

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

DONALD ZARDA,

Plaintiff,

- against -

**ALTITUDE EXPRESS, INC. d/b/a SKYDIVE
LONG ISLAND, and RAY MAYNARD,**

Defendants.

Case No.: CV-10-4334 (JFB)(ARL)

**NOTICE OF MOTION TO
DISMISS**

PLEASE TAKE NOTICE that Saul D. Zabell, Esq., counsel for Defendants, will move this Court, before the Honorable Joseph F. Bianco, at the United States District Courthouse for the Eastern District of New York, located at 100 Federal Plaza Central Islip, New York, pursuant to the briefing schedule set by Judge Bianco on March 28, 2014, or as soon thereafter as counsel can be heard, pursuant to FRCP § 12(b) to dismiss the complaint in the above-captioned case.

Dated: Bohemia, New York
April 15, 2014

ZABELL & ASSOCIATES, P.C

By: _____

Saul D. Zabell, Esq.
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To: Gregory Antollino, Esq.
18-20 West 21st Street, #802
New York, NY 10010

Richard J. Cardinale
26 Court Street, Suite 1815
Brooklyn, NY 11242

**UNITED STATES DISTRICT COURT
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**ALTITUDE EXPRESS, INC. d/b/a SKYDIVE
LONG ISLAND and RAY MAYNARD,**

Defendants.

Case No.:

10-CV-4334 (JFB)(ARL)

**DECLARATION IN SUPPORT OF
DEFENDANTS' MOTION
TO DISMISS**

SAUL D. ZABELL, ESQ., attorney duly admitted to practice before this Court, hereby affirms the following under the penalty of perjury:

1. I am the managing principal of Zabell & Associates, P.C., and counsel for Defendants Altitude Express, Inc. d/b/a Skydive Long Island and Ray Maynard in the above-captioned Action. I submit this Declaration in support of Defendants' Motion to Dismiss.

EXHIBIT

2. Attached hereto as "Exhibit 1" is a true and correct copy of the relevant portions of the deposition transcript of Donald Zarda.

Dated: Bohemia, New York
April 15, 2014

ZABELL & ASSOCIATES, P.C.

By: _____

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EXHIBIT 1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DONALD ZARDA,

Plaintiff,

-against-

Index No.
10-CV-04334

ALTITUDE EXPRESS, INC., d/b/a/ SKYDIVE LONG
ISLAND, and RAY MAYNARD,

Defendants.
-----X

December 9, 2011
10:15 a.m.

4875 Sunrise Highway
Bohemia, New York

EXAMINATION BEFORE TRIAL OF DONALD ZARDA,
the Plaintiff herein, taken by the
Defendants, pursuant to Article 31 of the
Civil Practice Law and Rules of Testimony,
and Notice and order, held at the
above-mentioned time and place, before Karen
LaMendola, a Professional Court Reporter and
Notary Public of the State of New York.

1 D. Zarda

2 Q Where in Coram, New York did you
3 live?

4 A I was leasing a condo from the
5 aforementioned Sal Falcone that we talked
6 about, and that was -- I can remember the
7 address but not the zip code. Three
8 Appomattox, A-P-P-O-M-A-T-T-O-X, Court,
9 Coram, New York, and I believe the zip code
10 might have been 11727, but you'll have to
11 look that up yourself.

12 Q You resided there until when?

13 A In 2010?

14 Q Correct.

15 A I stayed there until, I believe,
16 September 17, and if it wasn't exactly
17 September 17, it was real close to that, real
18 close. Probably within a day, which I don't
19 remember which day exactly, but it was just
20 after the time period that I was supposed to
21 leave anyway.

22 Q Where did you go after that?

23 A I have to think about it for a
24 second.

25 I believe I proceeded back

1 D. Zarda

2 towards Missouri. Yes, I did. I was in my
3 truck, and then I went back home to Missouri,
4 but along the way, I stopped at some other
5 drop zones.

6 Q Where did you stop?

7 A What drop zone I stopped at was
8 a drop zone that I sought employment at after
9 Ray fired me in July, and that was
10 Chicagoland Skydiving Center. At the time,
11 Chicagoland, they just moved this past
12 season, and you may have to look that up. I
13 can't remember exactly which city. I think
14 it was Hinckley, Illinois at the time.
15 They've moved.

