

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

----- X

**MELISSA ZARDA and WILLIAM MOORE,**  
**Administrators, Estate of DONALD ZARDA, :**

**Plaintiffs, :**

**- v. - :** 10-cv-04334 (JFB)

**ALTITUDE EXPRESS and RAYMOND**  
**MAYNARD, :**

**Defendants. :**

----- X

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that for the reasons set forth in the annexed declaration,  
plaintiffs move for an order from this Court:

1. Re-calendaring this case for conference and other matters;
2. Such other relief as may be just and proper

Dated: New York, New York  
September 14, 2020

*Greg S. Antollino*  
\_\_\_\_\_  
GREGORY ANTOLLINO, ESQ.  
ATTORNEY FOR PLAINTIFF

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

----- X  
**MELISSA ZARDA and WILLIAM MOORE,  
Administrators, Estate of DONALD ZARDA,**

**Plaintiffs,**

- v. -

10-cv-04334 (JFB)

**ALTITUDE EXPRESS and RAYMOND  
MAYNARD,**

**Defendants.**

----- X

**DECLARATION**

1. I represent the Estate of Donald Zarda and move to re-calendar this matter after the affirmance of the en banc decision, reported at 883 F.3d 800 (2d. Cir 2018), *aff'd sub nom Bostock v. Clayton Cty.*, 140 S. Ct. 1741 (2020). I conferred (by email) with my adversary, Mr. Zabell, but he did not respond as to whether he consented to the relief requested.

2. It's been a difficult summer, but it is time to begin to bring this case to a conclusion. Dr. Fauci says the country will return to some sense of normality by 2022, and I see this as a light at the end of the tunnel. The Court is unlikely to schedule a trial anytime soon, but there is so much we can do before then.

3. I wrongly assumed that the Circuit would have to remand the matter after the Supreme Court entered its final Judgement of August 6, 2020, with costs to The Estate of Zarda. (*See* Exhibit A.) This weekend, I put the pieces together with an examination of Rule 41. I concluded that since the case had already been remanded when the Mandate issued. (Exhibit B.) Costs were later added. (Exhibit C.)

4. As I learned, FRAP 41 allows the District Court to do what it appears appropriate that is not inconsistent with the Mandate. While Mr. Zabell could have moved to stay the Mandate at the Circuit level, he didn't need to. At the last conference on May 21, 2018 (transcript, Exhibit D), the Court held that since the case would go up – at least for a cert. petition – there would be no proceedings until we found out what came down.

5. The reason I had moved for the last conference is reflected in the letter-motion correspondence attached collectively as Exhibit E and incorporated herein.

6. I wrongly assumed the Circuit would remand the case again, but Rule 41(d) says it only reissues the Mandate if there has been a stay of the Mandate and if certiorari has been *denied*. Neither eventuality took place here since the District Court ruled it would effectively stay the action pending Supreme Court review.

7. Thus, as plaintiffs' counsel, I make this motion. Jury trials are not happening anytime soon, but there are several things to address on the agenda in the many months until a jury trial needs to happen

a. The issue(s) I presented in the final letter motion, collectively attached as Exhibit E.

b. Defendant must pay the Supreme Court costs to the Stanford University Law Clinic. I have asked Mr. Zabell to send a check to me (made out to Stanford) at least twice. Even though The Estate was the titular "Respondent," that was only because, with the combination of the *Bostock*, the Supreme Court made clear there had to be a realignment of the parties for argument. We were only respondents as a matter of fiction, which took a few emails and several weeks for the Judgment Clerk to sort out. Nevertheless, the Clinic fronted the costs of the Joint Appendix because it has a volume discount at the printer

Wilson Epps. Instead of haggling about the matter, Stanford fronted the costs, and it deserves to have them reimbursed forthwith. It's not a lot of money, but Mr. Zabell essentially threatened me with a cert. petition unless the Estate settled for peanuts. Counsel didn't get a demand in the range he wanted, and he did what he thought was appropriate. Now he owes Stanford Law School the costs awarded. The Court should address the issues of costs with resolve. These costs are an enforceable judgment from the Supreme Court, after all.

c. The plaintiffs also won just over \$3,000 in costs after the en banc stage. (We didn't even ask for costs for the panel appeal, though we might have since we needed to jump through that hoop to get to the en banc.) These costs, too, are a money judgment from the Circuit and cannot be ignored.

d. After the issues of successor liability are determined (or even before), the parties might, instead of having the case go to trial again, engage in mediation or some other form of ADR.

e. If that doesn't work, *Bostock* changes the legal landscape, and Title VII rulings are presumably retroactive. Some inflammatory evidence – such as Don Zarda's revealing to a customer in 2001 that he was gay was a reason to terminate him for doing it again in 2010 – is, as I see it, discrimination as a matter of law.

