15-3775

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore,Jr, co-independent executor of the estate of Donald Zarda,

Plaintiffs - Appellants,

v.

Altitude Express,Inc, doing business as Skydive Long Island, Ray Maynard,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

SAUL D. ZABELL, ESQ.
ATTORNEY FOR DEFENDANTS-APPELLEES
1 CORPORATE DRIVE, SUITE 103
BOHEMIA, NY 11716
(631) 589-7242
SZABELL@LABORLAWSNY.COM

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RULE 26.1 STATEMENT

Pursuant Rule 26.1 of the Federal Rules of Appellate Procedure and to enable Judges of this Court to evaluate possible disqualification or recusal, the undersigned counsel for Defendants states as follows:

Defendant Altitude Express, Inc., d/b/a Skydive Long Island, is a domestic business corporation organized and existing under the laws of the State of New York.

Defendant Altitude Express, Inc., d/b/a Skydive Long Island is not a governmental entity, there are no parent corporations, nor does any publicly held corporation hold 10% of its stock.

By: Zabell & Associates, P.C. www.laborlawsny.com Digitally signed by Saul D. Zabell Date: 2016.06.28 12:29:11 -04'00'

Saul D. Zabell (SZ 2738)

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I. JURISDICTIONAL STATEMENT

Appellants, Melissa Zarda and William Allen Moore, Jr. as Co-Independent Executors of the Estate of Donald Zarda, ("Appellants") appeal from the United States District Court for the Eastern District of New York on behalf of Donald Zarda, who is deceased ("Zarda", or "Appellant"). Altitude Express d/b/a Skydive Long Island and Raymond Maynard ("Appellees", "SDLI" or "Maynard") do not contest or otherwise dispute the basis for the District Court's jurisdiction or that of the Court of Appeals.

II. STATEMENT OF ISSUES

Appellants' argue this Court should:

1. Vacate lower court's decision granting Summary Judgement on Zarda's claim for sexual orientation discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. ("Title VII") and the District Court's subsequent denial of Zarda's motion to for reconsideration where no such claim exists under federal law.

2. Determine that the District Court's decision to permit the filing of a June 20, 2014 Pre-trial Order, approximately sixteen (16) months before trial, constituted reversible error based upon the inclusion of fifty-seven (57) co-workers. Although, only three (3) were called as witnesses, each individual as well as the scope of their knowledge was disclosed during discovery and discussed by Donald Zarda himself.
3. Determine that the District Court's decision:
    a. Allowing evidence of Zarda's first of three separate terms of employment and termination therefrom constitutes reversible error;
    b. Allowing evidence of Zarda's belief that his Workers' Compensation claim was a possible basis for his termination was reversible error;
    c. Precluding Melissa Zarda and William Moore from testifying that Zarda went on a gay cruise because he lived in an airport shack, and that he touched his teeth was reversible error;

d. Allowing of any evidence critical of Zarda's workplace behavior was reversible error even though it formed the basis of his termination for legitimate business reasons; and

e. Allowing the term "odd" to be used to characterize the relationship between Zarda and his expert witness, whom he met, for the first time, as a patient in an emergency room.

III. STATEMENT OF THE CASE

Appellants' arguments aside, this is a straightforward dispute based on discrimination claims arising in the workplace. The central issues at hand are whether the Appellant, Donald Zarda, was in fact subject to impermissible discrimination and whether the basis for the alleged discrimination is protected under Title VII of the Civil Rights Act. The issue of sexual orientation discrimination falling outside the scope of Title VII has previously been addressed by Congress and subsequently interpreted by this Circuit. All facts forming the basis of Zarda's putative sexual orientation claim arising under Title VII have already been tried before a Jury of his peers within the context of the New York State Human Rights Law, NY EXEC. LAW §296, et seq. ("NYSHRL"). Upon the completion of a fair and proper trial, Zarda's

claims were ultimately determined to be unfounded. Here, should this Court determine that existing precedent has outlived both the logic and reason from which it was derived, Appellants' arguments must still be rejected by the Court because Zarda had an opportunity to present his allegations of discrimination to a jury of his peers under the corresponding state statute. This Court has consistently applied the same legal standard to claims arising under the NYSHRL as it does to claims arising under Title VII. In light of this construct and Zarda's inability to identify direct or circumstantial evidence supporting his position, his claims fail as a matter of law.

