

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,	. Civil No. 10-CV-4334-JFB-ARL
	.
Vs.	.
	. 824 Federal Plaza
	. Central Islip, NY
ALTITUDE EXPRESS INC.	.
D/B/A SKYDIVE LONG ISLAND	.
and RAY MAYNARD,	. October 4, 2012
.

TRANSCRIPT OF CONFERENCE
BEFORE HONORABLE JOSEPH F. BIANCO,
UNITED STATES DISTRICT MAGISTRATE

APPEARANCES:

For The Plaintiff:	By: GREGORY S. ANTOLLINO, ESQ. 18-20 West 21st Street Suite #802 New York, NY 10010
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For The Defendant:	ZABELL AND ASSOCIATES, PC By: SAUL D. ZABELL, ESQ. AMANDA GREINER, ESQ., 4875 Sunrise Highway Suite 300 Bohemia NY 11716
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Colloquy

3

1 COURT CLERK: Calling case 10-CV-4334, Zarda versus
2 Altitude Express. Counsel, please state your appearance for
3 the record.

4 MR. ANTOLLINO: Greg Antollino for Mr. Zarda. Did
5 you hear that?

6 MR. ZABELL: For the defendant, Saul Zabell and
7 Amanda Greiner (phonetic) with the law firm of Zabell and
8 Associates.

9 THE COURT: Okay, good afternoon. As you know, we're
10 here for argument on the motion to admit the expert testimony.
11 I have reviewed the papers and obviously this is a chance for
12 you to highlight anything you would like to highlight and there
13 is the issue of the request for the payment of the preparation
14 with respect to that.

15 And then I did, I obviously know that there's other
16 outstanding issues. It was helpful that Mr. Antollino listed
17 them for me so we can go one by one through them, but I think
18 it might be better just to do the argument on the motion first
19 and then deal with those issues, maybe some of them have been,
20 I doubt they've been resolved, but we'll see what happens.

21 Okay, so it's your motion on the expert. You get to go first,
22 Mr. Antollino, go ahead.

23 MR. ANTOLLINO: All right, Judge, I really don't
24 think I have much to say. I have a lot in paper. Can you hear
25 me? I like to stand but I don't like the podium.

Antollino/Argument

4

1 THE COURT: If you're going to stand, I would just
2 ask you use the podium because I'm not sure the mic will
3 capture.

4 MR. ANTOLLINO: All right, then I'm going to sit. I
5 really --

6 COURT CLERK: Could you just bring the mic closer?

7 MR. ANTOLLINO: Sure.

8 THE COURT: Pull it.

9 MR. ANTOLLINO: All the way closer. All right. I
10 think that outlined in paper why I need this witness. Why this
11 witness tends to be relevant and will inform the jury and
12 experts like this have been admitted over and over and over
13 again, perhaps not in a case involving a gay man or gay person,
14 but that doesn't make any difference. I need Kenji, Professor
15 Yoshino to help the jury understand sex stereotypes. That
16 might be something that is easy enough for you and I to discuss
17 as lawyers but when you come down to it, there's a lot for us
18 to learn.

19 If you saw Professor Williamson's slide show which I
20 attached to my memorandum, I got that directly from her. She
21 presented that to the new Judges, I guess in 2008 and I was
22 astounded to learn some things that were on that slide show,
23 such that studies had shown that when you decide whether or not
24 you decide to hire a musician, when the musician is behind a
25 screen that the, women are hired 46 percent at a higher rate.

1 There were so many other observations she made.

2 This is an entire study, field of study that Judges
3 are educated on so why not juries. And in my particular case,
4 my particular case is unusual. I've got a man who my adversary
5 referred to as a muscle head who I'm trying to convince a jury
6 that his client treated with sex stereotypes. I need Professor
7 Yoshino to explain that. He's well versed in the field. The
8 fact that he's not a sociologist doesn't make any difference
9 whatsoever.

10 He studied these things, just as those other experts
11 that I offered to Your Honor, Eskridge, Williams, and the other
12 two, McKinnon (phonetics) and there's one more whose name I
13 can't recall. All four lawyers and all four imminent in the
14 field of sexuality studies. Kenji Yoshino will also help with
15 the jury which may not be familiar with gay culture, all right.
16 I don't know how familiar anyone in this room is with gay
17 culture. I learned, as a gay person I learned some things from
18 Kenji's book about gay culture.

19 So since this is a case about gay discrimination and
20 gay identity, it will help the jurors understand what it means
21 to be a gay person and how announcing one is gay and announcing
22 one has a partner, is not grounds for termination or is
23 something that is a stereotype, that is discrimination.

24 And finally, experts like Prof. Yoshino have been
25 admitted over and over again. If there's something in his

1 report which went over the line, I'm not into the job of
2 looking at my expert's reports editing it and then sending it
3 back for review. He did cite a case which the jury shouldn't
4 be told about. The jury can be told simply that there was a
5 situation wherein X, Y, Z happened. They don't have to be told
6 that it was a case which the Second Circuit decided. The
7 citation to the Second Circuit was probably overboard but by
8 very little. And if there's something which you believe in
9 there goes to the ultimate issue rather than explaining the
10 jury, then what you can do is you can say I'm going to allow
11 this, but I'm not going to allow this. I think this goes too
12 far.

13 But that's what the Judge is for. Professor Yoshino
14 is not a litigator. He's a law professor and he tells it like
15 he sees it. If you think that there's something here that is
16 admissible, you admit it and if it's not admissible, you don't
17 admit it. But my adversary has shown nothing to show that
18 Professor Yoshino's evidence would not be admissible. He has
19 fulfilled all of the Daubert tests and you know, I could go
20 over them here one by one, but Professor Yoshino in his
21 affidavit, not his expert report set them out one by one and
22 Mr. Zabell didn't refute them at all.

