

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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ESTATE OF ZARDA,

Plaintiff-Appellant,

-against-

ALTITUDE EXPRESS, et ano.

Defendants-Appellees

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**REPLY  
DECLARATION IN  
SUPPORT OF  
BILL OF COSTS**

15-3775

GREGORY ANTOLLINO, an attorney admitted to this court who represents, with Steven Bergstein, on appeal and en banc review, does hereby declare under penalty of perjury of the United States as follows:

1. We thought we made a very reasonable calculation for costs, which did not even ask for the in-house reply briefs we might have asked for, not the transcript which cost at least \$1.10 per page, depending on when ordered. We waived all of those potential costs, even though we needed the transcript to prove we had preserved our objection to the Court's instruction on "but for" versus "motivating factor."

2. The defendants' arguments are unavailing. First, defendants are incorrect that a statute that provides for costs, as Title VII does, does not allow for appellate costs. We succeeded not on a mere procedural technicality, but a question of law as part of a landmark decision on appeal. If we do not succeed as prevailing party on remand, we will not be entitled to costs or attorneys fees; the same is true if the defendant seeks certiorari and succeeds.

3. While not relevant, this information about certiorari is a surprise to us, since defendants at both the panel appeal and the en banc proceeding conceded the legal issue was ripe for review, but merely defended the issue on other grounds. At the panel appeal, appellee merely argued that *Simonton v. Runyon* was binding and the district court didn't err in following it. At oral argument defendants conceded the logic of our argument, but argued it was a matter not of judicial interpretation but for the legislature.

4. Defendant's position then shifted at the en banc, where they abandoned the separation of powers argument and argued only procedural points as to the charge. It was a daring strategy, but the defense attempted, unsuccessfully, to argue that plaintiff was seeking an "advisory opinion," which was illogical both to the Court - including the dissent - and the undersigned. Indeed, at the beginning of its en banc brief, appellees argued:

The facts of this case are inexorably linked with the legal question presented - facts which establish that, despite this laudable attempt to remedy a long-standing denial of protection to a now recognized and comparatively vulnerable class of its citizens, the Court's inevitable answer in the affirmative results in a decision from which no relief flows. Any answer in the affirmative to the question presented would be a prohibited advisory opinion.

Appellee's en banc brief in opposition, at 1-2. Defendants conceded there existed a legal issue in dispute, but wrongfully attempted to intertwine the legal issue with the facts; the reason the en banc court took this case, however, despite plaintiff's loss at trial under the state statute (and diversity jurisdiction) was that the instruction required plaintiff to meet a higher standard of proof. Rather than "motivating factor," the court instructed the jury that the standard was "but for." The defendant still doesn't appreciate that.

4. Defendants indicate they will seek certiorari, but if this were even relevant - and how could it be if every case could potentially go up on certiorari - we will not seek to enforce a bill of costs if they follow through on this stated intention. Any basis for Supreme Court review, however, would seem to be misplaced. Defendants agreed to the legal issue at the en banc but to morph the facts of the case with the legal standard that the trial judge applied on the state law. Defendants confuse plaintiff's point that "but for" - as the district court instructed the jury at the trial on the state claim (followed by a requirement that it analyze the case under *McDonnell-Douglas*) - was a significantly

higher burden of proof than the "motivating factor" burden provided under 42 U.S.C. §2000e-2(m).

5. I surmise defendants believe the "but for" simple test under *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) is the same as the "but for" burden of proof as the judge instructed the jury, which is what is required of plaintiffs attempting to prove causes of action for retaliation, see *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013) (explaining the difference) and for age discrimination under the ADEA. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009).

6. It is unfortunate that *Manhart*, decided in 1978, used the language that *Gross* would use thirty years later to distinguish "motivating factor," but the phrase does not mean the same thing in the statute as it did in *Manhart*. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (1991 amendments to Title VII "relax[] this standard . . . to prohibit even making a protected characteristic a "motivating factor" in an employment decision.") (citing 42 U.S.C. §2000e-2(m)). Perhaps defendants would be advised to appreciate this difference before filing a petition for a writ, because they have taken a position that - in our opinion - has waived any review. Supreme Court Rule 10 states that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The justices nevertheless have the final say and we won't seek to enforce any bill of costs until - and if - the Justices opine on this dispute.<sup>2</sup>

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<sup>2</sup> In addition, appeals are pending in the 8th Circuit, *Horton v. Midwest Geriatric Management*, and, the undersigned was preliminarily retained in a case whose appeal was just noticed before the 4th Circuit. We believe the Justices might want to wait for the issue to percolate before taking this case and this issue on plenary review.

7. Second, it is not the case that because Title VII provides for costs - which include attorneys' fees - that we are unable to obtain costs under the Federal Rules of Appellate procedure. They are two different types of costs, and if we prevail on retrial, we will seek attorneys' fees for the appeal. But we agree that to do so now would be premature. The case cited by the defendant, *Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv.*, 382 F.3d 1159,1161 (9th Cir. 2004) was abrogated or implicitly overruled by *Marx v. Gen. Revenue Corp.*, 568 U.S. 371 (2013). As one district court explained it

*Marx* found that "not all statutes that provide for costs are contrary to Rule 54(d)(1)." . . . The Court was "not persuaded: by the argument that "any statute that specifically provides for costs displaces Rule 54(d)(1), regardless of whether it is contrary to the Rule."). Given the Supreme Court's later decision in *Marx*, the undersigned declines to apply the nonbinding authority of *Ocean Conservancy*.

*People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium & Festival Fun Parks, LLC*, 2017 U.S. Dist. LEXIS 84027, at \*7-8 (S.D. Fla. May 30, 2017). This bill of costs is strictly for the printing on appeal, not the costs we could obtain under Title VII, which include potential attorneys' fees. If we are successful at a retrial, we won't seek these costs again, to be sure.

8. Third, the bills from Cockle Printing are complicated, but the defendants do not read them correctly. Cockle charges a base amount, then an additional amount for each pages and binding and covers. The base amount offsets the costs for the individual pages, bindings and covers, and we are not asking for any more than the total amount Cockle charged us. We are asking for the color pages because these color pages bring alive what the lower court saw and are part of the record. We believe these color pictures - in which the complainant and his girlfriend

are seen having a tremendous, wonderful time - prove the lie that Donald Zarda did anything improper on that jump, and that he was only fired for telling the passenger he was gay. Those pictures prove our case.

9. For these reasons, and given all of the costs we might have sought but waived - the panel appeal, and 13 of 15 reply briefs to the en banc - the amount of costs we ask for in the bill of costs is reasonable and should be granted, including the color copies.

Dated: New York, New York  
March 22, 2018

*Greg S. Antollino*  
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GREGORY ANTOLLINO, ESQ.