

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DONALD ZARDA,

Plaintiff,
-against-

ALTITUDE EXPRESS, INC., et ano

Defendants.

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REPLY
MEMORANDUM OF LAW
IN OPPOSITION AND SUPPORT

10-cv-04334-JFB

REPLY ARGUMENT

I. PLAINTIFF’S SEX STEREOTYPING CLAIM SURVIVES SUMMARY JUDGMENT.

This is a mind-bending and unusual case; but it is also very important, and at the cutting edge of where we are as a society versus where we were. Plaintiff acted as he always had in protecting his student, but had no idea there was an unemployed, homophobic waiter wanting his money back and ready to complain about anything. His girlfriend, who surely wanted to survive the jump, testified she trusted Don’s judgment in protecting her life, but mentioned she felt uncomfortable at the hips, and was told – shock – that plaintiff is gay. Now we have a highly federal case.

In their papers, defendants promulgate numerous bases upon which plaintiff acted inappropriately with Rosana – as if he were sexually attracted to her. Very stupid, when a man, under penalty of perjury is willing to attest to the repulsion he feels at the very thought of male-female sexual relations. This is perhaps the very first case in history where a person is being accused of craving women when he is 100% gay.

Notably, the complaint Rosana’s boyfriend initially report was not that Don acted inappropriately, but that, as Ray said, “He said that he had his hands on her hips and made her feel very uncomfortable”. Maynard dep. at 182. That feeling of uncomfortability morphed into impropriety and many different motivations on Don’s part, including that it was sexual harassment, because “He has his hip on my -- his chin on my shoulder . . . I didn't give him permission to do that.” Orelana Dep. at 89. Oh, Rosana, but you had! Antollino Dec. at Exhibit

A, ¶ 13. Then she changed her story and admitted it not sexual, Orelana Dep. at 101. Finally she had to admit that she did not know she would be touched on the skydive because she was too troubled or excited or troubled to read the waiver. Nevertheless, Maynard used any basis that he could grasp to fire plaintiff; you might say he “shot from the hip” (pun intended). While certainly plaintiff was fired for expressing that he is gay, he was also fired, as Ray stated, for making Rosana, who was not aware the extent that she would be touched, uncomfortable for being touched when the sport, when you come down to it, is all about touching and risking your life.

So plaintiff was fired for telling Rosana that he is gay, but he was also fired for other reasons, including that he was a victim of Ray’s gender stereotype. People can be fired for multiple reasons, and there’s an expression for in this area of law: Mixed motives. In this case, plaintiff was fired for expressing that he was gay – which is a function of his *being* gay – and also because of sex stereotypes. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

Plaintiff argues three theories upon which he was fired for sexual stereotyping. Argument One: Plaintiff was fired because a facially-pretexual, second-hand, uninvestigated complaint was credited that he had inappropriately touched a woman. This was the theory that got the plaintiff to the jury in Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009). Although there is one difference between Sassaman and this case – Ray didn’t say “I have to believe the woman over the man,” because he never spoke to the woman – but other differences between these cases cut for Don. I explored most of those distinctions in my opening brief, at 6-7, and I’d like to add one more. In Sassaman, the plaintiff and the accuser were co-workers at the Board of Elections and the plaintiff had no arguable reason to touch his complainer in any way. and yet he got to the jury. In plaintiff’s case, he had no performance problems, was doing what he was supposed to, but because Orelana refused to educate herself about what was going to happen on the jump. Because of Ray’s actions in response, we have a federal case and plaintiff gets to the jury.

Mr. Maynard overblew the evidence he had in his arsenal. Remember the initial complaint was “discomfort – and Ray credited the allegation of improper touching despite having examined the video, which was completely exculpatory toward Don; despite the fact that