23 So I don't see how unusual this is. We don't need
24 one of these in every case perhaps, but this case is highly
25 unusual. This may be one of the most unusual cases, I don't

1 know what cases you have, Judge. Far be it from me --

2 THE COURT: I would say this is an unusual case.

3 MR. ANTOLLINO: This is an unusual case, all right.

4 So you've accepted that. And I believe that Professor Yoshino
5 will be able to explain to the jury why my client has a
6 cognizable theory both of sex stereotype discrimination and
7 sexual orientation discrimination. If they want to bring in an
8 expert to rebut it, if they want to cross examine Professor
9 Yoshino, he has written so many things, they can cross examine
10 him on his book, on his lectures and any number of speeches he
11 has given but it still is admissible and I would like you to
12 grant the motion.

13 THE COURT: Let me just ask you a couple questions
14 because there's really two issues and you've identified them
15 both. I don't even want to get into the issue of the, you
16 know, there is a back and forth about whether he's qualified or
17 not because he doesn't have a sociology background. But for
18 purposes of today, I think there's two focuses. One is there
19 are definitely parts of his report that do cross the line and
20 you obviously understand why he couldn't be explaining legal
21 cases to the jury, but I think Mr. Zabell has identified other
22 portions of the report where he appears to be making specific
23 findings of discrimination in this particular case and that is
24 not something that I would allow.

25 I think it's compounded by the fact that he's a law

1 professor so a jury would be hearing a law professor say I've
2 reviewed this case and I believe, you know, this was, you know,
3 gender discrimination or sexual orientation discrimination, and
4 there are other parts of the report that he appears to be
5 opining about, you know, sky diving business where he says that
6 you know, the touching of the person was a legitimate act in
7 the context of what they have to do. He's obviously not
8 qualified to make those types of conclusions.

9 But having said that, I agree with you that you can
10 obviously preclude certain portions of the report or testimony
11 about certain portions of the report and there is definitely a
12 portion of the report that where he does describe these issues
13 of stereotyping as you have laid out. But on that part of the
14 report, my question to you is, and I agree with you, that this
15 is a somewhat unusual fact pattern of a case, but to me, some
16 of the other cases that you cite where this type of expert
17 testimony has been allowed, are ones where the facts at issue,
18 the type of discrimination that was the focus of those cases
19 seem to have been more issues of more subtle workplace
20 discrimination where a jury might not understand how based upon
21 a certain stereotype how that might manifest itself in a
22 workplace situation sort of behind the scenes underneath the
23 surface.

24 And I think an argument can be made in some
25 complicated fact pattern like that, that a jury may not

1 understand some of the stereotypes or how some of them might be
2 manifested and that's why courts have and certain circumstances
3 allowed it because beyond the experience or knowledge of an
4 average juror.

5 But here, the fact pattern is very straightforward.
6 This is one where he identified himself obviously under the
7 circumstances and was terminated and the now the question
8 before this jury is whether he was terminated because he
9 revealed that or because as they say, it was not a sexual
10 orientation or anything to do with the gender. It has to do
11 with that he revealed personal information. He shouldn't have
12 done that and made the person feel uncomfortable not because of
13 his sexual orientation, but because of revealing personal
14 information about himself and I don't know that that's beyond a
15 jury. What do you need an expert, a jury has to decide what
16 the reason was.

17 I don't understand why you would need an expert to
18 come in to talk about stereotyping in the workplace generally.
19 That's, to me that's the issue in this case. And I certainly
20 understand that issue and I think jurors walking off the street
21 can understand that issue so that's what my question to you is.
22 You listed some of the things that you think he would help on
23 and the first one you list is how people with stigmatizing
24 condition is homosexuality is considered by some may choose to
25 reveal that condition as an act expressing their rights.

1 What relevance does that have to this case, whether
2 in some other workplace you might have someone who feels they
3 want to reveal it, you know, for personal reasons, whatever
4 reasons. Here, he revealed it. His motivation for revealing
5 it, I'm not sure what relevance his motivation really has.
6 Once he reveals it, really his employer knows about it and you
7 know, can't discriminate based upon it. His motivation for
8 revealing it, why does the jury have to consider what your
9 client's motivation for revealing it was?

10 MR. ANTOLLINO: Because the motivation for revealing,
11 in another instance the motivation for revealing another
12 instructor's heterosexuality was exactly the same thing and it
13 was considered to be okay. I came in --

14 THE COURT: I know but that's what I mean. Jurors
15 can understand that. If you make that argument to the jury, if
16 the jury is persuaded by that, if you say look, they're saying
17 it was because he revealed personal information, there's this
18 other person revealed personal information and nothing happened
19 to him, why does a jury need an expert to explain that to them?

20 MR. ANTOLLINO: That's not what I need an expert to
21 explain to the jury. I can do that myself.

22 THE COURT: Right.

23 MR. ANTOLLINO: What I need to explain to the jury is
24 the sex stereotype aspect. There are two claims we're making.
25 We're making a claim under Title VII for sex stereotyping. And

1 it is completely devoid of the claim for sexual orientation
2 discrimination. So Professor Yoshino will explain what
3 stereotyping is, how stereotyping can manifest itself and how
4 it may have manifested itself in this case. And where our
5 argument is in particular that this defendant did not
6 investigate a claim of touching because my client was a man and
7 he said that well, I don't know since he's a man, he can switch
8 back and forth between being gay and being straight.

9 Maybe there are some people who believe that and
10 maybe there are some people who will be on this jury who will
11 believe that. You certainly won't be in a position to express
12 that to them at the beginning of the case. My expert will.
13 The sexual stereotype is what I need Professor Yoshino for. If
14 this were simply a sexual orientation discrimination case, I
15 wouldn't have hired just as a strategic decision, I would not
16 have hired Professor Yoshino. But the sexual stereotype under
17 Title VII, that's a harder barrier for me to overcome and
18 that's more complicated, that's complicated to me, that's more
19 complicated to you and to the jury and I need him for that.
20 But in addition to that, he can explain how being able to
21 express one is gay is just the same as while we're waiting for
22 you, Your Honor, Mr. Zabell and madam clerk were talking about
23 you and your wife and my client was not able, was fired because
24 he talked about him and his boyfriend.

25 So there's a double standard there that Professor

1 Yoshino will explain. I wouldn't hire him just for that but he
2 can add to that. He can add to that and make the jury see,
3 there might be jurors who will take the opinion that no, I
4 don't want to hear that you're gay. Keep that to yourself.
5 But Professor Yoshino will be able to explain to them how being
6 able freely to say that one is gay is the same as being gay.

