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.: 10-CV-4334(JFB)(ARL)

DEFENDANTS' MEMORANDUM OF LAW SUBMITTED IN OPPOSITION OF PLAINTIFF'S MOTION TO COMPEL DISOVERY

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I. INTRODUCTION

Altitude Express, Inc. d/b/a Skydive Long Island, and Ray Maynard, collectively ("Defendants"), in this action, respectfully submit this memorandum of law in support of their Opposition to Plaintiff's Motion to Compel Discovery pursuant to Fed.R.Civ.P. Rule 37, *et seq.* For all of the reasons set forth below, Plaintiff's motion should be dismissed in its entirety, and Defendants should be awarded costs and legal fees incurred for having to defend Plaintiff's frivolous motion.

II. FACTS

In or about July 2010, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming that he was subjected to discrimination because of his sexual orientation and his alleged non-conformity with gender stereotypes. On or about September 24, 2010, Plaintiff filed suit in the Eastern District of New York, seeking damages for purported violations of Title VII, the New York State Human Rights Law, the Fair Labor Standards Act, and the New York State Labor Law while alleging many of the same purported unlawful actions outlined in his EEOC Charge. Relatively soon thereafter, the parties engaged in discovery.

Paper discovery commenced in 2011 and depositions began in November, 2011. Raymond Maynard's deposition, the deposition at issue in Plaintiff's motion, took place on December 14, 2011. Plaintiff filed his initial Motion to Compel on March 21, 2012, and a subsequent amended Motion to Compel on March 26, 2012, three months after Plaintiff's deposition, due to "a handful of typos" and an admitted factual error.

III. ARGUMENT

A. Ray Maynard Deposed for a Full Seven Hours and Should not be Subject to a Second, Unnecessary Deposition

Plaintiff mistakenly contends that the video recorded testimony of five hours and thirty minutes accurately reflects the full duration of the deposition. What Plaintiff fails to mention in his Motion to Compel is the relevant fact that the videographer does not record video exhibits. Therefore, while Plaintiff was introducing and showing videos, all of which were voluminous and lengthy, the video record was turned off (Maynard Deposition 233:18, 233:23, 265:25, 269:9, 271:16, 272:20, 273:15, 273:20, 274:23, 276:20, 277:1, 279:11, 279:15, 279:22, 283:12, 290:20, attached collectively as Ex.1). As playing the video for purposes of questioning the deponent should certainly be counted towards Plaintiff's seven hour time limit, Plaintiff is not entitled to any further questioning of Defendant. Fed.R.Civ.P. 30.

B. Any Legal Advice Maynard May have Received from Harvey Arnoff is Protected by Attorney-Client Privilege and Should Not be Revealed to Plaintiff or Plaintiff's Counsel

Courts have long recognized that conversations between a client and his attorney are privileged and thus immune to discovery requests. Plaintiff's argument that Maynard's extrajudicial revelation that he consulted with an attorney before terminating Plaintiff constituted a waiver of privilege for every conversation Maynard had with his attorney is in direct contradiction of the relevant case law. First, Maynard's purported waivers are premised upon statements by Maynard that he had a conversation with his attorney. Mere acknowledgment of a conversation does not constitute a waiver of privilege if the substance of the conversation is not disclosed. GFI Sec. LLC v. Labandeira, 01 CIV. 00793 (JFK), 2002 WL 460059 (S.D.N.Y. Mar. 26, 2002) ("the substance of privileged communications is protected while the fact that they may

have occurred is not." (citing Church of Scientology of Cal. v. Cooper, 90 F.R.D. 442, 443 (S.D.N.Y.1981)).

