

15-3775

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MELISSA ZARDA AND DONALD MOORE AS INDEPENDENT CO-EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiff-Appellant,

— against —

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SPECIAL APPENDIX

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March 2015

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

-----X

ESTATE OF DONALD ZARDA,
Plaintiff

JUDGMENT IN A CIVIL CASE

-against-

Case Number: CV-10-4334

ALTITUDE EXPRESS INC., ET AL.
Defendants.

-----X

 X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

 Decision by Court. This action came to trial/hearing before the Court. The issues have been tried/heard, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, estate of Donald Zarda, take nothing of the defendants, Altitude Express Inc. and Raymond Maynard, and that the action be dismissed on the merits.

Dated: Central Islip, New York
October 28, 2015

DOUGLAS C. PALMER
Clerk of Court

 /S/
By: Michele Savona
Deputy Clerk

1
2
3 **RULING ON RENEWAL OF TITLE VII CLAIM**
4 **BASED ON BALDWIN V. FOXX**

5 10/13/15
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14 THE COURT:
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16 Last week I said I didn't want to -- I had a
17 jury trial going on, I didn't want to place the reason for
18 my denial of the motion for reconsideration by plaintiff
19 to either reinstate the Title VII claim or to what the
20 jury decided in the event that the Second Circuit changes
21 its precedent with respect to that issue. I want to place
22 my reasoning on the record.

23 The Second Circuit has in a published decision,
24 *Simonton v. Runyon*, 232 F.3d 33, Second Circuit 2000 case,
25 concluded that Title VII does not prohibit discrimination

1 based on sexual orientation in a non-published summary
2 order. The Second Circuit affirmed a District Court
3 decision in 2008 reaching the same conclusion based upon
4 Runyon. That case is Kiley v. American Society for
5 Prevention of Cruelty to Animals, 296, Fed. Appx, 107 at
6 page 109, Second Circuit 2008. And I believe Runyon
7 continues to be binding precedent on this Court
8 notwithstanding the recent EEOC advisory opinion that
9 reaches a different conclusion.

10 Until the Second Circuit overrules the binding
11 precedent, I believe a District Court must follow Runyon
12 and, therefore, the motion for reconsideration is denied
13 to the extent the request was to put it before the jury so
14 potentially there wouldn't have to be a retrial if the
15 Second Circuit were to conclude differently and overrule
16 Runyon. I don't believe in this case I should be putting
17 a claim before a jury that as the law currently stands
18 does not exist in the Second Circuit at least. So I'm
19 denying -- in my discretion, I'm not going to do that.
20 I'm denying the motion.

21 Prior to jury selection, Mr. Antollino requested
22 the Court allow the lawyers to participate in the voir
23 dire by asking their own questions to the jurors. I know
24 that there are judges in Federal Court who do allow that
25 practice in whole or in part but I'm not one of them. I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA ZARDA, . Civil No. 10-CV-04334-JFB-AYS
Vs. .
. 824 Federal Plaza
ALTIITUDE EXPRESS, INC., . Central Islip, NY
. June 10, 2014
.

TRANSCRIPT OF TELEPHONIC CONFERENCE
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For The Defendant: ZABELL & ASSOCIATES PC
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I N D E X

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1 THE CLERK: Calling case 10-cv-4334, Zarda verse
2 Altitude Express. Please state your appearance for the record.

3 MR. ANTOLLINO: Greg Antollino for the plaintiff.
4 Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. ZABELL: And for the defendant, Saul Zabell with
7 the law firm of Zabell & Associates. Good afternoon, Your
8 Honor.

9 THE COURT: Good afternoon. As you know I scheduled
10 the conference because I saw the letters regarding the issue
11 with respect to the pretrial order and Mr. Zabell's list of
12 witnesses and Mr. Antollino indicated that's there some other
13 issues that he wanted to discuss as well. So why don't we just
14 deal with that issue first? I think the way to resolve this
15 issue, Mr. Zabell, obviously you need to put what witnesses to
16 reserve your ability to call witnesses but also putting a list
17 of you know 50 people is not particularly helpful either and it
18 does not allow the other side to properly, one of the primary
19 purposes of the pretrial order is to allow the other side to
20 prepare for the case. And if it's just a list of names, some
21 of whom's relevance to any trial is completely unclear, then
22 that's not providing the other side with an opportunity to
23 really prepare the case.

24 So what I'm going to ask you to do is for those
25 witnesses who have been deposed, what their relevance to the

1 case is. Obviously, you can just list them. But for people
2 who were not deposed, you need to put in, you know in the
3 pretrial order a couple of sentences that summarizes what their
4 testimony would be you know relevant to not just like fact
5 witness but you know whatever it is they have as relevant so
6 that Mr. Antollino could at least, first of all, object and
7 prepare if he feels necessary based upon what you're saying
8 their relevance is to the case, okay?

9 MR. ZABELL: That's fine, Your Honor, but I think
10 part of the problem here is that Mr. Antollino doesn't recall
11 that he received the identity of all these witnesses and their
12 addresses back in I believe 2011 pursuant to an order from Your
13 Honor that I turn over all the employee's names and addresses
14 for the, I think from 2009, 2010 jump season. So all of this,
15 these are all, the majority of the individuals listed are all
16 employees or former employees who worked with Mr. Zarda during
17 the 2009, 2010 year.