8. Indeed, there might well be a summary judgment motion for liability to plaintiffs. But they deserve at a minimum, given the issue of successor liability, discovery into that question. We fought the grant of certiorari on this issue and lost the point. Defendant cannot now, after obtaining the extraordinary relief of a grant of certiorari, maintain that there is no defendant to collect from. Raymond Maynard undeniably entered into a contract of sale for

the goodwill of the moniker Skydive Long Island, and the agreement of purchase undeniably sets forth who is responsible for the outcome of the lawsuit.

9. Moreover, if he transferred his assets to a third party, there is the potential issue of fraudulent transfer under New York law.

10. The plaintiffs deserve to have these questions answered. The Supreme Court ruled we have a right to a trial under Title VII – where the motivating factor can be the sine qua non where liability hinges. Intervening events such as the sale of Skydive Long Island do not change that, and plaintiffs have the right to discover facts in this area of law.

11. For these reasons, plaintiffs ask for a conference to address these matters.

Dated New York, New York  
September 14, 2020

*Greg S. Antollino*

---

GREGORY ANTOLLINO, ESQ.  
ATTORNEY FOR PLAINTIFF

**AMENDED**  
**8/6/2020**

**Supreme Court of the United States**

**No. 17-1623**

**ALTITUDE EXPRESS, INC., ET AL.,**

Petitioners

v.

**MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT  
EXECUTORS OF THE ESTATE OF DONALD ZARDA**

**ON WRIT OF CERTIORARI** to the United States Court of Appeals for the  
Second Circuit.

**THIS CAUSE** came on to be heard on the transcript of the record from the  
above court and was argued by counsel.

**ON CONSIDERATION WHEREOF**, it is ordered and adjudged by this Court  
that the judgment of the above court is affirmed with costs.

**IT IS FURTHER ORDERED** that the respondents Melissa Zarda and William  
Allen Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda recover from  
Altitude Express, Inc., et al., Two Thousand Five Hundred and Thirty Dollars and Fifty Cents  
(\$2,530.50) for costs herein expended.

June 15, 2020

**Printing of record: \$2,530.50**



# MANDATE

## EXHIBIT B

### UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26<sup>th</sup> day of February, two thousand and eighteen.

Before: Robert A. Katzmann,  
*Chief Judge,*  
Dennis Jacobs,  
José A. Cabranes,  
Rosemary S. Pooler,  
Robert D. Sack,  
Reena Raggi,  
Peter W. Hall,  
Debra Ann Livingston,  
Gerard E. Lynch,  
Denny Chin,  
Raymond J. Lohier, Jr.,  
Susan L. Carney,  
Christopher F. Droney,  
*Circuit Judges.*

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore, Jr., co-independent executor of the estate of Donald Zarda,

Plaintiffs - Appellants,

v.

Altitude Express, Inc, doing business as Skydive Long Island,  
Ray Maynard,

Defendants - Appellees.

**JUDGMENT**  
Docket No. 15-3775

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that, after *en banc* rehearing, the judgment of the district court on Zarda's Title VII claim is VACATED and the case is

REMANDED for further proceedings consistent with this Court's opinion. The judgment of the district court is AFFIRMED in all other respects.

For the Court:

Catherine O'Hagan Wolfe,  
Clerk of Court

  
Catherine O'Hagan Wolfe

---

\*Judge Sack and Judge Lynch, who are senior judges, are eligible to participate in this *en banc* pursuant to 28 U.S.C. § 46(c)(1) and 28 U.S.C. § 294(c).

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

  
Catherine O'Hagan Wolfe

CVFG@GR A

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14<sup>th</sup> day of May, two thousand eighteen.

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore, Jr, co-independent executor of the estate of Donald Zarda,

**STATEMENT OF COSTS**

Docket No. 15-3775

*Plaintiffs - Appellants,*

v.

Altitude Express, Inc, doing business as Skydive Long Island, Ray Maynard,

*Defendants - Appellees.*

IT IS HEREBY ORDERED that costs are taxed in favor of the Appellants in the amount of \$3,693.80.

For the Court:

Catherine O'Hagan Wolfe,  
Clerk of Court


A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


EXHIBIT E

App. 158

**APPENDIX E**

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

**Civil No. 10-CV-04334-JFB-GRB**

**[Dated March 28, 2014]**

_____	)
DONALD ZARDA,	)
	)
Vs.	)
	)
ALTITUDE EXPRESS,	)
INC., ET AL.,	)
d/b/a Skydive Long Island	)
	)
Ray Maynard	)
_____	)

TRANSCRIPT OF TELEPHONIC HEARING  
BEFORE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

824 Federal Plaza  
Central Islip, NY

APPEARANCES:

For The Plaintiff:

GREGORY ANTOLLINO, ESQ.  
276 Seventh Avenue.  
Suite 705  
New York, NY 10001

1a

**APPENDIX A**

Gregory Antollino  
Attorney at Law  
greg@antollino.com  
275 Seventh Avenue Suite 705  
New York New York 10001  
Tel (212) 334-7397  
Fax (212) 334-7399

April 11, 2018

Judge Joseph F. Bianco U.S. District Judge  
100 Federal Plaza  
Central Islip, NY 11722

Dear Judge Bianco,

Hello again. I write with great humility. Winning the en banc is probably the greatest gift ever conferred on me in my career.

