GREGORY ANTOLLINO
ATTORNEY AT LAW
GREG@ANTOLLINO.COM

275 SEVENTH AVENUE, SUITE 705
NEW YORK, NEW YORK 10001

TEL. (212) 334-7397
FAX (212) 334-7399

September 9, 2016

Catherine O'Hagan Wolfe
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Estate of Zarda v. Altitude Express, et ano., 15-3775

Dear Ms. Wolfe or to whom it may concern:

Appellant writes under Rule 28(j). Appellant's claim on appeal is that Simonton v. Runyon should be overruled. Without backing away from that, we point out Vasquez v. Empress Ambulance Serv., 2016 U.S. App. LEXIS 15889 (2d Cir. Aug. 29, 2016), which dovetails with our facts. The holding in Vasquez is that an employer is liable under Title VII when an employee sets up another for a false charge of sexual harassment. The "cat's paw" analysis is discussed, and the emplyee causes a supervisor to conduct a shoddy investigation that subjects the falsely accused to adverse action.

In Zarda, a gay skydive instructor, required to touch a woman at the hips to adjust straps to keep her alive, mentioned he was gay. Her boyfriend learned this and reported both contentions to the employer, who did no investigation except to confront Zarda. The defense contended at summary judgment that the complaint itself was the reason for termination. The Court accepted this at summary judgment, and rejected plaintiff's argument that a specious "touching" complaint with no investigation was a violation of Title VII. SPA.22-26. Plaintiff brought up this point in his brief at pp. 6-7, 10, 18, 24, 60; and reply brief at 19.

The "customer's veto" has long been a verboten basis upon which to discrimination against an employee. Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. 2010). Also, using the language of Vasquez, and substituting the word "co-worker" with "customer," the defendants' "neutral reason" is surely no longer neutral under Title VII. As this Court held:

> [W]hen an employer . . . adopts an [customer's] unlawful animus by acting *negligently* with respect to the information provided by the [customer], and

> thereby affords that biased [customer] an outsize role in its own employment decision . . . an employer can still "just get it wrong" without incurring liability under Title VII, but it cannot "get it wrong" without recourse if in doing so it negligently allows itself to be used as conduit for even a [customer's . . .] prejudice.

Vasquez, 2016 U.S. App. LEXIS 15889 at **21-22.

Sincerely,

Greg A. Antollino /s/

Gregory Antollino

Cc: All parties by ecf