18 So we've listed them because of what they could
19 potentially say to either rebut Mr. Zarda or supplement Mr.
20 Maynard's (phonetic) case depending on what the case in chief
21 that Mr. Zarda puts in. There were no surprises. These are
22 all individuals, the identity of whom had come up in discovery
23 and these are all individuals who Mr. Antollino has had their
24 names and addresses or last known addresses since 2011.

25 MR. ANTOLLINO: Well, you know, Judge, there are

1 surprises and there are surprises. And he's explaining this
2 now, I do remember getting a list of some addresses, some of
3 which were not accurate or were just PO Boxes. But the bottom
4 line is I don't think your rules require that rebuttal
5 witnesses be listed in the pretrial order, just rebuttal
6 documents that would make sense to me insofar as you know I can
7 look at a document, figure it out and examine it before trial
8 but I can't a witness who you know I might have had their
9 address two years ago but I might have decided that the case
10 went in a different direction and I didn't need to provide, to
11 examine those witnesses.

12 Moreover, Judge, there are some, you know causes of
13 action or semi-causes of action that you just dismissed like
14 the hostile work environment which a lot of these witnesses
15 might have testified to but that's out of the case. I'm not
16 calling any of these witnesses and you're not going to allow a
17 50, I'm sorry, a 60 case witness trial and I really just think
18 that this is a big impediment towards having an expeditious and
19 fair trial for both parties to have all of these names in
20 there.

21 And I was able to succeed in getting Mr. Zabell to
22 remove one name, someone who his client had testified that
23 didn't want to get involved and didn't know anything but I mean
24 I think that just demonstrates that he has just gotten together
25 all of the names and cut and paste and put it in and you know

1 I'm going to get back a list of you know will testify to the
2 events that occurred in the workplace and that plaintiff was
3 not subject to discrimination in any manner.

4 Let's just play fair here. This is a week trial that
5 involved, you know seven main parties or main witnesses and I
6 would b e happy with your proposal, Judge, but let's hold that
7 to a tee and have these witnesses specifically identified as to
8 what they're going to testify to and if anything at all, other
9 than some generic will testify to events at the workplace or
10 something like that. I just think that this is just an
11 impediment towards getting this case to move forward and to
12 make me waste time on things that are just not going to come
13 up.

14 THE COURT: Well, I don't think, first of all, the
15 fact that they're in a list, there's no way this is going to be
16 a 50 witness case. I think Mr. Zabell knows that, too. So I'm
17 not worried that the trial is going to be longer just because
18 he put these 50 names down and obviously just because he put
19 the name down, doesn't mean he's going to be able to call them.
20 If he wants to call them, he would have to demonstrate that it
21 was relevant, noncumulative, you know so there's no prejudice
22 to you or your client just because he puts the list on.

23 The only thing I was concerned about is if you have
24 no idea who the person is that he should identify who the
25 person is and something basic about their testimony. Now, to

1 the extent you're asking me to have, he has to give like
2 chapter and verse of what they would say if they were called, I
3 don't think that's warranted either. If he identifies, I
4 didn't realize that most of these people were employees at the
5 time that your client was employed there. If he identifies
6 them as employees who worked there at the time that your client
7 did and he wants to reserve the ability to call them, depending
8 upon what your client may or may not say on the stand with
9 respect to Mr. Maynard's conversations with him, treatment of
10 him, even though you don't have a hostile work environment
11 claim, does not mean that you know other interactions that they
12 may have had or conversations would not be relevant to the
13 remaining claims.

14 So I'm not going to, the rebuttal, his witnesses
15 aren't rebuttal witnesses. In other words, the defendant's
16 list of witnesses are not considered rebuttal witnesses simply
17 because they may respond to what your client says. They're
18 still you know, you're the one who has the right to call
19 rebuttal case. So he does need to list who his potential
20 witnesses are and you know I don't think there's any, as long
21 as you have a general idea of who the person is, I don't think
22 there's any prejudice.

23 You can obviously just object, you know in the
24 pretrial order you can object to them if you think they're not
25 going to be relevant and should he ever try to call any of

1 them, you would have a discussion about why they were necessary
2 in light of the case that you put on, okay?

3 MR. ANTOLLINO: All right. If they're identified as
4 employees, then I have the ability to reach out if there are
5 any, but obviously they weren't all employees, because one of
6 them was his client's girlfriend. So if I get a couple of
7 sentences as to what they're for, that's fine with me. I think
8 it makes the pretrial order longer. But now you're saying you
9 want me to object in the pretrial order as to witnesses that I
10 think should not testify? I wasn't aware that that was a
11 requirement of your --

12 THE COURT: I'm not saying if you know you're going
13 to object now, you can put it in there. I'm not going to say
14 you waived the objection because --

15 MR. ANTOLLINO: All right.

16 THE COURT: -- because you don't have enough really
17 to know at this point because you know he's just going to give
18 a general summary. So if you know for sure you would object,
19 you could put the objection in but you preserve the ability to
20 object once he identifies before trial or at trial exactly what
21 the substance of their testimony is going to be, okay?

