

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

**10 CV 4334 (JSB)**

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MELISSA ZARDA and WILLIAM MOORE for  
the ESTATE OF DONALD ZARDA

**PLAINTIFF’S PROPOSED  
REQUESTS TO CHARGE THE  
JURY<sup>1</sup>**

Plaintiffs,

-against-

RAYMOND MAYNARD., and  
ALTITUDE EXPRESS,

Defendants.

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Plaintiffs, by their attorneys, pursuant to Rule 51 of the Federal Rules of Civil Procedure, respectfully request that the Court give the following instructions to the jury, and such other instructions as may be submitted hereafter in accordance with later proceedings in this action.

**INTRODUCTION**

Members of the jury, you have now heard all of the evidence in the case. You have paid careful attention, and I am confident that you will act together with fairness and impartiality to reach a just verdict in the case. We are near the point where you will take on your final functions as jurors.

There are four parts to these instructions:

First, I will provide you with some general instructions that define and govern the duties of a jury in a civil case;

Second, I will describe the elements of Plaintiff’s causes of action in this matter;

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<sup>1</sup> This includes instructions on claims that are sub judice.

Third, I will instruct you regarding how to calculate damages, in the event that you find either or both of the Defendants liable in this matter; and

Finally, I will give you some concluding instructions before you begin your deliberations.

## **I. GENERAL INSTRUCTIONS**

### **A. Role Of The Court**

It is your duty to accept my instructions on the law and to apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow. You should not single out any particular instruction alone as stating the law. Rather, you should consider my instructions as a whole when you retire to deliberate in the jury room. You should not be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be – or ought to be – it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you. This includes testimony or evidence from any witness that he or she consulted with an attorney before taking action. A consultation with an attorney is a privileged matter and you are not to speculate what was said between any witness who has testified and his attorney. The rules I give to you are the only rules that apply in resolving the dispute.

You are not to infer from any of my questions or any of my rulings on objections or anything else I have said or done during this trial that I have any view as to the credibility of the witnesses or how you should decide the case. Any questions I asked

were designed to make sure that the testimony was clear and to avoid confusion. You are expressly to understand that the Court has no opinion as to the verdict you should render in this case.

### **B. Role Of The Jury**

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

You have all taken an oath as jurors, and it is your sworn duty to determine the facts and to follow the law as I give it to you. Once again, you must not substitute your own notions or opinions of what the law is or ought to be.

You must base your discussions and decisions solely on the evidence presented to you during the trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case.

### **C. Objections And Sidebars**

Each of the parties has a duty to object when the other side offers testimony or other evidence that he believes is not properly admissible. Therefore, you should draw no inference from the fact that someone objects to any evidence. Nor should you draw any inference from the fact that I might have sustained or overruled an objection.

From time to time, the parties and I had conferences at sidebar, out of your hearing.

These conferences involved procedural and other matters. None of the events relating to these conferences should enter into your deliberations at all.

#### **D. Sympathy or Bias**

All parties in this case are entitled to a trial free from prejudice and bias. Our judicial system cannot work unless you reach your verdict through a fair and impartial consideration of the evidence. You are to evaluate the evidence calmly and objectively, without prejudice or sympathy. You are to be completely fair and impartial. Your verdict must be based solely on the evidence developed at this trial, or the lack of evidence.

#### **E. Burden Of Proof**

This is a civil case and the Plaintiff, the Estate of Donald Zarda, has the burden of proving their claim by a “preponderance of the evidence.” Some of you may have heard the phrase “proof beyond a reasonable doubt,” which is the standard of proof in a criminal trial. That requirement does not apply in a civil case, and therefore you should put it out of your mind.

Preponderance of the evidence means simply to prove that the fact is more likely true than not. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not the number of witnesses nor documents. In determining whether a claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties – that it is equally probable that one side is right as it is that the other side is right – then you must decide that issue against the Plaintiff. That is because the Plaintiff

must prove more than a simple equality of evidence – the element at issue must be proven by a preponderance of the evidence.

On the other hand, the Plaintiffs need not prove their case by more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the Plaintiff – that what the Plaintiff claims is more likely true than not true – then that element has been proven by a preponderance of evidence.

#### **F. What Is And Is Not Evidence**

I want to take a moment to describe to you what is and is not evidence in this case. As I have said, you may only rely on the evidence in your deliberations. The evidence is the sworn testimony of the witnesses, including the deposition of Donald Zarda, the exhibits received in evidence, and any agreements of the parties. On the other hand, certain things are not evidence. For example:

1. A question by a lawyer is not evidence. It is the witnesses' answers that are evidence, not the questions. On cross-examination, at times, a lawyer may have incorporated into a question a statement which assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and if there is no direct evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because it was contained in the question.

