UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,

Plaintiff,

- against -

ALTITUDE EXPRESS, INC. d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD,

Defendants.

CASE NO.: 10-CV-4334(JFB)(ARL)

DEFENDANTS' REPLY MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY OR PRODUCTION OF DOCUMENTS UNDER F.R.C.P. § 37 et seq.

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I. INTRODUCTION

Altitude Express, Inc. d/b/a Skydive Long Island, and Ray Maynard, Defendants, in this action, submit this reply memorandum of law in further support of their Motion to Compel Discovery pursuant to Fed.R.Civ.P. Rule 37, *et seq*. For the reasons set forth below, Defendants' motion should be granted, and Defendants should be awarded costs and legal fees incurred for having to make the instant motion.

As an initial matter, Defendants will not address the ever-increasing personal attacks and unprofessional behavior of Mr. Antollino memorialized within the first two pages of his submission.

II. ARGUMENT

Plaintiff's default argument when confronting his numerous discovery deficiencies is that Defendants can obtain this information at deposition. (See, e.g., Response to Interrogatory No. 3, 5, 6, etc.). While Defendants will question Plaintiff concerning the subject matter of their discovery demands, Defendants are entitled to written discovery responses so that they can use them in preparation for and for the purpose of effectively conducting Plaintiff's deposition. Plaintiff's arguments are unilateral attempts to circumvent paper discovery.

While numerous discovery issues permeate this case, due to page limit restrictions, Defendants will only discuss a sample of Plaintiff's deficient responses in the instant memorandum. For any specific demands not expressly addressed herein, Defendants respectfully refer Your Honor to their original motion papers.

I. Plaintiff's Response to Defendants' First Set of Interrogatories:

Interrogatory No. 1: "Set forth with particularity and detail any and all efforts on the part of Plaintiff to lodge complaints of alleged gender and/or sexual orientation discrimination with any managerial, supervisory or Human Resources employees of Defendant, from 2001 through the present."

Plaintiff objects claiming this demand is overbroad and vague as written. Regarding Plaintiff's objection that the phrase "with particularity" is vague, Plaintiff himself uses the phrase on page 5 of his Memorandum of Law. Moreover, as words are to be given their plain meaning in discovery demands, Plaintiff is fully capable of answering this interrogatory. Regarding the temporal scope of the demand, the demand is sufficiently narrow in that Defendants employed Plaintiff only for portions of 2001, 2009 and 2010. Plaintiff has not attempted to answer this question directly, instead referring to additional, non-responsive information contained within his responses to other demands. As such, Plaintiff is fully capable of answering this interrogatory, and should not be permitted to force Defendants to conduct discovery in an inefficient manner.

Interrogatory No. 11: "Identify with particularity and detail any and all email addresses and/or instant message screen names utilized by Plaintiff from 2004 through the present."

In response to this document demand, Plaintiff identifies a "new" email address: dgzarda@gmail.com; one that he failed to previously identify. Accordingly, it is apparent Plaintiff did not fully respond to Defendant's discovery demands, and only provided additional information in connection with this motion.

Interrogatories Nos. 14, 15, 16, 17:

Plaintiff objected to these demands claiming a "**subpart is a subpart**" while ignoring the relevant case law within the Second Circuit.

Subparts "directed at eliciting details concerning a common theme should be considered a single question." 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2168.1 (3d. ed.2010). Courts have held that interrogatory subparts are not to be counted as discrete subparts if they are logically or factually subsumed within and related to the primary question. See Brown v. Artus, 2008 WL 268171 (N.D.N.Y. Jan. 29, 2008);

Cramer v. Fedco Automotive Components Co., Inc., 2004 WL 1574691, *4 (W.D.N.Y. May 26, 2004) (citations and internal quotations omitted). Additionally, multiple interrelated questions may constitute a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately. See Brown, 2008 WL 268171; Cramer, 2004 WL 1574691, *4. Answering four (4) additional interrogatories is neither unduly burdensome or an onerous task for Plaintiff, and will yield relevant information; especially concerning Plaintiff's mitigation efforts and the measure of his damages as a former part-time, seasonal worker of Defendants.

