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May 20, 2013

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 action and respond to defendant's motion to strike a portion of my reply brief. I also cross move to deem that portion a permissible sure-reply if it is not a proper reply.

1. Part I is a Proper Reply.

A year and months ago you denied my motion to strike Mr. Zabell's 25-page discovery memorandum. This was 22 pages over your rules' limit, and required significant attorney time in response when ultimately Mr. Zabell got very little, if anything, of what he sought. Those extra pages were wholly within your discretion. Now I ask that that you exercise your discretion to allow what's fair plaintiff, and that you do not strike part of the reply brief on Title VII. You have, over my objections, precluded my expert from offering testimony on the claim and that could cost me dearly - only Title VII carries an award of attorneys fees.

This is a very important case in which I came *very close* to moving for summary judgment on the sex-stereotype claim. I didn't because the arguments I was making were unique, the law on sexual stereotypes is evolving, and I honestly didn't think I could honestly win such a motion. Nevertheless, the issues are complex and deserve a full briefing. Nothing I said in the reply prejudiced Mr. Zabell; I wouldn't object to a sur-reply if he felt prejudiced, but notably, he never mentioned that in his letter. This is an unusual case in which cross motions on almost everything are flying back and forth. I do not think a few pages of argument will do anything but clarify the law for your Honor. This is an unusual case. The more you know the better, and Mr. Zabell apparently has nothing to add since he didn't ask for a sur-reply.

The two main causes of action in this case are intertwined. Mr. Zabell argues that plaintiff only has one cause of action for sexual orientation discrimination. I must, therefore, for the sake clarity, point out where the claims for sexual orientation lie, and

where the claims under Title VII lie, and where the overlap does not affect either cause of action. I can only do this if I argue both causes of action at all times. Defendants' strategy is to lump them together; my duty is to separate them. I can only do that if I have the opportunity, so I would respectfully ask you to deny the motion.

2. In the alternative, I ask that Part I be deemed a proper sur-reply.

In their opening brief, defendants spent most of their argument on the wage issues and hostile work environment – the least important issues – and lumped sexual orientation with sex stereotypes, making the following arguments: (1) Plaintiff was not subject to sex stereotyping because he was a male, going into a long discussion of the Farragher Ellereth defense; and (2) Plaintiff was not fired because he revealed he is gay. There was really nothing to it. Then, in its reply brief, it sandbagged me, by – again exceeding your page limits – by making new arguments that plaintiff did not suffer an adverse action and that customer complaints, no matter how ridiculous, have a basis in law for termination. This was a twist on their opening brief and deserved an additional response, especially since defendants again intertwined the two main causes of action. See brief at 11, in discussing the gender claim: "plaintiff merely attempts to bring an otherwise defective sexual orientation claim under Title VII." How can I respond to that sentence without the ability to discuss the two causes of action? I can't. Intermixing the two causes of action will be their strategy throughout; and I need to refute the strategy wherever it comes up. Think of it this way: I didn't move for summary judgment on the stereotype claim because I thought it was too complicated for summary judgment. I could have, however, fully within Rule 11, made such a motion to expand or extend existing law, solely for the purpose of being able to avoid this motion. That would have been bad faith, however, so plaintiff should not be punished now for trying to do the right thing early in the case.

There is no prejudice to defendant to Point I of my brief, and it is better for the Court to fully understand plaintiff's claims, especially now that I don't have an expert to explain them. I won't object to a brief sur-reply if Mr. Zarda thinks he's been prejudiced (he hasn't mentioned as much); there are still four days until submissions were expected, so there is enough time.

For these reasons, I ask that you deny defendant's motion; or, in the alternative, allow Part I as a legitimate sur-reply.

Sincerely,

Gregory Antollino

Cc: Saul Zabell by ecf