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The Honorable Joseph F. Bianco
United States Courthouse
100 Federal Plaza
Central Islip, New York 11722

Re: *Zarda v. Altitude Express, Inc.*, 10 CV 4334 (JFB)

Your Honor:

I am co-counsel to Gregory Antollino, attorney for the plaintiffs, and write in reply to defendants' opposition to plaintiffs' motion to reinstate their Title VII claim. Mr. Antollino is on vacation. Plaintiffs request that, unless the Court wishes oral argument, that their motion be deemed fully submitted and decided prior to the trial on this very important point.

First, the defense has failed to address the nuance of Mr. Antollino's arguments. Plaintiffs' motion is not a rehash of summary judgment. The defense focuses on old case law that limited the scope of sex-stereotype discrimination. The EEOC in *Complainant v. Foxx* has now held that every single case of sexual orientation discrimination is sex discrimination because the plaintiff is stereotyped by the sex of the person the plaintiff is attracted to. Discriminating against a man because of an attraction to men is in itself a sex stereotype. A plaintiff need no longer prove that he is a "feminine man" or a "masculine woman."

Second, the defense completely ignores the associational discrimination argument that, even without the sex-stereotype dimension, would allow a Title VII claim for a gay plaintiff.

Third, the defense ignores that the Second Circuit has recently given deference to the EEOC, pursuant to *Chevron v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), on a point that the Court had previously rejected. See *Fowlkes v. Ironworkers Local 40*, 2015 U.S. App. LEXIS 10339, at *17-18, 790 F.3d 378 (2d Cir. N.Y. 2015) ("It was not until *Macy v. Holder*, No. 0120120821, 2012 EEOPUB LEXIS 1181, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII. 2012 EEOPUB LEXIS 1181, [WL] at *11 & n.16. Thus, Fowlkes' failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had 'taken a firm stand' against recognizing his Title VII discrimination claims.").

Fourth, while the defense addresses the issue of prior Second Circuit authority, it fails to address what the Court should do when presented with new agency interpretation in the light of previous contrary authority. Plaintiffs request that the Court address that issue and, pursuant to the rule in *Chevron*, follow the agency interpretation. Under these circumstances, there is no evidence of congressional intent, and the agency interpretation is reasoned and reasonable. Applying *Chevron* deference, the *Complainant v. Foxx* ruling should be applied to this case.

The law is changing and has changed. Plaintiffs ask that you recognize this and reinstate their Title VII claim. Since plaintiffs agree to defer the issue of attorneys' fees until after an appeal, if the Court reinstates the Title VII claim, the worst thing that will happen is that a punitive damages verdict, if there is one, would be vacated. On the other hand, if Your Honor denies plaintiffs' motion and the Second Circuit reverses, the parties would have to come back for a new trial on punitive damages. While the issue of judicial economy is not determinative, it should weigh in favor of Your Honor giving deference to the EEOC's interpretation of Title VII in *Complainant v. Foxx*, which Judge Weinstein termed a "landmark ruling." See *Roberts v. UPS, Inc.*, No. 13 CV 6161 (JBW), 2015 U.S. Dist. LEXIS 97989, *40 (E.D.N.Y. July 27, 2015) ("On July 16, 2015, the Equal Employment Opportunity Commission ('EEOC') issued a landmark ruling — binding on all federal agencies — criticizing federal courts for 'simply cit[ing to] earlier and dated decisions without any additional analysis' when they interpreted Title VII's prohibition of sex-based discrimination not to include protections against sexual orientation discrimination.").

Respectfully,

/s/

Richard Cardinale

Copy: Saul Zabell