IV. STATEMENT OF FACTS RELEVANT TO THE APPEAL

Zarda began this litigation by alleging in his Amended Complaint, violations of New York State Human Rights Law, Title VII and New York State Labor Law. (JA0025-JA0040) Among those causes of action, Zarda claimed he was discharged because of a homophobic customer. (JA0025) Specifically, Zarda claimed that he had said to a customer that "You don't have to worry about us being so close because I'm gay." (JA0029) Zarda alleged that he was terminated for "mentioning the fact that he was gay to a passenger" and that he had touched a passenger

inappropriately. (JA0031-JA0032) At the time the Amended Complaint was filed, Zarda was unaware of the existence of a customer complaint. (JA0033) Zarda alleged in his Amended Complaint that he was fired from his position because his "behavior did not conform to sex stereotypes." (JA0035)

Summary Judgment

At summary judgment, Zarda's "gender stereotype discrimination, hostile work environment, and overtime claims" were each dismissed. Zarda's "sexual orientation discrimination claim" based upon his termination under New York State law, and minimum wage claim under New York State law were permitted. (JA0672) Zarda then moved for reconsideration of the dismissal of his gender stereotype discrimination and hostile work environment claims. (JA0021) By decision dated October 28, 2015, the District Court terminated Zarda's application for reconsideration of the Summary Judgment Decision. (SA024)[1]

[1] In addition to the Joint Appendix and Appellants' "Special Appendix", Appellees provide supplemental documentary evidence in their "Supplemental Appendix", references to which are (SA____).

Joint Pre-Trial Order

Zarda raises issues regarding the disclosure of fifty-seven (57) names contained within Appellees' witness list disclosed prior to the filing of the Pre-Trial Order. Zarda's June 5, 2014, letter motion first raised the issue of his not being aware of the names contained within Appellees' witness list and portion of the parties' Joint Pre-Trial Order. (JA0016, JA00682, JA00683) Zarda's June 5, 2014 letter motion was terminated on June 10, 2014 and Appellees were directed to include "information about the proposed defense witnesses" and that "plaintiff submit a letter to the Court by August 5, 2014, detailing any disputed objections to the designations." (*See* June 10, 2014 Order) (JA0017) On June 20, 2014, the parties submitted a Joint Pre-trial Order (see docket number 169 on (JA0017, JA0690-JA0704) which included the following language regarding the witnesses identified:

> **Defendants anticipate that the following witnesses will testify in person (witnesses 1-6 were deposition witnesses; witness 7 is a member of Rainbow Skydivers identified in Defendants' Rule 26 Disclosure Statement; witnesses 8-17 and 20-57 were employees from 2009-2010; and witnesses 18-19 were employees in 2001).** (JA0693)

Importantly, Zarda failed to file "a letter to the Court by August 5, 2014, detailing any disputed objections to the designations". Only after

the October 14, 2015 opening of trial, more than 14 months after being directed to do so, on October 16, 2015, Zarda filed a "Motion for Sanctions in precluding three or at least one for failure to adequately identify witnesses before trial." (JA0022, JA0731-JA0740) Although within his application, Zarda acknowledged being provided with the addresses for Shaw and Burrell during discovery, opposing counsel claimed to "have no idea who Kellinger is". This occurred despite Kellinger being identified in Zarda's document production, written Responses to Defendants' First Set of Interrogatories, the deposition of Winstock five (5) times (JA0395, JA0406, JA0417, JA0418) (SA008) and Zarda's own deposition nine (9) separate times. (JA0108, JA0110, JA0111, JA0113, JA0159, JA0162)

Trial

At trial, Appellants called Ira Helfand to testify as a fact witness. (JA0940) Mr. Helfand testified that he met Zarda in an emergency room in 1998 or 1999 as his treating physician and that they stayed in touch by phone for a few months. (JA0941) He further testified that despite an interruption in their conversations that lasted for several years, he

visited Zarda in 2007 or 2008 for dinner and "started being in touch again by telephone and talked from time to time." (JA0942)

Appellants then called Lauren Callanan (JA0963) who testified that she worked at Skydive Long Island from 2005 through 2011 (JA0964). In response to questions from Appellants' counsel, the following exchange occurred:

Q. When you go up in the sky in the plane, how would you describe the atmosphere before you are about to jump with the parachute?
A. Every single jump is different, so every experience is different.
Q. Would you characterize some as goofy?
A. At times.
Q. Would you characterize some as childlike?
A. Sometimes.
Q. Would you characterize some as boring?
A. Sure
Q. Would you characterize some as loose sexually?
A. Not necessarily, but I think to an extreme maybe. (JA0968)

Ms. Callanan, on direct examination from Appellants' counsel indicated she received a complaint about Zarda. Specifically, "that the customers were very unhappy with the service and felt that the instructor made inappropriate comments." (JA0976, JA0977) She further testified that the complainant relayed that the "skydive was

ruined and her first experience was not what she wished it would have been because of her instructor." (JA0978)

Appellants also called Mr. Winstock and on direct examination, he testified that he had learned that a customer had made a complaint about Zarda. (JA1071, JA1074) He further testified that he had advised tandem jump passengers that he was married and had children. (JA1075) This was done for purposes calming them down and "giving them a little bit of security knowing you have a reason to make this work." (JA1076) On cross examination, Winstock testified that Zarda was introduced to him as "Gay Don" prior to his employment with Appellees (JA1081 and JA1082) and that he introduced himself as "Gay Don". (JA1082) Winstock also testified that there is no reason for an extended touching of a tandem student's hips. (JA1082 & 1083) Winstock testified that the complaint against Zarda came from a husband "and it had to do with an inappropriate touching of the passenger and possible comments." (JA1084) He further testified that Zarda explained to him that he "preferred to actually take male passengers as opposed to female passengers." (JA1087) Winstock

testified that he was Zarda's supervisor and that Zarda never made any complaints to him about the workplace. (JA1088)