Ray knew that Don is gay; and despite that Ray knew that Rosana's hip straps would have to be manipulated on the jump. Defendants make a big deal about the fact that more of the manipulation would take place in the aircraft than in the air, but this is a distinction without a difference; if that's their defense in evaluating the testimony of a novice versus an expert, then they have no defense. Her hips were going to be touched in the airplane and in the air. She waved her right to complain about being touched, yet Ray was unwilling to use that waiver against a woman. Instead, rather than even talk to her, he talked only to her boyfriend and his secondhand allegation about her complaint. No matter if she did not complain because "she doesn't like confrontations," Maynard had a duty at least to reach out and ask her what happened. He didn't. He took the allegation as true despite the overwhelming evidence that it was untrue: first, Don is gay; The assumption that all men will be sexually attracted to women, or be prone to sexually harassing them, is a sex stereotype. Second, Rosana's hips needed to be touched for her safety. Third, the videographic evidence showed no impropriety whatsoever. Defendants repeat that the mantra that the video didn't record everything. This is probably true, but nonetheless where is the evidence on their side? Defendants suggest that because the video did not show everything that something must have occurred when the camera was not rolling. This is sheer speculation, and on the Sassaman issues alone, plaintiff gets to get to the jury.

The idea that any investigation took place in this matter insults everyone's intelligence. Zabell argues that the investigation, consisted of (1) a discussion with Kengle; (2) a discussion with Don; and (3) a review of the tape. These are not elements of an investigation; this was a pretext of one to get rid of Don for letting a customer know that he was gay. "Investigation" is defined by Webster's as "to observe or study by close examination and systematic inquiry." The discussion with Kengle was not a study by close examination by any means. Maynard was not privy to what went on in the plane, and he didn't even speak to the other workers present, of which there were three (videographer, other instructor, pilot). In another case with similar complaints of touching by instructors, Ray wrote, "personally if someone was feeling up my

girlfriend, I would do something *on the spot* to defend her dignity-unless of course I am [a] fourth-grader.” Antollino Dec. Exh. K, p.3. Kengle did nothing to identify what Don was doing wrong on the plane; when he saw it, the pictures show him and his lady having a damned good time. Antollino Dec. Exhibit B. Rather Kengle’s statement was the object to be investigated, and Maynard did nothing to effectuate any “study” or “systematic inquiry” of his allegation whatsoever, except to watch the video, which was *exculpatory* toward Don.

To suggest that Maynard’s interview with Don at the suspension hearing was part of an investigation is nonsense. According to defendants, Ray had seen the video, yet Don, after thirty or so customers since Rosana, did not remember anyone making any complaint, or anything unusual about any jump in the last few days; yet Maynard refused to allow plaintiff to see the video, which at the end, Rosana and Don are practically kissing. Zarda dec. at ¶¶ 4, 28, 29, 35, 42; Antollino Dec, Exhibit B. This *precluded* the investigation, and is an example of the utmost bad faith: along with Maynard’s stealing plaintiff’s check for a week; his calling plaintiff’s sexuality an “escapade”; and his making fun of his choice of color.

Ray did no investigation. He heard an *unverified, non-sensical allegation* and suspended Don, then watched a video that showed that everything went right. The immediacy of his acceptance of the allegation of impropriety is evidence of sex stereotyping. The court itself expressed understanding of this theory when it denied plaintiff the opportunity to present expert testimony on this point. “[Yoshino] cites the [Sassaman] case as that being a permissible theory. There’s no question that that’s a permissible theory but first of all, the [Sassaman] case doesn’t say anything about experts and whether [one] 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.” Transcript, February 22, 2013, pp.8-9 attached as Exhibit 1.

The second argument upon which plaintiff makes his sex-stereotype claim is based upon his freedom as a man to remove himself from the suggestion that he is heterosexual. There was a time when it was defamation per se to call a person homosexual. Those days are gone. See

Yonaty v. Mincolla, 97 A.D.3d 141 (3d Dep't 2012), lv. denied, 20 N.Y.3d 855 (2013). Now, not only is calling someone a homosexual not a tort, but, this should be the first case that holds it is discrimination to force a gay person to accept the allegation that he is heterosexual without allowing that gay person to rebut the allegation. Maynard believes the opposite – in other words that Don should have taken the suggestion “like a man.” Dep. at 261. Don is very masculine with a super, athletic body; except for his idiosyncratic pink affectations, few non-gays would assume he is gay. I am not nearly as masculine as Don, but depending on the circumstances if someone asks me if I have a girlfriend or a wife, I respond, “Why do you presume I am heterosexual?” And since I am gay and do not want to be considered straight, that is what I have the right to say. Don was accused of being interested in Rosana, and he didn’t want her to think he was interested in her when another diver suggested as much. He didn’t make a snarky response like mine, but gently told Rosana that he was gay and had the ex-husband to prove it. That is not an expression of telling customers about his “escapades,” and he did it for the purpose of making Rosana feel more comfortable, since she was the target of the joke as well. Times have changed. That Rosana did not feel comfortable is unfortunate, but legally not grounds for termination.

