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July 24, 2015

VIA ELECTRONIC CASE FILING

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

Re: 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. We respectfully submit the following in opposition to Plaintiff's pending application requesting Your Honor reconsider the dismissal of the Title VII claim. [ECF Doc. No. 206] For all the reasons set forth below, Plaintiff's application should be denied in its entirety.

On March 28, 2014, Your Honor granted Defendants' motion for summary judgment with respect to Plaintiff's gender stereotype discrimination, hostile work environment and overtime claims. Plaintiff's most recent application to the Court now requests Your Honor reconsider that decision and reinstate the Title VII claim. [ECF Doc. No. 145] Plaintiff relies solely on the U.S. Equal Employment Opportunity Commission's ("EEOC") recent advisory decision in *Anonymous v. Foxx*, EEOC Appeal 0210133080. Although deference may be accorded to an agency's interpretation, there is no affirmative obligation for this Court to adhere to a decision issued by the EEOC. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (noting that deference should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer). As Your Honor's Order granting partial summary judgment was issued over one (1) year ago, the EEOC's advisory decision in *Foxx* is not applicable in the current matter, and Plaintiff's Title VII claim should not be reinstated.



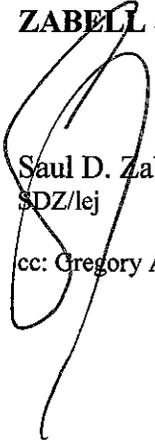
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However, even if the Court disagrees and gives deference to the EEOC's decision in *Foxx*, the reasoning behind Your Honor's decision still stands. Plaintiff, again, fails to recognize that Defendants did not subject Plaintiff to gender stereotyping. As we set forth in our motion for summary judgment, Defendants were aware of Plaintiff's sexual orientation prior to his hire and did not terminate Plaintiff based upon his failure to conform to sexual norms. *See Foxx*, EEOC Appeal 0210133080 (noting that); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004) (stating "[i]t follows [from *Price Waterhouse*] that employers who discriminate against men because they . . . act femininely[] are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *EEOC v. Boh Brothers*, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) ("[A] jury could view Wolfe's behavior as an attempt to denigrate Woods because – at least in Wolfe's view – Woods fell outside of Wolfe's manly-man stereotype" and that would constitute sex discrimination in violation of Title VII); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (noting that an employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim). Rather, the factual record established that Plaintiff was terminated based upon a customer complaint stemming from inappropriate behavior during a tandem skydive. This behavior included touching the customer's hips, resting his head on her shoulder, and discussing the intimate details of his personal life. Accordingly, Plaintiff's termination was based solely upon his inappropriate workplace behavior. Therefore, the EEOC's recent decision in *Foxx* has no bearing on the instant case and, further, there exists no basis by which Plaintiff's Title VII claim should be reinstated.

Therefore, Defendants respectfully request Your Honor deny Plaintiff's application in its entirety. Defendants' counsel remains available should Your Honor require any additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.



Saul D. Zabell
SDZ/lej

cc: Gregory Antollino, Esq. (via Electronic Case Filing); client