Zarda testified through his deposition testimony which was read into the evidence. Zarda filed an EEOC charge indicating that "I'm not making this charge based on my sexual orientation." (SA002-SA003) Zarda testified that Winstock was his Supervisor and that he felt he could bring any of his problems to Winstock's attention. (JA1163, JA1273, JA1274) With regard to his suspension and ultimate termination, Zarda testified that he was asked "a lot of questions" about the tandem "jump with Miss Rosanna" and that he did not remember a specific jump at that time to which he was referring. (JA1164-1165, JA1330, JA1331) Zarda acknowledged that Maynard, the owner of Skydive Long Island, was "investigating what I knew about" the complaint. (JA1166) Zarda acknowledged that his colleagues referred to him as "Gay Don" and that he "wasn't offended by that." And that he was treated "like anybody else." (JA1167)

Further, Zarda testified that his outward appearance lead people to believe that he was heterosexual and that he frequently was

mistaken for being straight and that such a mistake did not offend him. (JA1276-JA1277)

Relevant Workplace History

Zarda opined about his 2001 termination from SkyDive Long Island, "From the best I can recall, because Ray didn't discuss it with me, it had something to do with a customer being unhappy about not being able to do flips out of the airplane, or something that they wanted me to do out of the aircraft." (JA1169, JA1310, JA1325) Zarda testified that he was rehired in 2009, and that Appellees rehired him with full knowledge of his sexuality and that he had a positive working relationship with his colleagues. (JA1177) Zarda conceded he got along well with all of his colleagues in 2009. (JA1174) Zarda enjoyed working at Skydive Long Island until he broke his ankle in 2009, at which point, he stopped working on July 2, 2009. (JA1175)

In 2010, Zarda confirmed he did not have any negative interactions with any of his coworkers (JA1178) and none of his co-workers brought up his sexuality with the intent to hurt his feelings, or to be malicious. (JA1315) Zarda testified that Ray Maynard was taking things out on him because his Workers' Compensation insurance went

up drastically as a result of his claim for injury (JA1312) and that being upset about the Workers' Compensation premium increasing and the complaints about were a possible basis for his termination. (JA1313, JA1314, JA1316, JA1325)

2010 Customer Complaint

Tellingly, Zarda acknowledged that Mr. Kengle had lodged a complaint against him because "He said I was getting familiar with his girlfriend" (JA1285, JA1293, JA1294, JA1329) and that he conveyed that complaint to Ray Maynard. (JA1286) Zarda admitted disclosing his sexual orientation to Orellana because he sensed his actions made her feel uncomfortable. (JA1287) Zarda conceded he did not know what Maynard's motivation was for terminating him in 2010. (JA1299)

Rosanna Orellana, the female tandem jump student who complained about Zarda's behavior, was called by Appellants to testify. She testified on direct examination that Zarda made a joke about her being strapped to another guy. "He made the joke. He said to my boyfriend, how do you feel that I'm strapped to your girlfriend or something along lines. (JA1222) Ms. Orellana testified that Zarda whispered in her ear in a sensual manner. (JA1232) On cross-

examination, Orellana testified that the video introduced did not capture the entirety of the jump experience. (JA1245) She testified that Zarda made her feel uncomfortable by, "whispering in my ear, so close in a sensual way. And after that he kept, you know putting his chin on my shoulder, which I found to be like, inappropriate." She compared what she experienced to what she observed of her boyfriend's jump and testified that it made her "feel uncomfortable." (JA1247) She also testified that Zarda put his hands on her legs and no other instructors behaved in such a manner. (JA1247-JA1248) Orellana testified that Zarda made her feel uncomfortable and that his behavior was inappropriate. (JA1249) Orellana testified that instead of discussing the geography of what they were hovering over under the parachute that Zarda "was talking about his personal life. I can't remember the whole conversation, but something about a break up with his, you know, significant other and how upset he was because they had broken up. That's - - that was the main conversation during that period of time. (JA1253) After the jump, Orellana discussed what transpired with her boyfriend who had also jumped and they compared their respective experiences. At which point, Orellana expressed disappointment in her

jump experience. (JA1255-JA1256) On re-direct, Orellana testified that she expected Zarda "to do his job and talk about what he is supposed to talk about, which is the surrounding area." I'm not really, you know, a therapist, so if he wanted to talk about his personal life and his personal problems in his life, he should find a more appropriate time to talk about it, not while we are free falling with my life in his hands." (JA1262-JA1263)