2. Similarly, arguments by lawyers are not evidence, because the lawyers are not witnesses. What they have said to you in their opening and closing statements was intended to help you understand the evidence and to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection which controls. If there is disagreement on an important point of testimony, you may ask to

have it read back, or provided to you in the deliberation room.

3. Statements that I may have made concerning the quality of the evidence do not constitute evidence.

4. Anything you may have seen or heard outside the courtroom is not evidence, and as I have warned, you may not consult the internet nor any of your friends on social media about the case in any way during your deliberations.

### **G. Direct And Circumstantial Evidence**

Evidence may be either direct or circumstantial. As I told you previously, direct evidence is the communication of a fact by a witness who testifies to the knowledge of that fact as having been obtained through one of the five senses. So, for example, a witness who testifies to knowledge of a fact because he or she saw it, heard it, smelled it, tasted it, or touched it is giving evidence that is direct. Your task is to pass upon the credibility of that witness.

By contrast, circumstantial evidence is evidence that tends to prove a fact in issue by providing proof of other facts from which the fact in issue may be inferred. The word “infer” means to find that a fact exists from proof of another fact. You may draw an inference if it is logical and reasonable. In deciding whether to draw an inference, you must look at and consider all the facts in the light of reason, common sense, and experience. Whether an inference is or is not to be drawn is entirely a matter for you to decide. Please bear in mind, however, that an inference is not to be drawn by guesswork or speculation, but by reason and common sense.

For the purpose of clarity, I will reiterate the example of circumstantial evidence that I provided to you at the beginning of the trial. Assume the curtains are drawn in the

courtroom, and we cannot see outside. If a fact in issue is whether it is raining at the moment, none of us can testify directly to that fact because we cannot see outside.

But if a person walks into the courtroom wearing a raincoat that is soaking wet, or a person enters the courtroom carrying an umbrella dripping water, we may infer from those facts that it is raining. In other words, the fact that it is raining is an inference that could be drawn from having seen the wet raincoat and the dripping umbrella.

Circumstantial evidence does not necessarily prove less than direct evidence, nor does it necessarily prove more. You are to consider all the evidence in the case, direct and circumstantial, in determining what the facts are and in arriving at your verdict.

#### **H. Witness Credibility**

You are being called upon to resolve various factual issues raised by the parties based on the evidence at trial. You have had the opportunity to observe the witnesses, and hear sworn testimony. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judge of the credibility of each witness and of the importance of his or her testimony.

In making these judgments, you should carefully scrutinize the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you decide the truth and the importance of each witness' testimony.

How do you determine where the truth lies? You listened, and with the exception of Mr. Zarda, watched each witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did he or she appear to be frank, forthright, and candid? Or was the witness evasive and edgy, as if

hiding something? How did the witness appear? What was the witness's demeanor – that is, the witness's carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how he or she says it that moves us.

You should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider the opportunity the witness had to see, hear, and know the things about which he or she testified, the accuracy of her or his memory, her or his candor or lack of candor, her or his intelligence, the reasonableness and probability of her or his testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment, and your everyday experiences in life to make your credibility determinations.

### **I. Bias**

In deciding whether to believe a witness, you may take into account any evidence that shows that a witness may benefit in some way from the outcome of the case. Likewise, you should specifically note any evidence of hostility or affection that the witness may have towards one of the parties, or any other interest or motive that the witness may have in cooperating with a particular party.

It is your duty to consider whether the witness has permitted any such bias or interest to color his or her testimony. In short, if you find that a witness is biased, you should view his or her testimony with caution, weigh it with care, and subject it to close and searching scrutiny.

Of course, the mere fact that a witness is interested in the outcome of the case does not mean he or she has not told the truth. It is for you to decide, from your observations and applying your common sense and experience and all the other considerations mentioned, whether the possible interest of any witness, or of any party, has intentionally or otherwise colored or distorted his or her testimony. You are not required to believe an interested witness; you may accept as much of his or her testimony as you deem reliable and reject as much as you deem unworthy of acceptance.

**J. Prior Inconsistent Statements**

You have heard evidence that, at some earlier time, witnesses have said something that one party argues is inconsistent with their trial testimony.