II. Plaintiff's Response to Defendants' First Request for the Production of Documents:

Requests Nos. 12, 13, 14, 15, 16, 17: "Produce any and all documentation evidencing, referring, or supporting Defendant's purported discrimination against Plaintiff as alleged in [¶20, 21, 22, 23, 24, 25] of Plaintiff's Complaint, from 2004 through the present."

Plaintiff's internal monologue aside, Plaintiff objects to these requests by stating, "these demands are duplicative." Each of these individual demands correspond to distinct allegations contained within different paragraphs of Plaintiff's Complaint. Defendants wish to ensure that they are in possession of each and every document which supports every claim of purported discrimination against Plaintiff. Defendants should not be required to accept Plaintiff's assurances that he has gathered every "imaginable document," and has the right to probe any supporting evidence Plaintiff may have.

Requests Concerning Plaintiff's Utilization of Social Networking Sites:

> **Interrogatory No. 10:** "Identify with particularity and detail any and all of Plaintiff's accounts, profiles, memberships or postings on all social networking websites or internet communities and forums, from 2004 through the present."
> **Request No. 32:** "Produce any and all documentation evidencing Plaintiff's accounts, profiles, and/or memberships on all social networking websites or internet communities and forums, including but not limited to Facebook, Myspace, Twitter, and Friendster, from 2004 through the present."
> **Request No. 33:** "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, Friendster, and LinkedIn internet communities and internet forums, including but not

limited to postings, messages, uploaded photographs, video and audio, from 2004 through the present."

Request No. 34: "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, LinkedIn, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding Plaintiff's expression of an emotional feeling, from 2004 through the present."

Requests Nos. 35: "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding Plaintiff's employment with Defendant, from 2004 through the present."

Requests Nos. 36: "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding any of the allegations contained in Plaintiff's Complaint, from 2004 through the present."

Plaintiff argues that since his Facebook page is marked "private," the contents of his online postings are not discoverable. By Plaintiff's logic, any document a plaintiff intends to be kept as private (e.g., one's diary) would automatically be deemed undiscoverable in connection with any lawsuit.

The relevant case law confirms that this information is discoverable. Plaintiff has produced partial content of his Facebook account, only providing documents he unilaterally decided were relevant. Many of the documents he produced were responsive to these demands were altered to obscure their content. See, e.g., portions of Ex. "O." Defendants have the right to obtain unredacted documents relevant to Plaintiff's claims and measure of damages. For example, while Plaintiff has produced some Facebook communications which "contain references to plaintiff's anger and upset," he has produced no documents evidencing that he is emotionally stable. Since Plaintiff has affirmatively placed his emotional health in issue, he should not be free to offer only those documents he deems supportive of his purported damages. Defendants must be afforded the opportunity to investigate the full spectrum of Plaintiff's alleged emotional damages, and use this information to question Plaintiff during his deposition.

Request No. 51: "Produce any and all documentation referencing Plaintiff's employment status subsequent to his employment with Defendant, including but not limited to (a) personnel files, (b) job description, (c) applications, (d) resumes, (e) references, (f) recommendations, (g) diplomas, (h) salary and proof of wages and (i) and other documents provided during Plaintiff's initial application for a position, from July 2010 through the present."

As a plaintiff claiming damages resulting from employment discrimination, Plaintiff has an obligation to mitigate his damages. All documents concerning attempts to obtain employment, earn wages, obtain education, and operate a business are, by Plaintiff's admission, discoverable. Despite this fact, Plaintiff has yet to produce his 2010 tax return. As a part-time, seasonal worker who, presumably, works as a skydiver during warmer months, Plaintiff is required to produce all documentation regarding his attempts to earn wages as a skydiver over the past several months. As the Federal Rules impose an ongoing obligation to disclose, Plaintiff should be updating this information regularly. Instead, he chooses to produce only whatever documentation he desires whenever he sees fit. Plaintiff should be compelled to produce this responsive information.