David Kengle testified on direct examination that he complained to Maynard about Zarda's behavior with his girlfriend Orellana. (JA1405-JA1406, JA1410) Kengle testified, "I don't remember exactly the conversation that we had. I made a complaint based on what I felt was inappropriate and the story that my girlfriend Rosanna gave me at the time. Exactly what I told him, I don't remember the details, but he did refer to his personal life, referenced his personal life in some capacity. I felt that added inappropriateness, and that was my complaint." (JA1407) Kengle went on to explain that he complained about Zarda acting inappropriately in that he was flirtatious with Orellana, kept his hands on her hips, or thigh area throughout the jump, and was gesturing to his mouth. (JA1410-JA1412)

On direct examination by Appellants' counsel, Maynard testified that Zarda made him aware of his sexual orientation at the time of his first hiring in 2001. (JA1466). Maynard testified that he received a complaint about Zarda from Kengle. (JA1476) and that complaint included touching that made her feel uncomfortable (JA1478) and discussions between Zarda and Orellana that occurred during the fall from the plane. (JA1482, JA1543) Maynard testified that after he received the complaint, he started his investigation. (JA1544) As part of his investigation, Maynard asked Zarda questions about the jump which, upon reflection, he did not remember. He also testified that Zarda had a history of customer complaints and was spoken to twice before about these issues. (JA1482) After Maynard viewed the videotape of the jump, its content corroborated Kengle's complaint. (JA1482, JA1545)

Wayne Burrell testified that he was employed at Skydive Long Island for twenty-four (24) years as an instructor, and that he had worked with Zarda. (JA1514) Burrell testified that he observed Zarda "being a little unprofessional, rude not talking to them, not being

friendly" with female jumpers (JA1515 & JA1516) and that he had mentioned his observations to Maynard. (JA1516)

Duncan Shaw testified that he worked at Skydive Long Island for fifteen (15) years (JA1575) and that he worked with Zarda. (JA1576) He testified that Zarda introduced himself to others as, "Gay Don" (JA1577, JA1586) and frequently discussed his sexual orientation in front of co-workers and at times, went into detail about his relationships. (JA1577, JA1578-JA1580)

Curt Kellinger testified that he had worked at Skydive Long Island since 1992, up until a couple of years before his 2015 testimony. (JA1626) Kellinger knew Zarda and was instrumental in his hire at Skydive. (JA1627-JA1628) Kellinger testified that Zarda disclosed his sexual orientation to him at their first meeting. (JA1628, JA1629)

V. SUMMARY OF ARGUMENT

A. Sexual Orientation Discrimination is not a Prohibited Basis for Actionable Discrimination under Title VII.

While we offer no commentary on whether justice, equity, or morality should dictate otherwise, binding Second Circuit precedent confirms the Trial Judge properly refused to credit, or acknowledge any cause of action for sexual orientation discrimination arising under Title

VII. Notwithstanding recent societal inertia and the resultant effect upon administrative agencies, at present, there exists no such relief under Title VII. Nothing contained within Appellants' brief, or for that matter, any of the corresponding *amicus* briefs is sufficient to effectuate such change.

B. Judicial Deference to Administrative Decisions is not Mandatory

Appellants, not surprisingly, place great weight upon what they believe to be this Court's obligation to defer to the decisions of administrative agencies. However, in actuality, counsel's reliance upon the two seminal Supreme Court cases governing this practice is misplaced when, like here, Congressional intent is clear and unambiguous. Neither the *Skidmore*, nor the *Chevron* decision permits this Court to find in the law, protection for sexual orientation discrimination at a federal level, when Congressional intent indicates otherwise.

1. *Skidmore* Deference

This was an FLSA case involving unpaid overtime compensation. The Supreme Court held that "the rulings, interpretations and opinions of the Administrator under this Act" are not controlling, but they

"constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Court will evaluate an agency's decision in a case based on:

1. the thoroughness evident in its consideration;
2. the validity of its reasoning;
3. its consistency with earlier and later pronouncements; and
4. all those factors which give it power to persuade, if lacking power to control. *Id.*

This is a less deferential standard compared to that found in *Chevron*.

2. ***Chevron* Deference**

This case involved the construction of the term "stationary source" in an EPA regulation. The Supreme Court articulated a two-step test stating: **"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.** If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute … Rather, if the statute is silent or

ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (emphasis added).

Therefore, if Congress has already made a determination on an issue, the Court will defer to the intent of Congress. However, in a situation where Congress has not spoken on an issue, the Court should not attempt to construe the statute. Instead the Court should defer to the agency interpretation because the individuals in the agency are experts in that subject area and have more experience.

Here, as set forth below, Congressional intent is clear and Appellants' reliance upon *Chevron* in practical effect, bolsters Appellees' position.

C. The Second Circuit Decision in *Simonton* Remains Undisturbed.

In *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), the Second Circuit unequivocally held that "Title VII does not proscribe discrimination because of sexual orientation." *Id.* at 36. In reaching this conclusion, it cited "Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their

sexual preferences." *Id.* at 35 (*citing*, *e.g.*, Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); and the Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)).

