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April 3, 2014

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
United States District Court 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 all Defendants in the above-referenced action. We write pursuant to Your Honor's Individual Rule of Practice III(A) to request a pre-motion conference regarding Defendants' anticipated motion to strike factual allegations added to Plaintiff's Second Amended Complaint [ECF Doc. 146] and concurrent motion to dismiss Plaintiff's Title VII cause of action which was previously dismissed with prejudice in Your Honor's March 28, 2014 Order. [ECF Doc. 145]

Defendants' anticipated motion to strike is well-founded. Your Honor's March 28, 2014 Order granted Plaintiff leave to submit his Second Amended Complaint, "including the amount-in-controversy." While Plaintiff did ultimately include the amount-in-controversy, Plaintiff also took the liberty to amend his First Amended Complaint (hereinafter "Complaint") [ECF Doc. 28] adding extraneous facts obtained in discovery and from deposition testimony presumably designed to resuscitate his Title VII claim which was dismissed with prejudice. Specifically, Plaintiff added the following:

- Paragraph 38: Changed "other statements" to "another statement" and added that Ray Maynard "knew this to be a lie, as plaintiff is gay and Rosanna would have to be touched in order to protect her life.";
- Paragraph 39: Amended to state for certain, rather than "upon information and belief" that although Ray Maynard "could have used the 'touching' as a basis to get plaintiff's unemployment benefits denied, he did not and merely alleged that plaintiff should not get unemployment because he provided information of a 'personal nature,'

- or words to that effect, to Rosanna.” Plaintiff also changed the term “personal information” to read “personal information.”;
- Paragraph 42: Added “It is unknown to plaintiff what Rosanna said before this complaint arose, but she did not complain to Maynard, who immediately suspended plaintiff and docked his pay because he refunded the boyfriend’s money.”;
- Paragraph 43: Changed “the facially pretextual manner for Plaintiff’s termination to “the facially pretextual manner of this allegation” and added “and especially since plaintiff was regarded as an excellent skydive instructor, even by Maynard.”; and
- Paragraph 49: Changed “Maynard’s reaction to Rosanna’s baseless complaint” to “Maynard’s reaction to Rosanna’s alleged complaint.”

By adding the foregoing, Plaintiff impermissibly exceeded the scope of Your Honor’s Order granting him limited leave to amend the Complaint to include the amount-in-controversy allegation.

Additionally, Plaintiff removed his causes of action for overtime claims arising under the Fair Labor Standards Act and New York Labor Law, however, Plaintiff conspicuously failed to remove his cause of action arising under Title VII. In fact, Plaintiff amended his Title VII cause of action by adding “and such actions were in violation of Title VII” to Paragraph 52. Plaintiff’s inclusion of this claim in his Second Amended Complaint is telling, particularly in light of the fact that the other causes of action dismissed pursuant to Your Honor’s Order were removed by Counsel. Accordingly, Defendants believe a motion to dismiss Plaintiff’s First Cause of Action (Discrimination under Title VII) is warranted, not only because of its inclusion, but based upon the actions of Plaintiff’s Counsel. Clearly, there can be no argument that Counsel simply neglected to remove the cause of action from his Second Amended Complaint in light of substantial revisions to the factual narrative.

Moreover, Plaintiff’s cover letter to the Court contains a material misrepresentation. Counsel indicates that he amended to “as contemplated by our discussion on the record” and that he “renumbered . . . the amended.” Defendants do not recall any discussion on the record regarding the addition and/or amendment of the factual allegations contained in the Complaint. Further, Plaintiff did not simply “renumber” the Complaint. He withheld the fact that the factual allegations contained therein were substantially amended.

Plaintiff also impermissibly amended his cause of action arising under New York Minimum Wage Law to seek “a 100% statutory penalty and/or liquidated damages.” (See Paragraph 66) Originally, Plaintiff sought “a 25% statutory penalty.” Presumably, Plaintiff made this amendment to reflect an amendment to Section 198 of the New York Labor Law which took effect on April 9, 2011. This amendment changed the amount of liquidated damages a Plaintiff can recover for unpaid wages from twenty-five percent of the total amount of the wages found to be due to one hundred percent of the total amount of the wages found to be due.

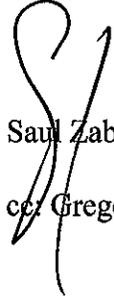
Aside from exceeding the scope of Your Honor’s Order, the proposed amendment fails as a matter of law. Defendants note that Plaintiff did not work for Defendants after the amendment to this statute took effect and this Court has not retroactively applied this amendment. “Liquidated damages under the NYLL for the period prior to April 9, 2011 are calculated by

multiplying the amount due by .25.” Hernandez v P.K.L. Corp., 12-CV-2276 (NG) (RML), 2013 WL 5129815 (E.D.N.Y. Sept. 12, 2013) citing Wicaksono v. XYZ 48 Corp., 10-CV-3635 (LAK) (JCF), 2011 WL 2022644 (S.D.N.Y. May 2, 2011) *report and recommendation adopted*, 10-CV-3635 (LAK), 2011 WL 2038973 (S.D.N.Y. May 24, 2011). Therefore, this amendment should be stricken from Plaintiff’s Second Amended Complaint based on the fact that Plaintiff exceeded the scope of Your Honor’s Order and because the amendment to the statute does not apply to Plaintiff’s claims.

Based on the foregoing, Defendants respectfully request a pre-motion conference be convened to address Defendants’ anticipated motion to strike and motion to dismiss. Counsel remains available should Your Honor require additional information regarding this application.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.



Saul Zabell

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