Finally, plaintiff presented evidence that Ray showed a discriminatory attitude toward his female-appearing attire. Zarda Dec. at 15-18, dep. at 111. The Second Circuit has said that discrimination based on a “fail[ure] to conform to gender stereotypes [can be stated] in two ways: (1) through behavior or (2) through appearance.” Here we have both.¹ No matter whether Ray demanded Don to paint the pink cast or put a sock over its, the difference is immaterial. The point is that he made Don cover his identification with his female side - let’s put it that way – not only with the cast, but with the pink-painted toenails. Had this been another venue, Ray might have been on better footing, but this was an skydive center where people walk around half naked, Maynard dep. at 88; where men ogle at women’s breasts on video as gravity forces them to flop

¹ Behavior includes speech. See Acosta v. City of Costa Mesa, 2013 U.S. App. LEXIS 9066, p. 36 (9th Cir. 2013)

into the air, *id.* at 133; where parties are titled sexually as in “Pull Your Pork” and “Get Laid,” *id.* at 74; and where tandem instructors and passengers hoist a flute of champagne to the tune of “Make sh*t happen!” Antollino Dec. Exhibit B, Winstock videos. The SDLI is a potty-mouthed free for all where anything goes - except for stating one is gay, or denying one is heterosexual.

The defendants’ argument that plaintiff was fired for “poor customer service” is belied by the fact that (1) the contemporaneous evidence shows everyone having a good time; (2) Don was recognized as an outstanding instructor, liked by all; and (3) seemingly ever other complaint made about SDLI was illegitimate: At SDLI the customer has never been right, until Don’s case. Defendant’s citation to plaintiff at 172 of his deposition is another of Zabell’s misrepresentations. Read from the question on page 171 to the end of the last answer on page 173 and that is what Don attested to. Maynard fired plaintiff for a multitude of reasons, one of which was that he immediately credited a facially pretextual allegation that a gay skydiver, better trained and experienced than Ray would touch a woman inappropriately, especially after she practically kissed Don while the tape was running at the end of the jump, pronouncing, “That was awesome!” Antollino Dec. Exhibit B, Rosana jump. If it was awesome, then she enjoyed it.

Finally, defendant dropped the hips “uncomfortable” claim before the unemployment board. This change was made at Ray’s behest, even if Lauren Callanan wrote it. Dec. at Exhibit O; Maynard Dep. at 343. A “juror can reasonably view an employer's changing explanations as ‘pretextual, developed over time to counter the evidence suggesting ...discrimination.’” Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 106 (2d Cir. 2001) (held: remanded for trial)

For these reasons, the Title VII claim must go to the jury

II. **BEING GAY IS NOT AN “ESCAPADE.” PLAINTIFF MUST WIN SUMMARY JUDGMENT AS TO LIABILITY ON HIS SEXUAL ORIENTATION CLAIM.**

There is no dispute that plaintiff was fired, in part, because he told Orellana that he is gay. He said this because he is gay. This is mentioned on the termination tape. Antollino Dec. Exhibit B. It is also mentioned in the unemployment rebuttal, although it is watered down as

“discussing personal matters.” Antollino Dec. Exhibit O. Defendants attempt to defend the actions on the grounds of Maynard’s right to fire employees because of their customers discriminatory beliefs, but that’s not true. Chaney v. Plainfield Health Care Ctr., 612 F.3d 908, 913 (7th Cir.2010) (illegal to allow patients to pick race of attendants); Customer preference cannot intrude into the anti-discrimination laws lest they be “allow employ[ers] to avoid liability no matter how many discriminatory actions they took so long as the ‘final decision’ on placement could be attributed to the client.” Katz v. Adecco United States, Inc., 845 F. Supp. 2d 539, 544 (S.D.N.Y. 2012).