Based on the Second Circuit's interpretation of Title VII in *Simonton*, Judge Bianco properly held that Appellants could not bring a claim under Title VII for discrimination based on sexual orientation. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005) ("[T]o the extent that [the plaintiff] is alleging discrimination based upon her lesbianism, [the plaintiff] cannot satisfy the first element of a *prima facie* case under Title VII because the statute does not recognize homosexuals as a protected class.").

The *Simonton* Court additionally looked to the other protected classifications under Title VII, reasoning that when read alongside the categories of race, color, religion, or nationality, "sex" could logically only refer to a class "delineated by gender, rather than sexual activity regardless of gender." *Id.* (*quoting DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306–07 (2d Cir. 1986)).

D. **The EEOC has not Displaced *Simonton*.**

Appellants argue, in sum and substance, that, even if *Simonton* is settled law, the decision was displaced by a July, 2015 EEOC ruling that Title VII protects against discrimination based on sexual orientation. (*relying on Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *1 (July 16, 2015)).

Appellants' position is incorrect. Binding Second Circuit precedent does not support a wider expansion or interpretation of *Baldwin,* (a federal sector case); certainly not one which would move this Court away from the well-reasoned decision in *Simonton*.

EEOC interpretations of Title VII are entitled to *Skidmore* deference at most—that is, "deference to the extent [that they have] the power to persuade." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 619 (2d Cir. 2016) (relying on *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 53 (2d Cir. 2012); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, —— U.S. ——, 133 S.Ct. 2517, 2533 (2013)); *Crump v. T Coombs & Associates, LLC*, 13-CV-707, 2015 WL 5601885, at *24 n. 12 (E.D.Va. Sept. 22, 2015) (EEOC guidance given deference only to the extent that it has power to persuade).

The district courts that have decided Title VII claims in the wake of *Foxx* have also given the EEOC's interpretation of Title VII deference to the extent that the EEOC's decision is persuasive. *E.g., Christiansen v. Omnicom Grp., Inc.*, No. 15 CIV. 3440 (KPF), —— F.Supp.3d ——, —— —, 2016 WL 951581, at *15 (S.D.N.Y. Mar. 9, 2016); *Videckis v. Pepperdine Univ.*, No. CV-15-00298 (DDP) (JCX), —— F.Supp.3d ——, ——, 2015 WL 8916764, at *8 (C.D.Cal. Dec. 15, 2015); *Isaacs v. Felder Servs., LLC*, 13-CV-0693 (MHT), ——F.Supp.3d ——, —— – ——, 2015 WL 6560655, at *3–4 (M.D.Ala. Oct. 29, 2015); *Dew v. Edmunds*, No. 1:15–CV–00149 (CWD), 2015 WL 5886184, at *9 (D. Idaho Oct. 8, 2015); *Burrows v. Coll. of Cent. Florida*, 14–CV–197 (PRL), 2015 WL 5257135, at *2 (M.D.Fla. Sept. 9, 2015).

District courts have, however, split on whether to follow the EEOC or to follow the law of their regional circuits and their own districts. *Christiansen* and *Burrows* noted that the EEOC's decision was entitled to deference to the extent that it was persuasive, but found that the decision could not displace the explicit holdings of their regional circuit court (in the case of *Christiansen*) or of their own district (in the case of *Burrows*). *Christiansen*, —— F.Supp.3d at ——, 2016 WL

951581, at *15; *Burrows*, 2015 WL 5257135, at *2. As the *Christiansen* court noted: (1) the conduct before it was "reprehensible"; (2) "[t]he broader legal landscape has undergone significant changes" toward increased protection against sexual orientation discrimination in recent years; and (3) current rules recognizing Title VII discrimination claims based on sexual stereotyping but barring claims based on sexual orientation discrimination are incoherent. *Christiansen*, —— F.Supp.3d at ——— – ———, 2016 WL 951581, at *13–15. **However, that court still concluded that that, under binding Second Circuit precedent, it could not adopt the EEOC's position**.

By contrast, *Isaacs* and *Videckis* adopted the EEOC's position without addressing governing precedent from the regional circuit or their own district. *Isaacs*, —— F.Supp.3d at ——— – ———, 2015 WL 6560655, at *3–4; *Videckis*, —— F.Supp.3d at ———, 2015 WL 8916764, at *8.

Appellants latch onto the aforementioned decision in *Isaacs,* package it with the *Baldwin* holding, and present it to this Court as a cogent means by which to overturn *Simonton.* Logical syllogism aside, this strategy is patently ineffectual.

Appellants' counsel states that a court has already found *Baldwin* to be persuasive. (*See* Appellant's Brief, 39) "These cases pre-date *Baldwin* and now apply with greater force. The EEOC is entitled to deference under *Chevron*, as the agency charged with enforcing Title VII, or insofar as it is able to persuade. *Skidmore*, 323 U.S. 140 (1944). *Baldwin* is persuasive, and at least one court has already so found. *Isaacs v. Felder Servs., LLC*, 2015 U.S. Dist. Lexis 146663 at *8-9 (M.D. Ala. Oct 29, 2015)."

