07-5441-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SERGE DUBOIS,

Plaintiff-Appellant,

—v.—

MACY'S EAST INCORPORATED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (GARAUFIS, J.)

APPELLEE'S BRIEF AND APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee certifies that Macy's East (incorrectly sued by plaintiff as "Macy's East Incorporated") is an unincorporated division of Macy's Retail Holdings, Inc., which is, in turn, a wholly-owned subsidiary of Macy's, Inc. Macy's, Inc. is a publicly-held company whose stock is traded on the New York Stock Exchange.

ORAL ARGUMENT REQUEST

Defendant-Appellee respectfully requests oral argument and submits that argument may be useful to the Court to answer any questions that the Court may have in resolving the legal issues presented by this appeal.

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COUNTERSTATEMENT OF THE ISSUES

Defendant-Appellee Macy's East ("Macy's") instituted a policy under which employees are required to arbitrate all employment disputes unless they take certain affirmative steps to opt out of such arbitration. Plaintiff-Appellant Serge Dubois ("DuBois") concedes that he was notified of this policy. The questions at issue in this case are:

1. When an employee fails to take all required steps to opt out of arbitration and continues his at-will employment after being informed of his enrollment in the arbitration program, is the employee bound to arbitrate his employment disputes?

2. Does DuBois' criticism of the district court's handling of the case present any legal basis for reversal?

COUNTERSTATEMENT OF THE CASE

DuBois filed suit against Macy's in the United States District Court for the Eastern District of New York, asserting claims of sexual harassment and retaliation under federal antidiscrimination law. Macy's moved to stay the proceedings and compel arbitration on the grounds that DuBois had agreed to arbitrate all employment-related claims. (PA 114-26.)[1] In a ruling dated November 26, 2007,

[1] Citations to "PA" refer to the Plaintiff's Appendix.

the district court granted the motion to compel arbitration. (*Id.* at 6-9.) DuBois filed a Notice of Appeal on December 3, 2007. (*Id.* at 5.)

COUNTERSTATEMENT OF FACTS

A. Overview of Macy's Solutions InStore Program

In the fall of 2003, Macy's introduced a dispute resolution program called Solutions InStore ("SIS"), to become effective at the beginning of 2004. (*Id.* at 141.) SIS is a four-step process for resolving workplace disputes. (*Id.*) The first three steps involve internal procedures, and Macy's, but not the employee, is bound by a resolution of the dispute at any of these steps. (*Id.* at 141-42.) The fourth and final step is mandatory binding arbitration under the auspices of the American Arbitration Association. (*Id.* at 142-43.)

Under the terms of the SIS program, the arbitration step of the program makes available the same remedies that an employee could recover in court. (*Id.* at 144.) In addition, the program offers both financial assistance and certain procedural benefits to employees who bring claims in arbitration. (*Id.*) The SIS program became effective on January 1, 2004. (*Id.* at 143.) The arbitration plan covers all employment-related claims raised by an employee (or by Macy's) on or after January 1, 2004. (*Id.* at 143-44.)

Most important, for purposes of this case, the arbitration plan applied automatically to all employees who did not follow specified procedures to opt out of the binding arbitration requirement. (*Id.* at 143.)

B. Macy's Mailing Of Notice, And Plaintiff's Election To Continue To Work Without Following The Opt-Out Procedures

To ensure that all employees were aware of the details of the SIS program and of the obligation to opt out of binding arbitration if they wished to be excluded from the requirement to arbitrate employment disputes, Macy's conducted information sessions explaining the program, which active employees were required to attend. (*Id.* at 144-45.) The presentation described the four-step program, the employee's right to opt out of arbitration, and the upcoming mailing they would receive. (*Id.*)

After conducting the information sessions, Macy's mailed to all of its employees a package containing the Plan Document describing the SIS program, the form to opt out of arbitration, and a pre-addressed, postage-paid envelope for returning the form. (*Id.* at 146.) This package was mailed to DuBois on September 26, 2003. (*Id.*) The Plan Document, which included a full arbitration agreement detailing the specifics of arbitration under Step 4 (A-07),[2] explained that arbitration covers all employees who have not "return[ed] an 'Arbitration Election

[2] Citations to "A" refer to the Defendant's Appendix submitted herewith.

