Counseling and Advising Clients Exclusively on Laws of the Workplace

Zabell & Associates, P.C.
EMPLOYMENT COUNSELING, LITIGATION, LABOR & BENEFITS LAW

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Saul Zabell
Email: szabell@laborlawsny.com

April 12, 2011

***VIA* ELECTRONIC CASE FILING**

The Honorable Joseph F. Bianco
United States District Judge
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Your Honor:

This firm is counsel to Altitude Express, Inc., *et al.*, Defendants in the above-referenced action. We write in opposition to Plaintiff's April 8, 2011 letter motion seeking to compel discovery. For all the reasons set forth below, Defendants respectfully request Your Honor deny Plaintiff's letter motion.

As an initial matter, during the previous court conference, Your Honor directed the parties, after meeting and conferring, to file any motions to compel *via* formal motion practice, and not letter motion. Accordingly, Plaintiff's motion is procedurally defective, violates Your Honor's directive, and therefore requires dismissal.

Notwithstanding Plaintiff's claims for alleged discrimination based on sexual orientation and sexual stereotyping, Plaintiff was terminated due to inappropriate workplace behavior. Moreover, while Plaintiff alludes to the potential withdrawal of his overtime claims due to the fact Defendants are exempt under the Fair Labor Standards Act, any such withdrawal also requires withdrawal of his federal minimum wage law claim. See 29 U.S.C. § 213(a)(3).

Defendants respond to Plaintiff's specific arguments as follows:

1. **Names and addresses of co-workers at the defendant company for the summers of 2009 and 2010.**

While Defendant Altitude is in possession of the contact information for its employees, this information is not relevant in the case at bar. Plaintiff is correct that Defendants identified they were in possession of this information in its Automatic Disclosure Statement. However, this fact alone does not mandate disclosure. According to the 1993 Committee Note of FRCP 26, the

listing of documents does not waive objections to their production, even on grounds of relevance. ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.") Committee Note, 146 F.R.D. at 631. Moreover, while Plaintiff argues co-workers regularly engaged in sexual banter, and although appropriately demanded in discovery, he has yet to identify any specific co-worker he believes to have done so. Accordingly, this vague request for identifying information is nothing more than an attempt to annoy and harass Defendants and their employees. We have previously stated that should Plaintiff identify any specific employee he thinks possesses relevant information, we would revisit this position. See Exhibit "A." To the extent Plaintiff alleges his co-workers regularly engaged in this conduct, he should be able to identify, with specificity, any employee who has purportedly engaged in this conduct.

Regarding Plaintiff's renewed threats of a motion to disqualify, Plaintiff misstates the relevant case law. In U.S. v. Occidental Chemical Corp., 606 F.Supp. 1470 (W.D.N.Y. 1985), Counsel for the defendants offered, by letter, to represent any non-party employee witnesses who were subpoenaed for deposition in that case. The Court held that this constituted an improper solicitation of business, but did not warrant disqualification. The Court did not preclude defendant's counsel from representing non-party employees at future depositions, but stopped the defendant's counsel from soliciting such representation. Occidental, 606 F.Supp. at 1476-1477, 1478. In Rivera v. Lutheran Medical Ctr., 22 Misc.3d 178, 866 N.Y.S.2d 520 (Kings Cnty. 2008), the Court found that defendant's counsel should be disqualified from representing non-party witnesses (but not the defendant), based upon similar solicitation and because of a history in that case of defendant's counsels "improperly thwarting plaintiff's attempts to obtain discovery." Rivera, 22 Misc.3d 178 at 186, 866 N.Y.S.2d 520. In the case at bar, Plaintiff ignores the fact the undersigned has not actively solicited any employee of Defendants. However, should an employee request representation in the course of this proceeding, we intend to undertake such representation.

