the question. He makes all these assumptions, moreover, without any citation to the record. Paradise, Figueras, and Almeida have no bearing on this case.

Jeunes argues that “[t]here was evidence before the court sufficient to permit a trier of fact to conclude that the plaintiff’s prior disciplinary history was minor in nature and entirely unrelated to the employer’s Zero Tolerance Policy.” Pl. Br. 10. Jeunes does not elaborate on this argument beyond this statement, and so this Court should deem it waived. *See EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 n.1 (2d Cir. 2007) (holding failure to press argument results in waiver). This argument, however, also fails on the merits.

Williams testified that he considered Jeunes’ prior disciplinary history. JA at 184. Jeunes did not offer any evidence to show that Williams was restricted to considering prior discipline that was similar to the incident at hand. Regardless of whether Williams could or could not consider the prior discipline, however, Williams also testified that “I would have issued him a removal for these charges regardless of progressive steps because of the

seriousness of [Jeunes'] actions in this case.” JA at 184. Jeunes' argument about his prior disciplinary history, therefore, is unsupported by the evidence.

Jeunes argues that this Court can draw an inference of discrimination in his favor because Nichols was not disciplined. “When considering whether a plaintiff has raised an inference of discrimination by showing that [he] was subjected to disparate treatment, we have said that the plaintiff must show [he] was ‘similarly situated in all material respects’ to the individuals with whom [he] seeks to compare [himself].” *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000). Stated in its most general form, the test for determining if a plaintiff is similarly situated with an individual is: “(1) whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness.” *Id.* at 40. Although the plaintiff need not show that the cases were identical, “the standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff’s and comparator’s cases . . . .” *Id.* Jeunes cannot show that he and Nichols were similarly situated.

Jeunes and Nichols are not similarly situated because their conduct on October 26, 2007, was so different. Putting aside Jeunes' and Nichols' statements, the other witnesses to the incident recall that Jeunes instigated the situation, cursed at Nichols, and challenged him to a fight. For example, Lampson reported that:

From what I remember, Josier replied by saying the following, “Just leave me alone, why are you fucking with me. You fucking asshole fuck you, you want to bring it on, come on!” Josier continued to engage in a verbal fight with tom [sic]. Josier repeated multiple times, “bring it on pussy.” Josie [sic] made it clear that he was willing to fight Tom. During this altercation, Tom never left his case and he never proceeded to use foul language.

JA at 199. Similarly, Gentili told the Postal Service that

Tom [Nichols] said I found a small parcel it’s in the throwback case, if you wan’t [sic] it’s there if you don’t want it it’s there. Josier was at the clock and this is what I heard. That I can remember, Bring it on [Josier] said with open arms like [Josier] wanted to fight. I am not scared, pussy. I remember Wayne [Garcia] coming to calm things down. [Wayne] said quiet down and leave the building. Tom never left his case.

JA at 204. Williams recorded that Garcia told him “Wayne doesn’t know how this got started but heard profanity being used. Wayne also stated that he heard the ‘F’ and ‘P’ word [sic]. Wayne didn’t hear Tom Nichols using any profanity.” JA at 210.

The evidence demonstrates that Nichols and Jeunes were not similarly situated. The above statements show

that, as far as the Postal Service knew, Jeunes cursed at Nichols and challenged him to a fight. Nichols did neither. Thus, while Nichols and Jeunes were subject to the same workplace rules, Nichols did not engage in “conduct” that “was of comparable seriousness.” *Graham*, 230 F.3d at 40. Nichols, therefore, was not a proper comparator. Because Nichols was not a proper comparator, no inference of discrimination can be drawn. Jeunes cannot prove that the Postal Service’s reason for terminating his employment was a pretext for discrimination.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 19, 2010

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "DCN", is positioned above the typed name of David C. Nelson.

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**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,728 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read 'DCN', is centered on the page.

DAVID C. NELSON  
ASSISTANT U.S. ATTORNEY

## ANTI-VIRUS CERTIFICATION

Case Name: Jeunes v. Potter

Docket Number: 09-4279-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 3/19/2010) and found to be VIRUS FREE.

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*Record Press, Inc.*

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March 19, 2010

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Notary Public, State of New York  
No. 01HO6118731  
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