The week after I filed a request for a bill of reproduction costs with the Circuit, it was met with strong opposition from the defense in which Mr. Zabell also noted an intention to file a petition for certiorari.

Mr. Zabell and Skydive Long Island, Inc.<sup>1</sup> have both publicly supported the legal conclusion of the en banc court – SDLI has on its website and Mr. Zabell has said to the press. We know, however, that in the prac-

---

<sup>1</sup> SDLI, Inc. is the successor in interest to Altitude Express, which changed its location to Shirley New York before this case went to trial, then after the appeal was filed. SDLI distanced itself from Altitude Express on its website after the ruling (took the pages down), but some screenshots I took are attached. Altitude Express moved to Shirley, NY before trial – 2014 or 2015. Altitude Express dis-incorporated, and Skydive Long Island registered as a corporation in 2016.

2a

tice of Supreme Court litigation, there are lawyers who are dying to appear before the high court who are willing to take a case up for a losing party at no cost. I am speculating, but my suspicion is that where we are now.

The day after the costs petition (opposition and reply) was fully submitted, Mr. Zabell solicited from me a demand, suggesting there was little money to go around. I asked what SDLI's liability for this debt could be – and have asked repeatedly – but Mr. Zabell has remained mum. I nevertheless made the demand and was told that (after 7+ years of litigation) it was out of range. I don't know if the defense was willing to pay anything, but plaintiff deserves to know who is paying the bill. Is it just Ray Maynard or – as I suspect – did SDLI assume liability for Altitude Express' liabilities. We deserve to know this information just as much as we deserve to know if there is were an insurance policy.

The mandate has issued and there is no stay. We are not asking for a trial date. What we ask for is simply the unredacted sales document that either disavows or assumes liability on Altitude Express. We will keep it confidential. You might also want to refer this to Magistrate Shields.

If our demand was too big, then perhaps we were wrongly assuming successor liability. This is an important question; I have taken cases to trial where there is no money to be taken and don't intend to do so here. The most important question in discussing settlement – and this would be a question that we should explore before certiorari is granted or denied – is the question of successor liability. There is certainly a document that addresses this question in the sale of Altitude Express, Inc. to Skydive Long Island, Inc.

3a

This document is not publicly available. If Mr. Zabell believes we are asking for too much, we need the sales document to know in what area settlement should be explored. Mr. Zabell is trying to hide behind Mr. Maynard as the sole defendant, but he refuses to tender the sales document.

I ask that it be tendered now. I need to advise my clients what money might be obtained at a new trial if cert is denied (or we win on the merits). At a new trial, compensation would include seven years of attorney's fees, punitive damages, a lower standard of proof (a single motivating factor under Title VII) plus the new rule of law announced in *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267 (2d Cir. 2016).

The defense has announced an intention to petition for certiorari, but it also solicited a demand. We will not be pushing this case to trial until the certiorari petition is filed, but there is no reason there cannot be limited discovery on this minor issue. You don't want to have this case on your docket for another seven years, and there is no reason not to use the time as we wait to explore this discrete issue.

Maybe a phone conference should be scheduled, and I am free until Friday except for Friday morning. Monday I must report for jury duty, but can confer during the lunch hour, 1-2:15.

Thank you for your consideration.

Sincerely,

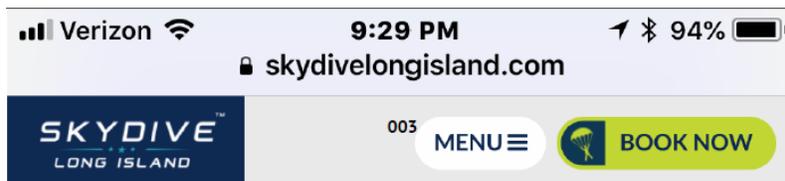
/s/ Greg S. Antoffino

Gregory Antollino

Cc: Saul Zabell, Stephen Bergstein

4a

## APPENDIX B



**Long Island NY** – On February 26th, 2018, a federal appeals court in New York has ruled that employers cannot discriminate against workers based on their sexual orientation. **We fully support this ruling.**

This ruling stems from the alleged 2010 dismissal of Donald Zarda from Altitude Express dba Skydive Long Island. The case of Mr. Zarda has been cited following the Department of Justice’s filing of court papers stating that a major federal civil rights law does not protect employees from discrimination based on sexual orientation.