16 Q When did you stop by
17 Chicagoland?

18 A It would have been in the third
19 week or so of September.

20 Q And you asked them for
21 employment; is that correct?

22 A At one time, I did; yes.

23 Q That September, did you ask them
24 for employment?

25 A I did not ask for employment in

1

D. Zarda

2

September, but rather I discussed the matter

3

of him not offering me employment in July in

4

response to Mr. Maynard terminating me in

5

June.

6

Q Why did you drive there in

7

September then?

8

A Because it is on the way home,

9

directly on the way home, and because I

10

wanted to have a face-to-face conversation

11

with the owner of the drop zone.

12

Q Did you?

13

A I did. I felt we were both

14

entitled to have a conversation about the

15

matter face-to-face.

16

Q What did your conversation with

17

him consist of?

18

A Mostly it was about the e-mail

19

exchange that we had regarding me responding

20

to his ad for help and his denying me

21

employment and the action that had taken

22

place at Skydive Long Island with Ray. We

23

discussed that and what I was going to do

24

about it, primarily.

25

Q What was discussed about what

1 D. Zarda

2 A Before I went somewhere else,
3 you mean?

4 Q Yes.

5 A Approximately -- I'm pretty
6 busy. I do a lot of traveling, so I don't
7 have my travel itinerary exactly in front of
8 me, so I can't tell you for sure if I went
9 somewhere else between the next trip, but the
10 next trip that I can remember that I went on
11 was a cruise.

12 Q A cruise?

13 A Yes.

14 Q From when to when did you go on
15 a cruise?

16 A That year -- it shifts every
17 year by a week, so the dates, I don't -- it's
18 typically the third week in October, so I
19 believe that I would have left somewhere
20 around the middle of October because I
21 usually go a little early. It's a yearly
22 event, and I come back a little after the
23 event, so I usually go out there before I go
24 on the cruise ship and make some fun jumps,
25 and then go on the cruise.

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D. Zarda

without thinking about jumping. They come out during the week, in fact, after work and make a jump to calm themselves down. It just varies. It depends. I know I can feel when I need to go make a jump.

Q Have you ever made a jump just to calm yourself down?

A What do you mean by calm myself down?

Q Exactly how you just used the term.

A I plan on making a jump tomorrow or Sunday or several jumps, so it's been a little while already. I've got a lot of things going on, and it's a nice, relaxing thing. I think we're going to have great weather, and I'm going to be with some friends, and I'm going to have a good time.

Q Where are you jumping tomorrow?

A Likely, if the weather does hold out, I will go to The Ranch which is in Gardiner, New York. It's a large commercial drop zone.

Q You went out to California in

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D. Zarda

the third week of October for some fun dives;
is that what you call them; fun jumps?

A Just to clarify for the record.
Typically, jumpers that work in the industry
will call work jumps, work jumps, and jumps
when we're not working, where we are actually
customers of the drop zone and we're actually
paying for a spot on the airplane and we're
just jumping for fun, we call those fun
jumps.

All jumps are fun, but there's a
distinguishing -- we distinguish between work
jumps when we're actually working and getting
paid and jumps where we're actually just
playing, and those are fun jumps. Just to
make it easier for us to have this dialogue.

Q So you went to California in the
third week of October for some fun jumps
before your cruise; is that correct?

A Yes, that's correct.

Q Then you went on the cruise for
seven days; is that correct?

A That is also correct.

Q Then you stayed in California

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D. Zarda

maintenance; is that correct?

A Yes, and prepare for school.

Q What school did you go to?

A I did go to, and I am currently going to Embry-Riddle Aeronautical University.

Q Where is Embry-Riddle Aeronautical University?

A Well, it's a worldwide school. It's the largest aeronautical university, so they have locations, you know, primary campuses; Daytona Beach, Florida and Prescott, Arizona. However, I'm a worldwide, online student.

Q You were preparing to attend Embry-Riddle via computer?

A That's right. These are compressed terms that move very quickly, so once they get started, you really do need to prepare before classes start so you can be seamlessly able to go through it.

Q When did you start going to Embry-Riddle, initially?

A The very first class I think I ever took with them was back in 2006 or 2007.