Not a single case they cite stands for the proposition that a customer can complain about a worker’s protected status and that forming the basis for a legal termination. Imagine Kengle coming to Maynard to complain that his girlfriend had been assigned a black instructor, and Maynard thereupon firing the instructor. Unthinkable, of course, but at one time it was not. Times have changed. The only difference now between plaintiff’s termination and a black person’s termination in the same situation would be that plaintiff is not obviously gay and had to declare his protected class. If that is forbidden, however, it discriminates in favor of protected classes that are visible versus those that are not, and that would itself be a form of discrimination. In any case, it has long been the case that customer preferences cannot dictate the hiring and firing of customers. Silver v. N. Shore Univ. Hosp., 490 F. Supp. 2d 354, 365 (S.D.N.Y. 2007) (Chin, J.) (“thick cloud of smoke” of discrimination where plaintiff is told he is not being hired by hospital because older scientists get less funding in the marketplace). Therefore, plaintiff’s stating – and therefore being – gay was a factor in his termination and he must win this cause of action as a matter of law. Tomassi v. Insignia Financial Group, Inc., 478 F.3d 111, 114 (2d Cir. 2007). So here we have established an inference of discrimination and there is no legitimate reason in response. It is well-settled that an inference of discriminatory intent may be derived from a variety of circumstances, including, but not limited to: the employer’s continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff’s qualifications to fill

that position (Maynard Dep. at 302-04); . . . or its invidious comments about others in the employee's protected group (pink toenails are "gay" Zarda dep. at 347, dec. at 18; "Gay" is an "escapade" ; Maynard Dep. at 226); or the more favorable treatment of employees not in the protected group (see Winstock dep. at 94,109-110 Winstock refers to his sexuality to passengers, but it is not grounds for discharge in his case, Maynard Dep. at 220, 347) or the sequence of events leading to the plaintiff's discharge." Leibowitz v. Cornell Univ., 584 F.3d 487, 501 (2d Cir.2013) (Bianco, J). In this case we have established the whole rainbow (pun intended) of discriminatory inferences, including, most significantly – singly it stands alone as against the law – plaintiff's termination for telling Orellana he is gay. We don't have to go any further and examine pretext when certain facts are not in dispute; plaintiff was fired, at least in part, for an illegal reason. Summary judgment must be granted as to liability on this claim.

III. AN ADVERSE INFERENCE SHOULD BE GIVEN AT CHARGE FOR A GROSSLY NEGLIGENT ELECTRONIC SEARCH.

There is nothing for plaintiff to add here. Maynard doesn't know what Callanan searched; Callanan admits she doesn't know what she searched, and admits she didn't search everything; and Zarda produced an electronic document from defendants that they cannot account for. All told, the evidence shows that the defendants' electronic search was insufficient, that they lost electronic documents, and plaintiff must be granted an adverse inference. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004).

IV. PLAINTIFF'S MIMIMUM WAGE CLAIM SHOULD BE GRANTED SUMMARILY.

Contrary to defendant's misconstruction of the minimum wage laws, state law requires employers to pay at least a minimum hourly rate to employees for every hour they work. N.Y. Comp. Codes R. & Regs. tit. 12, § 146-1.2. In this case, defendant kept no records, thus they have no standing to defeat plaintiff's motion on this point.

V. **DEFENDANTS' BEGINNING THEIR BRIEF WITH A BEEF ABOUT A 56.1 STATEMENT UNDERSCORES THE WEAKNESS IN THIS POSITION.**

If defendants had anything interesting to say about this unusual, important case that might make new law, it would begin with a real argument. Instead, it begins with a two-page tattletale about creativity in legal writing, and a cast of shame on me for not offering the court a stale recitation of deposition testimony. But then, out of the other side of their mouths, defendants do the exact same thing. Plaintiff very plainly stated at ¶ 8 of his 56.1 statement that, “Rosana, who found the experience “crazy and exhilarating,” did not want to complain.” This was true. Defendant then in response, which I will not repeat here verbatim, go on to argue with the tenor of the plain statement by citing other of her testimony – which was inconsistent throughout – that suggested that she really didn’t like the skydive after all, and it was only because she was afraid of confrontation that her boyfriend, “the brains of the operation” who complained for her instead.