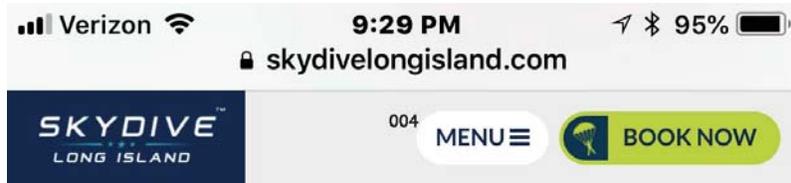
As a result of this report, our business has received several messages and phone calls expressing anger over the dismissal of Mr. Zarda. We feel it’s important to add clarity to this story. ***We have no affiliation to this case or the dismissal of Mr. Zarda.***

In 2016, the naming rights of Skydive Long Island was purchased from Altitude Express and has been under new ownership at an entirely different location (Altitude Express was located in Calverton, NY). We are located in Shirley, NY.

Skydive Long Island and it’s ownership wish to be clear in our expression of support for gay rights and the LGBTQ community.

Skydive Long Island’s owner, Brian Erler states, “We hire our staff based on qualifications related to aviation, skydiving, and hospitality. We do not discriminate based on sexual orientation, race, gender or religious affiliation. Personally, I \* \* \*

5a



to convince your mom skydiving is safe, what the skydiving age is, and how to find a safe dropzone.



### SKYDIVE LONG ISLAND SUPPORTS GAY RIGHTS AND THE LGBTQ COMMUNITY

“We hire our staff based on qualifications related to skydiving and hospitality. We do not discriminate based on sexual orientation, race, gender or religious affiliation. Personally, I have family members who are gay and it has always been my position to be supportive of gay rights and the LGBTQ community. We are all the same and we do not tolerate discrimination.”

-Owner, Brian Erler



6a

**APPENDIX C**

**EMPLOYMENT COUNSELING, LITIGATION,  
LABOR & BENEFITS LAW**

Counseling and Advising Clients  
Exclusively on Laws of the Workplace

Saul D. Zabell  
Email: SZabell@laborlawsny.com

Zabell & Associates, P.C.  
1 Corporate Drive  
Suite 103  
Bohemia, New York 11716  
Tel. 631-589-7242  
Fax. 631-563-7475  
www.Laborlawsny.com

April 12, 2018

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco  
United States District Court Judge  
United States District Court  
Eastern District of New York  
00 Federal Plaza  
Central Islip, NY 11722

Re: Donald Zarda v. Altitude Express, Inc. and  
Raymond Maynard

Case No.: 10-CV-04334 (JFB) (GRB)

Your Honor:

We are counsel for Defendants in the above referenced matter, though note that there is no active matter currently pending before Raymond Maynard. We write in response to Mr. Antolino's April 11, 2018,

7a

missive seeking discovery to assist counsel in determining if a party and/or third party can satisfy a potential judgement. Initially, we must point out that it is factually inaccurate and no attempt has been made to meet and confer regarding the relief requested. Beyond that and putting all histrionics aside, Mr. Antollino's letter seeks relief for which he has no legal basis to seek. Discovery has long been completed. Pleas for additional information to assist Plaintiff in determining the feasibility in litigation or references to settlement discussion should not be a basis for reopening discovery. In fact, Mr. Antollino's references to settlement conversations in his application are inappropriate.

As a final basis for denying Mr. Antollino's the entire application is premature as the time for Altitude Express to exhaust an appeal has yet to run.

We thank the Court for its consideration of this application.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

/s/ Saul D. Zabell

Saul D. Zabell

cc: Gregory Antollino, Esq. (*via* Electronic Case Filing) Client

8a

**APPENDIX D**

Gregory Antollino  
Attorney at Law  
greg@antollino.com  
275 Seventh Avenue Suite 705  
New York New York 10001  
Tel (212) 334-7397  
Fax (212) 334-7399

April 12, 2018

Judge Joseph F. Bianco  
U.S. District Judge  
100 Federal Plaza  
Central Islip, NY 11722

RE; Zarda v. Altitude Express, et al.

Dear Judge Bianco,

Mr. Zabell indicates there is no action pending against Mr. Maynard. This may or may not be true; there are limitations on individual liability under Title VII, but Maynard owned and transferred his major asset that is still a defendant. Further, we should use this hiatus for limited discovery. Mr. Zabell came to me to ask for a demand. The case could settle before certiorari is filed, as he apparently anticipated. The mandate is not stayed, nor has the defense moved for one (which would have to be made to the Circuit Justice). Moreover, if there is a certiorari petition, and the case returns to this court, we would certainly be entitled to discover the proper defendant, even if discovery is over. The transfer of Altitude Express, Inc. to Skydive Long Island, Inc. occurred after discovery was closed, thus there are new and extraordinary circumstances for plaintiff to seek discovery on this limited question, which is based on a multi-part test.

9a

*EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974), cited by *Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 404 (S.D.N.Y. 2012) (Oetken, J.).

Plaintiff is not asking for a trial date, just to know who is the proper defendant. We are entitled to know this, especially in a civil rights case. *See generally MacMillan*. We should not be held in the dark just because the date for a petition for certiorari has not expired. Proportionally, we are not asking for much, and with no stay, the equities are on plaintiff's side.