Form' within the prescribed time limits." (*Id.*) It also stated that the SIS program "is effective on January 1, 2004" and that any employment related disputes "raised on or after the effective date must be arbitrated pursuant to the[] rules and procedures [set out in the Plan Document]." (*Id.* at 9.) In addition, the Plan Document spelled out the consequences of arbitration, stressing "that neither the Associate nor the Company can file a civil lawsuit in court against the other party," and listing the various statutory claims subject to arbitration, including Title VII and state discrimination statutes. (*Id.* at 8-9.)

The opt-out form clearly states that in order not to be covered by the benefits of arbitration, "*your completed form must be returned to the Office of Solutions InStore and postmarked no later than October 31, 2003*." (PA 193.) The form also indicates that employees who wished to opt out but did "not receive confirmation [that your form was received] by December 29, 2003" should "send an e:mail to solutions.instore@fds.com or call 1-866-285-6689." (*Id.*)

Following the SIS mailings, approximately ten percent of eligible employees opted out of arbitration by returning the Election Form included in the mailing. (*Id.* at 146.) The SIS Office has regular procedures for processing opt-out forms. (*Id.*) They are date-stamped, reviewed for completeness, stored in file cabinets, and loaded into a database. (*Id.*) Although DuBois claims that he sent back the opt-out

form, Macy's has no record of receiving any such form from DuBois: it is not in the file cabinets and it is not in the database. (*Id.* at 147.)

Since Macy's never received an opt-out form from DuBois, he was not sent a confirmation letter. (*Id.*) DuBois admits that he failed to contact SIS, as directed in the election form, when he did not receive the notice confirming receipt of his opt-out form by December 29, 2003. (*Id.* at 195.)

In January 2004, DuBois, along with the other employees who did not opt out of arbitration, was sent a welcoming brochure about the SIS program. (*Id.* at 147-48.) The brochure listed all four steps of the program, including arbitration. (*Id.* at 148.) The SIS office maintains a toll-free number for employees to ask questions about the SIS program, and all calls are recorded in a "Master Call Log." (*Id.*) Over one thousand employees made calls to SIS, but there is no record of DuBois ever contacting SIS. (*Id.* at 148-49.) DuBois admits that he received the brochure, and that instead of contacting SIS to correct the situation, he allegedly spoke to one of his supervisors, who purportedly claimed it was "not important." (*Id.* at 195.)

C. DuBois' Claim In This Lawsuit

Plaintiff began his employment with Macy's in September 2002 as a service support associate. (*Id.* at 144.) He was terminated on June 4, 2004 for violating

company policy with regard to rude, abusive, and inappropriate behavior toward a customer when he called the customer "a piece of human waste." (*Id.* at 130.)

In October 2004, DuBois wrote a letter to Macy's stating:

> In reference to the Solutions InStore, which is being established by Macy's, that can be used to resolve any problem related to the job, I have decided to request your assistance, after being illegally suspended on May 29, 2004 and discharged on June 4, 2004 by Marc Joseph . . . [u]pon receipt of my correspondence, I would appreciate that you take it into consideration, for the possibility to resolve this matter as soon as possible.

(*Id.* at 195.) DuBois kept a certificate of mailing for this letter; he does not have any certificate of mailing for the opt-out form. (*Id.*)

On or about March 31, 2005, DuBois filed a discrimination claim with the New York City Commission on Human Rights ("NYCCHR"), alleging that he was subjected to sexual harassment, his work hours were reduced after declining sexual invitations, and he was terminated for complaining about the sexual harassment. (*Id.* at 20-21.) The NYCCHR issued an order on December 7, 2005, finding no probable cause for DuBois' claims and dismissing the complaint. (*Id.* at 129-30.) On February 9, 2006, and again on October 11, 2006, the EEOC adopted these findings and issued a Right to Sue letter. On December 7, 2006, DuBois filed a complaint in district court under Title VII of the Civil Rights Act of 1964. (*Id.* at 13.)