2. Names and addresses of customers with whom plaintiff jumped in 2009 and 2010

The identity of every single passenger with whom Plaintiff jumped is irrelevant to Plaintiff's claims of discrimination. By Plaintiff's own admission, as confirmed in the Complaint, the only relevant passenger in the case at bar is "Rosanna;" Plaintiff alleges it was her complaint that was the impetus behind his termination. Additionally, Plaintiff cannot identify with specificity any relevant information these individuals possess, but rather, has routinely stated they "**may** have discoverable information." Such speculation and conjecture does not meet the burden associated with Defendants' review of their records and corresponding production of contact information for every single passenger who jumped with Plaintiff.

Regarding the complaining witnesses, Defendants are in the process of obtaining the contact information for "Rosanna" and anticipates producing same shortly. However, Plaintiff has identified a customer by the name "Steve." See Exhibit "B." Defendants do not know the individual to which Plaintiff refers. To that end, Defendants requested additional contact information, but Plaintiff denied this request. See Exhibit "C." As such, Defendants cannot provide this information.

3. Plaintiff's Jump Logs

Once again, while Defendants confirmed they are in possession of this information, Defendants have not waived their objections to its production, and are under no obligation to produce it. See 146 F.R.D. at 631. In his April 8, 2011 application, Plaintiff makes the conclusory statement that "in unusual case[s]" a document identified in an Automatic Disclosure Statement can be withheld, this case is "surely not… one." Inasmuch as the jump logs contain information beyond dates worked (including customer identification information) Defendants have properly withheld production as such information is both confidential and irrelevant. Plaintiff's conclusory statement that this information is improperly withheld is insufficient to warrant production.

4. Depositions

Plaintiff's hyperbole concerning deposition priority would have this Court believe that Defendants are delaying the process. However, that is simply not the case. Defendants do not wish to depose Plaintiff until they are in possession of the requisite paper discovery necessary to do so. As Plaintiff admits, he is in possession of significant paper discovery which remains outstanding. As a consequence, Defendants will move to compel shortly. Defendants wish to avoid prejudice associated with starting Plaintiff's deposition before he has met his discovery obligations, and having to recall him after he has finished producing the relevant documentation in discovery. As Your Honor is aware, Plaintiff is not a resident of New York, and will be required to fly to New York for his deposition. This added expense on the part of Plaintiff, as well as the potential scheduling difficulty that will likely exist when attempting to schedule future flights, requires the parties to complete paper discovery prior to commencing depositions.

Additionally, as Plaintiff stated, he has conceded deposition priority. See Exhibit "D." Plaintiff should not be permitted to renege on this earlier concession due to his failure to adequately provide documentation in discovery. If allowed, Your Honor would be rewarding Plaintiff for purposefully failing to meet his discovery obligations.

Based upon the foregoing, Plaintiff respectfully requests Your Honor deny Plaintiff's application as it is both procedurally and substantively defective.

As always, counsel remains available should Your Honor require additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: Gregory Antollino, Esq. (*via* electronic case filing)

EXHIBIT A

Counseling and Advising Clients Exclusively on Laws of the Workplace

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Saul D. Zabell
SZabell@laborlawsny.com

March 24, 2011

***VIA* PRIORITY MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your March 22, 2011 email regarding purported deficiencies in Defendants' discovery responses. We disagree with much of its content. Notwithstanding this fact, we respond to each issue as follows:

Contact Information of all Employees in Last Two Years:

In response to this demand, we identified relevant portions of Defendants' Amended Rule 26 Statement. Despite this response, Plaintiff's demand is completely overbroad, and requests the disclosure of confidential employee information. While Defendants are in possession of contact information for many of its employees, they are under no obligation to give Plaintiff carte blanche to contact any and all former and current employees because they might possess some relevant information. To the extent you can identify specific employees whom you believe possess such information, we will consider your request when you provide an additional basis for contacting these employees.

Automatic Disclosures:

As an initial matter, Plaintiff is already in possession of, or has equal access to, many of these documents. Moreover, as indicated above, Defendants are in possession of contact information for its employees, but will not produce all such information as this demand is grossly overbroad. Regarding the 2008 Tax Return for Defendant Altitude Express, this information is irrelevant to Plaintiff's claims inasmuch as he was only employed during portions of the 2009 and 2010 calendar year. Accordingly, it remains our position Defendants are not required to produce this tax return.