Second, in the unlikely event that Maynard did waive attorney-client privilege regarding the conversation he specifically mentioned, Plaintiff is in no way entitled to inquire into every conversation Maynard had with counsel regarding Plaintiff or Plaintiff's termination. Though not expressly clear, it appears Plaintiff is attempting to invoke the fairness doctrine: the long-standing rule that testimony as to part of a privileged communication, in fairness, requires production of the remainder. McCormick on Evidence § 93, at 194-95 (2d ed. 1972). Plaintiff, however, misstates relevant case law. Plaintiff mistakenly relies on a District Court decision wherein the court held a voluntary disclosure of certain privileged attorney-client communications constitutes a waiver for all privileged conversations concerning the same subject matter. von Bulow v. von Bulow, 114 F.R.D. 71, 76 (S.D.N.Y.), aff'd., 811 F.2d 135 (2d Cir.), cert. denied, 481 U.S. 1015 (1987). Plaintiff conceals, however, the Second Circuit's subsequent mandamus relief for the same case, which overruled the District Court and held that extrajudicial disclosures of attorney-client communications are not subject to the fairness doctrine, and thus undiscoverable, if they are not subsequently used by the client in a judicial proceeding to his adversary's prejudice. *In re* von Bulow, 828 F.2d 94, 101 (2d. Cir. 1987).

In the instant case, any disclosure Maynard may have made was extrajudicial. Maynard did not raise the existence of a conversation in court; he mentioned the discussion with his attorney during a private conversation regarding Plaintiff's termination. Further, Maynard has never attempted to introduce these conversations into a judicial proceeding, let alone in a prejudicial manner. [1] If anything, it is Plaintiff who is attempting to use these conversations to

[1] Plaintiff has posted this conversation on YouTube.com and raised the issue in depositions, but these statements have not been introduced to this Court.

prejudice Defendant. Thus, under the parameters established by *In re* von Bulow, Plaintiff is not entitled to further discovery regarding Maynard's confidential and privileged communications with his previous attorney.

C. Plaintiff is not Entitled to the Address of Santine Megneco under the Federal Rules of Civil Procedure and the Federal Rules of Evidence

Plaintiff should be barred from any inquests into Ms. Megneco's whereabouts as any information regarding Defendant's deceased sister's partner far exceeds the scope of acceptable discovery in this matter. Fed.R.Civ.P. 26(b) only authorizes discovery of information that could "reasonably be calculated to lead to the discovery of admissible evidence." Nothing Ms. Megneco could provide would constitute such information.

According to Plaintiff, Ms. Megneco could proffer information regarding "Maynard's attitudes towards gay people." Foremost, discrimination on the basis of sexual orientation is not within the scope of Title VII. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit . . . [that] Title VII does not prohibit harassment or discrimination because of sexual orientation."). Supposition aside, it appears that armed with such information Plaintiff hopes to somehow find evidence relevant with respect to how Defendant would view or treat gay men. What Plaintiff ignores, however, is that Ms. Megneco's opinions on Maynard's alleged propensity for homophobic attitudes would be entirely inadmissible under the Federal Rules of Evidence, as "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Fed.R.Evid. 404(a); Hynes v. Coughlin, 79 F.3d 285, 290 (2d Cir. 1996) ("Evidence of other acts is not admissible to prove that the actor had a certain character trait, in order to show that on a particular occasion he acted in conformity with that trait."). Further, evidence should be excluded

if its probative value is substantially outweighed by its potential for unfair prejudice. See, e.g., Huddleston v. United States, 485 U.S. 681, 687–88, 108 S.Ct. 1496, 1500–01, 99 L.Ed.2d 771 (1988); Fed.R.Evid. 404(b) Advisory Committee Note (1972). Even in the unlikely event Ms. Megneco could provide any information other than propensity evidence, Plaintiff's traipsing the details of Defendant's deceased sister's relationship would surely be found unfairly prejudicial and thus excludable under Fed.R.Evid. 403(b).

The Federal Rules of Civil Procedure only authorize discovery when there is a likelihood of discovery of admissible evidence. Here, the only purported evidence Plaintiff has identified as discovering would not be admissible at trial. As Plaintiff has failed to identify any other reason, other than propensity, for why Plaintiff would want the opinions of Maynard's deceased sister's partner regarding his feelings towards the homosexual community, Plaintiff's request should be denied.

