UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDERICK M. CARGIAN,

Plaintiff,

15 Civ 1084 (GBD)

-against-

AFFIRMATION OF COUNSEL IN OPPOSITION TO DEFENDANT'S BILL OF COSTS

BREITLING USA, INC.,

Defendant.

JANICE GOODMAN, an attorney in good standing in the State of New York, affirms the following under penalty of perjury:

1. I am counsel to plaintiff, Frederick M. Cargian ("Cargian" or plaintiff"), in the above referenced matter and submit this affirmation opposing defendant's bill of costs in its entirety. Alternatively, reimbursement should be limited at most to $1,314.78.

2. Cargian was hired by the then President of Breitling USA, Marie Bodman, in 1990. He was the leading sales person until 2011 when Tierry Prissert ("Prissert") became the newly appointed President. ECF 48. Within one short year of Prissert's appointment Cargian went from being the best to the worst sales rep. He alleged that the reversal in his production was caused by Prissert treating him differently and more harshly than the other male sales reps by (a) imposing higher unobtainable sales goals than any other rep ; (b) not inviting him to critical marketing events which would enhance his sales; © demoting him in function and pay while

replacing him with a younger straight man with absolutely no sales experience (d) subjecting him to reprimand even when no policy was violated. Prissert terminated Cargian's employment effective December 31, 2013. Plaintiff was 53 years old at the time. Id

3. On February 17, 2015, after the required EEOC filing, Cargian filed this complaint alleging discrimination because of his sexual orientation (gay) and his age in violation of 42 U.S.§§ 2000e *et seq.* ("Title VII) and the Age Discrimination in Act, 29 USC § 621 *et seq.*. Supplemental jurisdiction was invoked pursuant to the Administrative Code of the City of New York, Secs 8-107 and the New York Human Rights Law, N.Y. Exec Law Sec. 296 *et seq.* ECF 1

4. On February 29, 2016, defendant moved for summary judgment on the grounds that plaintiff's claim of gender discrimination was not cognizable under Title VII and the ADEA Claim failed for lack of proof. ECF 38

5. On September 29, 2016, District Court Judge George B. Daniels granted Defendant's Motion on both claims. He dismissed the supplemental claims without prejudice. ECF 63

6. On October 24, 2016, Plaintiff appealed from the judgment dismissing his Title VII claim, but not the dismissal of the ADEA claim and requested reinstatement of the supplemental claims. ECF 66

7. On September 10, 2018, the Court of Appeals for the Second Circuit reversed the lower Court's grant of summary judgment based on its prior decision in *Zarda v Altitude Express*, 883 F.3d 100 (2d Cir. 2018), which was filed a few weeks before plaintiff's case, upheld by the Supreme Court's in *Bostock v. Clayton County, Georgia* , 140 S. Ct. 1731 (2020) both holding that Title VII prohibits discrimination based on sexual orientation. The Circuit remanded this case to the District Court for further consideration in light of the new law. ECF 67

8. On November 9, 2020, defendant renewed its motion for summary judgment

motion primarily arguing that the court's prior decision in fact already made a finding that even under a law that covered sexual orientation there were no facts to support a claim and that plaintiff failed to even establish a prima facie case of discrimination. ECF 84, 87.

9. On September 13, 2021, the District Court issued a memorandum decision and order granting defendant's renewed motion for summary judgment . In essence the court found that plaintiff did establish a prima facie claim of discrimination based on sexual orientation, but failed to adduce sufficient evidence to present to the jury to support a claim of discriminatory motivation. ECF 90

10. On September 15, 2021, the Clerk of the Court entered a final judgment dismissing the complaint. ECF 91

11. Plaintiff strongly disagrees with the Court's conclusions, but litigation costs make further appeals prohibitive. Plaintiff finds himself in precisely the situation that Congress and the Supreme Court were concerned with when they protected plaintiffs who act as private attorneys general against the costs of litigation unless the claims are frivolous or vexatious. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

12. Plaintiff submits that defendant's bill of costs be denied in total as a matter of equity because (1) defendant has flaunted all of the local rules regarding costs, burdening the court and plaintiff with unecessary review; (2) plaintiff prevailed on a very significant issue which established new law benefitting thousands of employees, if not more, making him in part the prevailing party, (3) plaintiff's claims are not frivolous or vexatious under *Christiansburg* Garment Co. *V. EEOC,* 434 U.S.412,422 (1978), (4) defendant's bill of costs is improper and vexatious.

13. Alternatively, as discussed below, defendant's reimbursement should be limited to

$1,314.78, the basic cost of the Cargian deposition. Defendant improperly requests reimbursement for every deposition transcript taken in discovery, including testimony totally irrelevant on summary judgment (Cargian's two brothers); were even filed by defendant as as part of the records it submitted in support of its summary judgment motion (Figueroa, Morice, Vessely,Schafrath) or were relied upon in their brief's or by the court in its ultimate decision (Prissert, Sommer, Cargian). Moreover, defendant improperly requests reimbursement for expedited transcripts where speed was not necessary; for appearance fees; and other costs this district regularly disallows.

14. First there is no evidence submitted by defendant that the amounts claimed were actually paid by defendant. All that was submitted are invoice. Six (6) of the nine (9) depositions were taken by plaintiff. We served copies for signing on defendant. It is not unheard of for a paty tol simply make photo copies of the deposition.