Sincerely,

/s/ Greg S. Antollino

Gregory Antollino

Cc: Saul Zabell, Stephen Bergstein

App. 159

For The Defendants:  
Altitude Express and  
Ray Maynard

ZABELL & ASSOCIATES  
BY: SAUL ZABELL, ESQ.  
One Corporate Drive  
Suite 103  
Bohemia, NY 11716

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service.

**TERRY GRIBBEN'S TRANSCRIPTION SERVICE**  
**27 Beach Road, Unit 4**  
**Monmouth Beach, NJ 07750**  
**(732) 263-0044 Fax No. 732-263-0075**  
**800 603-6212**  
**[www.tgribbentranscription.com](http://www.tgribbentranscription.com)**

[p.2]

Decision

THE CLERK: Calling Case 10-CV-4334, Zarda versus Altitude Express. Please state your appearance for the record.

MR. ANTOLLINO: Gregory Antollino for plaintiff, good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Antollino.

MR. ZABELL: And Saul Zabell for the defendants. Good afternoon, Judge.

THE COURT: Good afternoon. As you know, I scheduled this conference because I wanted to rule on the pending motions. I decided, given that they have

App. 160

been now pending for some time to place an oral ruling on the record. It's possible I may also do a written opinion on this, I haven't decided whether to or not yet, but I didn't want the case to be delayed further. So I'm going to place the ruling on the record. I just ask you to bear with me, it should take about 10 or 15 minutes, and then we'll discuss the next steps going forward.

So first just let me for the record state that the standard I'm applying for summary judgment is set forth in an opinion that I wrote several years ago, Zhao versus State University of New York, 472 F Sup 2nd. 289 Eastern District of New York (2007). I adopt that standard in its entirety, I won't repeat it here. In short with respect to summary judgment obviously the facts are accepted as true and all reasonable inferences are drawn in favor of the nonmoving party.

[p.3]

Here, we have cross motions for summary judgment so when considering each motion I'm applying that standard for the benefit of the nonmoving party. I also adopt as contained in that opinion the framework for analyzing a gender discrimination claim, which is similar both in the Federal law and State law in terms of the McDonnell Douglas burden-shifting analysis which I am applying here. And that case also dealt with gender stereotyping. It has some case law with respect to that as well, which is obviously part of the subject of this suit.

So I adopt that standard in its entirety and I move now to each of the claims. First, well, actually I should say the threshold matter. There was a motion to strike a portion of the reply memorandum of plaintiff's partial

App. 161

summary judgment motion because it raised the issue of sex discrimination stereotyping, which was not the subject of the plaintiff's motion.

I'm denying the motion to strike, there was no prejudice even by raising that. And in fact it was pretty much the same arguments that had been made previously. So the motion to strike it is denied. I have considered it, but it hasn't affected the ruling, again because it contained similar arguments.

The Court will first address the gender discrimination claim under Federal law for gender stereotyping.

[p.4]

Having reviewed the evidence under the applicable standard I'm granting the motion for summary judgment on that claim because I find that the plaintiff has failed to meet even the prima facie burden, as minimal as it is, that the adverse action gave rise to an inference of discrimination based up gender stereotyping.

But evening assuming arguendo the prima facie burden was met, the defendants here articulated a nondiscriminatory reason, namely the customer complaint about how the plaintiff was touching her and I believe there was insufficient evidence that the articulated reason was a pretext for gender discrimination based upon stereotyping. Although for reasons I'll state in a moment when I get to the New York State claim, I believe there is sufficient basis to have it go forward with respect to a sexual orientation discrimination.

App. 162

But sticking with the gender discrimination claim, there were a number of theories that were, I guess three theories that were asserted by plaintiff with respect to gender discrimination based on stereotyping. I note that to some extent I believe some of these theories are inconsistent with each other and to some extent inconsistent with a sexual orientation claim, and to some extent inconsistent with Mr. Zardo's deposition at page 215 where he indicated it was, Ray fired me for being gay.

But in any event I have analyzed them independently

[p.5]

of each other and I've even looked at them in conjunction to the extent that that can be done. I'm just going to through them.

The first theory I guess was that the plaintiff was fired because of stereotyping that a male must be guilty of sexual harassment if it is alleged. There's simply no evidence to believe that that stereotype was motivating Mr. Maynard in this situation. There's no, for example there's no evidence of comments, there's no female comparators who were treated differently. There is literally nothing to support that theory.

The only thing that the plaintiff points to in the papers, and this was discussed at oral argument, is what plaintiff believes was a sloppy investigation in terms of the interview of the plaintiff not allowing him a chance to see the video and other issues with how the investigation was conducted.

App. 163

However, the law is clear that disputes about the thoroughness of an investigation by itself cannot be enough to create an inference of discriminatory intent. This case is no exception to that. That's actually set forth in a case that the plaintiff cites in support of its position, Sassaman v. Gamache, 566 F.3rd, 307. It's a 2nd Circuit 2009 case where at page 315 the 2nd Circuit states, "We emphasize that we do not hold that an arguably insufficient investigation of a complaint

[p.6]

of sexual harassment leading to an adverse employment action against the accused is, standing alone, sufficient to support an inference of discriminatory intent. Rather, we hold only that where plaintiff can point to evidence closely tied to the adverse employment action that could reasonably interpret it as indicating that discrimination drove the decision, and arguably insufficient investigation may support an inference of discriminatory intent."