7 THE COURT: I mean, if the jury is told that you
8 can't discriminate based on sexual orientation, again, I'm not
9 sure what the relevance would be the consideration of why he
10 revealed it. Once he does, if the employer is aware of it,
11 they can't take any action on it and that's what the law
12 instruction will be.

13 MR. ANTOLLINO: Well, Judge, I mean that's the
14 instruction that comes at the end of the case. But again,
15 we're going in circles because what I need Professor Yoshino
16 for is for the sex stereotype claim. If it weren't for that, I
17 wouldn't be bringing him in.

18 THE COURT: I'm not even sure, I know you just
19 explained the theory of the case but you're trying to make the
20 argument independent of orientation, the fact that a male talks
21 about personal relationships is more --

22 MR. ANTOLLINO: No, no. What happened in this case
23 was this. Very extremely unusual. There were two skydive
24 instructors.

25 THE COURT: Yes, I know --

1 MR. ANTOLLINO: You know the whole story, okay.

2 THE COURT: -- the story by now.

3 MR. ANTOLLINO: And so as my client was --

4 THE COURT: Just state the theory again.

5 MR. ANTOLLINO: State the theory again. That there
6 was a second hand complaint. That the complainer was grabbed
7 at the hips and there were several witnesses and Professor
8 Yoshino didn't read Zarda's deposition for his report. There
9 were several witnesses from the defense who said that at the
10 place at the hips is precisely where you are attaching someone
11 and that's where you might feel discomfort. And just like the
12 Sasserman against Granich (phonetic) case, or whatever it is,
13 Mr. Maynard did not even investigate that allegation because he
14 is of the opinion that people can change, gay people can change
15 because of their gender and that's a gender stereotype. And
16 that's a very subtle argument. I don't know if I'm going to
17 win on that but I need an expert for that.

18 And if you take away the expert, it's just the same
19 as any of these other cases with subtle sex stereotype claims.
20 Again, I would not be bringing Professor Yoshino in here for
21 simply this sexual orientation discrimination. I think that
22 case is easy and I'm going to move for summary judgment on
23 that.

24 However, the sex stereotype claim is very complicated
25 and subtle. And it appears that after all of these papers, I

1 still haven't been able to explain it adequately to you. All
2 the more reason why I need Professor Yoshino to explain it to
3 you for the purposes of summary judgment and to the jury for
4 the purposes of finding a fact. I need Professor Yoshino for a
5 sex stereotype claim.

6 There have been decision after decision after
7 decision that say that a sex stereotype claim is not something
8 that is within the ambit of a juror's knowledge. Gerhard
9 Gazelle, who is the first Judge to hear a sex stereotype claim
10 said I don't see how I could have understood this without this
11 expert's knowledge. I've also cited a law review article says
12 that an expert is necessary for a sex stereotype claim.

13 I don't need Professor Yoshino for the gay
14 discrimination claim and I believe I can win on summary
15 judgment on that. But I need him for the Title VII claim which
16 brings with it significantly more damages. It's not the same
17 claim. The Title VII claim comes with attorneys' fees and
18 expert witness fees and all sorts of thing that the State law
19 does not. And if I cannot bring Professor Yoshino in here to
20 explain to the jury, I am at risk of losing because the jury is
21 not going to understand sex stereotyping, number one. And
22 number two, what was sex stereotyping in this case where this
23 muscle head was just treated like one of the guys.

24 THE COURT: Okay. I'll hear from Mr. Zabell. Go
25 ahead, Mr. Zabell.

1 MR. ZABELL: First, Your Honor, I just need to
2 clarify. I don't believe I was talking about Your Honor and
3 Your Honor's spouse. I was talking about Your Honor and Your
4 Honor's family, it was relayed to me that you had a child in
5 college and I was just surprised based upon how young you are,
6 Your Honor. We were talking about your accomplishment at such
7 a young.

8 Now, with regard to the expert, it seems to me based
9 upon counsel's arguments and the questions that Your Honor
10 stated, you know, we're objecting for a number of reasons. One
11 is it contains impermissible legal conclusions. Two, it does
12 not meet with the strict requirements on the Daubert side.
13 Now, in addressing the specific reasons why counsel says he
14 needs this expert, it seems he wants to say that Mr. Zarda was
15 treated as a man and that's why the complaints about him,
16 excuse me, as a heterosexual man and that's why the complaints
17 about him were not investigated. That seems to be my
18 understanding of the argument.

19 If I'm incorrect then it would be Mr. Zarda was
20 treated as a homosexual man and that's why his complaints were
21 not investigated. That's not contained within Mr. Yoshino's
22 expert report and there's nothing in the expert report that
23 elucidate, that expands upon that and that expands with any
24 scientific basis as to why his theories are relevant. In fact,
25 it's Mr. Yoshino's reports that say that come right out and

1 conclude that Mr. Zarda was terminated not because of his
2 stereotyping, but because of his sexual orientation.

3 So counsel is trying to offer the expert report for a
4 reason different than what he's saying here or a reason
5 different than what Mr. Yoshino stated in his report. In
6 addition, had Mr. Yoshino reviewed Mr. Zarda's deposition
7 testimony, he would have realized that everything he has
8 concluded is contraindicated by the direct testimony of Mr.
9 Zarda who said he does not believe he was treated any
10 differently based upon his sexual orientation or based upon the
11 perceptions of his sexual orientation.

12 So all the reasons that counsel is arguing for the
13 admission of this report are a) contraindicated by the facts
14 but b) contraindicated by the report itself. He's now arguing
15 that the report should be brought in solely for the sex
16 stereotyping when the report itself talks about sexual
17 orientation.