Concerning the jump log, please see Defendants' discussion below concerning the individuals who jumped with Plaintiff.

However, in an attempt to resolve this discovery conflict, and without waiving any objections, please see the attached documentation.

Document Demand No. 2:

See Defendants February 15, 2011 Supplemental Response to Plaintiff's First Request for the Production of Documents. Defendants are not in possession of any additional documentation responsive to this request.

Videotapes of Plaintiff

Regarding the video surveillance in Defendants' office, said system is set up to write over any and all electronic data on an approximately weekly basis. As such, no video is saved to a designated hard drive or electronically stored in any other capacity. Accordingly, Defendants are not in possession of any additional documentation responsive to this demand.

Document Demand Nos. 2, 9, 10, and 12:

Regarding Document Demand No. 2, please see Defendants response, *supra*. Concerning Demand No. 9, Defendants have already indicated that they are not in possession of any documentation responsive to this request.

Concerning Demand Nos. 10 and 12, these demands are wholly overbroad, unduly burdensome, irrelevant, are not reasonably calculated to lead to the discovery of admissible evidence, and are not reasonably limited in either time or scope. Pursuant to the allegations in Plaintiff's Amended Complaint, and by Plaintiff's own admission, the only relevant customer is "Rosana;" not any other customer with whom Plaintiff may have jumped in the past three years. As such, Defendants are under no obligation to provide additional information.

Document Demand No. 6:

At this juncture, Defendants have produced all responsive documentation. However, pursuant to our clients' obligations under the Federal Rules of Civil Procedure and Local Rules of Practice, Defendants will supplement their responses if and when required.

Document Demand No. 11:

Similar to Plaintiff's demand for identifying information for all Defendants' employees, this document demand is grossly overbroad, unduly burdensome, irrelevant, is not reasonably calculated to lead to the discovery of admissible evidence, and is not reasonably limited in either time or scope. This personal information of Defendants' customers is confidential, and we are under no obligation to provide same so that Plaintiff can once again attempt to engage in an improper discovery tactic of contacting and harassing Defendants' former clients. Pursuant to the allegations in Plaintiff's Amended Complaint, and by Plaintiff's own admission, the only relevant customer is "Rosana;" not any other customer with whom Plaintiff may have jumped in

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the past three years. As such, Defendants are under no obligation to provide additional information.

Document Demand No. 13:

Inasmuch as Plaintiff originally only sought the videotape of the jump with "Rosana," the individual Plaintiff identified as the complaining customer in his Complaint, any and all videotapes of Mr. Kengle's jump would be unresponsive to this demand. However, in the spirit of cooperation, and without waiving any objections, enclosed please find a copy of Mr. Kengle's videotaped jump.

Depositions:

I appreciate your concession that Defendants have deposition priority. We can discuss potential deposition dates during our telephone conference.

Mrs. Maynard:

We are not persuaded by your cited case law and corresponding threats of serving Mrs. Maynard with a subpoena. Initially, your assertion that no privilege exists where the marriage "is so obviously destroyed" is inapplicable as the Maynards were married during the relevant time period. Moreover, you have no evidence that a third party was involved in any communications concerning Plaintiff which could potentially waive the privilege.

Notwithstanding these issues, we are willing to discuss your proposals during the telephone conference.