15. As was reported in the papers, and told to me, defendant had insurance coverage and the insurer was present during the case and involved at various points. On information and belief, counsel for defendant may also have represented the insurer. Plaintiff suggests that insurance may have covered these costs, in which case defendant would not be entitled to any reimbursement, since it may never have paid for the transcripts. Defendant should at least be required to answer this question.

16. Moreover, of the nine (9) persons for whom reimbursement is requested all but plaintiff and his brothers were employees of defendant, including its president, Prissert. These company witness were deposed by plaintiff, not defendant, solely for discovery purposes. Defendant did not need these depositions, since all of these witness were available to defendant by affidavit. Indeed, defendant did produce and relied almost exclusively on the 15 page

affirmation of Prisant, the 56.1 Statement, affirmation of Charles Anderson, the sales manager, and a multitude of business records to support its summary judgment motion. ECF 39, 40. The court, in its final judgment, similarly adopted and relied exclusively on defendant's 56.1 statement and its supporting affirmations and exhibits. ECF 90.

17. The following addresses each deposition transcript and why the cost is not recoverable:

A. . John Cargian and Michael Cargian, $631.50. These are relatives of plaintiff whose depositions were taken by defendant. They were listed by plaintiff as having knowledge relating to the emotional damages suffered by plaintiff. Their testimony was never relevant on a summary judgment motion and was never even introduced by defendant. ECF 39-41.

B. Diane Figuero, Breitling Personnel Director, $796. Breitling's never made Figuero's testimony part of the record; nor did it once introduce her testimony to support its claims, nor does the court note it or rely on it in any form. ECF 39, ECF 90. Moreover defendant impermissibly requests payment for reproduction of exhibits. These were all Breitling's business records produced by defendant in discovery.

C. **Sophie Morice, Breitling Director of Retail and Melissa Vessely, Breitling's Training Manager. $1,047.80.** These depositions were also taken by plaintiff. Both had complementary comments about plaintiff. Breitling never introduced any of their testimony into the record or make note of it in its brief ECF 39, 41,46 nor does the Court make note of any testimony, and certainly does not rely on anything these witnesses said. ECF 90. .Again defendant includes an $11 charge for reproduction of documents it produced in discovery.

D. **Isaac Schafrath, the man who replaced Cargian as sales rep. $1,256.40.**

Plaintiff took this deposition as part of his discovery. Plaintiff did not introduce the transcript into the record, ECF 39, or rely on this deposition on its briefs to demonstrate a legitimate reason for replacing Cargian, ECF 39, nor is the deposition relied upon by the court. ECF 90.

E. **Thierry Prissert, President of Breitling USA. $1,663.20.** Defendant submitted a 15 page affirmation by Prissert together with many business records regarding Cargian and his alleged performance. ECF 39. The court's ultimate decision relies almost exclusively on this affirmation, not on deposition transcripts. ECF 90 Defendant in its opening brief cites this affirmation at least 18-20 times and about 25 times in its reply brief. ECF 84, 87. Throughout its decision the court relies almost exclusively on Defendant's 56.1 statement and the Prissert affirmation (along with the affirmation of of Chuck Anderson) and the business records. The Court does not cite the Prissert deposition. ECF 90.

F. **Annie Sommers was a fact witness in support of plaintiff but because she was still employed by defendant she would not voluntarily testify. $550.80.** Plaintiff conducted this deposition but, as was testified to at the deposition defendant debriefed her prior to the deposition. Again, her deposition testimony was not relied upon by defendant or the court, rather the defendant cited business records which were also relied upon by the court. ECF 84, 87, 90. Moreover, in addition to the $374.40 requested for the transcript of the deposition, defendant improperly requests payment of $176 for a transcript of a teleconference which, to the best of my recollection, related to a conference with the court where there was a legal dispute as to the propriety of some inquiries. That is not an includable cost.

G. **Frederick M. Cargian the plaintiff. $3,909.95.** Plaintiff submits that this deposition,

taken by defendant was simply discovery and not relied upon by defendant or the court in its ultimate decision, and therefore is not reimbursable. Indeed defendant cites the testimony only once (a few lines) in its briefs . Cargian's deposition testimony was not relied upon either by defendant or the court in its ultimate decision. Defendant and the Court relied almost exclusively on the affidavits of Prissert and Anderson and the attached exhibits in arguing for summary judgment. At a minimum, the following charges, which are not allowable under the Local Rules, should be rejected: defendant requests$3,291.75 for "expedited delivery" of the transcript. There was no reason to expedite. There was no court mandate and defendant's first summary judgment motion was not filed for another 4 plus months. The charge to plaintiff for a copy of the transcript on ordinary 2 week delivery was $1,314.78. In addition to the expedited fee, there is $450 requested for an appearance fees, a cost that has been consistently disallowed under the local rules. There is an unexplained charge of $70 for PM pages; $75 for reproducing their own exhibits and $23 for delivery which is only charged because it was expedited. None of these costs are recoverable. If the court decides to allow any costs for this deposition then it should be limited to the cost for ordinary 2 week delivery.

18. Plaintiff submits, based on the above, and his brief in support, defendant should be denied the requested costs entirely or, at a minimum, those costs should be reduced to $1,314.78.

Dated: New York, New York
October 13 2021.

JANICE GOODMAN