While the court in *Isaacs*, a case originating out of the Middle Distract of Alabama, discussed *Baldwin,* and in the course of doing so, stated it was "compelling", the court ultimately held that "this claim fails for the same reason Isaacs's other discrimination claims fail: He has offered no direct or circumstantial evidence to suggest that the decision of Felder Services to fire him was based on his sexual orientation." *Isaacs v. Felder Servs., LLC*, 2015 U.S. Dist. Lexis 146663 at *4 (M.D. Ala. Oct 29, 2015). As set forth in the proceeding section of this brief, Appellants' putative claim of sexual orientation discrimination arising under Title VII is also fatally flawed for the same

reasons. Plainly, the *Isaacs* decision does not alter the calculus of this dispute.

Although curiously absent from Appellants' brief, we would be remiss not to point out that in one notable case, The Eastern District of New York adopted the EEOC's position, notwithstanding explicit Second Circuit law to the contrary. *See Roberts v. United Parcel Serv., Inc.*, 115 F.Supp.3d 344 (E.D.N.Y. 2015) (surveying the federal and local sea-change in attitudes towards sexual orientation discrimination). However, the logic in *Roberts* has been disputed because a district court simply cannot change the law of the regional circuit. *Hinton v. Virginia Union University*, 2016 WL 2621967 at *5, (E.D.Va. May 5, 2016). This decision weighs on the present dispute to the extent Appellant asks this Court to change the law of the Second Circuit despite the existence of black letter statutory language to the contrary.

Appellants advance, in support of their arguments, decisions where courts have adopted the EEOC's position. However, the scope and reach of Title VII properly lies within the exclusive purview of the Legislative branch. Since Congressional intent is clearly articulated, the two (2) step analysis in *Chevron* is not applicable and the sound

reasoning behind the *Simonton* decision remains the guiding principle by which this case is governed.

Absent amendment, Title VII, as written, does not encompass sexual orientation discrimination claims. The EEOC's *Baldwin* decision is at best, persuasive authority; its application is inherently limited. Appellants cannot state a claim for discrimination under Title VII and the Trial Judge did not commit reversible error by failing to allow such a claim to proceed.

E. Any Putative Claim for Sexual Orientation Discrimination Arising Under Title VII Fails as a Matter of Law

1. Disparate Treatment

While not presently actionable under Title VII, claims of sexual orientation discrimination are actionable under the New York State Human Rights Law. *Stephenson v. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271 (2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 224 (2d Cir. 2005).

Importantly, and for purposes of the pending appeal, courts analyze claims under the NYSHRL using the same standards that apply to federal civil rights statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. *See Weinstock v. Columbia*

Univ., 224 F.3d 33, 42 & n. 1 (2d Cir. 2000); *see also Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 n. 3,786 N.Y.S.2d 382, 819 N.E.2d 998 (2004).

The question of whether such claims are viable is determined by the familiar *McDonnell Douglas* burden shifting analysis used for Title VII claims. *Id.*; *Dawson v. Bumble & Bumble*, 398 F.3d 211, 224 (2d Cir. 2005); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To meet this burden, Plaintiff must demonstrate that "(1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." *Id.* If the Plaintiff does so, "a presumption of discrimination arises and the burden shifts to the Defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action." *Dawson v. Bumble & Bumble*, 398 F.3d 211, 216 (2d Cir. 2005). If the Defendant does so, "the presumption of discrimination created by the *prima facie* case drops out of the analysis, and the Defendant will be entitled to summary judgment unless the

Plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *Id.* (internal quotations and citations omitted). In analyzing the Defendant's business decision, courts must refrain from second-guessing a business's decision making process. *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985) *see*, *e.g.*, *Sweeney v. Research Foundation of the State Univ. of N.Y.*, 711 F.2d 1179, 1187 n. 11 (2d Cir. 1983).

2. **There Exists No Inference of Impermissible Discrimination**

At trial, Appellants failed to meet their burden under the *McDonnell Douglas* analysis, because a jury of Zarda's peers determined that he failed to establish that he was terminated under circumstances which give rise to an inference of impermissible discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Certain factors "strongly suggest that invidious discrimination [is] unlikely. For example, where the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [that person] an invidious motivation that would be inconsistent with the decision to hire." *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir.1997); *Chin v. ABN-AMRO N. Am., Inc.*, 463

F. Supp. 2d 294, 304 (E.D.N.Y. 2006); *Zuffante v. Elderplan, Inc.*, 2004 WL 744858, at *6 (S.D.N.Y. Mar. 31, 2004). Invidious discrimination is especially unlikely when the termination "occurred a short time after the hiring." *Id.* at 560; *see Cooper v. Morgenthau*, 2001 WL 868003, at *6 (S.D.N.Y. July 31, 2001) ("The 'underlying rationale for the [same actor] inference is simple: it is suspect to claim that the same manager who hired a person in the protected class would suddenly develop an aversion to members of that class.'").

