UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,	:	
	:	10-CV-4334 (JFB)(GRB)
Plaintiff,	:	
	:	February 22, 2013
V.	:	Central Islip, NY
ALTITUDE EXPRESS, INC., et al.,	:	
Defendant.	:	

TRANSCRIPT OF CIVIL CAUSE FOR DECISION
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: GREGORY S. ANTOLLINO, ESQ.

For the Defendant: SAUL D. ZABELL, ESQ.

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THE CLERK: Calling case 10-CV-4334, Zarda v. Altitude Express.

Counsel, please state your appearance for the record.

MR. ANTOLLINO: Gregory Antollino for the plaintiff. Good afternoon, your Honor.

THE COURT: Good afternoon, Mr. Antollino.

MR. ZABELL: And Saul Zabell for the defendant. Good afternoon, your Honor.

THE COURT: Good afternoon, Mr. Zabell.

As you know, I scheduled this because I wanted to rule on the pending motion to admit, plaintiff's motion to admit expert testimony regarding sex stereotyping and sexual orientation stereotyping, and the accompanying motion with respect to the preparation time for the deposition that did not ultimately take place.

So I'm going to place the Court's ruling on the record now. If you want to order a copy of the transcript, obviously, it will be available to you. And then we'll see if there are any issues. I don't think there are any issues, given the summary judgment briefing, but I'll hear if there are any other issues we need to address today. It should take about ten minutes, so just bear with me.

With respect first to the motion to admit the expert testimony, I'm denying that motion for the following reasons: First, the standard is clear; it was cited by both sides.

Part of the standard that relates to expert testimony is the question of whether use -- Second Circuit courts have long held that use of expert testimony is not permitted if it will "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it."

United States v. Bilzerian, 926 F.2d 1285 at page 1294 (Second Circuit 1991), as well as district court cases obviously citing that standard, including Roundout Valley Central School District v. Canaro Corp. (ph), 321 F.Supp.2d 469, (N.D.N.Y. 2004), where it made clear that it's axiomatic that an expert is not permitted to provide legal opinions, legal conclusions or interpret legal terms.

Professor Yoshino's (ph) report in this case is permeated with what I view as impermissible legal conclusions regarding his conclusion that the termination was based on sex stereotyping and disparate treatment based upon sexual orientation. There are a number of references in the report to that in very

clear terms.

Obviously, he's -- those type of legal conclusions require interpreting legal terms. I view that as especially dangerous when you have someone who is a law professor purporting to do that. I believe without question that that would be competing with my function of instructing the jury in this case, and those types of conclusions are not permissible.

The professor does not limit his opinion to defining sex stereotyping or sexual orientation stereotyping or explaining the effects of that. Part of his opinion does do that, which I'll get to in a moment. But certainly his opinion goes across that line and states legal conclusions regarding the reasons for the termination, among other things.

Again, based upon the above-referenced case law, I don't believe that that is permissible, because it will usurp my role in instructing the jury on the law and certainly potentially confuse them with respect to the issues in the case.

The case I'll cite reached a similar conclusion in exactly this context, Blessing v. Ohio University, 2011 West Law 6076327, (Southern District of Ohio December 6, 2010). It involved an expert in women's educational equality, and the court ruled that

the legal conclusions about hostile work environment that the expert was purporting to give were not going to be helpful or admissible in connection with that trial.

So that deals with a certain portion of the report. As Mr. Antollino noted in his papers and in oral argument, there are certainly other portions of the report that do not do that, and he stated that obviously the report and the testimony could be tailored to avoid any of those legal conclusions.

However, I view the other portions of the report with respect to the stereotyping itself will not assist the jury in this case. The standard with respect to that -- again, this is basically a relevance standard on whether or not it would be helpful or not to the jury.

This is contained in many opinions, including one Judge Preska (ph) wrote, EEOC v. Bloomberg, 2010 West Law 3466370 (S.D.N.Y. August 31st, 2010). She cites the cases that talk about, relevance can be expressed as a question of fit, whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.

And in addition, and this to me is the

important part as it relates to this particular issue in this case, expert testimony is not helpful if it simply addresses "lay matters which a jury is capable of understanding and deciding without the expert's help." She cited United States v. Mulder, 273 F.3d 91 at page 101 (Second Circuit 2001).

The issue here with respect to the stereotyping -- obviously, Professor Yoshino discusses extensively this issue of forced covering. But in my view -- first of all, a couple of things: I don't think that's a difficult issue to understand. Basically, the point is that -- the point he's trying to make to the jury is that heterosexuals are permitted to talk about sexual identity and homosexuals are not, and if they do, they are punished.

But to the extent that if there was some type of subtleties or complexities with respect to that type of stereotyping that an expert may need to explain to the jury, and there certainly could be cases where that was necessary -- I'm not suggesting that this type of testimony would not be helpful in any case. But in this particular case, this is perhaps the most straightforward issue of stereotyping that you could possibly present to a jury.