22 MR. ANTOLLINO: Okay.

23 THE COURT: And you said there were other issues you
24 wanted to raise?

25 MR. ANTOLLINO: Yeah, there is another issue that I'm

1 going to raise and I as Mr. Zabell knows, I videotaped Mr.
2 Maynard's deposition and one thing that the videographer or the
3 deposition company can do is put together bits and pieces in
4 one film as to the defendant's testimony which I plan to do.
5 And so I've identified you know many portions of the
6 defendant's deposition not all of which, but some of which were
7 objected to.

8 So at some point, I'm going to have to put these into
9 a video that's going to be shown to the jury. And it would be
10 nice to get the objections well in advance so if you rule that
11 this isn't relevant or that is relevant, I can take that in or
12 put that in, take that out or put that in, well in advance.
13 It's not like I'm just reading a deposition. You know there's
14 some steps involved.

15 So this way we have plenty of time to do that and
16 since Mr. Zabell is very quickly going to get my list of
17 designations you know I would ask that you know his objections
18 be made known by a certain time. And then I'll either look at
19 it and say yeah, that's not so important or I'll say no, I
20 really want that and we'll have to go to you for a resolution
21 on that.

22 THE COURT: Okay, that sounds reasonable. Mr.
23 Zabell, will you do, once you get his designations in the
24 pretrial order, will you just state which ones you're objecting
25 to so that I can rule on those so he'll have sufficient time to

1 prepare the video?

2 MR. ZABELL: Absolutely, Your Honor.

3 THE COURT: Okay. All right, so we'll set a date,
4 once we set the pretrial order date, we'll set a date for that,
5 okay?

6 MR. ZABELL: Okay.

7 THE COURT: So how much longer do you guys need then
8 for the pretrial order?

9 MR. ANTOLLINO: Well, for the pretrial order I'm done
10 basically. And it's just Mr. Zabell's decision as to know
11 which of the witnesses, you know he wants to put a sentence or
12 two in for, and so I don't know, I think that that can be done
13 within a week.

14 THE COURT: Mr. Zabell?

15 MR. ZABELL: All I'm going to say for the witnesses
16 is I've identified them as employees for the 2009 through 2010
17 jump year.

18 THE COURT: But again, if there are some that are not
19 employees, you --

20 MR. ZABELL: They are. The witnesses that I've
21 listed are all employees.

22 THE COURT: Okay.

23 MR. ZABELL: They're all --

24 THE COURT: So how long do you need then? Can you do
25 it in a week then?

1 MR. ZABELL: Yes, I can do it within a week, that's
2 fine.

3 THE COURT: So we'll say it will be filed June 17th,
4 and then how long will you need then to go through the
5 designations to state any objections?

6 MR. ANTOLLINO: I would like to be able to say I can
7 do it in a week but I just don't know how many designations are
8 going to be made.

9 THE COURT: Why don't --

10 MR. ANTOLLINO: If it's a reasonable amount, you know
11 20 or 30, we can do it in a week. If it's 300, it may take me
12 a little longer.

13 THE COURT: Okay. So I'll give you until the end of
14 the following week, that's like 10 days. We'll say June, hold
15 on, I lost my date here. So June 17th, say July 7th, okay?
16 Just do a letter to Mr. Antollino indicating which ones, some
17 ridiculous amount you can ask me for more time but I'm assuming
18 you can get it done, okay?

19 MR. ANTOLLINO: That sounds reasonable.

20 THE COURT: And then Mr. Antollino, I guess if you
21 get designations that you, if you get objections that you don't
22 agree with, you want me to set a date for you to put a letter
23 into me?

24 MR. ANTOLLINO: Yeah, could you give me actually just
25 because of a road trip I'm going on could you give me until

1 August 5th or would that be too late?

2 THE COURT: No, that's okay, August 5th, okay? And
3 then if we need be, we'll have a conference call to resolve
4 whatever issues are. But obviously, Mr. Zabell, to the extent
5 if it's not prejudicial in some way, let's not nick pick over
6 every line, okay?

7 MR. ZABELL: Absolutely. If I could ask, Judge,
8 because Mr. Antollino has indicated that he has finished his
9 portion of the pretrial order and we've already sent him ours,
10 if we can get him to send us today his portion of the pretrial
11 order so we can start melding the two documents together?

12 MR. ANTOLLINO: Sure, I have no problem with that. I
13 just want to ask you one thing, Judge. Do you require, well,
14 let me ask you this. Let me ask Mr. Zabell in front of you and
15 let me ask you at the same time, you require objections on
16 exhibits to be made in the pretrial order or is that something
17 you take up closer to trial?

18 THE COURT: Hold on one second. We're just checking
19 our individual rules. Sometimes lawyers do put the objections,
20 the exhibits in the pretrial order but if it would expedite the
21 submission of it, you know if you and Mr. Zabell just want to
22 reserve the ability to object --

23 MR. ANTOLLINO: That's why we had requested it
24 because it was our understanding that your rules require it,
25 Judge, and we were operating under that.

1 THE COURT: I just want to double check. I think
2 they probably do but I just want to, yes. Yes, it does require
3 it. But again, I don't want to, if both sides agree to reserve
4 that ability, it doesn't affect my life. You both want to
5 reserve the ability to object closer to, you know to the trial
6 or at the trial, as opposed to trying to go through each one
7 now.

8 MR. ANTOLLINO: Well, what I do, Judge, is if, excuse
9 me, Mr. Zabell, is put something that has worked in the past,
10 you know for good cause shown, the parties may amend this
11 pretrial order before the trial begins as a final paragraph and
12 so for good cause shown, you know you can make an objection at
13 a later time.