So here, where there is nothing other as it relates to this claim, no other evidence other than a dispute about the thoroughness of the investigation, I conclude that that is not sufficient to give rise to an inference of discrimination, and certainly, certainly not sufficient to overcome the articulated nondiscriminatory reason for the termination.

Sassaman obviously is clearly distinguishable from this case because it wasn't just a dispute about the adequacy of the investigation, there was a direct comment by the supervisor that you probably did what she said you did because you're male.

App. 164

So obviously a completely different situation where in addition to the investigation there was direct proof of discriminatory intent based upon that comment. So I don't believe under that theory there's any possibility that this could survive summary judgment. And secondly, to the extent the sloppy investigation I think was a separate theory, for the

[p.7]

reasons I just stated I don't believe that the sloppy investigation of itself can be sufficient to allow this claim to, -- I should say the disputes about the sloppiness of the investigation because the defendants have a different version with respect to the investigation itself.

Moving to the other theory which is based on the, I guess the plaintiff did not conform to male stereotyping, -- to not conform to male stereotypes in terms of being teased about wearing certain things, a pink hat and other similar types of issues, the defendants noted as a threshold matter that Zarda stated in his deposition that he was masculine in appearance. But putting that issue aside, I don't think that's, the key issue as it relates to this.

The key issue is that any teasing or comments with respect to those types of items, there is no relationship, that no rational Jury could draw any relationship to those, to the termination decision. In terms of proximity to the adverse action, there was no proximity. It's clear what the proximity and the adverse action with this whole issue with the customer, which included the disclosure of the customer's sexual orientation, it had nothing to do with conforming to

App. 165

male stereotypes in terms of what you may wear or how you may behave, -- zero to do with that.

As Mr. Zabell noted in his papers also, Mr. Zardo was rehired after these alleged incidents regarding what he was

[p.8]

wearing. There's simply no connection between those, no possible connection that can be drawn by a rational Jury between those events and the termination decision here.

So for all of those reasons I'm granting the motion as it relates to the gender discrimination claim.

With respect to the State claims, first as a jurisdictional matter the complaint does allege diversity of jurisdiction. As was discussed at the oral argument, there was no dollar amount in the amended complaint. Mr. Antollino did put in a letter articulating why he believes the \$75,000 threshold had been surpassed. And I conclude based upon that letter that there is a good faith basis for him to allege that based upon the categories of damages that he outlined. And therefore, I believe that the jurisdictional requirement for diversity of citizenship is met.

I will ask him at the conclusion of this to amend the complaint as a technical matter to put in the allegation of, in excess of \$75,000. So I will move to the State law claims, the sexual orientation claim, the defendant's motion for summary judgment on that is denied for the following reasons.

App. 166

The plaintiff's evidence, unlike the gender discrimination claim, in addition to disputing the adequacy of the investigation itself, the plaintiff has several other pieces of evidence that they point to with respect to that that I believe are more than sufficient to create a genuine issue of

[p.9]

fact that must be resolved at trial, including primarily, I guess most significantly the timing of the disclosure of sexual orientation to the customer and the termination was obviously in very close proximity and was the subject of the interactions between Mr. Zardo and Mr. Maynard.

So I think that is another, -- is one piece of evidence that certainly can be relied on with respect to the sexual orientation claim. There are some other pieces of information or evidence that if credited and drawn most favorably to the plaintiff could also be utilized to support that claim. There's this issue regarding another employee, I think it was Weinstock if my memory is correct, who disclosed in some manner being heterosexual during a jump and there was no adverse action taken with respect to that.

Obviously I know the defendants argue the circumstances were different than alleged to an allegation of improper touching. But in any event, again this has to be construed most favorably to the plaintiff. With respect to the defendant's motion it is something that they could as part of their other evidence utilize for the purpose of creating a genuine issue of fact.

App. 167

There is some evidence that, in the unemployment form that the reason for the termination was not completely consistent with the reasons given at other times. And I believe that all of these things, while each of these things in

[p.10]

isolation would not be sufficient, I believe together they are certainly sufficient to create an issue of fact or whether the termination was because of the articulated nondiscriminatory reason given by the defendants of a customer complaint about discomfort and being touched by the plaintiff during the jump or whether he was terminated because of the sexual orientation, or the disclosure of his sexual orientation by the plaintiff.

So the defendant's motion on the State law claim for sexual orientation discrimination is denied. And similarly, the plaintiff's cross motion for summary judgment on the sexual orientation claim is denied. Looking, again, now looking at the evidence from the defendant's standpoint most favorably for purpose of the plaintiff's motion, it's undisputed that a customer complaint was made.