D. Defendants Properly Objected to Plaintiff's Second Combined Discovery Demands

Counsel's recitation regarding discourse centered upon Plaintiff's discovery demands and Defendants' responses thereto is wholly inaccurate. While it is clear the parties have, in many respects, reached impasse with respect to the discovery process, mere disagreement alone cannot serve as a legitimate basis for the relief sought by Plaintiff's counsel. To the contrary, Plaintiff's arguments in support are the unfortunate byproduct of counsel's heightened level of frustration, not a violation of the federal or local rules by Defendants. Regardless, we address each of Counsel's points below:

1. Discovery of Defendants' employment manuals.

Defendants object to such discovery as manuals implemented after Plaintiff's termination have no probative value in this dispute. Further, such documentation is tantamount to a

subsequent remedial measure and, in this instance, the danger of prejudice outweighs any real value. Additionally, to the extent Plaintiff seeks this information in an effort to determine "appropriate standards of conduct" in the workplace, such information was readily attainable at deposition. Counsel should not be rewarded for failing to conduct a complete examination of the deponents. Lastly, Counsel's statement to the effect that *"There are many other things that one can think it would reveal. It should be produced"* is objective evidence that the request is, in fact, borne from speculation. Consequently, Defendants' objections were proper.

2-5. *Discovery of all electronic documents pertaining to Donald Zarda that have not already been produced.*

First and foremost, as has been conveyed to Plaintiff's counsel on numerous occasions, all information which is in Defendants' possession and that is responsive to Plaintiff's legitimate discovery demands has been produced. The mere act of seeking any and all electronic information in Defendants' possession does not render all requests for same presumptively valid. Defendants properly lodged objections to many of Plaintiff's discovery demands, each of which was either overbroad and/or sought irrelevant information. Plaintiff deposed both Mr. Maynard and Ms. Callanan and in doing so, addressed issues surrounding electronic discovery and/or Counsel's belief (albeit misplaced) that some form of spoliation may have occurred. Supposition aside, we are at a loss as to Counsel's latest position on these issues. Again, Counsel had direct access to each of the individuals who would have generated the information which ultimately formed Defendants' discovery responses, yet somehow, by his own admission, failed to elicit the desired information. Now, having failed in the modest task which was his charge, Counsel has undertaken to mischaracterizing deposition testimony to suit his needs; i.e., to provide a presumptive basis for his erroneous position. Therefore, Defendants maintain the appropriateness of their position.

6. Documents outlining "appropriate" or "inappropriate" topics for discussions, etc.

Defendants properly objected to these demands as the terms incorporated by Plaintiff are undefined, vague and/or subject to alternate interpretation. Further, as evidenced by Counsel's own writing, the demand is based upon rank speculation and there exists no legitimate basis for such production. At a minimum, Plaintiff should be directed to rephrase his Interrogatories; at which point, Defendants will revisit their position.

7-10. Responses to Requests for Admission

Defendants have not tendered a "bad-faith" discovery responses. To the contrary, responses to requests for admission served pursuant to Fed. R. Civ. P. 36 do not require verification. Therefore, Plaintiff's arguments surrounding same should be dismissed in their entirety as they are predicated upon a fundamental mischaracterization of the federal rules. Plaintiff was terminated in the immediate wake of a customer complaint pertaining to his behavior. Plaintiff's attempts to align complaints filed against him individually with those memorialized in Pl. Ex. H ("Rip-off Report") are misplaced. The complaint in Exhibit H was not issued in a contemporaneous manner, nor was the identity of the complainant disclosed. Further, no investigation was warranted as, in the absence of an identified complainant, Defendant Maynard believed the complaint was authored not by an actual customer, but by a competitor; a belief fostered by overt factual inaccuracies contained within the express language of the complaint (Pl. Ex. H; Maynard response). In response, Defendant Maynard properly advised the alleged aggrieved party to contact the proper authorities. Upon submission, no such complaints were filed. Consequently, the Munoz decision, in which the Court Ordered production of customer complaints for all employees of Defendant during Plaintiff's tenure **comparable** to those lodged against Plaintiff, has no binding effect upon the present dispute.