14 THE COURT: Yes, that's fine. If you have an
15 objection now and you know there's no reason to hold the
16 objection. Put it in there.

17 MR. ANTOLLINO: Right.

18 THE COURT: But if you know I always allow the
19 parties if something comes up either before trial or even
20 during the trial if they can explain what the objection is, and
21 why they didn't identify it earlier, you know but you should
22 try to identify the ones that you can identify now, okay?

23 MR. ANTOLLINO: All right. Okay.

24 THE COURT: Okay, Mr. Zabell?

25 MR. ANTOLLINO: I'll get to Mr. Zabell shortly.

1 THE COURT: Okay, Mr. Zabell?

2 MR. ZABELL: That's fine, Judge. I would just prefer
3 in reviewing Your Honor's rules, I'm not waiving my right to
4 see Mr. Antollino's objections and I understand absolutely for
5 good cause shown changes occur at trial. That's fine, I
6 understand that, but to the extent that I can have his
7 objections when the pretrial order is due, or shortly
8 thereafter, that is part of the process of preparing for trial
9 that I --

10 THE COURT: Again, I don't want you to think that,
11 well, let me say it this way because I agree. I don't want to
12 have issues. If you know the objection, it should be in the
13 pretrial order or you know obviously or shortly thereafter
14 within a week or two of the order if you see something and you
15 didn't pick up on it, you know that's not going to prejudice
16 anybody but to the extent a week before the trial, or during
17 the trial, you're starting objecting to things that you didn't
18 object to in the order, I ask when a lawyer does that I ask for
19 an explanation like why you didn't raise this earlier.

20 If you don't have a good cause for not having raised
21 it earlier, then I could preclude you from you waived the
22 objection unless you can explain why you didn't identify it
23 earlier. Some things you can't --

24 MR. ZABELL: Okay.

25 THE COURT: -- identify until you know something

1 arises during the trial but I don't want you to think you sort
2 of have free reign to just object at any time without
3 explaining to me why you didn't raise it in the pretrial order,
4 okay?

5 MR. ZABELL: Okay.

6 THE COURT: But I think the good cause language
7 covers that, okay?

8 MR. ZABELL: Okay.

9 THE COURT: Okay, Mr. Zabell?

10 MR. ZABELL: Thank you, yes.

11 THE COURT: Okay, have a good day.

12 MR. ANTOLLINO: Same to you as well.

13 MR. ZABELL: Thank you. Good bye.

14 * * * * *

15 **C E R T I F I C A T I O N**

16 I, Tracy Gribben, court approved transcriber, certify
17 that the foregoing is a correct transcript from the official
18 digital audio recording of the proceedings in the
19 above-entitled matter.

20
21 **/S/TRACY GRIBBEN**

22
23 TRACY GRIBBEN TRANSCRIPTION, LLC December 9, 2015

24

25

DATE: 6/10/2014

AT: 4:41 p.m.

Time: 20 min.

BEFORE JUDGE JOSEPH F. BIANCO:

CIVIL CAUSE FOR TELEPHONE CONFERENCE

DOCKET NUMBER: CV 10-4334

TITLE: Zarda v. Altitude Express

APPEARANCES:

FOR PLAINTIFF(S): Gregory Antollino

FOR DEFENDANT(S): Saul Zabell

FTR: 4:41-5:01

X CASE CALLED.

X COUNSEL FOR ALL SIDES PRESENT.

_____ COUNSEL FOR _____ NOT PRESENT.

X CONFERENCE HELD.

_____ DISCOVERY TO BE COMPLETED BY _____

_____ PARTIES TO COMPLETE _____
BY THE NEXT CONFERENCE OR BY _____

_____ NEXT CONFERENCE SET FOR _____

_____ CASE TO BE REFERRED/ASSIGNED TO MAGISTRATE JUDGE _____
FOR _____

_____ MOTION TO BE FILED BY //2014 ;
RESPONSE BY //2014 ;
REPLY BY //2014 .

_____ ORAL ARGUMENT SET FOR //2014 at

_____ JURY SELECTION SET FOR _____

_____ TRIAL SET FOR _____

X OTHER Pretrial order due by 6/7/14. Letter to Mr. Antollino by 7/7/14. Letter to be submitted to the court by 8/5/2014.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, . Civil No. 10-CV-04334-JFB-GRB
Vs. .
. 824 Federal Plaza
. Central Islip, NY
ALTITUDE EXPRESS, INC., ET AL, .
d/b/a Skydive Long Island . March 28, 2014

**FILED
CLERK**

4/1/2014

Ray Maynard
.

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Decision

1 THE CLERK: Calling Case 10-CV-4334, Zarda versus
2 Altitude Express. Please state your appearance for the record.

3 MR. ANTOLLINO: Gregory Antollino for plaintiff, good
4 afternoon, Your Honor.

5 THE COURT: Good afternoon, Mr. Antollino.

6 MR. ZABELL: And Saul Zabell for the defendants.
7 Good afternoon, Judge.

8 THE COURT: Good afternoon. As you know, I scheduled
9 this conference because I wanted to rule on the pending
10 motions. I decided, given that they have been now pending for
11 some time to place an oral ruling on the record. It's possible
12 I may also do a written opinion on this, I haven't decided
13 whether to or not yet, but I didn't want the case to be delayed
14 further. So I'm going to place the ruling on the record. I
15 just ask you to bear with me, it should take about 10 or 15
16 minutes, and then we'll discuss the next steps going forward.