First of all, there was no alleged forced --

this was not a situation where covering took place. In this case, it was -- the issue of why a person might cover is not an issue in this case. How a person who covers could still be discriminated against is not an issue in this case, because in this case, the plaintiff disclosed his sexual identity, which is what they allege led to the termination.

So this is very straightforward. While some forms of complex or subtle stereotyping may be difficult for jurors to understand, this is not one of those. It's not hidden, it's not latent. In fact, I looked at Professor Yoshino's report, and he talks about this double standard.

He says in paragraph seven of his declaration -- not his report, his declaration: "I will not spend much time elaborating on this double standard, as I believe it is self-evident." So even he acknowledges, I think, that this is not a difficult thing for a jury to understand. We discussed this at oral argument.

I told Mr. Antollino -- and Mr. Zabell agreed to a question during jury selection, to the extent the concern is that jurors would punish a plaintiff and refuse to even consider a claim, simply because he or she revealed their sexual identity.

That's a jury selection issue. That's not a reason to have an expert in the case to try to essentially teach a juror who would otherwise -- might otherwise indicate in jury selection, no matter what they were told, they would believe that if the plaintiff revealed it, that he or she should not recover. Those people can be screened out in jury selection.

In fact, Mr. Antollino ultimately, at pages 22 and 23 of the transcript, acknowledged that if there was a question in jury selection that covered that, that he wouldn't need Professor Yoshino for that issue. In any event, even apart from that acknowledgment, it's my view that he's not needed for that issue and it would not be helpful to the jury, something that a layperson could certainly comprehend.

The second issue then that Mr. Antollino raised is that he would need him for not the sexual orientation stereotyping but the mail/female stereotyping issue. There issue there, as was discussed at the oral argument, is that the plaintiff's theory is that when a male is accused of inappropriately touching a female, it is more likely to be credited than if a female is accused of inappropriately touching a male.

He cites the Sassumin (ph) case as that

being a permissible theory. There's no question that that's a permissible theory but first of all, the Sassumin case doesn't say anything about experts and whether is needed on that. But it's my view, again, that that issue of stereotyping is not subtle, it's not difficult to understand, it's not complex, it's very straightforward.

Mr. Antollino is arguing that that stereotyping led to no investigation because his client is male, and it's very easy for a jury to understand the theory, understanding the issue of stereotyping there, and decide whether or not it's the basis for the discrimination here or not. So there's simply no need for an expert to explain that stereotyping to a jury.

There are cases, not exactly on that theory, but there are cases that have reached similar conclusions on this in this context. The Supreme Court in Price Waterhouse actually had a line in it, Price Waterhouse v. Hopkins, 490 U.S. 228 at page 255 (1989), saying it takes no special training to discern sex stereotyping -- in that case, a description of an aggressive female employee's requiring a course at charm school. In my view, this is very similar to that type of situation.

Judge Preska in the Bloomberg case reached

the same conclusion, excluding a gender stereotyping expert because it would not -- among other things, would not be helpful to the jury. Actually, there's a very good Minnesota appellate court case, Ray v. Miller Meestr Advertising Inc., 664 N.W.2d 355 (Minnesota Court of Appeals 2003), where again it reached the same conclusion and noted in that case, "It is unarguable that virtually all adults in our society know about gender stereotypes."

And in that particular case concluded, "There is nothing in this case that shows directly or inferentially some insidious scheme or pattern of gender discrimination that can be uncovered only with the help of expert analysis, such as a statistical demonstration. Rather, this case is straightforward and within the realm of ordinary understanding and comprehension."

Again, that's exactly what my view is with respect to this particular case. But I want to emphasize, I'm not reaching any general conclusion regarding the use of these experts for other types of alleged stereotype discrimination cases.

So for those reasons, the motion is denied, and I'm not going to Professor Yoshino to testify as an expert in the case.

With respect to the fees issue, I am granting that application, although I am going to make a modification to the amount that I'll explain in a moment. The plaintiff seeks compensation under Rule 26(b)(4)(E) for preparation time for the deposition that did not occur. Plaintiff seeks payment of $3,500 based upon 8.75 hours of preparation at a rate of $400 per hour.

Mr. Zabell makes a number of arguments, including that -- first, the threshold argument that there's no obligation at all to reimburse because he never personally served the subpoena and gave ample notification of the decision not to depose. His second argument is the 8.75 hours is unreasonable. His third point is that the $400 rate is unreasonable.

The standard is well-settled. It's contained in Smith v. New York Presbyterian Hospital, 2012 West Law 4903256 (S.D.N.Y. October 12, 2012), as well as Penberg v. Healthbridge Management, 2011 West Law 1100103 (E.D.N.Y. March 22, 2011).

Under the rule, "Unless manifest injustice would result, the court [and I don't believe this is a situation where there would be a manifest injustice] -- the court must require that the party seeking discovery pay the expert a reasonable fee for time spent

responding to the discovery under the discovery rules. In the absence of manifest injustice, compensating an expert for her time spent in deposition is mandatory under the rule. The mandatory nature of the rule is to avoid the unfairness of requiring one party to provide expensive discovery for another party's benefit without reimbursement. However, the party seeking the reimbursement of deposition fees bears the burden of establishing the reasonableness of those fees."