2012 U.S. Dist. LEXIS 17284 at *6-7. As set forth above, the complaints are not sufficiently analogous to warrant production.

11-13 *Interrogatories regarding Defendants' investigation and subsequent actions*

Again, for all of the reasons set forth in the preceding section, Defendants' objections were appropriately posed and no further production is warranted.

14. *Demand for inspection of Defendants' premises and review of video footage.*

Defendants properly denied Plaintiff to access a "sampling" of video footage for tandem jumps. The term "sampling" is undefined. While Plaintiff contends behavior encouraged of all jumpers; i.e. "pantomime" and "goof around extravagantly", Plaintiff's behavior not that of his co-workers', formed the basis of an immediate customer complaint. Plaintiff has been granted access to the jump footage with the complainant. There exists no appropriate parallel between the jump in question (Orellana) and other jumps with Defendants' employees which did not result in customer complaints. In seeking such production, Plaintiff seeks to impose an objective criterion by which jumpers' behavior is measured where none logically exists. Simply put, Plaintiff cannot circumvent responsibility for his inappropriate actions by endeavoring to impugn (without justification) his co-workers.

15. *Demand for pre-jump video tapes*

This information is irrelevant to the proceeding. What Orellana's expectations were in relation to Plaintiff's objectively inappropriate actions cannot be determined by review of video material. Counsel is in no position to ascertain Orellana's state of mind and/or expectations prior to her jump with or without access to the desired materials. Even if Counsel somehow formed a belief, such a belief would be nothing more than inadmissible speculation. Counsel should have broached this topic with Orellana at her deposition. To the extent questions regarding these

issues abound, they represent a failure on the part of Plaintiff's Counsel to conduct a proper examination. Nevertheless, the video material was and is available for inspection and review. Lastly, regardless of notions of relevancy, Defendants should not be required to entrust such materials to third-parties as the tapes are irreplaceable. Accordingly, Defendants' objections were proper.

16. *Dates upon which Plaintiff worked.*

Defendants produced all responsive information in their possession. Plaintiff only received compensation for actual jumps. Plaintiff testified that absent from assigned jumps, he was free to come and go as he pleased. While Plaintiff chose not to leave Defendants' facility during non-jump times, his testimony confirms he was not eligible for payment during these periods of time. Therefore, Defendants properly responded to this discovery demand.

E. Counsel's Representation of Corporate Employees at a Deposition is Entirely Appropriate Under this Circuit's Relevant Precedent

A ruling that Counsel cannot defend employees of Altitude Express would be in direct contradiction of long-standing precedent allowing corporate counsel to simultaneously represent a corporation and non-adverse corporate employees. Bonner v. Guccione, 1997 WL 91070 * 2 (S.D.N.Y. March 3, 1997) (noting that plaintiff had not cited "any civil case holding it would be improper for an attorney to represent both a defendant and its non-party employees"); D.S. Magazines v. Warner Publisher Services, Inc., 623 F. Supp. 624, 624 (S.D.N.Y. 1985) (denying motion to disqualify where "one law firm is representing the defendant and a former employee, non-party witness in the same action"). Representation of these employees is not only proper, but any conversation Counsel has with employees in preparation for a deposition, regardless of whether the employees are personal clients of corporate counsel, is protected by attorney-client privilege. Coleman v. City of New York, 98CIV.8761(LMM)(AJP), 1999 WL 493388 (S.D.N.Y.

