

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, . Civil No. 10-CV-04334-JFB-GRB
Vs. .
. 824 Federal Plaza
. Central Islip, NY
ALTITUDE EXPRESS, INC., ET AL, .
d/b/a Skydive Long Island . March 28, 2014

**FILED
CLERK**

4/1/2014

Ray Maynard
.

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiff: GREGORY ANTOLLINO, ESQ.
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For The Defendants: ZABELL & ASSOCIATES
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Decision

1 THE CLERK: Calling Case 10-CV-4334, Zarda versus
2 Altitude Express. Please state your appearance for the record.

3 MR. ANTOLLINO: Gregory Antollino for plaintiff, good
4 afternoon, Your Honor.

5 THE COURT: Good afternoon, Mr. Antollino.

6 MR. ZABELL: And Saul Zabell for the defendants.
7 Good afternoon, Judge.

8 THE COURT: Good afternoon. As you know, I scheduled
9 this conference because I wanted to rule on the pending
10 motions. I decided, given that they have been now pending for
11 some time to place an oral ruling on the record. It's possible
12 I may also do a written opinion on this, I haven't decided
13 whether to or not yet, but I didn't want the case to be delayed
14 further. So I'm going to place the ruling on the record. I
15 just ask you to bear with me, it should take about 10 or 15
16 minutes, and then we'll discuss the next steps going forward.

17 So first just let me for the record state that the
18 standard I'm applying for summary judgment is set forth in an
19 opinion that I wrote several years ago, Zhao versus State
20 University of New York, 472 F Sup 2nd. 289 Eastern District of
21 New York (2007). I adopt that standard in its entirety, I
22 won't repeat it here. In short with respect to summary
23 judgment obviously the facts are accepted as true and all
24 reasonable inferences are drawn in favor of the nonmoving
25 party.

1 Here, we have cross motions for summary judgment so
2 when considering each motion I'm applying that standard for the
3 benefit of the nonmoving party. I also adopt as contained in
4 that opinion the framework for analyzing a gender
5 discrimination claim, which is similar both in the Federal law
6 and State law in terms of the McDonnell Douglas burden-shifting
7 analysis which I am applying here. And that case also dealt
8 with gender stereotyping. It has some case law with respect to
9 that as well, which is obviously part of the subject of this
10 suit.

11 So I adopt that standard in its entirety and I move
12 now to each of the claims. First, well, actually I should say
13 the threshold matter. There was a motion to strike a portion
14 of the reply memorandum of plaintiff's partial summary judgment
15 motion because it raised the issue of sex discrimination
16 stereotyping, which was not the subject of the plaintiff's
17 motion.

18 I'm denying the motion to strike, there was no
19 prejudice even by raising that. And in fact it was pretty much
20 the same arguments that had been made previously. So the
21 motion to strike it is denied. I have considered it, but it
22 hasn't affected the ruling, again because it contained similar
23 arguments.

24 The Court will first address the gender
25 discrimination claim under Federal law for gender stereotyping.

1 Having reviewed the evidence under the applicable standard I'm
2 granting the motion for summary judgment on that claim because
3 I find that the plaintiff has failed to meet even the prima
4 facie burden, as minimal as it is, that the adverse action gave
5 rise to an inference of discrimination based up gender
6 stereotyping.

7 But evening assuming arguendo the prima facie burden
8 was met, the defendants here articulated a nondiscriminatory
9 reason, namely the customer complaint about how the plaintiff
10 was touching her and I believe there was insufficient evidence
11 that the articulated reason was a pretext for gender
12 discrimination based upon stereotyping. Although for reasons
13 I'll state in a moment when I get to the New York State claim,
14 I believe there is sufficient basis to have it go forward with
15 respect to a sexual orientation discrimination.

16 But sticking with the gender discrimination claim,
17 there were a number of theories that were, I guess three
18 theories that were asserted by plaintiff with respect to gender
19 discrimination based on stereotyping. I note that to some
20 extent I believe some of these theories are inconsistent with
21 each other and to some extent inconsistent with a sexual
22 orientation claim, and to some extent inconsistent with Mr.
23 Zardo's deposition at page 215 where he indicated it was, Ray
24 fired me for being gay.

25 But in any event I have analyzed them independently

1 of each other and I've even looked at them in conjunction to
2 the extent that that can be done. I'm just going to through
3 them.