1 D. Zarda

2 Q -- answering that.

3 A All right. Repeat that
4 question, please.

5 Q In November of 2010 when you
6 started taking classes, do you know what
7 classes you took?

8 A Yes.

9 Q What classes did you take?

10 A From memory, I'll have to think
11 about this a little bit. Business
12 information systems, business law -- give me
13 just a minute -- and some other management
14 class. I can't...

15 Q One other management class?

16 A Yeah. It was management
17 production operations, or something to that
18 effect. It was a management-driven aviation
19 class. The specific title of that class, I
20 can't remember, but the other two, because
21 they were hard, I remember. Business law and
22 business information systems.

23 Q Do you know what your grade was
24 in the business information systems class?

25 A Yes. I got an A in all three

1 D. Zarda

2 classes.

3 Q That's pretty good; right?

4 A I guess. I suppose it is.

5 Q Were you happy with your grades
6 in all three classes?

7 A I was happy and surprised.

8 Q You were surprised that you did
9 so well?

10 A I was surprised I made it, yes.

11 Q But you did?

12 A I did.

13 Q Do you take classes other than
14 in November of each year?

15 A Yes.

16 Q When is the next period of time
17 that you take classes?

18 A Following the eleven-week term
19 that begins on November 15, I take classes in
20 the next term.

21 Q When does the next term run
22 from?

23 A It runs from February 15 until
24 the first week of May. Terms start on the
25 15th of every month all year long, but if

1 D. Zarda

2 you're already in a term, obviously, you're
3 going to finish that term, and then start
4 another one, so that's how I do it.

5 Q If you started a class
6 November 15, you would have gone to school
7 from November through December through
8 January; correct?

9 A That's right.

10 Q Did you do anything between the
11 end of the November term and the beginning of
12 the February term?

13 A So what you're asking me is in
14 the little break there?

15 Q Yes. What did you do?

16 A I went on a cruise.

17 Q Where did you cruise to?

18 A That was a Caribbean cruise; one
19 that I had booked a year in advance.

20 Q Did you have fun on the cruise?

21 A It was very refreshing after
22 what I'd just been through, so yes, I had a
23 good time.

24 Q You know, I didn't even ask
25 before, and it was rude of me. Did you have

1 D. Zarda

2 MR. ANTOLLINO: He warms up to
3 everyone, actually.

4 MR. ZABELL: I'm not really a
5 bad guy. Just Mr. Antollino doesn't
6 care for me all that much.

7 THE WITNESS: I don't think
8 anybody said you're a bad guy.

9 MR. ZABELL: I would hazard to
10 guess that Mr. Antollino, if he hasn't
11 said it, he certainly thought it.

12 THE WITNESS: Maybe.

13 A So when classes ended in May of
14 this year, I had plans made to go on a trip
15 overseas.

16 Q You had plans?

17 A I had made plans, and then I
18 executed those plans.

19 Q With precision?

20 A I wouldn't say it was with
21 precision, but I would say it was kind of a
22 sloppy buildup to it, but we had some
23 roadblocks along the way.

24 Q Where did you go?

25 A I went to Norway.

1 D. Zarda

2 Q Did you have fun?

3 A I had fun, yes.

4 Q Any chance you met your attorney
5 overseas?

6 A No, I did not.

7 MR. ANTOLLINO: I would have
8 liked it to have, but it didn't work
9 out that way.

10 MR. ZABELL: Well, I know you
11 had told me on several occasions that
12 you were out of the country.

13 MR. ANTOLLINO: Yes, we were in
14 different parts of Europe.

15 Q How long were you in Norway for?

16 A It ended up turning into two
17 months.

18 Q Two months. Now, I have to say
19 that the way you're saying that it turned out
20 to be a little over two months, you had a
21 very guilty look on your face, so that's
22 causing me to ask --

23 A Guilt is a relative term.

24 Q -- what's that?

25 A It's a relative term.

1 D. Zarda

2 Q Guilt is?

3 A That's a relative, relative
4 term.

5 Q Tell me what you did for the two
6 months, and why you're smiling when you're
7 talking about it.

8 A The reason I'm smiling when I
9 talk about it is because it was a very good
10 trip. I had a great time that allowed me to
11 get away from the horrible winter that I had
12 which was dealing with this case and the
13 classes and other things that were going on
14 that were difficult, and it was an
15 unbelievable breath of fresh air, a nice
16 place.

