

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-3592 Caption [use short title]

Motion for: adjournment of oral argument sine die

Set forth below precise, complete statement of relief sought: Request to adjourn oral argument on grounds that this case is controlled by this Court's en banc decision in Zarda v. Altitude Express, Inc. 855 F.3d 72 (2d Cir. 2017) (en banc), petition for cert. filed, No. 17-1623 (U.S. May 29, 2018), and should be held until the Supreme Court denies the petition for certiorari or resolves the case on the merits.

Cargian v. Breitling USA, Inc.

MOVING PARTY: Frederick M. Cargian OPPOSING PARTY: Breitling USA, Inc.

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Janice Goodman OPPOSING ATTORNEY: Glenn S. Grindlinger [name of attorney, with firm, address, phone number and e-mail]

Law Offices of Janice Goodman Fox Rothschild LLP 61 Jane St., New York, NY 10014 100 Park Ave., New York, NY 10017 (212) 869-1940; jg@janicegoodmanlaw.com (212) 878-7928; ggrindlinger@foxrothschild.com

Court- Judge/ Agency appealed from: U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: August 20, 2018

Signature of Moving Attorney: [Handwritten Signature]

Date: 7/31/18

Service by: CM/ECF Other [Attach proof of service]

x

FREDERICK M. CARGIAN,
Plaintiff-Appellant,

–against–

16-3592

BREITLING USA, INC.,
Defendant-Appellee.

x

**AFFIRMATION OF JANICE GOODMAN IN SUPPORT OF
PLAINTIFF-APPELLANT FREDERICK M. CARGIAN’S
MOTION TO ADJOURN ORAL ARGUMENT SINE DIE**

Janice Goodman, an attorney in good standing before the Bar of the State of New York and a member in good standing of the bar of this Court, affirms under penalty of perjury:

1. I represent Plaintiff-Appellant, Frederick M. Cargian (“Cargian”), in this appeal and submit this affirmation in support of his motion to adjourn oral argument, presently scheduled for August 20, 2018, on the ground that this case is controlled by this Court’s decision in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), in which a petition for certiorari is now pending before the U.S. Supreme Court.

2. After 23 years of employment with Breitling, Cargian, a gay man, was terminated from his position as a sales representative. He claims that the adverse action was because of his sexual orientation.

3. On February 17, 2015, Cargian filed an action pursuant to Title VII of the Civil Rights

4. On February 29, 2016, Defendant-Appellee moved for summary judgment.

5. On September 29, 2016, the U.S. District Court for the Southern District of New York dismissed the sex discrimination claim based entirely on this Court's decisions in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), holding that Title VII's proscription against sex discrimination does not extend to discrimination based on sexual orientation, and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), holding that sex stereotyping cannot be used to "bootstrap" protection against sexual orientation discrimination.

6. On October 21, 2016, Cargian filed this appeal, the single issue to be addressed being whether Title VII's proscription against discrimination "because of sex" includes discrimination because of sexual orientation. Both parties fully briefed the appeal.

7. On April 19, 2017, Cargian filed a petition to have his appeal heard *en banc* on the ground that the single issue to be addressed is whether this Court should reconsider and reverse its prior decisions in *Simonton* and *Dawson* and hold that Title VII's proscription against sex discrimination encompasses discrimination because of sexual orientation.

8. While Cargian's petition for initial hearing *en banc* was pending, this Court scheduled rehearing *en banc* in *Zarda* to address the exact same issue, namely, whether sexual orientation discrimination is a form of sex discrimination barred by Title VII.

¹ Cargian also raised a claim of age discrimination, which was dismissed on summary judgment. He has not appealed that portion of the judgment.

“because of sex” does encompass discrimination because of sexual orientation, overruling *Simonton* and *Dawson*. 883 F.3d at 112.

10. On May 29, 2018, Altitude Express filed a petition for certiorari with the U.S. Supreme Court on the question “[w]hether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation. No. 17-1623 (U.S. May 29, 2018). The response to the petition is due August 16, 2018.

11. Because this case is controlled by that question, judicial economy would be served by the adjournment of these proceedings until the Supreme Court denies the petition for certiorari or, if certiorari is granted, resolves the case on the merits.

12. I have consulted with counsel for Defendant-Appellee, who concurs in this application.

Dated: New York, New York
July³¹, 2018



JANICE GOODMAN