While there's a dispute about whether it should have been sufficient for the termination or not, -- certainly the fact that a complaint was made does provide some support for the defendant's position. There was some investigation done, it wasn't an immediate termination, it was a suspension with some discussion with the plaintiff. And again, while there's a dispute about whether that was sufficient under the circumstances of that, -- if that's construed most favorably to the defendant it certainly creates enough

App. 168

of an issue of fact with regard to his intent to preclude summary judgment in the plaintiff's favor on this.

[p.11]

And there's also evidence that there was knowledge of the plaintiff's sexual orientation far before this event transpired. Obviously that doesn't address the issue of whether or not the disclosure of the sexual orientation was the basis for the discriminatory act that's alleged, -- but as the issue of whether or not it was over the sexual orientation itself, certainly that evidence would support the defendant's position.

So the evidence in the record if construed most favorably to the defendant is certainly sufficient to overcome plaintiff's motion for summary judgment on the issue of whether or not the articulated reason, the articulated nondiscriminatory reason was the real reason for the termination.

Turning briefly to the hostile work environment claim, again, that standard is set forth in Zhao. I won't repeat it here, but the isolated incidents related to the comments about what the plaintiff was wearing or behavior, or similar things of that nature are, it's not even close to being sufficiently pervasive or severe to possibly have a Jury rationally conclude that it was a hostile work environment.

This issue is about, -- this case is about the termination, it's not about a hostile work environment. So the motion is granted with respect to that.

Turning to the wage claim, I'm denying the cross

App. 169

[p.12]

motions on the wage claim, because the record, the Court just can't discern from the record, again construing it most favorably to the nonmoving party in each situation, whether or not this can be resolved as a matter of law, based upon the facts that are in, that have been submitted in the summary judgment motion. Certainly, the defendants have attached records which accredited would allow them to prevail on this claim. And so that's why the plaintiff's motion for this is denied.

But I'm also denying the defendant's motion because there's some disputes about the adequacy of the record keeping about, there's a dispute about whether the plaintiff was required to be there in the vicinity of the location for certain periods of time. And I believe that the Zarda affirmation that was submitted in opposition on April 8, 2013, is sufficient to at least create an issue of fact that this can't be resolved at summary judgment. Although it does not seem to be a particularly strong claim, I believe it's sufficient to survive summary judgment.

The overtime claim, plaintiff did not even separately brief the overtime issue and I'm granting summary judgment on the overtime issue because I don't see any evidence that would support an overtime claim under New York law as opposed to a minimum wage claim.

So the cases that survive, excuse me, the claims

[p.13]

that survive summary judgment are the sexual orientation claim under New York law as well as the

App. 170

minimum wage claim under New York law. And those are the claims that will proceed to trial.

Okay, so Mr. Antollino, I am just going to ask that you formally just, I guess it would be the second amended complaint.

MR. ANTOLLINO: Certainly.

THE COURT: I'm sorry, what did you say?

MR. ANTOLLINO: Certainly.

THE COURT: What did you say, Mr. Antollino?

MR. ANTOLLINO: I'm sorry? No, I just said certainly.

THE COURT: Okay. So just put that in for a week from today, and Mr. Zabell, you can just file another answer.

MR. ZABELL: Your Honor, if I may, we had discussed at our last conference that if Your Honor's decision did in fact come down the way it came down today that I would be given an opportunity to brief the issue based upon the deposition testimony and the discovery documents that Mr. Zarda turned over that they do not meet the 75,000 jurisdictional requirement.

THE COURT: Okay. Well, if, if, I'm not going to let that the way everything else that we're going to do, because the case has been around for too long. So I will let you put something in. But what I'm going to do is I'm going to have

App. 171

[p.14]

them put in the amended complaint, if you believe that there's not a good faith basis based upon the letter that he submitted, I think it was June 13 or something like that where he put in the various categories of damages. I guess in lieu of an answer you could file a motion to dismiss on jurisdictional grounds, okay.

MR. ANTOLLINO: Judge, and just to be clear, the standard is not whether or not the damages are provable, but whether there is a good faith basis to allege them.

THE COURT: Yes. I know that standard, I've been through it a few times.

MR. ANTOLLINO: I just wanted to make it clear as to all parties that if there were any motion it would be that I do not have a good faith basis --

THE COURT: Right.

MR. ANTOLLINO: -- to assert this. Not that it's not going to be provable. It's not a summary judgment motion --

THE COURT: Right.

MR. ANTOLLINO: It would be I do not have a good faith basis to pay it.

THE COURT: Right. That's why I thought your letter was, you know, very detailed in terms of looking at other cases in terms of emotional damages and things like that, of what a good faith potential recovery would be. So I think Mr. Zabell, as you probably gathered, you have a real uphill battle on

App. 172

[p.15]

that, but I won't prevent you from, -- I said I would give you a chance and I think you're entitled to a chance. So if you want to put in, but I am going to ask that you put that in, you know, quickly. And then I'll give Mr. Antollino a chance to respond to that, okay.

MR. ANTOLLINO: Thank you, Judge.