17 Q I've got to stop you. You said
18 some other things that were going on this
19 winter?

20 A Just minor stuff.

21 Q I'm going to need to know what
22 they are; you know that, right?

23 A Okay, go ahead. Ask me.

24 Q What were those some other
25 things that you just referenced?

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D. Zarda

A My partner, his father died over the holidays, so that was tough. That just added on to all this other stuff. I was out there living on an airport, going to classes, and we had an unusual run of bad weather and a lot of the snow, and it's very rural. I literally got in a situation where I was snowed in to my house, and I couldn't even go get food several times, and I didn't have some water for part of time because everything froze up.

Just when you add all that together with classes, trying to deal with this situation --

Q "This situation" being the lawsuit?

A -- the lawsuit, getting these interrogatories and these demands met that were needed for this, my partner needing, you know, strength from me for his loss. It was a lot in a short amount of time.

The class load alone. I took nine hours. That's a very heavy load for an eleven-week term. They're compressed. Six

1 D. Zarda

2 hours is considered full-time, twelve hours
3 is maximum. They don't even let you take
4 more than twelve, so that just gives you an
5 idea of what kind of class load it is with
6 this university, and it's a leading
7 university, and they don't mess around.

8 Q How did you do on your classes,
9 by the way?

10 A I did good. I struggled. It
11 was very hard. It took a lot out of me, but
12 I did okay.

13 Q You got As on them; right?

14 A I did.

15 Q Prior to 2009, how were your
16 grades?

17 A They were the same.

18 Q All As?

19 A I've been getting good grades.
20 I wouldn't say all As. I think I got a
21 couple of Bs in there somewhere, but mostly
22 As.

23 Q Is it safe to say that after
24 July of 2010, you've only gotten As in your
25 coursework?

1 D. Zarda

2 any legal action whatsoever, so basically,
3 what I was telling him is that somebody is
4 talking shit on me, and I'm pissed off.

5 Q Did you ever find out who was
6 talking that shit on you?

7 A I did not find out. I pressed
8 Mr. Smith, as far as I felt was gentlemanly,
9 and he wasn't willing to offer the source.
10 He just said he had sources, and apparently,
11 his sources were incorrect. For one, because
12 of the timing, and I don't know, you know,
13 how they're related to Ray or Ray's drop zone
14 or anybody that knows anything about what
15 happened.

16 All I can say is that I applied
17 because of what happened at Skydive Long
18 Island. I didn't get the job, and it was a
19 major drop zone, a major skydiving center,
20 and that upset me very much.

21 Q Where else did you apply for
22 work?

23 A I didn't directly apply, but I
24 went and had a meeting with the owner of Long
25 Island Skydiving Center, which is Ray's

1 D. Zarda

2 competitor on Long Island, and that guy's
3 name was Brian Erler. Don't quote me on it.
4 He's the only owner. I can't remember the
5 guy's name. I just can't remember.

6 Q When did you speak to him?

7 A I spoke to him probably around
8 that same time.

9 Q Around July of 2010?

10 A Around the end of July.

11 Q The end of July?

12 A Yeah. Because it was around the
13 third week of July, I think, if we look in
14 the e-mail from Doug Smith where we were
15 going back and forth talking about me working
16 for him. I think it was around maybe the
17 third week of July when he said no. It was
18 after that I think I talked to Long Island
19 Skydiving Center, and I drove out there in my
20 truck and sat down and discussed the matter
21 in detail with the owner of Long Island
22 Skydiving Center.

23 Q What matter did you discuss?

24 A I told him everything that we've
25 discussed right here today. I told him about

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EASTERN DISTRICT OF NEW YORK**

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Plaintiff,

– against –

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Defendants.

Case No.:

10-CV-4334 (JFB)(ARL)

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION
TO DISMISS**

Saul D. Zabell, Esq.
Zabell & Associates, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716

I. PRELIMINARY STATEMENT

Defendants, Altitude Express, Inc. d/b/a Skydive Long Island (“SDLI”) and Ray Maynard, respectfully submit this memorandum of law in support of their Fed. R. Civ. P. 12 motion to dismiss for lack of diversity jurisdiction.

