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December 4, 2012

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)

Dear Judge Bianco:

I represent plaintiff in this matter and write in response to my adversary's pre-motion letter pertaining to summary judgment. I apologize for exceeding three pages.

1. Plaintiff's Title VII Claim

As has been typical in this litigation, Mr. Zabell either misconstrues or oversimplifies plaintiff's contentions, again repeating the tired mantra that a claim for sexual orientation discrimination cannot be bootstrapped into a claim for under Title VII. We've never suggested as much, and because Mr. Zabell repeats it again in his letter does not make it so. In this case, the evidence has shown that plaintiff was fired in part because his behavior and appearance did not conform to that of a man. In Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005), which defendant cites, the Court noted that a sex stereotype theory would be viable where there is evidence of discrimination based on a "fail[ure] to conform to gender stereotypes ... through behavior or ...appearance." Id. In Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000), which defendant also cites, the Court "express[ed] no opinion as to how this issue would be decided in [the] future," given different facts. Id. at 37. Since then, the Second Circuit has allowed sex stereotype claims to proceed to the jury. In one, a sexual orientation claim was also present. See Miller v. City of New York, 177 Fed. Appx. 195, 2006 U.S. App. LEXIS 10730 (unpublished). In another, the complaint allowed a male to proceed to the jury where, as in this case, the employer reflexively terminated the accused male harasser because the employer contended that a male is less worthy of belief where there is an allegation of sexual harassment. Sassaman v. Gamache, 566 F.3d 307, 311 (2d Cir. 2009).

In this case, there are three bases upon which the Title VII claim lies. As the Court may know, defendant and all witnesses have testified that plaintiff was a sterling employee and executed a near perfect jump on the date that he got fired. What happened to "monkey wrench" matters was that, while he strapping himself to

one Rosana Orellana, a fellow skydiver strapping himself to Orellana's boyfriend, David Kengle, said, "I bet you didn't think your girlfriend was going to get strapped to another guy!" After Mr. Zarda sensed Orellana's discomfort over that statement, he told her words to the effect that, "you don't have to worry about me, I'm gay." He does not remember, but Orellana testified that Zarda also said he had just gotten out of a relationship with his boyfriend.

All of the video and photographic evidence shows that Orellana and Kengle had a fantastic skydive, and even posed, smiling, face to face, with Don, after it was over; one such picture is attached as an exhibit. Later, however, Kengle found out about what Zarda told Orellana and got mad. Orellana testified she had no interest in complaining. Kengle, however, an unemployed waiter, was outraged, and told Maynard that Zarda – shock – told his girlfriend he was gay; and then, seemingly contradictorily, that he touched her in at the hips in an inappropriate way. The hips happen to be the location of the straps that prevented Orellana's death by falling, but Maynard paid that no mind. Maynard refunded the \$600 fee Kengle had paid, and stole it from plaintiff's paycheck.¹ He did not speak to Orellana about the event, and did not review the visual material. *Maynard knew that touching was required as part of a jump, and he knew that Orellana had signed a waiver that said she would be touched and should not go on the skydive if she didn't want to be touched.* Instead of investigating, Maynard suspended plaintiff immediately, then terminated him a week later, just as in Sassaman. During this suspension, Maynard's then highly trusted second-hand man Rich Winstock strongly recommended that Don not be terminated because, as Rich testified, he was "an excellent instructor."

Plaintiff's theory of Title VII liability is, first, that he was assumed to be guilty of sexual misconduct simply because a female's honor was besmirched by a man, just as in Sassaman. Maynard testified at his deposition that though he knew Don was gay, he thought Don could switch back and forth between heterosexuality and homosexuality, thereby providing him a motive for Don's wanting to touching Orellana's hips. That testimony coupled with Sassaman alone will prevent summary judgment. What is worse in this case, though, is that, unlike the supervisors in Sassaman, *Maynard knew that touching was required as part of the job.* Nevertheless, he seized upon the second-hand allegation of improper touching without even speaking to Orellana, and without recognition that his own waiver – that Orellana signed – notes that touching is part of the skydive experience.²

Plaintiff's second Title VII argument is that, as a man, he was punished for attempting to extricate himself from the suggestion that he was attracted to a woman. Plaintiff was uncomfortable by the suggestion that he was attracted to Orellana because he sensed that she was. He wanted to extricate himself from the suggestion, made by the other skydiver, that he was attracted to her. He did this by telling her he was gay. Maynard's position is indubitably that he should have

¹ He gave it back a week later.

² Orellana testified she didn't read the waiver.

acquiesced in the suggestion, made by the other skydive instructor, that plaintiff was attracted to Kengle's girlfriend.

Third, there were several examples of Maynard's remarks about plaintiff's appearance that support the inference that Maynard believed in sex stereotypes. Thus, aside from the sexual orientation aspect alone, there is sufficient evidence that plaintiff behavior and appearance, as well as sex stereotypes that men should act in a certain way, were a factor in his termination, and a summary judgment motion on this issue would not be successful.