D. The District Court's Order Dismissing DuBois' Claim and Compelling Arbitration

In a report and recommendation dated July 13, 2007, the magistrate judge found that "plaintiff's statement that he opted-out of the Step 4 arbitration program is belied by the record." (*Id.* at 198.) According to the magistrate judge, DuBois presented "no evidence" that the opt-out form was ever received by Macy's, and DuBois knew it was not received because he mentioned this fact to his supervisor. (*Id.*) Since DuBois had a copy of the form, the magistrate judge explained, DuBois was aware of the language on the form that stated that he should contact SIS if he did not receive a confirmation by December 29, 2003. (*Id.*) DuBois also took no action when he received the brochure welcoming him to the SIS program. (*Id.*) The magistrate judge concluded that "the evidence submitted by *both* parties demonstrates that plaintiff did not opt-out of the Step 4 binding arbitration program adopted by his employer." (*Id.* at 199.)

In an order dated November 26, 2007, the district court adopted the magistrate judge's recommendations in their entirety. The court recognized that "Plaintiff has failed to produce any evidence that the waiver was ever received by Defendant" and that he "did not call SIS at any time to explain that he desired to opt-out of arbitration." (*Id.* at 7.) According to the court, DuBois' "conduct certainly displays Plaintiff's knowledge that he did not opt-out of the SIS program and his intent to contract to use it." (*Id.*) Thus, the court "f[ou]nd that Plaintiff did

not, in fact, opt-out of the SIS program and is therefore bound by its arbitration provisions." (*Id.* at 7-8.) The court referred the case to arbitration and dismissed the complaint. (*Id.* at 8.)

SUMMARY OF ARGUMENT

The district court correctly decided that, as a matter of New York law, DuBois agreed to arbitration.

DuBois knew that Macy's never received an opt-out form from him, and that Macy's believed that he had agreed to participate in the SIS arbitration program. New York law recognizes that an at-will employee who continues his employment after being notified of a new condition of employment necessarily agrees to that new condition. Here, DuBois continued his employment after failing to take all of the required steps to opt out of arbitration, and, indeed, after being notified that he was enrolled in the arbitration program. Accordingly, DuBois' continued employment constitutes his assent to arbitration.

DuBois does not dispute any of these facts or legal principles; his only argument is that he mailed the opt-out form to Macy's. However, this argument, even if true, does not change the fact that he agreed to arbitration based on his subsequent conduct: his failure to notify SIS after receiving a welcome package instead of an opt-out confirmation letter, and his continuing employment while knowing of his enrollment in the program.

Finally, DuBois makes several procedural arguments—mostly in the form of derogatory accusations, without any legal or factual basis—that are meritless. Accordingly, the district court's order should be affirmed.

STANDARD OF REVIEW

This Court "review[s] the district court's determination as to whether parties have agreed to arbitrate *de novo*." *George v. LeBeau*, 455 F.3d 92, 93 (2d Cir. 2006). "However, the factual findings underlying the conclusion may not be overturned unless clearly erroneous." *Id.*

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT DUBOIS AGREED TO ARBITRATION BY CONTINUING TO WORK AFTER KNOWING OF HIS ENROLLMENT IN THE ARBITRATION PROGRAM

Under the Federal Arbitration Act, "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan, Inc.*, 514 U.S. 938, 944 (1995); *see also Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004) (looking to New York law in holding that plaintiff, who signed U-4 form containing arbitration clause, was bound to arbitrate). As the magistrate judge noted, and DuBois does not dispute, New York law governs whether DuBois agreed to arbitrate. (PA 197.) Furthermore, courts "generally resolve such cases in favor of arbitration." *LeBeau*,

455 F.3d at 94 (internal quotation marks omitted). This approach accords with New York law because "[i]t is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions." *Westinghouse Elec. Corp. v. N.Y. City Transit Auth.*, 82 N.Y.2d 47, 53, 603 N.Y.S.2d 404, 407 (1993).