Defendants’ 56.1 statement is slanted as well – in response to plaintiff’s and initially in support of theirs. Their citations to evidence, as I pointed out frequently, did not add up to the testimony cited (suggesting strongly at ¶ 94 that plaintiff had sexual relationships with women at one point). Furthermore, what is particularly galling is that every time plaintiff cited a portion of his affidavit for a contention that wasn’t covered in the deposition – because Zabell did not ask about it – Zabell again and again comes up with the suggestion that plaintiff’s testimony is “self-serving.” Plaintiff testified in a sworn affidavit that he is 100% gay and has no attraction to women, and defendants argue that this is a self-serving remark? In other words, what defendant is suggesting is that you disregard plaintiff’s affidavit, assume plaintiff was heterosexual, but then deny plaintiff’s motion for summary judgment on the grounds of sexual orientation discrimination because Ray Maynard knew all along that plaintiff is gay. There will never again be another argument like this.

Ultimately, plaintiff’s 56.1 statement is no different than any other this Court has seen or will see. I try to make it interesting and tell a story, but all of the contentions come from the depositions. The one discrepancy that the defendant was able to point out was whether plaintiff was asked to put a sock

over his pink cast or paint it black. Ultimately, cover the cast is what Maynard demanded plaintiff do, so the difference is immaterial.

VI. PLAINTIFF'S AFFIDAVIT DOES NOT CONTRADICT HIS DEPOSITION AND IS AN APPROPRIATE EVIDENTIARY VEHICLE.

Earlier in this litigation, Mr. Zabell arranged for Rosana Orellana and David Kengle to submit affidavits to the court that *directly contradicted not only their depositions, but their errata sheets*. See Exhibit 2 (Kengle & Orelana contradictory affidavits). The Court accepted these affidavits as absolving Mr. Zabell of lying to the Court. Now comes bell accusing my client of contradicting himself in his affidavit versus his deposition, with no proof. Nothing could be further from the truth. Mr. Zabell conducted his deposition as he saw fit, asking questions that I thought irrelevant and in an order that which I would not have presented to the Court. My client therefore adopted his deposition testimony but told his own story in narrative form. Affidavits are both truthful and easier to read than question and answer, and testimony out of chronological order serves mostly the defendants' agenda. The defendants did not ask all questions that needed answering, either.

There is nothing wrong with this, and the Court does not disregard an affidavit unless it directly contradicts something stated in deposition. See White v. ABCO Eng'g Corp., 221 F.3d 293 (2d Cir. 2000) (affidavit may clarify deposition testimony); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 104 (2010) (same). In this case, the defendant shows no material contradiction, and the only contradiction that I will concede is that plaintiff's affidavit attests that Maynard asked him to paint his cast black, whereas his deposition attested that Maynard asked him to put a sock over it. The issue is that Maynard asked that the pink cast be covered, not the method of covering, since Maynard conceded that the cast was present and he didn't want any casts around the drop zone, dep. at 161-63. The contradiction however, is immaterial, more logical and clarifying. There are no other contradictions.

CONCLUSION

For these reasons and for all reasons set forth in the evidence submitted, defendants' motion should be denied and plaintiff's granted.

Dated: New York, New York
 May 19, 2013

_____/s/
GREGORY ANTOLLINO
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DONALD ZARDA,                   :
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                                :      February 22, 2013
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ALTIUDE EXPRESS, INC.,         :
et al.,                        :
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                                :      Defendant.
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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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Proceedings recorded by electronic sound recording,
transcript produced by transcription service

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

3 Counsel, please state your appearance for
4 the record.

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

7 THE COURT: Good afternoon, Mr. Antollino.

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

10 THE COURT: Good afternoon, Mr. Zabell.

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

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

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

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

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

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

1 clear terms.

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

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

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

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

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

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

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

17 This is contained in many opinions,
18 including one Judge Preska (ph) wrote, EEOC v.
19 Bloomberg, 2010 West Law 3466370 (S.D.N.Y. August 31st,
20 2010). She cites the cases that talk about, relevance
21 can be expressed as a question of fit, whether expert
22 testimony proffered in the case is sufficiently tied to
23 the facts of the case that it will aid the jury in
24 resolving a factual dispute.

25 And in addition, and this to me is the

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

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

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

25 First of all, there was no alleged forced --

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

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

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

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

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

8 In fact, Mr. Antollino ultimately, at pages
9 22 and 23 of the transcript, acknowledged that if there
10 was a question in jury selection that covered that,
11 that he wouldn't need Professor Yoshino for that issue.
12 In any event, even apart from that acknowledgment, it's
13 my view that he's not needed for that issue and it
14 would not be helpful to the jury, something that a
15 layperson could certainly comprehend.