18 MR. ANTOLLINO: I say it should be brought for both
19 but I thought he was done, Judge, I'm sorry.

20 MR. ZABELL: That was a logical conclusion.

21 MR. ANTOLLINO: All right, if I can respond, Judge.
22 What I was just about to say was that I brought him in for the
23 sex stereotype and if you look at his opinion number one, the
24 immediacy with, this is on page 2 of his opinion, you can read
25 it at your leisure, the immediacy with which Maynard credited

1 the harassment allegation reflects sex stereotyping. That is a
2 very subtle argument that he's making and you know, you're
3 going to take out the reference to Sasserman but that is why
4 I'm bringing Professor Yoshino in there. With --

5 THE COURT: If I were to summarize your argument on
6 that point, it's that when a male is accused of inappropriately
7 touching a female that because of stereotyping, it's more
8 likely to be credited as harassment, is that your argument?

9 MR. ANTOLLINO: Yes, and that's what Sasserman
10 against Granich held. That's exactly what it held.

11 THE COURT: And you think that's beyond --

12 MR. ANTOLLINO: Well, you don't have to cite that,
13 Judge, but Mr. Yoshino can explain that.

14 THE COURT: You think a jury needs that explained to
15 them?

16 MR. ANTOLLINO: Yes, I do.

17 THE COURT: Because I didn't understand, my problem
18 was not, you're saying I needed an expert because if the Judge
19 can't understand the theory. But the question is not, I need
20 to understand the theory, then I can decide whether or not the
21 jury needs someone to explain that theory to them but now that
22 I understand the theory, more clearly, I need you to explain
23 why you think a jury can't understand that.

24 MR. ANTOLLINO: Because it's not obvious to a jury
25 and it's a novel claim. And why do I have to assume that every

1 single juror is going to have the same intelligence as you and
2 I and Mr. Zabell? And furthermore, Mr. Zabell's reference to
3 Mr. Zarda's testimony is completely wrong but that's safe for
4 another day. This is admissible. It can help the jury
5 understand. It has some basis to prove that some of the
6 allegations in the complaint are true and that's the standard
7 of admissibility, Judge.

8 THE COURT: In the Sasserman case, I think Mr. Zabell
9 pointed out there was no, there didn't appear to be any ruling
10 with respect to the expert testimony.

11 MR. ANTOLLINO: No, there wasn't a ruling with the
12 expert testimony but there was, but that's what the case is
13 about.

14 THE COURT: I know but I understand what it's about
15 but again, my issue here is not, I understand that that could
16 be a viable theory of discrimination as it was in that case.
17 The question is whether or not in this case that an expert is
18 necessary to do that.

19 MR. ANTOLLINO: Why don't you let me decide what's
20 best to prove my case as best I can if the expert can shed
21 light and if it has some tendency to prove my claim under Rule
22 1 or whatever the rule is. I'm entitled, that is what the
23 relevancy is.

24 THE COURT: What's your basis of your expert have any
25 better handle on whether or not that stereotype, that

1 stereotype that men, people are more likely to believe that men
2 would be inappropriately touching someone of the opposite sex
3 than a woman would be? What's his basis for that?

4 MR. ANTOLLINO: His research and his study in the
5 field.

6 THE COURT: On what? Where is that? In that section
7 of the report, what study, was there a study done?

8 MR. ANTOLLINO: There's a study he cites by Madeline
9 Heilman (phonetic), sex discrimination in the affirmative
10 action remedy. He cites the forbidden Sasserman case and he
11 analyzes the deposition testimony of what a sex stereotype is
12 based on what these people said. And he comes to an opinion
13 and the jury can reject the opinion. Mr. Zabell --

14 THE COURT: So anybody who reads the Sasserman case
15 and then reads the items related to this case becomes an expert
16 on the issue, this particular issue of whether or not there is
17 a stereotype that men would be more likely, it would more
18 likely credit a man, that a man would harass someone than a
19 female? That's what makes him an expert?

20 MR. ANTOLLINO: No, no the expert --

21 THE COURT: Well, anybody can read the Sasserman
22 case.

23 MR. ANTOLLINO: His expertise is set forth. I mean,
24 his expertise is set forth in his CV --

25 THE COURT: I know, but as you know a lot of his

1 expertise relates to this whole issue of sexual orientation and
2 covering and things like that, right? Isn't that really what
3 the focus --

4 MR. ANTOLLINO: No, it's gender studies. You're
5 pigeon holing him into simply an expert in gay things. No, he
6 is an expert. He teaches Price Waterhouse and sex stereotypes
7 at NYU law school. He lectures on it and he has lectured on
8 all types of discrimination. And this has some basis to allow
9 the jury --

10 THE COURT: Give me any research he has done or any
11 studies that he has acquired knowledge of that to speak to a
12 particular issue that you're focusing this jury on, that a male
13 accused of inappropriate touching, it's more likely to be
14 credited that it was inappropriate than a female.

15 MR. ANTOLLINO: Well, he cites one study here, Judge.
16 If you want, if Mr. Zabell wants to cross examine him or if you
17 want clarification as to what other studies, I am not the
18 expert, Judge. I can't tell you.

19 THE COURT: Which one? You said one study, which
20 study are you referring to?

21 MR. ANTOLLINO: The study he referred to in point one
22 by Heilman, Sex Discrimination and the Affirmative Action
23 Remedy, the Role of Sex Stereotype in Women and Corporate
24 Management. And that's what he cites in this particular thing.
25 But the whole purpose of an expert, Judge, is that someone who

1 has broad knowledge in the field is not going to say oh well,
2 this is exactly the same as this study and this is exactly the
3 same as this study. Professor Yoshino has written a book and
4 he, at the last conference, you seem to think that his
5 qualifications were unimpeachable. I mean a Rhodes scholar who
6 is an endowed professor at NYU law school who teaches in the
7 area of sex and gender studies.

8 This is admissible, Judge. There might be a line
9 that you can draw where you say that some of it is admissible
10 and some of it is not. But this will help the jury understand
11 my sex stereotyping claim. I also believe that Professor
12 Yoshino is there to explain why saying someone is gay, is part
13 of the gay identity. But I wouldn't bring him in just for
14 that.