II. ARGUMENT

A. Legal Standard

The District Courts have original jurisdiction over a civil action where the case is between citizens of different states and the matter in controversy exceeds the sum or value of \$75,000. 28 U.S.C. § 1332. The plaintiff bears the burden of showing that there is a “reasonable probability that the claim is in excess of the statutory jurisdictional amount.” Intl. Christian Broadcasting, Inc. v. Koper, 928 F. Supp. 2d 559, 562 (E.D.N.Y. 2013) (citing Scherer v. Equitable Life Assurance Society of U.S., 347 F.3d 394, 397 (2d Cir. 2003)). “Generally, this probability is easily met, since there exists a rebuttable presumption that the face of a plaintiff’s complaint is a ‘good faith representation of the actual amount in controversy.’” Intl. Christian Broadcasting, 928 F. Supp. 2d at 562 (citing Wood v. Maguire Automotive, LLC, 2013 WL 309979 *1 (2d Cir. Jan. 28, 2013) (citation omitted) (see Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., 166 F.3d 59, 63 (2d Cir.1999))).

“[T]o overcome the face-of-the-complaint presumption, the party opposing jurisdiction must show ‘to a legal certainty’ that the amount recoverable does not meet the jurisdictional threshold.” Scarpinato v. E. Hampton Point Mgt. Corp., 12-CV-3681 (JFB) (GRB), 2013 WL 5202656, *14 (E.D.N.Y. Sept. 13, 2013) (quoting Scherer v. Equit. Life Assur. Socy. of U.S., 347 F.3d 394, 397 (2d Cir. 2003) (citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936))). “The Second Circuit has ‘allowed . . . resort to materials

developed in discovery to be used to amplify the meaning of the complaint allegations.”
Scarpinato, 2013 WL 5202656, *14 (citing Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2d Cir. 1982)).

B. Application

On March 28, 2014, the Court issued an Order dismissing Plaintiff’s federal claims under Title VII and the Fair Labor Standards Act. [ECF Doc. 145] Plaintiff’s remaining claims all fall under New York State law. Specifically, Plaintiff maintains claims under the New York State Human Rights Law and New York Labor Law.

As Your Honor has explained, “Where a ‘district court has dismissed all claims over which it has original jurisdiction,’ it may, in its discretion, decline supplemental jurisdiction over any remaining claims.” Scarpinato, 2013 WL 5202656, *15 (citing 28 U.S.C. § 1367). Here, Plaintiff’s claims over which the Court had original jurisdiction have been dismissed and, because diversity jurisdiction does not exist, the Court should dismiss this matter.

While Defendants concede that the parties to this action are citizens of different states, there remains a dispute as to whether Plaintiff can meet the jurisdictional threshold required by 28 U.S.C. § 1332.

Emotional Distress Damages

The majority of Plaintiff’s “good faith” claim for damages is attributable to emotional distress damages. Based on information obtained through discovery, particularly Plaintiff’s deposition, Defendants aver that to a legal certainty, the amount recoverable for emotional distress damages does not meet the jurisdictional threshold.

In Plaintiff’s June 15, 2013 letter, counsel for Plaintiff, relying on Plaintiff’s Declaration [ECF Doc. 126], asserts that “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." [ECF Doc. 143] Hyperbole aside, counsel for Plaintiff argues that this presumptive set of allegations alone is enough to establish a good-faith basis for asserting the amount in controversy exceeds \$75,000.00. However, Plaintiff's deposition testimony contradicts this assertion and, in a garden variety emotional distress claim, like here, Plaintiff's measure of emotional damages does not rise to the level of the jurisdictional threshold.

Plaintiff testified that shortly after his termination, in or around October 2010, he went out to California as he does every year and made "some fun jumps" before going on his annual cruise with friends. (Pl. Dep. pg. 144:12-25, 150:18-24)¹ Just four (4) months after his termination, Plaintiff was engaged in activities he enjoyed and his social agenda was unaffected. Moreover, Plaintiff testified that he planned on going to make several jumps the day after his deposition and have a good time with some friends; verifying that he was not too distraught to jump and have fun. (Pl. Dep. pg. 149:13-19)