4 The first theory I guess was that the plaintiff was
5 fired because of stereotyping that a male must be guilty of
6 sexual harassment if it is alleged. There's simply no evidence
7 to believe that that stereotype was motivating Mr. Maynard in
8 this situation. There's no, for example there's no evidence of
9 comments, there's no female comparators who were treated
10 differently. There is literally nothing to support that
11 theory.

12 The only thing that the plaintiff points to in the
13 papers, and this was discussed at oral argument, is what
14 plaintiff believes was a sloppy investigation in terms of the
15 interview of the plaintiff not allowing him a chance to see the
16 video and other issues with how the investigation was
17 conducted.

18 However, the law is clear that disputes about the
19 thoroughness of an investigation by itself cannot be enough to
20 create an inference of discriminatory intent. This case is no
21 exception to that. That's actually set forth in a case that
22 the plaintiff cites in support of its position, Sassaman v.
23 Gamache, 566 F.3rd, 307. It's a 2nd Circuit 2009 case where at
24 page 315 the 2nd Circuit states, "We emphasize that we do not
25 hold that an arguably insufficient investigation of a complaint

1 of sexual harassment leading to an adverse employment action
2 against the accused is, standing alone, sufficient to support
3 an inference of discriminatory intent. Rather, we hold only
4 that where plaintiff can point to evidence closely tied to the
5 adverse employment action that could reasonably interpret it as
6 indicating that discrimination drove the decision, and arguably
7 insufficient investigation may support an inference of
8 discriminatory intent.”

9 So here, where there is nothing other as it relates
10 to this claim, no other evidence other than a dispute about the
11 thoroughness of the investigation, I conclude that that is not
12 sufficient to give rise to an inference of discrimination, and
13 certainly, certainly not sufficient to overcome the articulated
14 nondiscriminatory reason for the termination.

15 Sassaman obviously is clearly distinguishable from
16 this case because it wasn't just a dispute about the adequacy
17 of the investigation, there was a direct comment by the
18 supervisor that you probably did what she said you did because
19 you're male.

20 So obviously a completely different situation where
21 in addition to the investigation there was direct proof of
22 discriminatory intent based upon that comment. So I don't
23 believe under that theory there's any possibility that this
24 could survive summary judgment. And secondly, to the extent
25 the sloppy investigation I think was a separate theory, for the

1 reasons I just stated I don't believe that the sloppy
2 investigation of itself can be sufficient to allow this claim
3 to, -- I should say the disputes about the sloppiness of the
4 investigation because the defendants have a different version
5 with respect to the investigation itself.

6 Moving to the other theory which is based on the, I
7 guess the plaintiff did not conform to male stereotyping, -- to
8 not conform to male stereotypes in terms of being teased about
9 wearing certain things, a pink hat and other similar types of
10 issues, the defendants noted as a threshold matter that Zarda
11 stated in his deposition that he was masculine in appearance.
12 But putting that issue aside, I don't think that's, the key
13 issue as it relates to this.

14 The key issue is that any teasing or comments with
15 respect to those types of items, there is no relationship, that
16 no rational Jury could draw any relationship to those, to the
17 termination decision. In terms of proximity to the adverse
18 action, there was no proximity. It's clear what the proximity
19 and the adverse action with this whole issue with the customer,
20 which included the disclosure of the customer's sexual
21 orientation, it had nothing to do with conforming to male
22 stereotypes in terms of what you may wear or how you may
23 behave, -- zero to do with that.

24 As Mr. Zabell noted in his papers also, Mr. Zardo was
25 rehired after these alleged incidents regarding what he was

1 wearing. There's simply no connection between those, no
2 possible connection that can be drawn by a rational Jury
3 between those events and the termination decision here.

4 So for all of those reasons I'm granting the motion
5 as it relates to the gender discrimination claim.

6 With respect to the State claims, first as a
7 jurisdictional matter the complaint does allege diversity of
8 jurisdiction. As was discussed at the oral argument, there was
9 no dollar amount in the amended complaint. Mr. Antollino did
10 put in a letter articulating why he believes the \$75,000
11 threshold had been surpassed. And I conclude based upon that
12 letter that there is a good faith basis for him to allege that
13 based upon the categories of damages that he outlined. And
14 therefore, I believe that the jurisdictional requirement for
15 diversity of citizenship is met.

16 I will ask him at the conclusion of this to amend the
17 complaint as a technical matter to put in the allegation of, in
18 excess of \$75,000. So I will move to the State law claims, the
19 sexual orientation claim, the defendant's motion for summary
20 judgment on that is denied for the following reasons.