15 I think that a jury can learn from that. I think
16 there are many people who would be on this jury who might be on
17 this jury, who might believe that being gay is about being
18 quiet and being in the closet, and shutting up and not telling
19 people that you're gay. And I deserve, my client deserves an
20 expert to say that no, that the essence of homosexuality as an
21 identity is to be able to freely admit not necessarily flaunt
22 as Professor Yoshino uses the word in his report, not to
23 determine it --

24 THE COURT: If that's what you're concerned about,
25 why wouldn't it be a much better remedy or mechanism for

1 addressing that concern that some jurors might hold it against
2 him for having spoken his identity, sexual orientation to just
3 ask a question during jury selection do any of you believe that
4 it's inappropriate for an employee to identify the sexual
5 orientation in the work place and if they answer yes to that,
6 we could excuse them from the case. Wouldn't that be an easier
7 way?

8 MR. ANTOLLINO: And that would be --

9 THE COURT: Rather than having an expert come and try
10 to explain to all the jurors and we don't know whether this is
11 an issue with any of them or not, it's certainly not a legal
12 issue to try to talk them through that issue, rather than ask
13 them directly that.

14 MR. ANTOLLINO: They will be excused for cause if
15 they checked yes?

16 THE COURT: If they said that do you believe it's
17 wrong for someone under any circumstances to reveal their
18 sexual identity in the workplace? I think, in this particular
19 case, I probably excuse that person for cause because they
20 wouldn't be able to look at the legal elements then. They
21 would just start with the idea if he reveals it, it was wrong.
22 I'm not looking at the rest of the case.

23 MR. ANTOLLINO: Okay, that sounds good to me, Judge,
24 but that doesn't deal with the sex, if that were the case, I
25 would only need Professor Yoshino to testify on the sex

1 stereotype. I wouldn't use him, but if I can hold you to that,
2 Judge, that's a great compromise but still --

3 THE COURT: Well, I'll let Mr. Zabell be heard on
4 that.

5 MR. ANTOLLINO: You know --

6 THE COURT: Mr. Zabell, do you have any objection to
7 that question?

8 MR. ZABELL: I think if the question was posed as you
9 said it the second time, do you believe that somebody is wrong
10 for disclosing their sexual identity in the workplace, and they
11 say yes, we do believe that that's wrong, I would have no
12 objection to excusing that person for cause.

13 THE COURT: Okay.

14 MR. ANTOLLINO: So that takes care of the gay issue
15 but I still need Professor Yoshino for --

16 THE COURT: We agreed on something. That's amazing.

17 MR. ANTOLLINO: That is amazing, Judge.

18 THE COURT: That's a first, mark that down, Michelle.

19 MR. ANTOLLINO: So I don't need him for the gay issue
20 then.

21 THE COURT: I understand the argument on the other
22 thing. I don't want to go in circles. I just want to address
23 the cost issue briefly and let me, I know you're making a
24 motion but there's one thing I want to ask Mr. Zabell first
25 because I guess it was his threshold argument but a technical

1 matter. I think you argued that you never served the subpoena
2 on the expert but, and I read your letter which says you're
3 going to serve it. But it appears that there was a back and
4 forth exchange where it was understood that you know, you were
5 scheduling the deposition. The deposition was going to take
6 place. It didn't seem to be like a situation where you
7 notified him you were thinking about doing it and there was no
8 further discussion and then he started prepping it without your
9 understanding and you're saying wait a second, I never went
10 forward with that. Wasn't there an assumption that this
11 deposition was going forward?

12 MR. ZABELL: Yes. There is the assumption.

13 THE COURT: And there were subsequent conversations
14 about that then scheduling.

15 MR. ZABELL: Never with Mr. Yoshino, directly with
16 counsel. Typically, what we do in a situation like this,
17 especially given --

18 THE COURT: Well, doesn't counsel sometimes accept
19 service of subpoenas on experts in that situation, too?

20 MR. ANTOLLINO: Yes.

21 MR. ZABELL: Yes, but he did not make that
22 representation to us here. Before we serve a subpoena, we
23 always, because we believe it's our obligation, to serve a
24 courtesy copy of that subpoena on our adversary before we serve
25 it thus if they control the target of the subpoena, generally

1 they'll tell us don't worry about it, you don't have to have
2 someone knock on their door and hand it to them. We'll accept
3 it and we'll coordinate that.

4 Here, once we said this, we started discussing when
5 would be a good time to do it. At some point, I realized that
6 he was talking to Mr. Yoshino and scheduling that, absolutely.

7 THE COURT: And he never told you, you need to serve
8 him, I won't accept service? There was never a discussion that
9 you needed to personally serve him?

10 MR. ZABELL: I don't recall having that conversation.

11 MR. ANTOLLINO: There was never any discussion,
12 Judge.

13 THE COURT: Okay. Then on the second issue of, I
14 understand you have issues about the amount, but I want to hear
15 your arguments as to why it was unreasonable given the
16 timeframes that were being talked about here for Mr. Antollino
17 to start preparing for the deposition. It was a very short
18 timeframe, right?

19 MR. ZABELL: Yes, but that was for Mr. Antollino to
20 start preparing, not for the expert.

21 MR. ANTOLLINO: Yeah, these are the fees for
22 Professor Yoshino, not for me. I just sat and did nothing.
23 This was fees for --

24 THE COURT: Well, I guess that was the wrong way to
25 phrase it, I guess. For the expert to start preparing for the

1 deposition given the short timeframe.

2 MR. ZABELL: I think given the size of his report --

3 THE COURT: Well, I understand you think he didn't
4 need to spend that much time on it, but obviously he needed to
5 start prepping given the short timeframe, right?

6 MR. ZABELL: I think --

7 THE COURT: Even if you decided later not to depose
8 him.

9 MR. ZABELL: Technically, yes, I think it would be
10 improper to impose an obligation on my client to pay for that
11 prep when we did not in fact serve the subpoena on him. Yes, I
12 understand that this was going on in the background, but up
13 until that point, we had no direct contact with Mr. Yoshino. I
14 understand the logic if we reached out to counsel and counsel
15 was scheduling that it's reasonable to conclude that he was
16 having conversations with him to prepare him --

17 THE COURT: And that his expert would be preparing.

18 MR. ZABELL: And at some point, I did become aware
19 that that's what was happening but we're talking about a time
20 period that was relatively quick and I had sent on --

21 THE COURT: But you could have said if in fact you
22 weren't sure if you ultimately were going to depose him. You
23 could have said look, I'm not sure I'm even going to do this.
24 I'm still thinking about it. I would ask that you have him not
25 start preparing for it or I'll push the deposition date off

1 until I firmly decide that I'm going to do this, right? That
2 would have been a way of dealing with that.