That's the standard that the Court is operating under. First, under that standard, I believe that Mr. Antollino is entitled to recovery of some of the fees. The fact that no actual direct service of the subpoena on the expert occurred, in my view, in this particular case is irrelevant.

Rule 26(b)(4)(E) refers to a party seeking discovery. It doesn't say anything about that the subpoena has to be individually served for the rule to be triggered. There's no question here that Mr. Zabell was a party seeking discovery of the expert. He e-mailed the letter and subpoena to Mr. Antollino on May 18th for a deposition that was noticed for June 11th. They had a discussion about adjourning, which was not agreed upon. Mr. Antollino obviously forwarded the subpoena to the expert.

Those actions by Mr. Zabell, in my view, constituted under the rule a party seeking discovery, even though he didn't ultimately serve the subpoena directly on Professor Yoshino himself.

The second argument that there should be no reimbursement because the deposition was canceled and there was no need to prep, I disagree with that based upon the timing. It was canceled June 5th, three business days before the deposition. I guess it's six total days. It's not as if Mr. Antollino waited when he got that notice. He states that he immediately notified the expert.

The expert told me in the papers that he immediately stopped working. But because he had other obligations, he had already prepped for the deposition. And in my view, it was not unreasonable for him to have prepped already, given how soon the deposition was to occur. I don't believe that that's a basis to deny the reimbursement.

However, I do view the 8.75 hours in this case to be unreasonable for the following reasons: Some of these reasons are similar to the ones in Mannarino v. United States, 218 F.R.D. 372 at page 375.

First, the expert had just drafted the report only two weeks earlier before the deposition, so

he had very recently put together the pertinent report. You would think that not a lot of prep time would be required under those circumstances.

Second, this is not a voluminous report. It was, I think, six pages or so, so he didn't have to review a voluminous or complex report or record in order to prepare for the deposition, especially given how close in time the report was prepared to the deposition itself.

The second point, which there was a back and forth in the papers on, with respect to how the time was spent, I have no problem with the time that was spent obviously reviewing -- he reviewed some research studies of professors in universities. He spent some time going through the Dalbert factors in connection with his work.

I also -- Mr. Antollino noted that he read the Desardo (ph) deposition, which he had not done, I guess, for purposes of doing the report. I think that was reasonable as well to prepare for any questioning that might come up with respect to what Desardo had said.

But when I looked at Exhibit D, I saw that he also charged 3.5 hours total for reviewing depositions of Maynard, Kengel (ph), Orelana (ph) and

Winstock (ph). And when I looked at his expert report, which was prepared on May 17th, he said, "I relied on the following materials, including the deposition transcript of Orelana, Kengel, Winstock and Maynard." So while he may not have read the Desardo transcript, his report states that he reviewed those in connection with his report, and I see no reason why he would have needed to spend 3.5 hours reviewing those depositions again in connection with his own deposition.

So I think the 5.25 total hours, in terms of reasonableness, is all that plaintiff has demonstrated is reasonable under the circumstances, and that's the amount that I will award fees for.

With respect to the rate, I think the $400 fee is a little too high, for the following reasons:

First, it's the plaintiff's burden. It's not exactly clear to me what rate he's charging Mr. Antollino. Mr. Antollino put checks of $10,000, I guess for the report, but it's not exactly clear what rate he's charging Mr. Antollino. But putting that aside, even if it were the same rate, he's provided no rates of what I would view as any similar experts.

There's reference to rates for lawyers. First of all, I don't believe that's the correct measure, because he's not -- as I said before, he

wouldn't be testifying as a lawyer. So I don't really think those rates apply. There's a number of cases that talk about that, including Smith v. Presbyterian, 2012 West Law 4903256 at footnote 4, citing other cases.

In any event, even if you were using the lawyer rate, as the Penberg case noted at page 6, citing one of my prior opinions, the rate in this district is between $200 and $375 for a partner at a firm. I don't even want to get into the back and forth of whether a professor should be considered in relation to that rate.

But the bottom line is, I believe under the circumstances, that the lawyer rate is really not the correct measure. I think that a $350 is a reasonable rate for his services in connection with this case. So by my math, 5.25 hours at $350 an hour is $1,837.50, and that's the fees that I'm awarding under the rule with respect to his prep time.

Is there anything else we need to address today, Mr. Zabell?

MR. ZABELL: Not from defendant, your Honor.

THE COURT: Mr. Antollino?

MR. ANTOLLINO: No, I don't think so.

THE COURT: Okay, thank you, gentlemen.

Have a good day.

MR. ANTOLLINO: All right, goodbye.

MR. ZABELL: Thank you for your time, your Honor.

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

ELIZABETH BARRON March 13, 2013