2. Plaintiff's Sexual Orientation Claim

Defendant argues that plaintiff was terminated because he made a customer "uncomfortable." However, this "discomfort" was, in part, telling the customer that he is gay. It is now "widely accepted that a company's desire to cater to the perceived [discriminatory] preferences of its customers is not a defense under" anti-discrimination laws. Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 913 (7th Cir. Ind. 2010). Imagine a customer would prefer not to have a black skydive instructor; or imagine if a light-skinned black person, whom the customer assumed to be Caucasian, shocks a customer by telling her he's black. The customer is offended, but would this be an insulation from liability? Of course not. We wouldn't be debating this if plaintiff were any protected class other than gay. It's the last acceptable form of discrimination – protections not in every state, and in this state not in 2001 when Ray Maynard testified that he also fired plaintiff because he told a customer that he is gay. The law, however, has changed, but Maynard has not. He still wants his gay employees to stay in the closet. The straight ones can flaunt their sexuality, however, and we have innumerable instances of the flaunting of heterosexuality being completely acceptable at the workplace. But Don merely tells a person he is gay and he gets fired.

The suggestion that Maynard knew that plaintiff was gay and that therefore insulates him from liability is simplistic, and overlooks that Maynard disparately treated gay people from other protected classes. He testified at his deposition that "sharing personal information" was the reason for plaintiff's termination, and told this to state unemployment authorities.³ However, at his deposition, I went over a list of personal information that was appropriate for discussion at the workplace, including his girlfriend, his wife, being Irish, being Cuban, being married, loving one's husband, telling customers about heterosexual partners and children, and discussing one's military status. He stopped, however, at the suggestion that someone could wear a "Legalize Gay" t-shirt at his drop zone. That would be inappropriate, according to Maynard. If you listen to Don's termination interview you sense the anger in Maynard's voice, and he specifically refers to plaintiff's sexuality as an "escapade." The dictionary definition of escapade is

³ Notably, in the letter to dispute plaintiff's unemployment benefits, many months later, there was no reference to touching, even though in the abstract that would have been a better allegation of misconduct. By then Maynard undoubtedly realized how ridiculous the suggestion was.

“an adventure, a jaunt, an antic, an exploit.” But no gay person’s sexual orientation is an escapade any more than a heterosexual’s orientation is an escapade. That’s a gross insult and an expression of a derogatory view toward homosexuals that would preclude summary judgment. See Sandiford v. City of New York, 94 A.D.3d 593, 595 (1st Dept. 2012). A person’s sexuality is a person’s identity, and it is a protected class in this state. Therefore, defendant’s motion on the sexual orientation discrimination case would fail. For all of these reasons – and because plaintiff’s identifying as gay was admittedly a factor in his termination – plaintiff will cross move for partial summary judgment (i.e. liability) on this cause of action.

3. Wage Claims

Plaintiff withdraws his overtime claim on the basis of the FLSA “seasonal” exemption, but that does not apply to his minimum wage claim under state law. See Matter of Cuomo v. Dreamland Amusements Inc., 22 Misc. 3d 1107A, 2009 N.Y. Misc. LEXIS 85 p***16 (N.Y. Sup. Ct. 2009). Plaintiff finds it unusual that defendant was unable to provide us a list of the dates in which plaintiff did not do any jumps – and therefore made no money – and yet now says that plaintiff earned at least \$7.50 an hour. My response is, first, there is no showing that the “piece work” theory applies to New York state law, therefore this is an issue of first impression that we don’t intend to waive. FLSA does not preclude state labor laws, see id., and Mr. Zabell has cited none that allow “piece work” pay.

Second, even if the “piece work” theory did apply in New York, how did defendants come to the conclusion that my client earned minimum wage when they could not produce the records as to when there were no, one or two jumps in a single day? (Those would be the days in which plaintiff earned less than minimum wage in that day.) We will therefore cross-move that defendant should be estopped from making this argument. At his deposition Maynard testified that he could indeed bring in records showing on which days my client sat around all day without a single jump, or just one. I served an interrogatory, which was ignored. I moved to compel and you agreed with me, issuing an order. In the end, Mr. Zabell served me with an affidavit from Maynard that said that he did not have the information. Now they do? Discovery is over, and it is the employer’s obligation to keep work records for three years under federal law. 29 C.P.R. §§ 516.6. This lawsuit was filed within three years of plaintiff’s employment, then presumably Don’s work records should be available. I have been provided nothing, which can’t be fair; and there is no explanation as to how defendant’s calculation was arrived at, therefore, I’m not in a position to respond to it. I do intend to cross move for summary judgment on the grounds of spoliation.

Sincerely,


Gregory Antollino

Cc: Saul Zabell by ecf