Further, Plaintiff testified to the fact that he received "A's" in all three classes he enrolled in during the semester following his termination. (Pl. Dep. pg. 159-160:5-2) This proves that Plaintiff's mental state did not prevent him from excelling in these "hard" classes he took beginning in November 2010. (Pl. Dep. pg. 159:18-22) Plaintiff also testified that he went on another cruise after the semester concluded and "had a good time." (Pl. Dep. pg. 161:10-23)

In or around May 2011, the first summer Plaintiff did not work for Defendants since 2009, Plaintiff went to Norway for two (2) months. (Pl. Dep. pg. 179:13-25, 180:15-17) Plaintiff explained that this trip enabled him to "get away from the horrible winter that [he] had

¹ A true and accurate copy of the relevant portions of Plaintiff's deposition transcript is annexed to the Declaration of Saul D. Zabell dated April 15, 2014 as Exhibit 1.

which was dealing with this case and the classes and other things that were going on that were difficult.” (Pl. Dep. pg. 181:11-14) Importantly, Plaintiff’s “horrible winter” admittedly had little, if anything, to do with the case. Plaintiff elaborated by revealing that his partner’s father passed away over the holidays, Plaintiff was living in an airport, going to classes, dealing with the bad weather and being snowed in his house. (Pl. Dep. pg. 182:2-12) Plaintiff qualified the effect of his pending lawsuit by explaining that he had to get “these interrogatories and these demands met that were needed for [the lawsuit].” (Pl. Dep. pg. 182:13-20) Tellingly, Plaintiff did not mention that his termination contributed in any way to his “horrible winter.” In light of the foregoing, it would appear little, if anything, changed by virtue of this case.

“In awarding compensatory damages for anguish and humiliation, the New York courts have held that the plaintiff may prove such damages through her own testimony ‘corroborated by reference to the circumstances of the alleged misconduct.’” Walia v. Vivek Purmasir & Assoc., Inc., 160 F. Supp. 2d 380, 390 (E.D.N.Y. 2000) (citing New York City Transit Authority v. State Div. of Human Rights, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991)). “In evaluating the reasonableness of an award, courts look to see whether it deviates materially from what would be reasonable compensation.” Walia, 160 F. Supp. 2d at 390 (citing Shea v. Icelandair, 925 F. Supp. 1014, 1020-21 (S.D.N.Y. 1996)).

Defendants are cognizant of the range of emotional distress damages typically awarded by New York Courts. “New York cases vary widely in the amount of damages awarded for mental anguish.” Lynch v. Town of Southampton, 492 F. Supp. 2d 197, 207 (E.D.N.Y. 2007) aff’d, 07-cv-3478, 2008 WL 5083010 (2d Cir. 2008) (citing Cross v. New York City Transit Authority, 417 F.3d 241, 259 (2d Cir. 2005) (quoting Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 78 (2d Cir. 2004) certiorari granted on other grounds and judgment vacated by

KAPL, Inc. v. Meacham, 544 U.S. 957, 125 S.Ct. 1731, 161 L.Ed.2d 596 (2005)); see also Cross, 417 F.3d at 259 n. 4 (reaffirming validity of Meacham remittitur holding)). This Court has explained that “many decisions ‘reduce awards to \$30,000 or below,’ . . . “others ‘uphold awards of more than \$100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment,’” Lynch, 492 F. Supp. 2d 197, 207 (E.D.N.Y. 2007) aff’d, 07-cv-3478, 2008 WL 5083010 (2d Cir. 2008) (citing Cross, 417 F.3d at 259) (internal citations omitted).

Based on Plaintiff’s deposition testimony, Defendants aver that Plaintiff cannot support a claim for emotional damages above \$30,000. Objectively, and by his own sworn admission, Plaintiff was able to go about his life, take numerous vacations, make “fun jumps,” and succeed in school. There is no evidence in the record that his termination impacted his emotional, physical and/or mental well-being in any way.

Lost Wages and Mitigation

Plaintiff seeks damages for lost wages for the remaining portion of summer 2010 (post-termination) and for all of summers 2011 through 2013. However, Plaintiff would, at most, only be entitled to lost wages for the remaining portion of summer 2010 because he failed to satisfy his duty to mitigate damages for the remaining time frame.