17 So first just let me for the record state that the
18 standard I'm applying for summary judgment is set forth in an
19 opinion that I wrote several years ago, Zhao versus State
20 University of New York, 472 F Sup 2nd. 289 Eastern District of
21 New York (2007). I adopt that standard in its entirety, I
22 won't repeat it here. In short with respect to summary
23 judgment obviously the facts are accepted as true and all
24 reasonable inferences are drawn in favor of the nonmoving
25 party.

1 Here, we have cross motions for summary judgment so
2 when considering each motion I'm applying that standard for the
3 benefit of the nonmoving party. I also adopt as contained in
4 that opinion the framework for analyzing a gender
5 discrimination claim, which is similar both in the Federal law
6 and State law in terms of the McDonnell Douglas burden-shifting
7 analysis which I am applying here. And that case also dealt
8 with gender stereotyping. It has some case law with respect to
9 that as well, which is obviously part of the subject of this
10 suit.

11 So I adopt that standard in its entirety and I move
12 now to each of the claims. First, well, actually I should say
13 the threshold matter. There was a motion to strike a portion
14 of the reply memorandum of plaintiff's partial summary judgment
15 motion because it raised the issue of sex discrimination
16 stereotyping, which was not the subject of the plaintiff's
17 motion.

18 I'm denying the motion to strike, there was no
19 prejudice even by raising that. And in fact it was pretty much
20 the same arguments that had been made previously. So the
21 motion to strike it is denied. I have considered it, but it
22 hasn't affected the ruling, again because it contained similar
23 arguments.

24 The Court will first address the gender
25 discrimination claim under Federal law for gender stereotyping.

1 Having reviewed the evidence under the applicable standard I'm
2 granting the motion for summary judgment on that claim because
3 I find that the plaintiff has failed to meet even the prima
4 facie burden, as minimal as it is, that the adverse action gave
5 rise to an inference of discrimination based up gender
6 stereotyping.

7 But evening assuming arguendo the prima facie burden
8 was met, the defendants here articulated a nondiscriminatory
9 reason, namely the customer complaint about how the plaintiff
10 was touching her and I believe there was insufficient evidence
11 that the articulated reason was a pretext for gender
12 discrimination based upon stereotyping. Although for reasons
13 I'll state in a moment when I get to the New York State claim,
14 I believe there is sufficient basis to have it go forward with
15 respect to a sexual orientation discrimination.

16 But sticking with the gender discrimination claim,
17 there were a number of theories that were, I guess three
18 theories that were asserted by plaintiff with respect to gender
19 discrimination based on stereotyping. I note that to some
20 extent I believe some of these theories are inconsistent with
21 each other and to some extent inconsistent with a sexual
22 orientation claim, and to some extent inconsistent with Mr.
23 Zardo's deposition at page 215 where he indicated it was, Ray
24 fired me for being gay.

25 But in any event I have analyzed them independently

1 of each other and I've even looked at them in conjunction to
2 the extent that that can be done. I'm just going to through
3 them.

4 The first theory I guess was that the plaintiff was
5 fired because of stereotyping that a male must be guilty of
6 sexual harassment if it is alleged. There's simply no evidence
7 to believe that that stereotype was motivating Mr. Maynard in
8 this situation. There's no, for example there's no evidence of
9 comments, there's no female comparators who were treated
10 differently. There is literally nothing to support that
11 theory.

12 The only thing that the plaintiff points to in the
13 papers, and this was discussed at oral argument, is what
14 plaintiff believes was a sloppy investigation in terms of the
15 interview of the plaintiff not allowing him a chance to see the
16 video and other issues with how the investigation was
17 conducted.

18 However, the law is clear that disputes about the
19 thoroughness of an investigation by itself cannot be enough to
20 create an inference of discriminatory intent. This case is no
21 exception to that. That's actually set forth in a case that
22 the plaintiff cites in support of its position, Sassaman v.
23 Gamache, 566 F.3rd, 307. It's a 2nd Circuit 2009 case where at
24 page 315 the 2nd Circuit states, "We emphasize that we do not
25 hold that an arguably insufficient investigation of a complaint

1 of sexual harassment leading to an adverse employment action
2 against the accused is, standing alone, sufficient to support
3 an inference of discriminatory intent. Rather, we hold only
4 that where plaintiff can point to evidence closely tied to the
5 adverse employment action that could reasonably interpret it as
6 indicating that discrimination drove the decision, and arguably
7 insufficient investigation may support an inference of
8 discriminatory intent.”

9 So here, where there is nothing other as it relates
10 to this claim, no other evidence other than a dispute about the
11 thoroughness of the investigation, I conclude that that is not
12 sufficient to give rise to an inference of discrimination, and
13 certainly, certainly not sufficient to overcome the articulated
14 nondiscriminatory reason for the termination.

15 Sassaman obviously is clearly distinguishable from
16 this case because it wasn't just a dispute about the adequacy
17 of the investigation, there was a direct comment by the
18 supervisor that you probably did what she said you did because
19 you're male.