Requests Concerning Emotional Damages:

> **Request No. 53:** "Provide a properly executed HIPAA Compliant Medical Authorization for any and all health care providers Plaintiff has treated or consulted with during his term of employment with Defendant, including but not limited to therapists, psychologist, psychiatrists and /or other mental health practitioners."
> **Request No. 83:** "Produce any and all documentation supporting any alleged emotional damages suffered by plaintiff from 2004 through the present."
> **Request No. 84:** "Produce all documents concerning, relating to and/or regarding consultation with and/or treatment by any medical and/or mental health professional concerning and/or regarding Plaintiff's allegations and/or claims for emotional distress and psychological injuries."

Defendants should be afforded the opportunity to explore the extent of Plaintiff's purported emotional damages. Plaintiff has admitted to the existence of additional stressors in his life during the relevant time period. Defendants should be permitted latitude to explore these issues in the course of discovery to obtain all documentation concerning Plaintiff's purported

measure of emotional damages (e.g., copies of any and all medical records regarding Plaintiff's mental health and/or emotional damages). Absent such discovery, Defendants' ability to point to or focus questions upon other stressors in Plaintiff's life will be unreasonably restricted. As a result, the Court should compel Plaintiff's compliance with these demands.

Request No. 54: "Produce a properly executed authorization for the release of Plaintiff's employment records for each position held subsequent to the cessation of Plaintiff's employment with Defendant."

This request is probative of Plaintiff's efforts to mitigate his damages, directly relates to the causes of action outlined in Plaintiff's Complaint and his corresponding damage calculations. Accordingly, Defendants should be allowed to obtain copies of all employment records for his self-described "one weekend job" and his employment at Advanced Skin Fitness. To the extent Plaintiff harbors concerns about prospective employers due to the pendency of a lawsuit which he chose to file, there are available legal avenues he can pursue, the existence of which nullify Plaintiff's position. Plaintiff's arguments that these records would act as a bar to future employment are unlikely as the lawsuit itself is a public document, any citizen can obtain a copy of the documents filed with the clerk should they desire, and Plaintiff and his counsel have sought to publicize this litigation.

Request No. 63: "Produce any and all documentation concerning, relating to, and/or reflecting income earned by Plaintiff from 2004 through the present, including but not limited to a) 1099 and/or IRS Form W-2's, (b) payroll records, (c) pension documents, (d) 401(k) documents, (e) pay stubs, (f) deposit records and the like, and (i) any other compensation-related documents."

Plaintiff admits these documents are relevant and discoverable. However, to date, Plaintiff has yet to produce his 2010 tax return, and any documents regarding the solvency of Advanced Skin Fitness; a business in which he maintains an ownership interest. Clearly, Plaintiff is required to produce these documents.

Personal Financial Information:

Request No. 64: "Produce any and all of Plaintiff's banking records, including statements, notices, and other similarly responsive documentation, from 2004 through the present."
Request No. 65: "Produce any and all of Plaintiff's credit card statements from 2004 through the present."

Plaintiff has failed to provide case law for his position that this documentation is not discoverable. Rather, Plaintiff relies on the fact that he is seeking "garden variety" emotional damages. However, the court in Chiquelin v. Efunds Corp., 2003 WL 21459581 (S.D.N.Y. 2003) contemplated this factual situation. Id. (Complete credit card statements of former employee relevant to age discrimination lawsuit, since statements reflected employee's activity and mental state). An individual's spending habits provide probative evidence of their emotional state. Accordingly, Defendants should be afforded the opportunity to probe same in discovery.

Request No. 72: "Produce all documents concerning any communications with any individual(s) whom Plaintiff believes possesses knowledge of the facts, allegations, and claims involved in this case, from 2004 through the present."

Plaintiff argues that no additional responsive documentation exists. However, discovery should not be limited to the self-serving representations of Plaintiff, an individual who seeks to have the content of his Facebook page be designated "private." Accordingly, Plaintiff should be compelled to produce any and all additionally responsive documents in his possession, or affirmatively state none exist.

III. Plaintiff's Response to Defendants' First Request for Admissions:

Request No. 6: "Admit that in 2009, before working for Defendant, Plaintiff expressed to Defendant's employees that he is gay."
Request No. 8: "Admit that in 2010, before working for Defendant, Plaintiff expressed to Defendant's employees that he is gay."