THE COURT: So I mean, do you want to set a motion schedule for that now, then, Mr. Zabell, since I have you? Do you want to just do that?

MR. ZABELL: Yeah, that, I can get 15 days, Judge?

THE COURT: Yes. So then Mr. Antollino will put it in by April 4. And then 15 days would be, that would be a weekend --

MR. ZABELL: Wait, wait.

THE COURT: April 21?

MR. ZABELL: Wait, I'm sorry, Judge, 15 days is, that's going to take me to, let's see. That's not going to take me to April 4, that will take me --

MR. ANTOLLINO: I'm going to put in the amended complaint toot sweet. So you know, it will be 15 days from the day that I put in the amended complaint, not April 4. I mean, I really feel that if Mr. Zabell is actually going to pursue this motion it's not only a waste of his client's money, it's a waste of the Court's time. And I'll look at it very carefully, but I have, I've made a thorough letter on that point because I

App. 173

[p.16]

knew I was correct on this and I think that if Mr. Zabell is going to waste his client's money and the Court's time he'd better have a good faith basis to make the argument that I don't have a good faith basis to say that this could happen.

So I may make a, I may decide to make a cross motion for sanctions if we have to waste our time on a point which is really theoretical, not something that I have to prove. Theoretically I can get more than \$75,000 on this case. It's not going to the Jury now and it's not, it's not even summary judgment. It's just me having a good faith basis. So what he's arguing is that I am in fact, -- have a bad faith argument by making his argument that I don't have a good faith basis.

THE COURT: Okay. Let's just get it scheduled, Mr. Antollino, okay. You can make a cross motion, you can make whatever motion you'd like to, but let's, so you said you're going to put it in Monday then? The amended complaint?

MR. ANTOLLINO: Yeah, I'll put it in, I'll put it in this weekend.

THE COURT: Okay. So if he puts it in this weekend, Mr. Zabell, do you want 15 days then from Monday?

MR. ZABELL: Yes, please.

THE COURT: So we'll say, that would be, say April 15. How long do you want to respond? Mr. Antollino, if you, if you believe that you've covered this

App. 174

in your letter you can just submit a letter to me saying you're relying on your

[p.17]

previous submission, you don't have to write up something, you know, you don't have to repeat what you said previously, okay?

MR. ANTOLLINO: Okay, all right.

THE COURT: So how long do you want?

MR. ZABELL: Well, give me ten days from his response.

THE COURT: Okay. So April 25 will be the opposition, and then a week for any reply, Mr. Zabell?

MR. ZABELL: That will be sufficient, thank you, Judge.

THE COURT: Okay, so that's May 2. I won't have an argument on this because I think it's a fairly straightforward issue. Unless I have questions I'll just, I'll either do what I did today where I'll have a phone conference and I'll rule on it, or I'll issue a short order, okay.

But in terms of the, it's not, just to mention, Mr. Antollino this is not going to affect obviously the trial date in this case because we weren't going to have the trial that soon anyway. So the, what I'll do is I'll make the pretrial order due, it shouldn't be too complicated, maybe 30 days from May 2 then?

MR. ZABELL: That's fine.

App. 175

MR. ANTOLLINO: I can work with that, Your Honor.

THE COURT: So we'll say June 2, pretrial order. And then within 10 days of that we'll have a call to set a trial

[p.18]

date, which I anticipate would be in the all, okay?

MR. ZABELL: Okay. Your Honor, there is one last thing, and I bring it up as much for humor's sake as anything else. But I can say in every conference that I've had with Mr. Antollino, Mr. Antollino has brought up the issue of seeking sanctions against me. I just, I bring it up for comedy's sake, it's Friday afternoon. I just think it's, it's well worth noting.

MR. ANTOLLINO: I'd like to bring up a little comedy. One of the World Trade Center jumpers from this week was actually one of the witnesses mentioned in the pretrial although disclosures, although he never put in an affidavit or was deposed. So that's some real comedy.

THE COURT: All right. I don't think we need any more comedy, okay.

MR. ANTOLLINO: Okay. Who's the reporter on this?

THE COURT: I'm sorry, what did you say?

MR. ANTOLLINO: The court reporter, the court reporter?

THE COURT: Oh, there is no court reporter here. We put this on the, this is being recorded digitally. So

App. 176

if you want to order the transcript just contact my deputy and she'll tell you who in the clerk's office, -- or it's in our rules I guess, too, who in the clerk's office you can call to order it. They send it out to an agency and they produce the transcript,

[p.19]

okay.

MR. ANTOLLINO: Okay.

THE COURT: Okay, thank you, counsel, have a good weekend.

MR. ANTOLLINO: Thank you, bye.

MR. ZABELL: Everybody have a good weekend.

\* \* \*

### **C E R T I F I C A T I O N**

I, **TRACY GRIBBEN**, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

---

/S/ TRACY GRIBBEN

TERRY GRIBBEN'S TRANSCRIPTION SERVICE

DATE: April 1, 2014