Here, Maynard hired Zarda on three (3) separate occasions: 2001, 2009 and 2010. (JA0107, JA0108, JA0112, JA0113, JA0339, JA0342). Each time Maynard invited Zarda to work at SDLI, Maynard had full knowledge of his sexual orientation because Zarda was openly gay. (JA0107, JA0109, JA0113, JA0334, JA0397, JA0418). Maynard was aware of Zarda's sexual orientation yet continued to bring him back to SDLI to work. Additionally, Maynard was the person who decided to fire Zarda. (JA0107, JA0108, JA0112, JA0113, JA0148, JA0339, JA0342, JA0371). Given that Maynard decided to hire Zarda, with full knowledge of his sexual orientation, and subsequently decided to fire him, there can be no inference of discrimination. *Grady*, 130 F.3d at

560. It is illogical to suggest, as Appellants now do, that Maynard would re-hire Zarda, knowing his sexual orientation, if he had any aversion to homosexuals. *See Cooper*, 2001 WL 868003, at *6. Additionally, Zarda was terminated within two (2) years of his hire date - he was hired late in 2008 and terminated in June 2010. (JA0108, JA0109, JA0148, JA0371, JA0337). The short period between his hire date and his termination creates a strong inference that Zarda was not subjected to invidious discrimination. *Grady*, 130 F.3d at 560; *see Cooper v. Morgenthau*, 2001 WL 868003, at *6 (S.D.N.Y. July 31, 2001) (holding the inference of no discriminatory animus due when plaintiff was hired and fired by the same person "should be accorded substantial weight where the time period between the hiring and firing is less than two years."). Moreover, Zarda was suspended and terminated in the immediate wake of a customer complaint. (JA0102, JA0103, JA0346). Again, the close proximity between the complaint about Zarda's conduct and his termination indicate that he was terminated based solely on his inability to satisfy a customer. The jury properly found that Zarda was not fired under circumstances giving rise to an inference of

impermissible discrimination. *Grady*, 130 F.3d at 560; *Cooper*, 2001 WL 868003, at *6.

3. **Appellees had a Legitimate, Non-Discriminatory Reason for Zarda's Discharge.**

Even if, assuming, *arguendo*, Zarda could somehow demonstrate that he was terminated under circumstances which give rise to an inference of discrimination, Appellees had a legitimate, non-discriminatory reason for the termination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Zarda's termination was a result of a customer complaint regarding his behavior. (JA0152, JA0136, JA0154, JA0150, JA0164).

A customer complaint is a legitimate business reason for termination. *See Iverson v. Verizon Communications*, 2009 WL 3334796, at *5 (S.D.N.Y. Oct. 13, 2009) (holding plaintiff was terminated for legitimate business reasons because plaintiff had poor performance and received multiple customer complaints); *Hayes v. Cablevision Sys. New York City Corp.*, 2012 WL 1106850, at *15 (E.D.N.Y. Mar. 31, 2012) (holding customer complaints and written reprimands were sufficient to show a legitimate business reason for plaintiff's termination). SDLI is first and foremost a customer service

business, in which the highest priority is customer safety and the second is ensuring an enjoyable experience. (JA0128, JA0129, JA0323). On June 18, 2010, Zarda was unable to provide a customer with an enjoyable experience. (JA0144, JA0476, JA0489). Instead, Kengle and Orellana were placed in an uncomfortable position because Zarda put his hands on Orellana's hips, rested his chin on her shoulder, and in the course of doing so, disclosed intimate details of his personal life. (JA0476, JA0486, JA0489, JA0454, JA0464, JA0465). As a result, Orellana and Kengle had a dissatisfactory experience and called SDLI to lodge a complaint. (JA0345, JA0456, JA0457). This alone is the reason Zarda was terminated. (JA0103, JA0148, JA0152, JA0136, JA0154, JA0150, JA0164, JA0371). In terminating Zarda, Maynard made a business decision to eliminate an employee who failed to provide the customer with one of the core goals of skydiving – an enjoyable experience. This decision was based on SDLI's desire to please its customer base, not Zarda's sexual orientation. Zarda himself conceded that the customer complaint regarding his behavior was unrelated to his sexual orientation. (JA0183). Appellants cannot rebut this fact. In addition, Zarda was the only instructor Maynard had ever received

complaints about in his twenty (20) years at SDLI, Maynard properly responded to the complaint with immediate and unbiased corrective action. (JA0317, JA0318, JA0375). Parenthetically, this was not the first incidence in which a customer complained about Zarda during a jump; he received a prior customer complaint in 2001. (JA0108, JA0147, JA0148, JA0165). In terminating Zarda, Maynard simply eliminated an employee who, on at least two (2) separate occasions, failed to provide satisfactory customer service. Therefore, Zarda was terminated for a legitimate, non-discriminatory reason and the jury properly dismissed his claim for sexual orientation discrimination.

