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June 15, 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 in which cross summary judgment motions are pending. At oral argument the issue came up as to whether I have a good faith basis to plead that there was \$75,000 in controversy between the parties, an inadvertent error on my part that has never been raised by the defense. This issue only becomes relevant in the unpleasant – to plaintiff – contingency that you dismiss the sex stereotype Title VII claim. Jurisdiction is invoked under both federal question and diversity claims, which the circuit has held permissible. Lyons v. Legal Aid Soc's, 68 F.3d 1512, 1517 (2d Cir. 1995) (“Accordingly, since the complaint alleged that the parties were citizens of different states, and it sought injunctive relief that could easily exceed the value of \$ 50,000,” the court should have retained jurisdiction). Obviously plaintiff believes the sex stereotype claim should survive and that this letter should be irrelevant; but I am familiar with the law on this case, it having come up in two different cases that I've litigated in the Southern District. The point is this: if the only flaw after a summary judgment motion is a pleading flaw, the party that makes the pleading error has consistently been afforded a chance to replead. See, e.g., Housand, 594 F.2d at 926 (remanding the case “with instructions to allow amendment of the complaint within a reasonable time to state a claim, if any exists, under diversity jurisdiction”). Obabueki v. IBM, 145 F. Supp. 2d 371, 401-02 (S.D.N.Y. 2001) (summary judgment strikes defense against large corporation which may replead). Fermin v. Moriarty, 2003 U.S. Dist. LEXIS 13367 (S.D.N.Y. Aug. 1, 2003) p*26 (Mukasey, J) (dismissal with leave to amend diversity jurisdiction, if possible).

“Before making a determination that the plaintiff's claim does not meet the jurisdictional minimum, the court must afford the plaintiff an “appropriate and reasonable opportunity to show good faith in believing that a recovery in excess of [the jurisdictional amount] is reasonably possible.” A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82 (2d Cir. 1991). In this case, I would simply add the sentence that the amount controversy exceeds \$75,000. The question is merely one of plausibility - a pleading question, not a question as a matter of law per summary judgment. Notably, the

defendant did not make the argument at summary judgment that there was *not* \$75,000 in controversy, which would have defeated the state claim in the contingency you dismissed the federal claim.

Neither party contests that plaintiff is a citizen of Missouri (or Texas) – he began this lawsuit as a citizen of Missouri but during the litigation, the land on which he was living sold and he moved to Texas. Unfortunately, I didn't plead that there was \$75,000 in controversy in the amended complaint, but there is no question that there is a reasonable basis that there is \$75,000 in controversy, not including the claims that I have withdrawn.

I. Damages for Emotional Distress, Loss of Quality of Life, etc.

I had a good faith basis for invoking \$75,000 in controversy on this basis alone. Before I even speak about tangible damages like wages and out of pocket expenses, the law of the state of New York, as found by the circuit, is very liberal in finding very high awards for emotional distress in discrimination cases, even in the absence of psychiatric assistance. Cross v. N.Y. City Transit Auth., 417 F.3d 241, 258-59 (2d Cir. 2005) (collecting cases and noting that in New York courts have “upheld awards of more than \$100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment.”). Eight years ago, the Second Circuit said that emotional distress damages can reach as high as \$100,000 in New York and are sustained in appeal. In that case, I believe the plaintiff only got \$50,000, but that's not the point; the point is that in New York, emotional distress damages can go as high as \$75,000, if not higher. Mr. Zarda has an emotional distress witness and sets forth a compelling statement as to his state of mind as a result of what's happened to him as a result of being branded what he referred to as a “gay pervert.” He no longer has the confidence to do his job. See Zarda Declaration, docket sheet 126 ¶ 47. That's enough for good-faith basis for me to argue to the jury for a substantial award.

II. Lost Wages

Executive summary: If plaintiff worked the entire summers of 2010, when he was fired, he could earn at least \$10,477. Since he was fired, we've had three summers and will have at least three and a half before the case gets to trial. At a minimum, we're talking about \$36,000 – the remainder of 2010, 2011, 2012 and 2013. Combined with what the circuit sustained (and found sustainable) in Cross, there's a realistic minimum of \$86,000 in dispute and a good faith maximum of \$142,000.

If you care to ascertain how I reach this analysis consider the letter that I attach hereto from the defendant to the unemployment division at the Department of Labor documenting his wages for various quarters in 2009 and 2010. In 2009, plaintiff worked about 8 weeks and went out on worker's compensation; in 2010, he was fired after about five or six weeks. See Wage Declaration of Donald Zarda, document 127 and attachments. Whether Maynard would have, in the absence of his termination, hired him for successive summers is not a pleading issue – it's a matter of controversy. Notably Maynard testified at his deposition that he always has a need for workers, and his

attorney had to take him out of the room before letting him answer why he would not rehire him at this point. See Maynard Dep. at 301, et seq. The amount in controversy is what is at issue, and plaintiff would have preferred not to have been fired and to have worked the 2010-2013 summers.