3 MR. ZABELL: On June 5th, when we were still honing
4 in on May 11th, I'm sorry, when we were still honing in on June
5 11th as the day for the deposition, I explained to counsel, I
6 decided to hold off on the deposition until we get some
7 clarification from the Court considering the motion on the
8 issue will you consent to strike your expert's report and later
9 that day, I got excuse me, but no. I do not consent on
10 withholding the expert report. Take your withdrawal of the
11 subpoena and other conduct as a waiver to depose the witness.

12 So as soon as we started examining the report, had an
13 opportunity to delve into the report, and see what we believe
14 it to be some level of deficiency, we advised counsel that we
15 do not intend to go ahead.

16 THE COURT: I know, but you created the situation by
17 scheduling it, putting a short timeframe on while you were
18 doing that, you put a short timeframe on the subpoena and
19 that's what prompted the need for immediate preparation on
20 their part.

21 MR. ZABELL: We did put a short timeframe on the
22 subpoena but as soon as we put that short timeframe on the
23 subpoena, counsel changed the date.

24 MR. ANTOLLINO: No, no, I asked --

25 MR. ZABELL: Suggested us, suggested to us another

1 day.

2 MR. ANTOLLINO: An earlier date actually and he said
3 no, making me think that we were going further.

4 THE COURT: Okay. Go ahead.

5 MR. ANTOLLINO: That's all I have to say, Judge. I
6 think that --

7 THE COURT: I do want to, in terms of the amount, Mr.
8 Zabell I think has a good point that he had just finished
9 preparing the report, you know, what a week or two before.

10 MR. ANTOLLINO: Yes. And one of the things that he
11 did, he had to do was read Zarda's deposition. Our strategy
12 was for him not to read the Zarda deposition until after he
13 wrote his report to base his report on their depositions and so
14 one of the things he had to do very quickly was read the Zarda
15 deposition and that took some time.

16 THE COURT: How long did it take to read the Zarda
17 deposition?

18 MR. ANTOLLINO: Judge, I don't have, but he has, one
19 of my exhibits is a schematic and he has a total of 8.75 hours,
20 Judge. We're not talking about, you know, 50 or 60 hours here.
21 We're talking about 8.75 hours, I believe. Let me just double
22 check.

23 MR. ZABELL: Your Honor, I have a hard time
24 understanding why counsel thinks that defendant should have to
25 pay for his strategy time with Mr. Yoshino. It's his strategy

1 to have Mr. Yoshino read Mr. Zarda's deposition to better
2 prepare him, for me questioning him on a report that he
3 prepared without reading that deposition, then why should the
4 defendant bear that burden of having have counsel prepare his
5 expert --

6 MR. ANTOLLINO: He had to prepare --

7 MR. ZABELL: -- for a report that he prepared without
8 that document?

9 MR. ANTOLLINO: He obviously had to prepare by
10 reading my client's deposition because as Mr. Zabell pointed
11 out just 20 minutes ago or however long ago, Mr. Zarda said X,
12 Y, Z. So we did not want the report to be based on Mr. Zarda's
13 opinion although some of his interrogatories and his complaint
14 is there. Judge, we're talking about 8.75 hours, I believe and
15 all of the case law in this jurisdiction, this jurisdiction
16 being New York and one little tiny affirmance in the Second
17 Circuit says that the defendant has to pay for prep time, 8.75
18 hours. You know, I'm sorry that the Eastern District gets a
19 bad deal in comparison to Manhattan but the \$400 an hour times
20 8.75 hours is not unreasonable for preparing for a deposition.

21 And Professor Yoshino stopped the minute I told him
22 that Mr. Zabell had canceled the deposition.

23 THE COURT: Okay, let's move to the list and let's
24 try to do this quickly. The employee handbook, I think you
25 represented you were going to produce that. Do you have that?

1 MR. ZABELL: I do have. I have the employee
2 handbook. I have it here. I don't want to turn over the
3 employee handbook until we hammer out the stipulation of
4 confidentiality.

5 MR. ANTOLLINO: No, wait a minute, the employee
6 handbook wasn't agreed to be confidential. The only thing that
7 was supposed to be confidential was the video for the jump and
8 so now everything is supposed to be confidential.

9 THE COURT: I don't know about everything. What's
10 your problem, who do you plan on disseminating that to?

11 MR. ANTOLLINO: No one. I want to see it, Judge, and
12 if he has a good faith basis to believe that it should be
13 confidential.

14 THE COURT: What are you concerned about?

15 MR. ZABELL: It's our employee handbook. It deals
16 with our employee policies and how we deal with our employees
17 and there is a competitor on Long Island and if they know how
18 we treat our employees, then they're in a better competitive
19 advantage. And there's no prejudice to maintaining it as
20 confidential.

21 MR. ANTOLLINO: Yeah, there is a prejudice, Judge,
22 because number one discovery is supposed to take place in
23 public and aside from the principal behind that, it's a whole,
24 you know, biblical thing. I've got to take special care of
25 these confidential documents. Put them in a special place,

1 mark them. Return them. It's an extra burden on me.

2 THE COURT: Can you hand it up so I may look at it?

3 Okay.

4 MR. ZABELL: Your Honor, I'm handing up what is to my
5 knowledge a copy of the handbook. I've been advised by my
6 client that he does have another copy with different graphics
7 but the body is the same.

8 THE COURT: Okay.

9 MR. ZABELL: And I'm getting another copy of that
10 with the different graphics.

11 THE COURT: Just give me one second. Okay, we'll
12 come back to this. The second one, you're going to produce
13 this affidavit regarding, do you have that, Mr. Zabell?