July 8, 1999) ("as such, the Corporation Counsel's discussion with non-adverse City employees about their deposition in a case in which the City (or City agency) is a defendant is protected by the *City's* attorney-client and/or work-product privilege, regardless of whether the employee also asks for representation in connection with the deposition."); see also Carter v. Cornell Univ., 173 F.R.D. 92, 95 (S.D.N.Y.1997) ("Communications made between an attorney and a corporate client's employees are privileged so long as they are made to attorneys ... for the purpose of securing legal advice and concern matters within the scope of the employees' corporate duties."); New York City Managerial Employee Ass'n. v. Dinkins, 807 F.Supp. 955, 958 (S.D.N.Y.1992) (documents that "contain a discussion of legal advice given by the New York City Corporation Counsel to City officials and/or agencies . . . are protected by the attorney-client privilege"); Weissman v. Fruchtman, 83 Civ. 8958, 1986 WL 15669 at *15, 21 (S.D.N.Y. Oct. 31, 1986) (holding that while there may not be an attorney-client privilege between Corporation Counsel and a particular City agency employee, Corporation Counsel's directions to the employee not to answer questions at deposition on privilege grounds are appropriate as Corporate counsel is attorney for City agencies.). Therefore, the circumstances surrounding Counsel's representation of corporate employees for their depositions are privileged and should not be subject to further inquest by Plaintiff. (Pl. Ex. C; "Winstock Deposition," Pl. Ex. F; "Callanan Deposition").

In the instant case, Counsel represented Lauren Callanan and Richard Winstock, both employees of Altitude Express being deposed in their corporate capacity, during their depositions. Plaintiff fails to cite any case law that indicates representing corporate employees is inappropriate and ignored the numerous cases that condones such representation. Further, Counsel at no time solicited either Lauren Callanan or Richard Winstock. Instead, Counsel

merely informed Defendant's employees of Counsel's ability to represent them at their depositions *if they so chose*. (Pl. Ex. F; "Winstock Deposition").

Furthermore, in the unlikely event this Court would find Counsel's behavior was inappropriate, disqualification is an unfitting remedy. Motions to disqualify attorneys are generally disfavored. In U.S. v. Occidental Chemical Corp., 606 F.Supp. 1470 (W.D.N.Y. 1985), defendant's counsel offered, by letter, to represent any non-party employee witness who were subpoenaed for deposition. The court did not preclude counsel from representing either the defendant or non-employee witnesses, though counsel was barred from distributing any further letter solicitations. Occidental, 606 F.Supp. at 1476-1477, 1478. In Rivera v. Lutheran Medical Ctr., 22 Misc.3d 178, 866 N.Y.S.2d 520 (Kings Cnty. 2008), the court found that defense counsel should be disqualified from representing non-party witnesses (though not defendant), based upon an egregious combination of solicitation and defense counsel's "improperly thwarting plaintiff's attempts to obtain discovery." Rivera, 22 Misc.3d 178 at 186, 866 N.Y.S.2d 520. No such attempts have occurred here. Therefore, even if this Court is to find that Counsel solicited Richard Winestock by relaying Defendant's authorization for Counsel to represent Winestock, Counsel should not be disqualified from representing either Defendant or any other employee-witnesses.

F. Discovery Should Not be Extended Until November 2012

It is unclear how Plaintiff's unsupported beliefs regarding the future precedence of this case justifies reopening discovery and extending the deadline to November 2012. Discovery closed on March 23, 2012, more than one year since discovery commenced and four months since depositions began. Prior requests for extensions made by Plaintiff have been denied as

there is no demonstrated necessity. Any extension, let alone an extension to November, 2012, would needlessly delay this already lengthy litigation.

