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VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
United States District Court 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, pursuant to Your Honor's Individual Rule of Practice III(A), to respectfully request a pre-motion conference regarding Defendants' anticipated motion for summary judgment. Defendants' basis for seeking summary judgment is detailed below.

I. Plaintiff's Title VII Claim[1]

Plaintiff's claim under Title VII of the Civil Rights Act of 1964 ("Title VII") fails as matter of law. In order to survive summary judgment, Plaintiff must meet the burden shifting test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), by demonstrating that "(1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." Plaintiff cannot meet this burden, as his claim under Title VII for gender stereotyping is nothing more than a re-packaged claim for sexual orientation discrimination, a protection not offered by Title VII. "[D]istrict courts in this Circuit have repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes." Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005). A "gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). Here, Plaintiff attempts to do just that, bootstrap his sexual orientation claim into Title VII. Plaintiff's claim for discrimination based on non-conforming gender stereotypes is inextricably linked to his sexual

[1] The same analysis applies to Plaintiff's "sex stereotyping" claim under the New York State Human Rights Law.

orientation. Plaintiff's claim for sex stereotyping is premised on his purported inability to conform to the gender stereotypes of men. (Complaint ¶¶ 26-30). Plaintiff's inability to conform to the gender stereotype of "masculinity" is intrinsically tied to his sexual orientation, and is an impermissible attempt to bring a sexual orientation claim under Title VII. There has been no allegation, nor evidence produced, conditioning Plaintiff's continued employment or treatment on his ability to appear masculine. Without such evidence, Plaintiff's claim is nothing more than a sexual orientation discrimination claim which is not protected under Title VII.

Additionally, Plaintiff alleges a sex stereotyping claim premised on Defendants' termination of Plaintiff pursuant to a customer complaint. Plaintiff contends that Defendants applied a sex stereo type to Plaintiff by terminating him based on a woman's complaint of inappropriate behavior – Plaintiff is male so he must have done it. However, there is no genuine dispute of material fact as to this issue. Ray Maynard, Defendant's principal, terminated Plaintiff because a customer complained about his behavior, stating it made her uncomfortable. Plaintiff himself confirmed these facts. The termination was not due to Plaintiff's gender or Mr. Maynard's stereotype of the male gender. Plaintiff's new argument is diametrically opposed to his original claim. Plaintiff simply acted unprofessionally, no matter his gender or his sexual orientation.

II. Sexual Orientation Discrimination

Claims of sexual orientation discrimination are actionable under the New York State Human Rights Law; however the question of whether such claims can survive summary judgment is determined by the same burden shifting analysis as for Title VII claims. Stephenson v. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO, 6 N.Y.3d 265, 271, 844 N.E.2d 1155, 1158 (2006); Dawson v. Bumble & Bumble, 398 F.3d 211, 224 (2d Cir. 2005); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

There is no issue of material fact regarding Plaintiff's claim for sexual orientation discrimination. Plaintiff cannot show he suffered an adverse employment action due to his protected status as a homosexual. When Plaintiff was hired, Defendants were aware of his sexual orientation. Plaintiff admits he was openly gay during his time at Altitude Express in both his Complaint and at his deposition. Plaintiff was initially hired in 2001, and Defendants employed Plaintiff for the seasons of 2009 and 2010. Additionally, Plaintiff was terminated because a customer complained that Plaintiff acted inappropriately during her tandem jump – making her uncomfortable – not because of Plaintiff's sexual orientation. There is no evidence, aside from Plaintiff's threadbare allegations, that Plaintiff's sexual orientation was a factor in his termination. Again, Plaintiff's own deposition testimony confirms that he was treated identically to his peers.

III. Fair Labor Standards Act

There is no material fact in dispute regarding Plaintiff's claims for minimum wage and overtime under the FLSA. Pursuant to 29 U.S.C.A. § 213, an employee is exempt from minimum wage and overtime requirements if he is "employed by an establishment which is an amusement

or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 ⅓ per centum of its average receipts for the other six months of such year..."

There is no dispute that Defendant Altitude Express is a recreational establishment. Additionally, the Defendant's gross receipts records demonstrate that its average receipts for the slowest six (6) month time period are far less than 33% of the average receipts for the busiest six (6) months. On that basis, Plaintiff is an exempt employee and not entitled to the normal minimum wage and overtime pursuant to the FLSA.

IV. New York Labor Law Minimum Wage

Plaintiff was paid at least the minimum wage during his employment with Defendant. Plaintiff was compensated on a "piece-rate" basis, being paid on a per-jump basis rather than by the hour. 29 U.S.C. § 206; see United States v. Rosenwasser, 323 U.S. 360, 363, 65 S. Ct. 295, 297, 89 L. Ed. 301 (1945) (holding the FLSA wage requirements include those paid by piece rate); Perez v. Jasper Trading, Inc., 05-CV-1725 (ILG)(VVP), 2007 WL 4441062 (E.D.N.Y. Dec. 17, 2007); see also Wirtz v. McGhee, 244 F. Supp. 412 (E.D.S.C. 1965) (the FLSA "does apply to employees compensated on a piece rate basis"). While the FLSA requires employers pay the minimum wage to employees, employers are not required to pay minimum wage in the traditional manner. Rather, his pay per week divided by the number of hours worked must equate to more than the minimum wage. "In the case of piece work wages, this regular rate coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked." Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424, 65 S. Ct. 1242, 1245, 89 L. Ed. 1705 (1945). Here, based on Defendants' pay and jump records, Plaintiff received anywhere from $7.50 to $18.63 per hour while employed by Defendants. This amount is in excess of the $7.25 per hour minimum wage mandated in New York.

Based on the foregoing, Defendants respectfully request a pre-motion conference be convened prior to the submission of a motion for summary judgment on the above delineated causes of action. Defendant submits that no disputes of material fact exist with regard to these issues and consequently summary judgment should be granted in Defendants' favor for the above stated claims. Counsel remains available should Your Honor require additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

Saul D. Zabell, Esq.

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