20 So obviously a completely different situation where
21 in addition to the investigation there was direct proof of
22 discriminatory intent based upon that comment. So I don't
23 believe under that theory there's any possibility that this
24 could survive summary judgment. And secondly, to the extent
25 the sloppy investigation I think was a separate theory, for the

1 reasons I just stated I don't believe that the sloppy
2 investigation of itself can be sufficient to allow this claim
3 to, -- I should say the disputes about the sloppiness of the
4 investigation because the defendants have a different version
5 with respect to the investigation itself.

6 Moving to the other theory which is based on the, I
7 guess the plaintiff did not conform to male stereotyping, -- to
8 not conform to male stereotypes in terms of being teased about
9 wearing certain things, a pink hat and other similar types of
10 issues, the defendants noted as a threshold matter that Zarda
11 stated in his deposition that he was masculine in appearance.
12 But putting that issue aside, I don't think that's, the key
13 issue as it relates to this.

14 The key issue is that any teasing or comments with
15 respect to those types of items, there is no relationship, that
16 no rational Jury could draw any relationship to those, to the
17 termination decision. In terms of proximity to the adverse
18 action, there was no proximity. It's clear what the proximity
19 and the adverse action with this whole issue with the customer,
20 which included the disclosure of the customer's sexual
21 orientation, it had nothing to do with conforming to male
22 stereotypes in terms of what you may wear or how you may
23 behave, -- zero to do with that.

24 As Mr. Zabell noted in his papers also, Mr. Zardo was
25 rehired after these alleged incidents regarding what he was

1 wearing. There's simply no connection between those, no
2 possible connection that can be drawn by a rational Jury
3 between those events and the termination decision here.

4 So for all of those reasons I'm granting the motion
5 as it relates to the gender discrimination claim.

6 With respect to the State claims, first as a
7 jurisdictional matter the complaint does allege diversity of
8 jurisdiction. As was discussed at the oral argument, there was
9 no dollar amount in the amended complaint. Mr. Antollino did
10 put in a letter articulating why he believes the \$75,000
11 threshold had been surpassed. And I conclude based upon that
12 letter that there is a good faith basis for him to allege that
13 based upon the categories of damages that he outlined. And
14 therefore, I believe that the jurisdictional requirement for
15 diversity of citizenship is met.

16 I will ask him at the conclusion of this to amend the
17 complaint as a technical matter to put in the allegation of, in
18 excess of \$75,000. So I will move to the State law claims, the
19 sexual orientation claim, the defendant's motion for summary
20 judgment on that is denied for the following reasons.

21 The plaintiff's evidence, unlike the gender
22 discrimination claim, in addition to disputing the adequacy of
23 the investigation itself, the plaintiff has several other
24 pieces of evidence that they point to with respect to that that
25 I believe are more than sufficient to create a genuine issue of

1 fact that must be resolved at trial, including primarily, I
2 guess most significantly the timing of the disclosure of sexual
3 orientation to the customer and the termination was obviously
4 in very close proximity and was the subject of the interactions
5 between Mr. Zardo and Mr. Maynard.

6 So I think that is another, -- is one piece of
7 evidence that certainly can be relied on with respect to the
8 sexual orientation claim. There are some other pieces of
9 information or evidence that if credited and drawn most
10 favorably to the plaintiff could also be utilized to support
11 that claim. There's this issue regarding another employee, I
12 think it was Weinstock if my memory is correct, who disclosed
13 in some manner being heterosexual during a jump and there was
14 no adverse action taken with respect to that.

15 Obviously I know the defendants argue the
16 circumstances were different than alleged to an allegation of
17 improper touching. But in any event, again this has to be
18 construed most favorably to the plaintiff. With respect to the
19 defendant's motion it is something that they could as part of
20 their other evidence utilize for the purpose of creating a
21 genuine issue of fact.

22 There is some evidence that, in the unemployment form
23 that the reason for the termination was not completely
24 consistent with the reasons given at other times. And I
25 believe that all of these things, while each of these things in

1 isolation would not be sufficient, I believe together they are
2 certainly sufficient to create an issue of fact or whether the
3 termination was because of the articulated nondiscriminatory
4 reason given by the defendants of a customer complaint about
5 discomfort and being touched by the plaintiff during the jump
6 or whether he was terminated because of the sexual orientation,
7 or the disclosure of his sexual orientation by the plaintiff.

8 So the defendant's motion on the State law claim for
9 sexual orientation discrimination is denied. And similarly,
10 the plaintiff's cross motion for summary judgment on the sexual
11 orientation claim is denied. Looking, again, now looking at
12 the evidence from the defendant's standpoint most favorably for
13 purpose of the plaintiff's motion, it's undisputed that a
14 customer complaint was made.

15 While there's a dispute about whether it should have
16 been sufficient for the termination or not, -- certainly the
17 fact that a complaint was made does provide some support for
18 the defendant's position. There was some investigation done,
19 it wasn't an immediate termination, it was a suspension with
20 some discussion with the plaintiff. And again, while there's a
21 dispute about whether that was sufficient under the
22 circumstances of that, -- if that's construed most favorably to
23 the defendant it certainly creates enough of an issue of fact
24 with regard to his intent to preclude summary judgment in the
25 plaintiff's favor on this.