Evidence of a prior inconsistent statement was placed before you for the purpose of helping you decide whether to believe the trial testimony of a witness who may have contradicted a prior statement. If you find that the witness made an earlier statement that conflicts with the witness's trial testimony, you may consider that fact in deciding how much of the witness's trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; and whether the witness had an explanation for the inconsistency and, if so, whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so, how much, if any, weight to give to the inconsistent statement in determining whether to

believe all, or part of, the witness's testimony.

#### **K. False Testimony**

If you find that any witness has willfully testified falsely as to any material, or important fact, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one important fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally "unbelievable." You may accept so much of his or her testimony as you deem true and disregard what you feel is false. As you are the sole judges of the facts, you will decide which of the witnesses you believe, what portion of their testimony you accept, and what weight you will give to it.

#### **L. Corporate Parties and the Estate of the Deceased**

In this case, one of the Defendants is a corporation, and one is an estate. The mere fact that one of the parties is not a live person does not mean it is entitled to any lesser consideration by you. All litigants are equal before the law, and corporations, big or small, are entitled to the same fair consideration as you would give any other individual party. In addition, since a corporation is not a natural person, it can act only through its officers, employees, or other agents. Thus any act or omission by any of Altitude Express' officers or employees that is undertaken in the scope of employment as an act or omission by Defendant Altitude Express. Conduct is undertaken within the scope of employment if it is reasonably related to the kinds of tasks that the employee was employed to perform or it is reasonably foreseeable in light of the employer's business or the employee's responsibilities. In this case, the plaintiffs have not claimed that anyone other than Raymond Maynard committed any act in violations of the statutes that I will

describe to you, and it is undisputed that Mr. Maynard was the sole owner of Altitude Express.

Furthermore, death is a natural occurrence whose timing can never be predicted, at least not without certainty. Donald Zarda's death was unexpected and when he died, his case was ready for trial. A claim for money damages to be won at trial is like any asset, and can be handed down from a plaintiff to his estate, just like an inheritance that is in the bank, or any other personal property owned by the deceased at the time of his death. You may not sympathize with the estate because of Mr. Zarda's death, but if the estate has proved Mr. Zarda's claim by a preponderance of the evidence, you must find for his estate. Conversely, and again, if the estate has not proved Mr. Zarda's claim by a preponderance of the evidence, you must find for the defendants.

## **II. PLAINTIFF'S CAUSE OF ACTION**

### **A. Introduction**

In this case, Mr. Zarda brought his claims under the New York State Human Rights Law and Title VII of the Civil Rights Act of the United States Code. Both of these laws prohibit discrimination against employees on the basis of sexual orientation. As a general matter, an employer is free to fire an at-will employee for any reason not prohibited by law. In this case, the Zarda Estate claims that the Defendants violated these laws by suspending, withholding pay, and terminating Mr. Zarda because of his sexual orientation (Gay). I instruct you that being gay is a protected characteristic and an employee is entitled to identify as gay in the workplace just as he would be entitled to identify as Caucasian, African American, Catholic or any other similar characteristic.

The laws the Estate is suing under prohibit an employer from discriminating

against an individual on the basis of sexual orientation in the terms, conditions or privileges of employment. In other words, employers cannot treat gay employees in a manner different than heterosexual employees.

In order to find for the Zarda estate on this claim, you must first determine by a preponderance of the evidence, that he was the member of a protected class. The parties do not dispute that Mr. Zarda was a gay man at all times he worked at Altitude Express, and he was therefore a member of a protected class.

To establish a claim for discrimination on the grounds that Mr. Zarda was gay, the Estate has the burden of proving by a preponderance of the evidence that, first, Mr. Zarda suffered adverse action. The parties agree that each of the elements of adverse action alleged by the estate qualify as adverse action: suspension, the withholding of pay and termination.

Second, the central question for you in deciding whether the estate has established liability is whether Mr. Zarda's sexual orientation was a motivating factor in one, two or all three of the adverse actions. There may be more than one motivating factor for an action, and the Zarda Estate has the burden of proving that Mr. Zarda's sexual orientation was at least one motivating factor for the adverse action.

Plaintiff is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of all evidence, for example, explanations that were given that you find were what is known as "pretextual." "Pretextual" means either false or, though true, not the real reason for the action taken. In other words, the employer may articulate a reason for taking adverse action – whether that reason is true or false – but the primary issue for you

is whether the deceased plaintiff was treated less well than other employees because he was gay.

Authority: McNamara, Todd J. and J. Alfred Southerland, Federal Employment Jury Instructions (2009) § 1:810 (harassment), citing *Forager v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *id.* at § 1:870 (unwelcome conduct defined), citing *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 321 (3d Cir. 2000) (an employer does not have to discriminate against all members of a class to illegally discriminate against a given member of that class).