14 MR. ZABELL: I do have, I have two actual affidavits.
15 May I?

16 THE COURT: Yes.

17 MR. ZABELL: I have two affidavits, one which is
18 noticed, it's actually signed by my client but not notarized.
19 I can turn over the signed but not notarized and then when I
20 see my client actually, I can notarize it.

21 THE COURT: Okay. Do you have a copy, or is this
22 your only copy?

23 MR. ZABELL: Yes.

24 THE COURT: Okay.

25 MR. ZABELL: -- both copies --

1 THE COURT: You want us to file this or you're going
2 to, has this been filed or no?

3 MR. ZABELL: No, it has not been filed. Is that
4 something you want filed ECF or just exchange amongst counsel?

5 THE COURT: I don't see any reason, as long as it's
6 exchanged, I don't think we need it at this point, okay. It's
7 a discovery item.

8 MR. ZABELL: And this is the second affidavit that's
9 just signed and not notarized.

10 THE COURT: Okay.

11 MR. ZABELL: I just realized that.

12 THE COURT: So give these to Mr. Antollino now and
13 then provide him with the notarized copy, you know, in the next
14 couple days.

15 MR. ZABELL: Just as soon as I

16 THE COURT: Okay. The next issue regarding the
17 complaint, why don't you explain to me, Mr. Zabell, what's --

18 MR. ZABELL: That's addressed in the affidavit that
19 had the attachment. Essentially, the issue is this. My client
20 was aware that there was a complaint posted on some website
21 complaining about his service. At some point he or someone he
22 directed responded to that complaint. We don't physically have
23 a copy of what they saw on our website that was a complaint and
24 we don't have a copy of what was responded. That affidavit
25 says this is a complaint. I only have the complaint because it

1 was provided to me by Mr. Zarda during the discovery process.

2 THE COURT: But that states that he recalls reviewing
3 it or it doesn't state that?

4 MR. ANTOLLINO: Well, half and half. I've just
5 looked at the affidavit of Ray Maynard and he has attached the
6 complaint but not his response and his response is what I also
7 wanted him to admit to.

8 THE COURT: He's saying he doesn't have his response,
9 isn't that --

10 MR. ANTOLLINO: I gave him a response. I gave it to
11 them. I went to the Ripoff report and it said --

12 THE COURT: And it has Mr. Maynard's response?

13 MR. ANTOLLINO: It says yes, this is response by Ray,
14 the owner of Skydive Long Island. Didn't give his last name
15 but you know, and I asked for them to --

16 THE COURT: And has he confirmed that's his response
17 or not?

18 MR. ZABELL: All he recalls is that either he
19 responded or that somebody responded and he can't recall if
20 that's his response. But that's what he can ask him about in
21 his deposition. We have his deposition where Mr. Antollino
22 actually got a chance to ask his questions. And on page 55,
23 beginning on line 21.

24 A "There has been no direct complaint to me personally. I
25 know there's something out there on the internet that there's

1 responses to it, that I don't even believe that's a true
2 customer. It's probably a competitor."

3 MR. ANTOLLINO: All right, well, it says the response
4 is by Ray of Skydive Long Island, the owner of Skydive Long
5 Island. Since I'm going to get another hour, I'll let this go
6 to the deposition.

7 THE COURT: Okay.

8 MR. ANTOLLINO: But Judge, this deposition is going
9 to be a real hour, not including colloquy and objections and
10 calls to the Court, right?

11 THE COURT: We've already covered that.

12 MR. ANTOLLINO: Okay.

13 THE COURT: You're going to get your hour, okay?

14 MR. ANTOLLINO: All right.

15 THE COURT: In terms of the scheduling have you
16 agreed on a date yet?

17 MR. ZABELL: We suggested November 15th or 16th
18 because the date that counsel suggested we were actually
19 engaged in trial.

20 MR. ANTOLLINO: All right.

21 MR. ZABELL: I think even before Your Honor.

22 MR. ANTOLLINO: Actually, he hadn't confirmed that
23 but let me see now. I had asked him to confirm that but the
24 16th is open so I'm going to mark off the entire day.

25 THE COURT: Well, you're not getting the entire day.

1 MR. ANTOLLINO: Well, then mark off the entire day
2 just in case anyone is late or anything, I'm getting an hour
3 and if the 16th is the day, that's the day.

4 MR. ZABELL: How about the 15th? You want the 16th?

5 MR. ANTOLLINO: I have something on the 15th now.

6 MR. ZABELL: Okay, the 16th at ten o'clock.

7 MR. ANTOLLINO: Well, since we're coming from
8 Manhattan, I prefer the afternoon if that's okay.

9 MR. ZABELL: 12:30?

10 MR. ANTOLLINO: That's fine.

11 THE COURT: Okay. Next thing is the confidentiality
12 order. My understanding from Mr., I don't remember which
13 letter it was, there's two issues. The one is the amount of
14 time he has to notify that there's a problem.

15 MR. ANTOLLINO: To make a motion.

16 THE COURT: Right.

17 MR. ANTOLLINO: I'm asking for 20 days to make a
18 motion if I need to make a motion. I've never made a motion
19 before but I can't do it in five days.

20 THE COURT: Okay. I'm going to give you 20 days to
21 make a motion.

22 MR. ZABELL: Your Honor, it's my understanding that
23 you require a pre-motion letter.

24 THE COURT: Right.

25 MR. ZABELL: So why can't we have five days to make a

1 premotion letter?

2 THE COURT: You don't have to actually file the
3 motion. You would just have to notify me that there's a
4 problem. Is that, is your problem that you have to prepare the
5 motion or why can't you make?

6 MR. ANTOLLINO: Well, all right, five days for a
7 premotion letter. That's all that I have to do.

8 THE COURT: Just write a letter that there's a
9 problem. You don't have to file a motion itself.

10 MR. ANTOLLINO: I don't have to file the motion
11 itself, just five days for premotion letter.

12 THE COURT: Right.

13 MR. ANTOLLINO: All right, I'll agree to that.

14 THE COURT: Okay. And then the burden issue, I just,
15 I agree with Mr. Antollino. I don't know why that has to be in
16 a confidentiality agreement. That's a legal issue. You know,
17 I don't know why we even have to get into that.