Hypothetical scenarios aside, Plaintiff's objections are both unreasonable and improper. Rather than admit the content of these demands, Plaintiff seeks to compel a deposition in order to

qualify his response. As Plaintiff has admitted it was known in the workplace that he is a homosexual male, Plaintiff should have no aversion to admitting the content of Request Nos. 6 and 8. See FRCP §36(a)(6).

IV. Plaintiff's Response to Defendants' Second Request for the Production of Documents:

Plaintiff admits he received Defendants' Second Request for the Production of Documents *via* email. See Pl. Memo of Law, p. 17-18. Regardless of the purported loss of the document "in the shuffle," Plaintiff's responses were due within 30 days. Plaintiff asserts no excuse, save law office failure, for his failure to respond to these demands. Plaintiff had at most three extra days (not the five he suggests) to respond pursuant to FRCP §6(d). While Plaintiff states he responded "within hours" of receiving a reminder his demands were past due, in reality, Counsel provided not even cursory written responses within twenty minutes of his confirmed receipt of these demands. See Ex. M. As such, it was impossible for Mr. Antollino to provide a good faith, accurate response after reviewing these demands with his client. Accordingly, Plaintiff waived his objections and is required to provide full and adequate responses.

> **Request No. 1:** "Produce any and all documentation regarding communication between Plaintiff and Advanced Skin Fitness, its principals, managing partners, and/or employees, including but not limited to letters, emails, Facebook messages, Myspace messages, memoranda and other similarly responsive documentation, from 2005 through the present."
> **Request No. 2:** "Produce any and all documentation regarding communication between Plaintiff and William Moore, including but not limited to letters, emails, Facebook messages, Myspace messages and other similarly responsive documentation, from 2005 through the present."
> **Request No. 3:** "Produce any and all documentation regarding salary or monies earned by Plaintiff from Advanced Skin Fitness, including but not limited to checks, W-2 forms, financial reports, and other similarly responsive documentation, from 2005 through the present."
> **Request No. 4:** "Produce any and all documentation regarding Plaintiff's ownership interest, employment with and/or work performed for Advanced Skin Fitness, including but not limited to invoices, employee time records, employee agreements/contracts, employee manuals, memoranda, correspondence, and other similarly responsive documentation from 2005 through the present."

Request No. 5: "Produce any and all documentation regarding Plaintiff's ownership of and/or interest in Advanced Skin Fitness, including but not limited to corporate filings, certificates of incorporation, corporate taxation documents, shareholder agreements, partnership agreements, and other similarly responsive documentation, from 2005 through the present."

These documents are relevant to Plaintiff's mitigation efforts. Despite Plaintiff's assertions, earnings information is not the only information relevant for this issue. The profits of Plaintiff's business are relevant as it is unknown at this time how Plaintiff is compensated for his role as part owner of Advanced Skin Fitness. Defendants are entitled to explore Plaintiff's business in discovery, and should be allowed to investigate the viability, background, and management of Plaintiff's business. Despite Plaintiff's promises of future production of additional responsive documentation, he has yet to produce this responsive documentation. Thus, Plaintiff should be required to produce this documentation immediately.

Request No. 6: "Produce any and all correspondence between Plaintiff and Marko Markovich, including but not limited to letters, emails, Facebook messages, Myspace messages and other similarly responsive documentation from 2005 through the present."

Counsel admitted he redacted portions of the document production he unilaterally deemed "unresponsive." However, a review of these documents demonstrates that the redacted portions are in all likelihood additional "comments" concerning the relevant subject matter of conversations between Plaintiff and Mr. Markovich. See Ex. "O." Plaintiff should be required to produce complete, non-redacted copies of these documents.

Based upon the foregoing, Plaintiff should be ordered to provide complete responses to Defendants' discovery demands. Furthermore, Defendants should be awarded costs and attorneys' fees incurred for having to make the instant motion. See Fed.R.Civ.P. 37 *et seq.*

III. CONCLUSION

For all of the foregoing reasons, Plaintiff should be ordered to provide complete and adequate responses to Defendants multiple outstanding discovery demands, and Defendants should be awarded costs and attorneys' fees incurred with this submission.

Dated: Bohemia, New York
June 8, 2011

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