Under New York law, an at-will employee who is notified of a change in the terms of his employment agrees to the modification of the employment contract by continuing to work. Specifically, for at-will employment, the employer is "free to modify the terms of plaintiff's employment." *Bottini v. Lewis & Judge Co.*, 211 A.D.2d 1006, 1008, 621 N.Y.S.2d 753, 754 (3d Dep't 1995). If the employee "remain[s] in defendant's employment . . . [he] is deemed to have assented to the modification and, in effect, commenced employment under a new contract." *Id.*; *see also Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 174, 806 N.Y.S.2d 553, 557 (1st Dep't 2005) ("[A]n employer can change any term in an at-will employment and the employee's continued employment is deemed to be a consent thereto."), *leave dismissed in part and denied in part*, 7 N.Y.3d 859, 824 N.Y.S.2d 597 (2006).

Thus, under New York law, an at-will employee need not state expressly, either verbally or in writing, that he consents to newly-instituted terms or conditions of employment. Rather, it has long been established that employees manifest assent to such changes simply by continuing employment after receiving

notice of the modified terms. *See, e.g.*, *Hanlon v. MacFadden Publ'ns*, 302 N.Y. 502, 505-06, 99 N.E.2d 546, 547 (1951) (employee's continued employment after announcement of reduced commission rate "constituted a material change in the terms of [the employee's] hiring, resulting in a new [hire] or a rehiring"); *Gebhardt v. Time Warner Ent'mt-Advance/Newhouse*, 284 A.D.2d 978, 979, 726 N.Y.S.2d 534, 535 (4th Dep't 2001) ("Because plaintiff remained in defendant's employment after being informed that the commission rate was lowered, she is deemed to have agreed to prospective reduced commissions . . . .").

Here, Macy's instituted a binding arbitration program, with specified opt-out requirements, and DuBois failed to take the required steps to opt out of arbitration. To begin with, the district court correctly found that DuBois "has failed to produce any evidence that the waiver was ever received by" Macy's. (PA 7.) This finding is fully supported by the evidence. Macy's established that the SIS had regular, detailed procedures to ensure that all opt-out forms were properly filed and their information stored in a computer database. (*Id.* at 146.) And a search of the files and the database revealed that there is no record of an opt-out form, or any other correspondence, from DuBois. (*Id.* at 147.) By contrast, DuBois has no proof that he mailed the out-out form beyond his own unsupported allegation and a copy of the form, without any proof of mailing.

As a matter of New York law, Macy's evidence suffices to show that the form was never received. *See Elec. Servs. Int'l, Inc. v. Silvers*, 233 A.D.2d 361, 650 N.Y.S.2d 243 (2d Dep't 1996). In *Silvers*, the plaintiff alleged that he had mailed a claim notice, but the defendant possessed no such notice despite its "procedures . . . formulated to ensure that each claim is properly recorded, delivered and acknowledged." *Id.* at 362, 650 N.Y.S.2d at 245. The court concluded that the plaintiff's allegation of mailing "does not suffice to rebut the . . . defendant's strong proof of nonreceipt." *Id.* at 363, 650 N.Y.S.2d at 245; *see also Krieger v. City of N.Y.*, 118 Misc. 2d 537, 539-40, 461 N.Y.S.2d 171, 172-73 (Sup. Ct. 1983) ("the City's specific office practices in receiving, recording, numbering and preserving notices of claim and . . . an unfruitful search of its records covering a two year period" is sufficient to show that notice was not received); *Hogarth v. N.Y. City Health & Hosps. Corp.*, No. 97-cv-0625, 2000 WL 375242, at *4 (S.D.N.Y. Apr. 12, 2000) ("the presumption of delivery can be successfully rebutted with a sworn affidavit giving a detailed description of the mail procedures followed at a company for all incoming mail supporting the conclusion that the mail was never received"). Similarly, here, Macy's has shown that it had a regular procedure for filing and cataloging the opt-out forms, and that there is no form from DuBois in its records, which establishes that it never received an opt-out form from DuBois.

In any event, Macy's was entitled to institute an opt-out procedure whereby employees were required to send in an opt-out form *and*, if a confirmation was not received, to contact SIS to inform them of the desire to opt out. DuBois does not argue that this opt-out method is illegitimate. Indeed, if the law were otherwise, it would create a perverse incentive for companies to eliminate any ability to opt out, so as to preserve the efficiencies of the traditional condition-of-employment regime. Such a result would make no sense, and would harm employees by deterring employers from allowing opt-outs.