18 MR. ZABELL: I agree. I said we could leave the
19 issue or the burden out.

20 THE COURT: Okay.

21 MR. ZABELL: Because ultimately it's the Court that
22 decides.

23 MR. ANTOLLINO: No, I suggested and you said no.

24 THE COURT: Okay, forget it, whatever. It's out.
25 Just take that sentence out.

1 MR. ANTOLLINO: Okay.

2 THE COURT: So that's resolved. I've flipped through
3 the employee handbook and abundance of caution, I'm going to
4 allow this to be subject to the confidentiality order, too. It
5 does contain details about benefits and other policies that a
6 competitor could, I guess benefit from if they're trying to
7 mirror the operation so I'm going to make that to the
8 confidentiality order, too.

9 MR. ANTOLLINO: All right, and if I can have that
10 today, I'll represent to the Court I'm not going to show that
11 to anyone until obviously, you know, the order is executed. I
12 don't want to delay anything.

13 THE COURT: You're okay with that, Mr. Zabell, right?

14 MR. ZABELL: Yeah.

15 THE COURT: Okay.

16 MR. ZABELL: Yes, Your Honor.

17 MR. ANTOLLINO: And then we have the tapes.

18 THE COURT: Right, that's going to happen at the
19 November 16th?

20 MR. ANTOLLINO: No, no.

21 THE COURT: What tapes?

22 MR. ANTOLLINO: The instructional tapes are to be
23 produced now under the confidentiality order.

24 THE COURT: Right.

25 MR. ANTOLLINO: Do you have them or can you turn them

1 over to the video company that I --

2 MR. ZABELL: I'm sorry, we made a mistake. We happen
3 to have the instructional video and the tapes. I can give them
4 to you both. They're both on zip drives so you do not have to
5 view them at my office on the 16th at 12:30. I'm giving them
6 to you now subject to the terms of the confidentiality.

7 MR. ANTOLLINO: Now, wait a minute, that sounds, I'm
8 happy about that but let's explore. There were two
9 instructional videos, one with Ray and one with a lawyer. Do
10 you have both of those?

11 MR. ZABELL: I'm not sure. I'm going to give these
12 to you now. I'm going to check when I get back to my office.

13 MR. ANTOLLINO: And the other one will be subject to
14 confidentiality order.

15 MR. ZABELL: They're both subject to the
16 confidentiality.

17 MR. ANTOLLINO: Right, they're both, okay. Now, as
18 far as the sample of jumps, it was supposed to be me who picked
19 the sample. You know, I'll take what he has got here now but
20 the whole point of the sample, of the random sample was so that
21 they wouldn't go through and look for the nicest, prettiest
22 ones where everyone is acting appropriately.

23 THE COURT: Yes, that was the agreement.

24 MR. ZABELL: It absolutely was. I'm sorry. I
25 thought that that was what we provided Ms. Wall (phonetic) in

1 2010 --

2 MR. ANTOLLINO: If you have all of them here, then
3 that's great.

4 THE COURT: Hold on.

5 MR. ZABELL: Please, I thought it was. I'm now being
6 told that it might be something different. I'm giving you
7 those. They're being provided pursuant to the stipulation of
8 confidentiality. When I get back to my office, I will find out
9 and if there's something else, then we'll work that out. And
10 if I don't have to get it professionally copied, I'll provide
11 it to you on a zip drive, just like those.

12 THE COURT: Okay. If you're getting him all the
13 jumps, that's fine. But if they're not all the jumps, then on
14 November --

15 MR. ANTOLLINO: 16th.

16 THE COURT: -- 16th, he should be able to pick a few
17 out randomly.

18 MR. ZABELL: Yes, absolutely.

19 THE COURT: Okay. So is that it then?

20 MR. ANTOLLINO: I think that's it.

21 THE COURT: You both get an A for civility today.

22 MR. ANTOLLINO: Thank you. And I was only seven
23 minutes late.

24 THE COURT: My faith in the legal system and both of
25 you has been restored in terms of your ability to get along

1 with each other. So I appreciate you trying to work these
2 tings out. Okay. So I'm going to reserve decision on the
3 expert motion. I want to go back and look at this gender issue
4 more closely and will either a written opinion or by phone,
5 I'll place the ruling on the record depending on what I decide
6 to do, okay. And then after the deposition, that will be it
7 for discovery?

8 MR. ANTOLLINO: I believe so, unless I decide to make
9 everyone angry by bringing up the issue of Mrs. Maynard's
10 deposition again.

11 THE COURT: Well, we're not going to rehash anything
12 that we've already --

13 MR. ANTOLLINO: You never made a decision but maybe
14 I'll just let that go because I think she was talking about
15 this complaint and --

16 THE COURT: Okay, just give me a preview. You said
17 you anticipate moving for summary judgment, is that what --

18 MR. ANTOLLINO: On one of the causes of action.

19 THE COURT: Okay. So you know, put in your premotion
20 letters then sometime in late November.

21 MR. ANTOLLINO: Oh, Judge, I'm sorry, there was one
22 more thing that I forget. There was one other thing you
23 ordered turned over which I'm sure Mr. Zabell can get to me the
24 days in which my client did not work at all.

25 MR. ZABELL: That's addressed on the affidavit.

1 There's no record on days where your client did not work.

2 MR. ANTOLLINO: All right.

3 THE COURT: Yes, I think I remember seeing that in
4 the letter so apparently it was in the affidavit.

5 MR. ANTOLLINO: It was not in the letter. I forgot.

6 THE COURT: No, not in your letter. I thought in one
7 of Mr. Zabell's letters he said that because that rings a bell
8 with me but maybe not.

9 MR. ZABELL: But we put it in the affidavit just to
10 make sure.

11 THE COURT: Okay. Thank you, counsel, have a good
12 night.

13 MR. ANTOLLINO: Thank you, Judge.

14 MR. ZABELL: Thank you, Judge.

15 * * * * *

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

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

21

22

23 _____
TRACY GRIBBEN

24 TERRY GRIBBEN'S TRANSCRIPTION SERVICE DATE: **November 8, 2012**

25