G. Sanctions are Unnecessary and Inappropriate

Counsel did not make any sworn representations, either to this Court or to Plaintiff, regarding his ability to accept subpoenas on behalf of non-party witnesses. Orellana and Kengle authorized Counsel to accept subpoenas on their behalf, although both mistakenly indicated otherwise at their depositions. The witnesses were understandably confused at the depositions, as Plaintiff questioned both Orellana and Kengle extensively regarding the subpoenas, this despite both witnesses' lack of familiarity with the law or the legal process. Neither Orellana nor Kengle wished to have their personal information disclosed, or to undertake the embarrassment of being served at their places of employment, and therefore authorized Counsel to accept a subpoena on their behalf. The reality Mr. Antollino chooses to ignore is that, once ordered, Counsel assisted in scheduling and securing Orellana and Kengle's attendance at their depositions. Counsel's actions are inapposite with Plaintiff's contention that Counsel purposefully deceived this Court to frustrate Plaintiff's litigation.

With regard to the incident which occurred at Mr. Maynard's deposition, Plaintiff again misstates both the relevant facts and the relevant law. Counsel's instructions were primarily for the benefit of preserving the record. Counsel hoped to keep the deposition record clear with concise answers articulated slowly for the court reporter's benefit. Further, Counsel did not initiate a private conference with Defendant while a question was pending. Counsel stood up to initiate a break (for purposes of using the lavatory) before the question was ever posed. When Plaintiff saw Counsel planned on breaking, he quickly attempted to pose a question in an attempt to trap Defendant. In CA-POW! v. Town of Greece, 2012 U.S. Dist. LEXIS 36099 (W.D.N.Y.

Mar. 9, 2012), the case upon which Plaintiff relies in his request for sanctions, the court sanctioned an attorney under 28 U.S.C.S. § 1927 due to his repeated failure to file the proper and necessary memoranda of law. CA-POW!, 2012 U.S. Dist. LEXIS 36099 at *10. Here, Plaintiff does not seek sanctions under 28 U.S.C.S. § 1927 (nor should he, as that statute is "construed narrowly and with great caution, so as not to 'stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.'" Mone v. Comm'r., 774 F.2d 570, 574 (2d. Cir. 1985)) and unlike CA-POW!, Counsel has not "unreasonably and vexatiously multiplied the proceedings." CA-POW!, 2012 U.S. Dist. LEXIS 36099 at *12.

Lastly, Plaintiff's hyperbole concerning Counsel's willingness to confer under Local Rule 37.3(a) would have this Court believe Counsel is purposefully delaying the process and frustrating Plaintiff. That is simply not the case. Counsel does request to have objections and relevant case law in writing, as our case load is voluminous and it can be difficult to knowledgeably discuss the intricacies of discovery objections without knowing the details of Plaintiff's requests. Rule 37.3(a) does not forbid this practice, and while Plaintiff finds it a "colossal waste of time," in our experience it tends to streamline the pre-trial litigation process.

IV. CONCLUSION

For all the foregoing reasons, and any reasons Defendant may raise at oral arguments on this matter, Plaintiff's Motion to Compel should be denied in its entirety, and Plaintiff should be awarded costs and legal fees incurred for having to oppose the instant motion.

Dated: Bohemia, New York
April 23, 2012

ZABELL & ASSOCIATES, P.C.
Attorneys *for Respondents*

By: _____

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) **ss:**
COUNTY OF SUFFOLK)

MARK WALSH, being duly sworn, deposes and says:

1. That I am over eighteen years of age and am not a party to this action.

2. That on the 23rd day of April 2012, I served a copy of Defendant's Opposition to Plaintiff's Motion to Compel, Declaration of Saul D. Zabell, annexed hereto, upon:

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

3. *via* Priority Mail and Electronic Case Filing at the address listed above, same being the address designated for that purpose, by depositing a true copy of the same enclosed in a properly addressed wrapper in a depository under the exclusive care and custody of the United States Postal Service.

MARK WALSH

Sworn to before me
this 23rd day of April, 2012.

NOTARY PUBLIC

GARTH A. MOLANDER
Notary Public - State of New York
No. 02MO5043209
Qualified in Suffolk County
My Commission Expires May 8, 2015