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VIA ECF

Hon. George B. Daniels
United States District Judge
United States District Court
for Southern District of New York
500 Pearl St.
New York, NY 10007

**Re: Cargian v. Breitling USA, Inc.
Civil Action No.: 15-cv-01084**

Your Honor:

We represent Defendant Breitling USA, Inc. in the above-referenced matter.

As Your Honor is surely aware, on June 15, 2020, the United States Supreme Court, in *Bostock v. Clayton County, Georgia*, No. 17-1618 (2020) and its companion case *Altitude Express, Inc. v. Zarda*, No. 17-1623 (2020) (collectively, “*Bostock*”) held that sexual orientation discrimination is a form of sex discrimination and thus is prohibited by Title VII of the Civil Rights Act of 1964. This decision upheld the 2019 opinion by the Second Circuit in *Zarda v. Altitude Express, Inc.*, which reached the same conclusion. While *Bostock* has a material impact generally on Title VII litigation, it does not significantly alter the analysis set forth in Defendant’s Motion for Summary Judgment nor in the prior decision that Your Honor issued in granting said Motion. Accordingly, Defendant renews its Motion for Summary Judgment for the reasons set forth in its initial papers and as explained below.

Background

Originally, Plaintiff alleged that Defendant discriminated against him on the basis of sex, sexual orientation, and age in violation of Title VII, the Age Discrimination in Employment Act, the New York State Human Rights Law, and the New York City Human Rights Law. On February 29, 2016, Defendant moved for summary judgement on all claims, which Plaintiff opposed. On September 29, 2016, this Court issued a decision and order granting Defendant’s motion with respect to Plaintiff’s federal claims and declining to exercise supplemental jurisdiction over

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Plaintiff's State and City claims. Plaintiff appealed that decision with respect to his sex and sexual orientation discrimination claims, but not with respect to his age discrimination claims. *See Cargian v. Breitling USA, Inc.*, Second Circuit Case No. 16-3592, Docket No. 37, *Plaintiff's Appellate Brief* at 4 fn. 1 (2d Cir. Jan. 26, 2017) ("Plaintiff is not appealing dismissal of his ADEA claim."). As such, Plaintiff's age discrimination claims have been adjudicated in Defendant's favor. *See United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002) ("'[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone,' it is considered waived and the law of the case doctrine bars the district court on remand and an appellate court in a subsequent appeal from reopening such issues[.]") (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)).

This Court previously held that Plaintiff's sex discrimination claim under Title VII failed for two reasons. See generally, Docket No. 63. First, under prevailing precedent at the time, Your Honor held that Title VII did not recognize sexual orientation discrimination as a viable claim. *See id.* at 6. Second, Your Honor held that "Defendant has established that there is no admissible evidence sufficient to allow a trier of fact to find that Defendant discriminated against Plaintiff." *Id.* at 1. As Your Honor knows, following its decision in *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018), the Second Circuit reversed this Court's decision that Title VII did not recognize a claim for sexual orientation discrimination. *See Cargian v. Breitling USA, Inc.*, 737 Fed.Appx. 41, 42 (2d Cir. 2018)(Summary Order). However, the Second Circuit did not reverse Your Honor's decision that Plaintiff failed to establish that he was discriminated against by Defendant on the basis of his sex. Instead, the Second Circuit merely remanded the case back to Your Honor.

Defendant's Renewed Motion for Summary Judgment

Defendant renews its Motion for Summary Judgment on two grounds. First, in this Court's September 29, 2016 decision, Your Honor held:

Moreover, *Plaintiff has failed to show that he suffered an adverse employment action under circumstances giving rise to an inference of intentional discrimination based upon Plaintiffs membership in a protected class.* In support of his argument that he was treated as one of "the girls," Plaintiff alleges (1) frequent conversations about sports at the office from which he was excluded, (2) a business trip when he was assigned to share a hotel room with a female colleague, and (3) Breitling's use of images in its marketing campaigns that Plaintiff alleges are degrading to women and are "surely not pin ups that would entice gay men."

Frequent conversations about sports at an office do not constitute discrimination based upon gender stereotypes. Moreover, Plaintiff

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had voluntarily shared a hotel room with that same female colleague on multiple occasions on vacation, and Plaintiff had emailed a Breitling employee saying that he and the female colleague had shared rooms multiple times before [Thierry] Prissert started at Breitling. Finally, Plaintiff has failed to show how Breitling's marketing materials are in any way relevant to the employment actions taken against him.

Docket No. 63 at p. 8 (internal citations omitted)(emphasis added). Thus, this Court has already determined that Plaintiff's discrimination claims fail as a matter of law. This determination was not overturned by the Second Circuit and thus remains the law of the case. *See Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (“[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise.”). Accordingly, Defendant's Motion for Summary Judgment should be granted.

Second, even if the Court determines that the well-established law of the case rule does not apply, Plaintiff's sexual orientation claim has already been fully-briefed by the parties. In its moving papers, Defendant explained why Plaintiff's sexual orientation discrimination claim fails under the New York State Human Rights Law and New York City Human Rights Law. *See* Docket No. 41 at p. 13-17. As the standard under the New York State Human Rights Law and Title VII are identical, *see Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 311 (2004) (noting that courts should use the same framework for analyzing claims under the New York State Human Rights Law as they do for Title VII), there is no need for the parties to re-brief this issue and instead the Court can render a decision based on the material previously submitted. And, as that material conclusively shows, Defendant's Motion for Summary Judgment should be granted.

If the Court has any questions or concerns, we are available at the Court's convenience.

Respectfully yours,

FOX ROTHSCHILD LLP

/s/ Glenn S. Grindlinger

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cc: All counsel of record via ECF