1 And there's also evidence that there was knowledge of
2 the plaintiff's sexual orientation far before this event
3 transpired. Obviously that doesn't address the issue of
4 whether or not the disclosure of the sexual orientation was the
5 basis for the discriminatory act that's alleged, -- but as the
6 issue of whether or not it was over the sexual orientation
7 itself, certainly that evidence would support the defendant's
8 position.

9 So the evidence in the record if construed most
10 favorably to the defendant is certainly sufficient to overcome
11 plaintiff's motion for summary judgment on the issue of whether
12 or not the articulated reason, the articulated
13 nondiscriminatory reason was the real reason for the
14 termination.

15 Turning briefly to the hostile work environment
16 claim, again, that standard is set forth in Zhao. I won't
17 repeat it here, but the isolated incidents related to the
18 comments about what the plaintiff was wearing or behavior, or
19 similar things of that nature are, it's not even close to being
20 sufficiently pervasive or severe to possibly have a Jury
21 rationally conclude that it was a hostile work environment.

22 This issue is about, -- this case is about the
23 termination, it's not about a hostile work environment. So the
24 motion is granted with respect to that.

25 Turning to the wage claim, I'm denying the cross

1 motions on the wage claim, because the record, the Court just
2 can't discern from the record, again construing it most
3 favorably to the nonmoving party in each situation, whether or
4 not this can be resolved as a matter of law, based upon the
5 facts that are in, that have been submitted in the summary
6 judgment motion. Certainly, the defendants have attached
7 records which accredited would allow them to prevail on this
8 claim. And so that's why the plaintiff's motion for this is
9 denied.

10 But I'm also denying the defendant's motion because
11 there's some disputes about the adequacy of the record keeping
12 about, there's a dispute about whether the plaintiff was
13 required to be there in the vicinity of the location for
14 certain periods of time. And I believe that the Zarda
15 affirmation that was submitted in opposition on April 8, 2013,
16 is sufficient to at least create an issue of fact that this
17 can't be resolved at summary judgment. Although it does not
18 seem to be a particularly strong claim, I believe it's
19 sufficient to survive summary judgment.

20 The overtime claim, plaintiff did not even separately
21 brief the overtime issue and I'm granting summary judgment on
22 the overtime issue because I don't see any evidence that would
23 support an overtime claim under New York law as opposed to a
24 minimum wage claim.

25 So the cases that survive, excuse me, the claims

1 that survive summary judgment are the sexual orientation claim
2 under New York law as well as the minimum wage claim under New
3 York law. And those are the claims that will proceed to trial.

4 Okay, so Mr. Antollino, I am just going to ask that
5 you formally just, I guess it would be the second amended
6 complaint.

7 MR. ANTOLLINO: Certainly.

8 THE COURT: I'm sorry, what did you say?

9 MR. ANTOLLINO: Certainly.

10 THE COURT: What did you say, Mr. Antollino?

11 MR. ANTOLLINO: I'm sorry? No, I just said
12 certainly.

13 THE COURT: Okay. So just put that in for a week
14 from today, and Mr. Zabell, you can just file another answer.

15 MR. ZABELL: Your Honor, if I may, we had discussed
16 at our last conference that if Your Honor's decision did in
17 fact come down the way it came down today that I would be given
18 an opportunity to brief the issue based upon the deposition
19 testimony and the discovery documents that Mr. Zarda turned
20 over that they do not meet the 75,000 jurisdictional
21 requirement.

22 THE COURT: Okay. Well, if, if, I'm not going to let
23 that the way everything else that we're going to do, because
24 the case has been around for too long. So I will let you put
25 something in. But what I'm going to do is I'm going to have

1 them put in the amended complaint, if you believe that there's
2 not a good faith basis based upon the letter that he submitted,
3 I think it was June 13 or something like that where he put in
4 the various categories of damages. I guess in lieu of an
5 answer you could file a motion to dismiss on jurisdictional
6 grounds, okay.

7 MR. ANTOLLINO: Judge, and just to be clear, the
8 standard is not whether or not the damages are provable, but
9 whether there is a good faith basis to allege them.

10 THE COURT: Yes. I know that standard, I've been
11 through it a few times.

12 MR. ANTOLLINO: I just wanted to make it clear as to
13 all parties that if there were any motion it would be that I do
14 not have a good faith basis --

15 THE COURT: Right.

16 MR. ANTOLLINO: -- to assert this. Not that it's not
17 going to be provable. It's not a summary judgment motion --

18 THE COURT: Right.

19 MR. ANTOLLINO: It would be I do not have a good
20 faith basis to pay it.

21 THE COURT: Right. That's why I thought your letter
22 was, you know, very detailed in terms of looking at other cases
23 in terms of emotional damages and things like that, of what a
24 good faith potential recovery would be. So I think Mr. Zabell,
25 as you probably gathered, you have a real uphill battle on

1 that, but I won't prevent you from, -- I said I would give you
2 a chance and I think you're entitled to a chance. So if you
3 want to put in, but I am going to ask that you put that in, you
4 know, quickly. And then I'll give Mr. Antollino a chance to
5 respond to that, okay.

6 MR. ANTOLLINO: Thank you, Judge.

7 THE COURT: So I mean, do you want to set a motion
8 schedule for that now, then, Mr. Zabell, since I have you? Do
9 you want to just do that?