Here, it is clear that DuBois failed to follow Macy's opt-out procedures. Regardless of whether DuBois sent the opt-out form, the district court found—and DuBois does not contest—that he never received a confirmation and failed to contact SIS. (PA 7.) Under New York law, even where the employee *expressly* declines to assent to the new terms, the employee's continuation of employment constitutes acceptance by conduct. *See Dwyer v. Burlington Broadcasters, Inc.*, 295 A.D.2d 745, 745-46, 744 N.Y.S.2d 55, 56-57 (3d Dep't 2002) (employee's refusal to sign document reciting modification of prior oral agreement held irrelevant because the plaintiff assented to the modification by continuing her employment); *In re Footstar, Inc.*, No. 04-22350, 2007 WL 1989290, at *5-6 (Bankr. S.D.N.Y. July 6, 2007) (refusal to sign agreement altering prior compensation held irrelevant). *A fortiori*, where, as here, the employee does not

refuse assent in the manner provided by the employer, his purported attempt to opt out is insufficient. Since DuBois failed to complete the opt-out requirements and continued his employment while aware that he had not opted out, he agreed to employment with the condition of enrolling in the arbitration program.

Furthermore, even aside from this failure by DuBois, the district court correctly found that DuBois knew that he was enrolled in the arbitration program. (PA 7, 198.) DuBois did not receive an opt-out confirmation letter; instead, he received a brochure welcoming him to the SIS program, and listing arbitration as the last step in the program. (*Id.* at 147-48.) DuBois admits that he received the brochure, and that instead of contacting SIS to correct the situation, he spoke to one of his supervisors, who claimed it was "not important." (*Id.* at 195.) As the magistrate judge explained, Dubois "admits that he knew that the Election Opt-Out Form was never received because he told [his supervisor] about it." (*Id.* at 198.) When his supervisor allegedly told him it was "not important," DuBois made no effort to let anyone know that he wanted to opt out. (*Id.* at 195.) Thus, DuBois knew that Macy's believed that he had agreed to participate in the arbitration program, and the district court's finding is not clearly erroneous.

Since DuBois was clearly notified of his enrollment in the arbitration program, his decision to continue employment was a further acceptance of the enrollment. And the New York courts have recognized that a change in

employment terms can be announced in any form, so long as the employee is notified. *See, e.g., Gen. Elec. Technical Servs. Co. v. Clinton*, 173 A.D.2d 86, 88, 577 N.Y.S.2d 719, 720-21 (3d Dep't 1991) (employee given pamphlet explaining policy); *Horowitz v. La France Indus., Inc.*, 274 A.D. 46, 47, 79 N.Y.S.2d 794, 796 (1st Dep't 1948) (employee informed of change in terms orally at meeting and through notation on paychecks). Accordingly, Dubois' decision to remain employed at Macy's for months after receiving notice is an additional way in which he assented to arbitration as a new condition of his employment.

More generally, this Court has recognized that, under New York law, "the existence of a contract may be established through the conduct of the parties recognizing the contract." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 97 (2d Cir. 2007) (internal quotation marks omitted). And a party's conduct manifests assent where "he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." RESTATEMENT (SECOND) OF CONTRACTS § 19(2). Here, DuBois intentionally continued his employment while knowing that Macy's understood that he had assented to arbitration. Thus, his conduct established his assent as a matter of New York law.

In sum, the district court was plainly correct that, under New York law, DuBois agreed to binding arbitration under the terms of the SIS program.

II. DUBOIS' PROCEDURAL OBJECTIONS ARE MERITLESS.

DuBois makes several procedural objections, none of which has any legal or factual support.

