

GREGORY ANTOLLINO
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RE: Zarda v. Altitude Express, 10-cv-4334

Dear Judge Bianco,

Attached is a supplemental jury instruction. However, if the court is going to instruct on mitigation, we believe that in addition to whatever the defendant has offered for instruction, the jury be instructed that mitigation is an affirmative defense whose burden the defense must prove.

The instruction on customer biases follows and we would asked, based on the testimony that came out today and yesterday that it be included. We do not want the jury to surmise that Maynard was merely acting out on the whims of his customers, and that customer bias is not an excuse for employment discrimination./

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell (by ecf)

CUSTOMER PREFERENCE IS NOT A BASIS TO DISCRIMINATE AGAINST AN
EMPLOYEES

SOURCE: Chaney v. Plainfield Healthcare Ctr, 612 F.3d908 (7th Cir 2010), Ferrill v. Parker Group, 168 F3d 468, 477 (11th Cir. 1999); Fernandez v. Wynn, 653 F.2d 1273-1276-77 (9th Cir 1981)

An employer must follow non-discrimination laws that protect his or her employees even if the employer's customers might hold biases against the protected class at issue, which in this case is sexual orientation. An employer cannot take adverse action against an employee on the grounds that one or more customers might not prefer to associate with or are offended by the employee's protected class, whatever that might be.