21 The plaintiff's evidence, unlike the gender
22 discrimination claim, in addition to disputing the adequacy of
23 the investigation itself, the plaintiff has several other
24 pieces of evidence that they point to with respect to that that
25 I believe are more than sufficient to create a genuine issue of

1 fact that must be resolved at trial, including primarily, I
2 guess most significantly the timing of the disclosure of sexual
3 orientation to the customer and the termination was obviously
4 in very close proximity and was the subject of the interactions
5 between Mr. Zardo and Mr. Maynard.

6 So I think that is another, -- is one piece of
7 evidence that certainly can be relied on with respect to the
8 sexual orientation claim. There are some other pieces of
9 information or evidence that if credited and drawn most
10 favorably to the plaintiff could also be utilized to support
11 that claim. There's this issue regarding another employee, I
12 think it was Weinstock if my memory is correct, who disclosed
13 in some manner being heterosexual during a jump and there was
14 no adverse action taken with respect to that.

15 Obviously I know the defendants argue the
16 circumstances were different than alleged to an allegation of
17 improper touching. But in any event, again this has to be
18 construed most favorably to the plaintiff. With respect to the
19 defendant's motion it is something that they could as part of
20 their other evidence utilize for the purpose of creating a
21 genuine issue of fact.

22 There is some evidence that, in the unemployment form
23 that the reason for the termination was not completely
24 consistent with the reasons given at other times. And I
25 believe that all of these things, while each of these things in

1 isolation would not be sufficient, I believe together they are
2 certainly sufficient to create an issue of fact or whether the
3 termination was because of the articulated nondiscriminatory
4 reason given by the defendants of a customer complaint about
5 discomfort and being touched by the plaintiff during the jump
6 or whether he was terminated because of the sexual orientation,
7 or the disclosure of his sexual orientation by the plaintiff.

8 So the defendant's motion on the State law claim for
9 sexual orientation discrimination is denied. And similarly,
10 the plaintiff's cross motion for summary judgment on the sexual
11 orientation claim is denied. Looking, again, now looking at
12 the evidence from the defendant's standpoint most favorably for
13 purpose of the plaintiff's motion, it's undisputed that a
14 customer complaint was made.

15 While there's a dispute about whether it should have
16 been sufficient for the termination or not, -- certainly the
17 fact that a complaint was made does provide some support for
18 the defendant's position. There was some investigation done,
19 it wasn't an immediate termination, it was a suspension with
20 some discussion with the plaintiff. And again, while there's a
21 dispute about whether that was sufficient under the
22 circumstances of that, -- if that's construed most favorably to
23 the defendant it certainly creates enough of an issue of fact
24 with regard to his intent to preclude summary judgment in the
25 plaintiff's favor on this.

1 And there's also evidence that there was knowledge of
2 the plaintiff's sexual orientation far before this event
3 transpired. Obviously that doesn't address the issue of
4 whether or not the disclosure of the sexual orientation was the
5 basis for the discriminatory act that's alleged, -- but as the
6 issue of whether or not it was over the sexual orientation
7 itself, certainly that evidence would support the defendant's
8 position.

9 So the evidence in the record if construed most
10 favorably to the defendant is certainly sufficient to overcome
11 plaintiff's motion for summary judgment on the issue of whether
12 or not the articulated reason, the articulated
13 nondiscriminatory reason was the real reason for the
14 termination.

15 Turning briefly to the hostile work environment
16 claim, again, that standard is set forth in Zhao. I won't
17 repeat it here, but the isolated incidents related to the
18 comments about what the plaintiff was wearing or behavior, or
19 similar things of that nature are, it's not even close to being
20 sufficiently pervasive or severe to possibly have a Jury
21 rationally conclude that it was a hostile work environment.

22 This issue is about, -- this case is about the
23 termination, it's not about a hostile work environment. So the
24 motion is granted with respect to that.

25 Turning to the wage claim, I'm denying the cross

1 motions on the wage claim, because the record, the Court just
2 can't discern from the record, again construing it most
3 favorably to the nonmoving party in each situation, whether or
4 not this can be resolved as a matter of law, based upon the
5 facts that are in, that have been submitted in the summary
6 judgment motion. Certainly, the defendants have attached
7 records which accredited would allow them to prevail on this
8 claim. And so that's why the plaintiff's motion for this is
9 denied.