Kindly contact me should you have further questions regarding these matters.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: Client

EXHIBIT B

Tdomanick@laborlawsny.com

From: SZabell@laborlawsny.com
Sent: Friday, March 25, 2011 4:57 PM
To: Tdomanick@laborlawsny.com
Subject: Fwd: Rosanna's and Steve's address

Sent from a mobile location

Saul D. Zabell
Zabell & Associates, P.C.
4875 Sunrise Highway
Bohemia, NY 11716

631-589-7242

Begin forwarded message:

From: Gregory Antollino <gregory10010@verizon.net>
Date: March 25, 2011 2:29:57 PM EDT
To: "SZabell@laborlawsny.com" <SZabell@laborlawsny.com>
Subject: FW: Rosanna's and Steve's address

--_006_C9B257671F851gregory10010verizonnet_
Content-Type: multipart/related;
boundary="_005_C9B257671F851gregory10010verizonnet_";
type="multipart/alternative"

--_005_C9B257671F851gregory10010verizonnet_
Content-Type: multipart/alternative;
boundary="_000_C9B257671F851gregory10010verizonnet_"

--_000_C9B257671F851gregory10010verizonnet_
Content-Type: text/plain; charset="Windows-1252"
Content-Transfer-Encoding: quoted-printable

Mr. Zabell, I received your package today. We can discuss the various issue=
s on the phone next week. When will you be available? Please suggest some a=
fternoon(s). We will undoubtedly discuss in that conference the issue of na=
mes and addresses of customers and employees. Perhaps will need to take it =
to the judge. But you cannot possibly be of the belief that I should not ha=
ve Rosanna=92s and Steve=92s addresses and phone numbers. Attached is a por=
tion of a waiver that I downloaded from the SDLI website. The first page co=
ntains a name and address information and you only provided to me the signa=
ture pages for Rosanna and Steve. Is it your position that I am not entitle=
d to their addresses and phone numbers? I ask you to provide them before ou=
r teleconference so that I can contact the witnesses. The judge will undoub=
tedly require you to tender the information.

Gregory Antollino, Esq.
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[cid:3383908199_620118

EXHIBIT C

Counseling and Advising Clients Exclusively on Laws of the Workplace

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Saul D. Zabell
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March 28, 2011

***VIA* FIRST CLASS MAIL**
& ELECTRONIC MAIL

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your March 25, 2011 email in connection with the above-captioned matter. In your correspondence, you state that we provided you with only the "signature pages for Rosanna and Steve." Please enumerate more specifically the documentation that you allege to be incomplete so that we may be able to address your concerns accordingly.

Please do not hesitate to contact me should you have any further questions regarding this matter.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

Tdomanick@laborlawsny.com

From: SZabell@laborlawsny.com
Sent: Monday, March 28, 2011 2:19 PM
To: Tdomanick@laborlawsny.com
Subject: FW: Zarda v. Altitude express

Saul D. Zabell
Zabell & Associates, PC
4875 Sunrise Highway
Bohemia, NY 11716

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Website: LaborLawsNY.com

From: Gregory Antollino [mailto:gregory10010@verizon.net]
Sent: Monday, March 28, 2011 2:18 PM
To: SZabell@laborlawsny.com
Subject: Re: Zarda v. Altitude express

I'm sorry, but no. My response is good enough. I'm working on getting you a substantive response.

On 3/28/11 2:13 PM, "Robert Garafola" <RGarafola@laborlawsny.net> wrote:

Please see attached.

Robert Garafola

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Saul D. Zabell
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March 28, 2011

***VIA* FIRST CLASS MAIL**
& ELECTRONIC MAIL

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your March 28, 2011 email in connection with the above-referenced matter. Inasmuch as you have not provided further identifying information for "Rosanna" and "Steve," we are unable to substantively respond to your correspondence at this time.

Without waiving any objections, Defendants are currently undertaking a search of their business records and will supplement their discovery responses accordingly.

Please do not hesitate to contact me should you have any further questions regarding this matter.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

EXHIBIT D

GREGORY ANTOLLINO
ATTORNEY AT LAW
GREG@ANTOLLINO.COM

18-20 WEST 21ST STREET, SUITE 802
NEW YORK, NEW YORK 10010

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

March 22, 2011

Saul D. Zabell
Zabell & Associates, PC
4875 Sunrise Highway
Bohemia, NY 11716

RE: Zarda v. Altitude Express

Dear Mr. Zabell:

In accordance with your request, these are the matters that I believe, on your end, need to be addressed to avoid a motion to compel on my part:

1. Names and addresses and phone numbers of all employees in last two years. You have objected to this demand, yet simultaneously identified a list of employee telephone numbers as one of your initial disclosures. Please turn over the list of names and numbers identified, plus the addresses, for 2009 and 2010.