III. Out of Pocket Expenses and Mitigation

An "injured party . . . will be allowed to recover the expenses of a proper effort [to mitigate damages] even though it proves unsuccessful." Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publ'g Ass'n, 226 N.Y. 1, 122 N.E. 463, 465 (N.Y. 1919) (citing by Baker v. Dorfman, 239 F.3d 415, 427 (2d Cir. 2000)). In this case there has not been any discussion of tuition fees, but the court can take judicial notice of the high cost of higher education and loans. My client testified he attended Embry-Riddle Aeronautical University, see Zarda aff, ¶ 1, whose costs, not including housing are over \$42,000. See <http://daytonabeach.erau.edu/admissions/estimated-costs/>. No doubt he had been taking classes there before, but as a result of his termination he decided to increase the intensity with which he's focused towards his degree. Some amount of his tuition must be attributed to mitigation of damages.

Additionally, plaintiff, when he was fired, had to abandon a condominium deposit for a home had rented in Long Island. There's a thousand there. Though he abandoned most of his overtime claims at summary judgment, his minimum wage claim has been brought to summary judgment in the amount of \$1,700. All told, we've got at least a few more thousand dollars in out of pockets expenses, and a portion of his tutition and fees.

IV. Conclusion

For these reasons if the Court denies plaintiff the opportunity to get to the jury on sex stereotyping, we ask to replead to add the magic words "that \$75,000 are in controversy," or just forgive my inadvertence and dispense with the ceremony and hold that plaintiff has made out a good faith basis. Again all of this is relevant only in the unfortunate contingency you dismiss the federal claim.

Sincerely,



Gregory Antollino

Cc: Saul Zabell by ecf

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NYS DEPARTMENT OF LABOR
PO BOX 15130
ALBANY NY 12212-5130

REQUEST FOR EMPLOYMENT
AND WAGE DATA

**URGENT: RETURN TO US
WITHIN 7 DAYS**

Determination Date: 09-13-2010
Local Office: 881
Claim Effective Date: 08-30-2010

REPLY MAY BE FAXED TO:
(518) 457-9378

Social Security No.:

IF YOU FAX, DO NOT MAIL ORIGINALS.

Employee Name: DONALD J ZARDA

ALTITUDE EXPRESS INC
4062 GRUMMAN BLVD BLDG 24
CALVERTON NY 11933-1504

Other Name:

ENTER IF MISSING OR INCORRECT

EMPLOYER
REGISTRATION NO. 83-74949

LOCATION CODE
IF ANY

Employee's Work Location:
CALVERTON AIRPORT

The above named employee has filed a claim for unemployment insurance and has indicated that we do not have a record of all wages paid by you during the base period. Please complete and return this report even if the employee did not work for you or you believe that the employee is not eligible. If we do not receive this report within 7 days of the mail date, we will use information from the employee. If benefits are paid erroneously based on the employee's records, you will be liable for the incorrect charges up to the time we receive the corrected information.

1. Earnings:

For calendar quarters where some wages have already been reported for this employer account number: The wages have already been entered in the "GROSS WAGES PAID" column below. If these amounts are incorrect, please cross off and enter the correct amounts.

For quarters where no wages have previously been reported, make the following entries: 1) Enter the TOTAL GROSS WAGES PAID in each quarter. 2) If the employee was not paid wages in the quarter, write "NO WAGES PAID." 3) If the employee was paid wages in the quarter but wages were for work performed in excluded employment, enter the wages and write "EXCLUDED" after the wage entry and provide a brief explanation. 4) If the employee was paid wages in the quarter but they were reported to a different state, enter the wages and write "REPORTED TO (STATE)" after the wage entry. 5) If the employee did not work for you, write "NOT OUR EMPLOYEE." 6) If the employee's wages were not reported to the Employer Registration number listed above, write "WAGES REPORTED TO (CORRECT ACCT. #)."

BEGINNING	ENDING	GROSS WAGES PAID
04-01-2010	06-30-2010	\$5085
01-01-2010	03-31-2010	\$0
10-01-2009	12-31-2009	\$0
07-01-2009	09-30-2009	\$1,730
04-01-2009	06-30-2009	\$6,287

2. When did the employee work for you? From 5/18/2009 To 6/21/2010
Month/Day/Year Month/Day/Year

3. The employee became unemployed because:

- | | | |
|---|--|---|
| <input type="checkbox"/> LEFT OF OWN ACCORD (Explain details) | <input type="checkbox"/> LACK OF WORK | <input type="checkbox"/> INDUSTRIAL CONTROVERSY (Explain details) |
| <input type="checkbox"/> To accept other work | <input type="checkbox"/> Indefinite (Permanent Lay-Off) | <input type="checkbox"/> RETIREMENT |
| <input type="checkbox"/> To get married | <input type="checkbox"/> Temporary Lay-Off Recall date _____ | <input type="checkbox"/> Voluntary |
| <input type="checkbox"/> Domestic responsibilities | <input checked="" type="checkbox"/> DISCHARGED | <input type="checkbox"/> Disability |
| <input type="checkbox"/> Illness | <input type="checkbox"/> Incompetence | <input type="checkbox"/> Compulsory under company or union rules |
| <input type="checkbox"/> To leave area | <input checked="" type="checkbox"/> Misconduct (See Reverse) | <input type="checkbox"/> OTHER (Explain) |
| <input type="checkbox"/> Other | <input type="checkbox"/> Other (Explain details) | |

Employer Name Altitude Express Inc

Date 10/1/2010

Authorized Signature: [Signature]

Telephone No. (631) 208-3900