10 But I'm also denying the defendant's motion because
11 there's some disputes about the adequacy of the record keeping
12 about, there's a dispute about whether the plaintiff was
13 required to be there in the vicinity of the location for
14 certain periods of time. And I believe that the Zarda
15 affirmation that was submitted in opposition on April 8, 2013,
16 is sufficient to at least create an issue of fact that this
17 can't be resolved at summary judgment. Although it does not
18 seem to be a particularly strong claim, I believe it's
19 sufficient to survive summary judgment.

20 The overtime claim, plaintiff did not even separately
21 brief the overtime issue and I'm granting summary judgment on
22 the overtime issue because I don't see any evidence that would
23 support an overtime claim under New York law as opposed to a
24 minimum wage claim.

25 So the cases that survive, excuse me, the claims

1 that survive summary judgment are the sexual orientation claim
2 under New York law as well as the minimum wage claim under New
3 York law. And those are the claims that will proceed to trial.

4 Okay, so Mr. Antollino, I am just going to ask that
5 you formally just, I guess it would be the second amended
6 complaint.

7 MR. ANTOLLINO: Certainly.

8 THE COURT: I'm sorry, what did you say?

9 MR. ANTOLLINO: Certainly.

10 THE COURT: What did you say, Mr. Antollino?

11 MR. ANTOLLINO: I'm sorry? No, I just said
12 certainly.

13 THE COURT: Okay. So just put that in for a week
14 from today, and Mr. Zabell, you can just file another answer.

15 MR. ZABELL: Your Honor, if I may, we had discussed
16 at our last conference that if Your Honor's decision did in
17 fact come down the way it came down today that I would be given
18 an opportunity to brief the issue based upon the deposition
19 testimony and the discovery documents that Mr. Zarda turned
20 over that they do not meet the 75,000 jurisdictional
21 requirement.

22 THE COURT: Okay. Well, if, if, I'm not going to let
23 that the way everything else that we're going to do, because
24 the case has been around for too long. So I will let you put
25 something in. But what I'm going to do is I'm going to have

1 them put in the amended complaint, if you believe that there's
2 not a good faith basis based upon the letter that he submitted,
3 I think it was June 13 or something like that where he put in
4 the various categories of damages. I guess in lieu of an
5 answer you could file a motion to dismiss on jurisdictional
6 grounds, okay.

7 MR. ANTOLLINO: Judge, and just to be clear, the
8 standard is not whether or not the damages are provable, but
9 whether there is a good faith basis to allege them.

10 THE COURT: Yes. I know that standard, I've been
11 through it a few times.

12 MR. ANTOLLINO: I just wanted to make it clear as to
13 all parties that if there were any motion it would be that I do
14 not have a good faith basis --

15 THE COURT: Right.

16 MR. ANTOLLINO: -- to assert this. Not that it's not
17 going to be provable. It's not a summary judgment motion --

18 THE COURT: Right.

19 MR. ANTOLLINO: It would be I do not have a good
20 faith basis to pay it.

21 THE COURT: Right. That's why I thought your letter
22 was, you know, very detailed in terms of looking at other cases
23 in terms of emotional damages and things like that, of what a
24 good faith potential recovery would be. So I think Mr. Zabell,
25 as you probably gathered, you have a real uphill battle on

1 that, but I won't prevent you from, -- I said I would give you
2 a chance and I think you're entitled to a chance. So if you
3 want to put in, but I am going to ask that you put that in, you
4 know, quickly. And then I'll give Mr. Antollino a chance to
5 respond to that, okay.

6 MR. ANTOLLINO: Thank you, Judge.

7 THE COURT: So I mean, do you want to set a motion
8 schedule for that now, then, Mr. Zabell, since I have you? Do
9 you want to just do that?

10 MR. ZABELL: Yeah, that, I can get 15 days, Judge?

11 THE COURT: Yes. So then Mr. Antollino will put it
12 in by April 4. And then 15 days would be, that would be a
13 weekend --

14 MR. ZABELL: Wait, wait.

15 THE COURT: April 21?

16 MR. ZABELL: Wait, I'm sorry, Judge, 15 days is,
17 that's going to take me to, let's see. That's not going to
18 take me to April 4, that will take me --

19 MR. ANTOLLINO: I'm going to put in the amended
20 complaint toot sweet. So you know, it will be 15 days from the
21 day that I put in the amended complaint, not April 4. I mean,
22 I really feel that if Mr. Zabell is actually going to pursue
23 this motion it's not only a waste of his client's money, it's a
24 waste of the Court's time. And I'll look at it very carefully,
25 but I have, I've made a thorough letter on that point because I

1 knew I was correct on this and I think that if Mr. Zabell is
2 going to waste his client's money and the Court's time he'd
3 better have a good faith basis to make the argument that I
4 don't have a good faith basis to say that this could happen.