10 MR. ZABELL: Yeah, that, I can get 15 days, Judge?

11 THE COURT: Yes. So then Mr. Antollino will put it
12 in by April 4. And then 15 days would be, that would be a
13 weekend --

14 MR. ZABELL: Wait, wait.

15 THE COURT: April 21?

16 MR. ZABELL: Wait, I'm sorry, Judge, 15 days is,
17 that's going to take me to, let's see. That's not going to
18 take me to April 4, that will take me --

19 MR. ANTOLLINO: I'm going to put in the amended
20 complaint toot sweet. So you know, it will be 15 days from the
21 day that I put in the amended complaint, not April 4. I mean,
22 I really feel that if Mr. Zabell is actually going to pursue
23 this motion it's not only a waste of his client's money, it's a
24 waste of the Court's time. And I'll look at it very carefully,
25 but I have, I've made a thorough letter on that point because I

1 knew I was correct on this and I think that if Mr. Zabell is
2 going to waste his client's money and the Court's time he'd
3 better have a good faith basis to make the argument that I
4 don't have a good faith basis to say that this could happen.

5 So I may make a, I may decide to make a cross motion
6 for sanctions if we have to waste our time on a point which is
7 really theoretical, not something that I have to prove.
8 Theoretically I can get more than \$75,000 on this case. It's
9 not going to the Jury now and it's not, it's not even summary
10 judgment. It's just me having a good faith basis. So what
11 he's arguing is that I am in fact, -- have a bad faith argument
12 by making his argument that I don't have a good faith basis.

13 THE COURT: Okay. Let's just get it scheduled, Mr.
14 Antollino, okay. You can make a cross motion, you can make
15 whatever motion you'd like to, but let's, so you said you're
16 going to put it in Monday then? The amended complaint?

17 MR. ANTOLLINO: Yeah, I'll put it in, I'll put it in
18 this weekend.

19 THE COURT: Okay. So if he puts it in this weekend,
20 Mr. Zabell, do you want 15 days then from Monday?

21 MR. ZABELL: Yes, please.

22 THE COURT: So we'll say, that would be, say April
23 15. How long do you want to respond? Mr. Antollino, if you,
24 if you believe that you've covered this in your letter you can
25 just submit a letter to me saying you're relying on your

1 previous submission, you don't have to write up something, you
2 know, you don't have to repeat what you said previously, okay?

3 MR. ANTOLLINO: Okay, all right.

4 THE COURT: So how long do you want?

5 MR. ZABELL: Well, give me ten days from his
6 response.

7 THE COURT: Okay. So April 25 will be the
8 opposition, and then a week for any reply, Mr. Zabell?

9 MR. ZABELL: That will be sufficient, thank you,
10 Judge.

11 THE COURT: Okay, so that's May 2. I won't have an
12 argument on this because I think it's a fairly straightforward
13 issue. Unless I have questions I'll just, I'll either do what
14 I did today where I'll have a phone conference and I'll rule on
15 it, or I'll issue a short order, okay.

16 But in terms of the, it's not, just to mention, Mr.
17 Antollino this is not going to affect obviously the trial date
18 in this case because we weren't going to have the trial that
19 soon anyway. So the, what I'll do is I'll make the pretrial
20 order due, it shouldn't be too complicated, maybe 30 days from
21 May 2 then?

22 MR. ZABELL: That's fine.

23 MR. ANTOLLINO: I can work with that, Your Honor.

24 THE COURT: So we'll say June 2, pretrial order. And
25 then within 10 days of that we'll have a call to set a trial

1 date, which I anticipate would be in the all, okay?

2 MR. ZABELL: Okay. Your Honor, there is one last
3 thing, and I bring it up as much for humor's sake as anything
4 else. But I can say in every conference that I've had with Mr.
5 Antollino, Mr. Antollino has brought up the issue of seeking
6 sanctions against me. I just, I bring it up for comedy's sake,
7 it's Friday afternoon. I just think it's, it's well worth
8 noting.

9 MR. ANTOLLINO: I'd like to bring up a little comedy.
10 One of the World Trade Center jumpers from this week was
11 actually one of the witnesses mentioned in the pretrial
12 although disclosures, although he never put in an affidavit or
13 was deposed. So that's some real comedy.

14 THE COURT: All right. I don't think we need any
15 more comedy, okay.

16 MR. ANTOLLINO: Okay. Who's the reporter on this?

17 THE COURT: I'm sorry, what did you say?

18 MR. ANTOLLINO: The court reporter, the court
19 reporter?

20 THE COURT: Oh, there is no court reporter here. We
21 put this on the, this is being recorded digitally. So if you
22 want to order the transcript just contact my deputy and she'll
23 tell you who in the clerk's office, -- or it's in our rules I
24 guess, too, who in the clerk's office you can call to order it.
25 They send it out to an agency and they produce the transcript,

1 okay.

2 MR. ANTOLLINO: Okay.

3 THE COURT: Okay, thank you, counsel, have a good
4 weekend.

5 MR. ANTOLLINO: Thank you, bye.

6 MR. ZABELL: Everybody have a good weekend.

7 * * *

8 C E R T I F I C A T I O N

9

10 I, **TRACY GRIBBEN**, court approved transcriber,
11 certify that the foregoing is a correct transcript from the
12 official electronic sound recording of the proceedings in the
13 above-entitled matter.

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/S/ TRACY GRIBBEN

17 TERRY GRIBBEN'S TRANSCRIPTION SERVICE DATE: April 1, 2014

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