### **B. Direct Evidence of Intent is Not Required**

The Estate of Zarda is not required to produce direct evidence of intentional discrimination. Intentional discrimination may be inferred from the existence of other facts, or the cumulative weight of circumstantial evidence. The law makes no distinction between the effect of direct and circumstantial evidence.

For example, you may infer that the Estate has met its burden if you disbelieve Defendants' explanation for why they subjected Mr. Zarda to adverse action. That is, you may find for the Estate if you find that Defendants' articulated reason for taking adverse action against Mr. Zarda was a cover-up for illegal discrimination.

Employers rarely leave a paper trail - or "smoking gun" - attesting to discriminatory intent, so Plaintiffs must often build their cases from indirect evidence and pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Therefore, you may consider circumstantial or indirect evidence of a discriminatory motive.

Authority: *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

## **B. Direct Evidence of Intent Shifts the Burden to the Defendants**

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir.1987).

You have heard that there are two types of evidence – direct and circumstantial for you to consider in coming to a verdict, and that neither type of evidence holds more weight than the other.

I instruct you also that there is also something that the law considers “direct evidence of discrimination.” While plaintiff need not show direct evidence of intent, if he does show evidence that is so strong that it comes close to being the proverbial “smoking gun,” the burden shifts to the defense to prove that the adverse action it took was not illegal. In this case, plaintiff contends that the statements Mr. Maynard made at plaintiff’s termination were direct evidence of discrimination. The Court has no opinion on this, but that it is for you to decide.

If you find that certain statements were direct evidence of discrimination, the burden is no longer the plaintiff’s to prove discrimination; rather, the burden shifts to the employer to prove that plaintiff would have suffered adverse action or actions in the workplace even without the direct evidence.

No employer will admit to discrimination, but if you find that evidence is no quite a smoking gun, but quite close to it, you may, but are not required to, regard that evidence as “direct evidence of discrimination.”

### **III. DAMAGES ON PLAINTIFF'S CLAIMS**

#### **A. Consideration of Damages**

If you conclude that the Estate of Mr. Zarda has met its burden of proving that the Defendants are liable, then you must determine the damages to which Mr. Zarda would have been entitled from the time of the alleged discrimination in June 2010 to the date of his death, October 4, 2014. Again, Mr. Zarda chose to leave his claims in this lawsuit to his Estate, therefore you to consider, without sympathy, what he would have been entitled to as if he had survived, but no longer than the date of his death. I want to stress that you should not infer that Plaintiff is entitled to recover damages merely because I am instructing you on how to calculate damages. It is exclusively your function to decide upon liability, and I am instructing you on damages so that you will have guidance should you decide that the Estate of Zarda is entitled to recovery.

#### **B. Compensatory Damages**

You may award damages for any pain, suffering, humiliation or mental anguish that Mr. Zarda experienced as a consequence of the Defendants' discriminatory actions. You should not award damages for speculative injures, but only for those that the Plaintiff actually suffered as a result of the Defendant's conduct. In all instances, you are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

Among the elements of injury and harm which you should consider are:

The emotional and mental harm to the plaintiff during and after the adverse action, including fear, humiliation, and mental harm, fear, or mental anguish that plaintiff suffered until October 4, 2014.

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for mental or emotional distress. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for mental and emotional distress, you shall exercise your authority with calm and reasonable judgment, and the damages you fix shall be just and reasonable in light of the evidence.

### **C. Punitive Damages**

If you find that Defendants are liable to the Plaintiff for discrimination in violation of law, then you have the discretion to award punitive damages in addition to compensatory damages. The purpose of punitive damages is to punish a defendant for shocking conduct and to set an example to deter others from committing similar acts in the future. You may award punitive damages if the Plaintiff proves by a preponderance of the evidence that the Defendants intentionally engaged in discriminatory actions with either malice or reckless indifference to the Plaintiff's to be free from discrimination on the basis of his sexual orientation. The Defendants acted with malice or indifference if it has been proved that the Defendants knew that their conduct was in violation of law prohibiting discrimination, or acted with reckless disregard of that law.

The awarding of punitive damages is within your discretion – you are not required to award them. If you decide to award punitive damages, you must use sound reason in setting the amount; it must not reflect bias, prejudice, or sympathy toward any party, but the amount may be as large, or as small, as you believe is necessary to fulfill the purpose of punitive damages. You should consider the amount of actual damages awarded if you decide to award punitive damages.