First, DuBois argues that "Magistrate Judge Bloom on March 26, 2007, during Oral Argument, orally denied the Defendant's attorneys instant motion to dismiss the Complaint and compel Arbitration, after considering the Plaintiff's same substantial evidences that have been twisted, ignored and excluded by Judge Garaufis in order to favor the Defendant." Appellant's Br. at 23; *see also id.* at 24-25 (arguing that "this matter [has] already been raised before the Court and determined on March 26, 2007, by Judge Bloom"). However, DuBois does not explain how this argument provides any legal basis for reversal. In any event, the magistrate judge made no such ruling during oral argument. (PA 161-62.) Macy's had mentioned the arbitration issue in a February 1, 2007 letter requesting a pre-trial conference and describing the anticipated bases for a motion to dismiss. (*Id.* at 75-78.) Of course, the magistrate judge could not rule on the issue before it was actually raised; rather, the magistrate judge simply noted that the arbitration argument would require support in an affidavit to show that Macy's had not received an opt-out letter from DuBois. (*Id.* at 162.) And Macy's provided just such a supporting affidavit for its motion to compel arbitration filed on April 10,

2007. (*Id.* at 140-49.) After receiving this motion, and DuBois' response, the magistrate judge ruled on the issue on July 13, 2007. (*Id.* at 191-200.)

Second, DuBois argues that the "motion to dismiss . . . should never be allowed to file with the Court, on the grounds that the Plaintiff's Response to Discovery was already served upon them, and they never answered the Complaint." Appellant's Br. at 24. However, it is a commonly accepted practice for a defendant to file a motion to compel arbitration under 9 U.S.C. §§ 3 and 4 before filing an answer. *See, e.g., Wiepking v. Prudential-Bache Sec., Inc.*, 940 F.2d 996, 997 (6th Cir. 1991); *Bd. of Ed. Cent. Sch. Dist. No. 2 v. Aetna Cas. & Sur. Co.*, 453 F.2d 264, 265 (2d Cir. 1971); *EEOC v. Hooters of Am., Inc.*, No. 06-cv-6138CJS, 2007 WL 64163, at *4 (W.D.N.Y. Jan. 9, 2007); *Hueston v. Hueston*, No. 98-cv-1126, 1998 WL 903635, at *1 (N.D.N.Y. Dec. 23, 1998). Such a motion tolls the time for filing an answer under Rule 12 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 12(a)(4).

Finally, DuBois makes a number of accusations as to the integrity of the district court judge and Macy's' attorneys. *See, e.g.*, Appellant's Br. at 6 (The motion to compel arbitration was "granted unfairly and improperly, apparently, due to conflicts of interests . . . because of Honorable Judge Garaufis's collusion with Gordon & Rees, LLP, the attorneys for the Respondent Macy's East Incorporated."); *id.* at 10 ("Judge Garaufis, obviously due to the fact that the

Plaintiff is not represent[ed] by counsel, and according to his mysterious collusion with the Defendant's attorneys, has intentionally decided to violate rules of the court that are promulgated to insure orderly and fair dispensation of justice . . . ."); *id.* at 11 ("Judge Garaufis violated Federal Rules Governing Judicial Conduct and the Plaintiff-Appellant's rights."); *id.* at 16 ("Judge Garaufis personally instructed [Macy's] to write a confusing letter [for an extension of time] and intentionally postmarked it April 5, 2007 . . . by using their postal meter in such a way in which they have committed a Federal Crime."). None of these derogatory comments has any evidentiary basis, and they plainly do not provide any legal basis for relief in this Court.

CONCLUSION

This Court should affirm the district court's order granting defendant's motion to compel arbitration.

Dated: March 14, 2008

Respectfully submitted,

/s/ Meir Feder

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B). It contains **4,134** words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: March 14, 2008

/s/ Meir Feder
Meir Feder

Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

I, Meir Feder, a member of the Bar of this Court, hereby certify that on March 14, 2008, I caused copies of Defendant-Appellee's Brief to be served by First Class Mail upon the following party, acting *pro se*, to this appeal:

Serge DuBois
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Dated: March 14, 2008
New York, New York

/s/ Meir Feder
Meir Feder

ANTI-VIRUS CERTIFICATION

Case Name: DuBois v. Macy's

Docket Number: 07-5441-cv

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@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 3/14/2008) and found to be VIRUS FREE.

/s/ Natasha R. Monell
Natasha R. Monell, Esq.
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