5 So I may make a, I may decide to make a cross motion
6 for sanctions if we have to waste our time on a point which is
7 really theoretical, not something that I have to prove.
8 Theoretically I can get more than \$75,000 on this case. It's
9 not going to the Jury now and it's not, it's not even summary
10 judgment. It's just me having a good faith basis. So what
11 he's arguing is that I am in fact, -- have a bad faith argument
12 by making his argument that I don't have a good faith basis.

13 THE COURT: Okay. Let's just get it scheduled, Mr.
14 Antollino, okay. You can make a cross motion, you can make
15 whatever motion you'd like to, but let's, so you said you're
16 going to put it in Monday then? The amended complaint?

17 MR. ANTOLLINO: Yeah, I'll put it in, I'll put it in
18 this weekend.

19 THE COURT: Okay. So if he puts it in this weekend,
20 Mr. Zabell, do you want 15 days then from Monday?

21 MR. ZABELL: Yes, please.

22 THE COURT: So we'll say, that would be, say April
23 15. How long do you want to respond? Mr. Antollino, if you,
24 if you believe that you've covered this in your letter you can
25 just submit a letter to me saying you're relying on your

1 previous submission, you don't have to write up something, you
2 know, you don't have to repeat what you said previously, okay?

3 MR. ANTOLLINO: Okay, all right.

4 THE COURT: So how long do you want?

5 MR. ZABELL: Well, give me ten days from his
6 response.

7 THE COURT: Okay. So April 25 will be the
8 opposition, and then a week for any reply, Mr. Zabell?

9 MR. ZABELL: That will be sufficient, thank you,
10 Judge.

11 THE COURT: Okay, so that's May 2. I won't have an
12 argument on this because I think it's a fairly straightforward
13 issue. Unless I have questions I'll just, I'll either do what
14 I did today where I'll have a phone conference and I'll rule on
15 it, or I'll issue a short order, okay.

16 But in terms of the, it's not, just to mention, Mr.
17 Antollino this is not going to affect obviously the trial date
18 in this case because we weren't going to have the trial that
19 soon anyway. So the, what I'll do is I'll make the pretrial
20 order due, it shouldn't be too complicated, maybe 30 days from
21 May 2 then?

22 MR. ZABELL: That's fine.

23 MR. ANTOLLINO: I can work with that, Your Honor.

24 THE COURT: So we'll say June 2, pretrial order. And
25 then within 10 days of that we'll have a call to set a trial

1 date, which I anticipate would be in the all, okay?

2 MR. ZABELL: Okay. Your Honor, there is one last
3 thing, and I bring it up as much for humor's sake as anything
4 else. But I can say in every conference that I've had with Mr.
5 Antollino, Mr. Antollino has brought up the issue of seeking
6 sanctions against me. I just, I bring it up for comedy's sake,
7 it's Friday afternoon. I just think it's, it's well worth
8 noting.

9 MR. ANTOLLINO: I'd like to bring up a little comedy.
10 One of the World Trade Center jumpers from this week was
11 actually one of the witnesses mentioned in the pretrial
12 although disclosures, although he never put in an affidavit or
13 was deposed. So that's some real comedy.

14 THE COURT: All right. I don't think we need any
15 more comedy, okay.

16 MR. ANTOLLINO: Okay. Who's the reporter on this?

17 THE COURT: I'm sorry, what did you say?

18 MR. ANTOLLINO: The court reporter, the court
19 reporter?

20 THE COURT: Oh, there is no court reporter here. We
21 put this on the, this is being recorded digitally. So if you
22 want to order the transcript just contact my deputy and she'll
23 tell you who in the clerk's office, -- or it's in our rules I
24 guess, too, who in the clerk's office you can call to order it.
25 They send it out to an agency and they produce the transcript,

1 okay.

2 MR. ANTOLLINO: Okay.

3 THE COURT: Okay, thank you, counsel, have a good
4 weekend.

5 MR. ANTOLLINO: Thank you, bye.

6 MR. ZABELL: Everybody have a good weekend.

7 * * *

8 C E R T I F I C A T I O N

9

10 I, **TRACY GRIBBEN**, court approved transcriber,
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