2. Please tender your identified initial disclosures 2,4, 15 (up to December 2010), 17, 18, 19, 20, 21, 24 (and 2009), 25, 26, 27, 28, 37-42. Some of these will permit me to make an informed decision, based on documentary evidence, to withdraw the FLSA claim. We had discussed this in November.

3. In response to plaintiff's second document demand: Have you completed your "search of corporate records?" Furthermore, has the individual defendant searched his personal records? Please indicate, and tender any responsive documents.

4. Furthermore, with respect to the aforementioned demand, my client has indicated that Mr. Maynard has video surveillance running in his office at all times. A videotape of my client would be an electronic record. My client would like the videotape of his suspension and termination meetings with Mr. Maynard, plus any other videotapes of him in your clients' possession.

5. With respect to demands # 2, 9, 10 and 12, are you certain you have tendered all documents, including emails, and that none exist? I would hate to depose Mr. Maynard, find out there were additional documents, and have to recall him for another round of questioning after a supplemental production. Notably, Mrs.

Maynard told Don that there had been other customer complaints, yet there were none tendered by you. This makes me suspect that your response is inadequate.

6. With respect to demand # 5, please interpret this as documents reasonable related to your defenses, and produce documents accordingly.

7. Please tender the identifying information in response to demand number 11. This is obviously relevant to the good service my client provided to satisfied Skydive customers. Plaintiff may choose to contact one or more for trial.

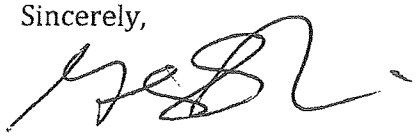
8. With respect to demand number 13, please also tender Mr. Kengle's video. It appears to me that he made the complaint against Don, and Don will also appear on that video. Furthermore, is it your position that you have no identifying information (address, phone number) for Mr. Kengle or Rosanna, his purported fiancé? If not, I will want incoming phone records for the day they called Mr. Maynard, which we can certainly ascertain.

9. Please be ready to discuss deposition dates. I will respect your priority, however, I want to do them back to back.

10. Please consider a more judicially economical manner to proceed vis a vis Mrs. Maynard, and consider the case law. First, there are two spousal type privileges in federal court, and only one applies in the civil context. United States v. 281 Syosset Woodbury Rd., 71 F.3d 1067, 1070 (2d Cir. N.Y. 1995). In the civil context, an adverse inference in a civil case may be drawn by the assertion of a marital privilege. United States v. 281 Syosset Woodbury Rd., 862 F. Supp. 847 (E.D.N.Y. 1994), aff'd, 71 F.3d 1067 (2d Cir. N.Y. 1995). Furthermore, even if the stronger privilege were to apply, it only exists to *private* communications that are not waived to third parties. Id.; Thomsen v. County of Erie, 2006 U.S. Dist. LEXIS 5401 (W.D.N.Y. Jan. 26, 2006) (citing Pereira v. United States, 347 U.S. 1, 7 (1954).) Finally, the privilege does not extend to a marriage "so obviously destroyed as the one here." *See, e.g.*, United States v. Fisher, 518 F.2d 836, 841 (2d Cir. 1975).

I would be willing to consider any possible manner in which to address this issue – including, potentially, dismissing Ray Maynard as a defendant to obviate any assertion of the privilege – but in the absence of same, I will definitely be serving a subpoena on Ms. Maynard. We never would have contacted her, but she let the cat out of the bag. I will would be remiss if I were to let that go based on your threatened assertion of a privilege that I can derive an adverse inference from. Please think this over and I would be willing to entertain any proposal.

Sincerely,



Gregory Antollino