“Generally, an employer seeking to avoid a lost wages award bears the burden of demonstrating that a plaintiff has failed to satisfy the duty to mitigate.” Broadnax v. City of New Haven, 415 F.3d 265, 268 (2d Cir. 2005) (citing Dailey v. Societe Generale, 108 F.3d 451, 456 (2d Cir. 1997)). Here, Defendants easily overcome this burden based on Plaintiff’s deposition testimony. After his termination in 2010, Plaintiff contacted “Chicagoland Skydiving Center”

and “Long Island Skydiving Center” in an effort to obtain employment for the remaining portion of the summer. (Pl. Dep. pg. 132-133:7-5, 213-214:21-22)

Plaintiff, however, failed to testify as to any efforts to obtain employment for summer 2011. In fact, as mentioned above, Plaintiff spent approximately two (2) months in Norway during summer 2011. (Pl. Dep. pg. 179:13-25, 180:15-17) Moreover, in Plaintiff’s June 15, 2013 letter to the Court, his “efforts” to mitigate seem to be focused solely on enrolling in classes. [ECF Doc. 143] However, Plaintiff was taking classes at Embry-Riddle Aeronautical University since as early as 2006 or 2007 and there is no evidence of any changes in course work since that time. (Pl. Dep. pg. 152:22-25) Additionally, Plaintiff did not testify about enrolling in classes during summer months, the periods during which his mitigation efforts should be focused because this is the time of the year he worked for Defendants. Plaintiff also fails to proffer any evidence indicating that “he decided to increase the intensity with which he’s focused towards his degree.” [ECF Doc. 143] Therefore, Defendants can readily meet their burden of demonstrating that Plaintiff failed to satisfy the duty to mitigate.

Further, Plaintiff avers that he is entitled to costs of mitigation. This argument fails because Plaintiff cannot establish that his enrollment in classes was in any way done as an effort to mitigate damages. Additionally, Plaintiff’s counsel misguided the Court in setting forth \$42,000 as the amount Plaintiff pays in tuition “not including housing.” Principally, Plaintiff testified that he is working toward his degree online. (Pl. Dep. pg. 152:7-17) Additionally, in examining the website provided by Plaintiff’s counsel, tuition, inclusive of room and board, for this year is \$42,294. (See Tuition and Estimated Costs, Daytona-Beach, Embry-Riddle, <http://daytonabeach.erau.edu/admissions/estimated-costs/index.html> (last visited Apr. 14, 2014)). Tuition alone is \$31,344, however that is for a student enrolled in 12-16 credit hours (see id.)

and, as Plaintiff testified, in 2010 he took nine (9) credit hours and six (6) credit hours is considered full-time while twelve (12) credit hours is the maximum. (Pl. Dep. pg. 182-183:23-3) As a result, even if the Court were to consider Plaintiff's tuition as part of his effort to mitigate damages, which Defendants aver the Court should not, Plaintiff's representation of costs is wholly inaccurate.

Out of Pocket Expenses

Plaintiff also misrepresents his out of pocket expenses in stating that "when he was fired, [he] had to abandon a condominium deposit for a home [he] had rented in Long Island." [ECF Doc. 143] This statement contradicts Plaintiff's deposition testimony, in which, he explained that he stayed in the condominium up until September 17, 2010, which was "just after the time period that [he] was supposed to leave anyway." (Pl. Dep. pg. 131:4-21) Thereafter, Plaintiff testified that he proceeded back to his home in Missouri. (Pl. Dep. pg. 131-132:22-5) Therefore, his claim that his termination, which occurred on or about June 21, 2010, led him to abandon his condominium on September 17, 2010, on or about the time he "was supposed to leave anyway," is illogical and should not be considered in calculating his damages.

Minimum Wage

Defendants deny Plaintiff's minimum wage allegations and aver Plaintiff was properly compensated in accordance with the applicable laws, however, Defendants acknowledge that Plaintiff seeks damages pursuant to this claim.

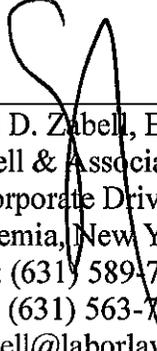
III. CONCLUSION

For all the foregoing reasons, this Court should grant Defendants' Fed. R. Civ. P. 12 motion to dismiss for lack of diversity jurisdiction.

Dated: Bohemia, New York
April 15, 2014

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