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

25 He cites the Sassumin (ph) case as that

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

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

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

25 Judge Preska in the Bloomberg case reached

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

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

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

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

1 With respect to the fees issue, I am
2 granting that application, although I am going to make
3 a modification to the amount that I'll explain in a
4 moment. The plaintiff seeks compensation under Rule
5 26(b)(4)(E) for preparation time for the deposition
6 that did not occur. Plaintiff seeks payment of \$3,500
7 based upon 8.75 hours of preparation at a rate of \$400
8 per hour.

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

16 The standard is well-settled. It's
17 contained in Smith v. New York Presbyterian Hospital,
18 2012 West Law 4903256 (S.D.N.Y. October 12, 2012), as
19 well as Penberg v. Healthbridge Management, 2011 West
20 Law 1100103 (E.D.N.Y. March 22, 2011).

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

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

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

16 Rule 26(b)(4)(E) refers to a party seeking
17 discovery. It doesn't say anything about that the
18 subpoena has to be individually served for the rule to
19 be triggered. There's no question here that Mr. Zabell
20 was a party seeking discovery of the expert. He e-
21 mailed the letter and subpoena to Mr. Antollino on May
22 18th for a deposition that was noticed for June 11th.
23 They had a discussion about adjourning, which was not
24 agreed upon. Mr. Antollino obviously forwarded the
25 subpoena to the expert.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. ZABELL: Not from defendant, your Honor.

23 THE COURT: Mr. Antollino?

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

25 THE COURT: Okay, thank you, gentlemen.

1 Have a good day.

2 MR. ANTOLLINO: All right, goodbye.

3 MR. ZABELL: Thank you for your time, your
4 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

Counseling and Advising Clients Exclusively on Laws of the Workplace

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May 14, 2012

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
United States District 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 Defendants in the above-referenced action. We write in response to a specific issue raised in Plaintiff's Reply Memorandum in support of his pending motion for compel discovery and for sanctions [Document No.: 66].

Contained on page 8-9 of Plaintiff's reply, Mr. Antollino claims the undersigned committed an act of perjury in connection with my being authorized to accept service of subpoenas on behalf of two (2) non-party witnesses. In addition to making this serious allegation, counsel raises the specter of the matter being referred to the U.S. Attorney's office.

To the extent Your Honor would entertain the course of action recommended by Mr. Antollino, I respectfully request the two annexed affidavits be made part of the evidentiary record.

Counsel remains available should Your Honor require additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, PC

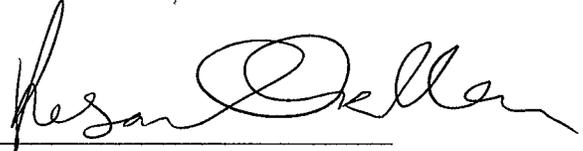
Saul D. Zabell

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

Encl

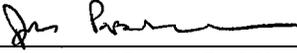
EXHIBIT A

8. Similarly, my failure to correct my errata sheet was in error.



ROSANA ORELLANA

Sworn to before me this
11 day of May 2012

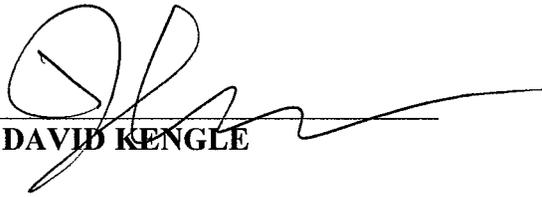


Notary Public

JOHN G PAPADOPOULOS
NOTARY PUBLIC-STATE OF NEW YORK
No. 02PA6255311
Qualified in Nassau County
My Commission Expires February 06, 2016

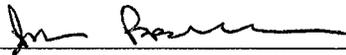
EXHIBIT B

8. Similarly, my failure to correct my errata sheet was in error.



DAVID KENGLE

Sworn to before me this
11 day of May 2012



Notary Public

JOHN G PAPADOPOULOS
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Qualified in Nassau County
My Commission Expires February 06, 2016