F. Appellees did not Engage in Trial by "Ambush".

To the extent Appellants suggest the inclusion of a certain number of witnesses in the parties' proposed Joint Pre-Trial Order, dated June 20, 2014, constitutes "trial by ambush," such a theory is nullified by the objective, factual record. Appellants claim Appellees' counsel was, for all intents and purposes, motivated by a nefarious agenda by including fifty-seven (57) potential witnesses in their portion of the proposed Joint Pre-Trial Order.

First and foremost, there exists no threshold number of witnesses, the inclusion of which would presumptively violate any local or federal rule. Appellees respectfully maintain that in a case such as the one at bar, its actions were, at all times, eminently reasonable. Appellees' proposed witnesses were each Zarda's former co-workers during his three (3) separate tenures at SDLI. Since skydiving is weather dependent, jumpers are migratory by nature. (JA0027, JA0049, JA0081, JA0165) As demonstrated during the pre-trial process, jumper availability was difficult to manage. This fact necessitated the inclusion of each of Zarda's former co-workers. (JA0682-JA0688)

Tellingly, while the Joint Pre-Trial Order was filed with the Court on June 20, 2014, and Jury Trial commenced on October 13, 2015, the names of the three (3) witnesses which form the basis of Appellees' position were disclosed several years earlier. (SA008, SA021, SA022, SA023)

Specifically, the names of the following witnesses appeared in documents exchanged by the parties at the corresponding dates below:

1. **Wayne Burrell:** Zarda served his response to Appellees' First Set of Interrogatories on April 7, 2011. Appellees' second interrogatory

required Zarda to identify "all individuals employed by Defendant who partook in purported banter or conversation with Defendant's customers and/or clients as described in ¶18 of Plaintiff's Complaint." To which, Zarda responded by providing an extensive list of names, including a "Wayne Burrell." Appellees' request did not inquire about Wayne Burrell specifically. His name did not appear in the interrogatory. Instead, Zarda first identified Mr. Burrell as possessing information related to this action by providing his name in direct response to a legitimate discovery demand. Again, this discovery response was served several years before the ultimate trial.

2. **Curt Kellinger**: Appellants similarly claim a lack of knowledge about Mr. Kellinger. However, Appellants' counsel produced a response to Appellees' First Request for the Production of Documents on February 1, 2011 which included, amongst other items, documents referencing Curt Kellinger. Specifically, Zarda produced an e-mail chain reflecting a conversation between he and Curt Kellinger *via* Facebook. (SA022, SA023) On April 7, 2011, Zarda produced a response to Appellees' First Set of

Interrogatories, in which Curt Kellinger was identified as possessing information relevant to this matter. Additionally, Curt Kellinger's name was referenced prominently during the depositions of Richard Winstock and Zarda. Specifically, Mr. Kellinger was referenced no fewer than five (5) separate times during Winstock's deposition and no fewer than nine (9) separate times during Zarda's deposition. (JA0395, JA0406, JA0417, JA0418, JA0108, JA0110, JA0111, JA0113, JA0159, JA0162) Tellingly, Richard Winstock was the first to introduce Curt Kellinger's name in his deposition testimony, rather than counsel for Appellees. (JA0395) Similarly, Zarda was the first to introduce Mr. Kellinger, or "Curt," in his own testimony without being prompted to do so by counsel. (JA0108)

3. **Duncan Shaw**: Appellants' allegations regarding Duncan Shaw are wholly inaccurate as Mr. Shaw was referenced more frequently than any of the three (3) witnesses upon which opposing counsel relies in support of his argument. Zarda first introduced Mr. Shaw's name in response to Appellees' First Request for the Production of Documents on February 1, 2011.

(SA021) Zarda, yet again, provided Duncan Shaw's name in response to Appellees' First Set of Interrogatories on April 7, 2011. In addition, Duncan Shaw was referenced in four (4) separate depositions. (JA0402, JA0320, JA0336, JA0348, JA0441) Tellingly, Zarda referenced Duncan Shaw during his deposition on no fewer than twenty (20) separate occasions. (JA0108, JA0110, JA0111, JA0161, JA0162, JA0166, JA0174, JA0175)

Despite the foregoing, Appellants insist they were somehow "ambushed at trial" by the inclusion of these witnesses and that such action constitutes reversible error. In support of his position, counsel relies upon the decisions in *US v. Charles Kelly and Raymond Imp*, 420 F.2d 26 (1969) and *US v. Richard Baum and Joseph Scapoli*, 482 F.2d 1325, 1331 (2nd Cir., 1973). However, the relatively aged and highly contextualized cases upon which Appellants rely are insufficient to support any finding that Appellees, in any manner, "ambushed" Appellants.

Specifically, *US v. Charles Kelly and Raymond Imp*, 420 F.2d 26 (2d Cir. 1969) is a criminal case involving two New York City detectives conspiring to traffic drugs. The trial took place in 1968 at which time

there was a new "neutron activation" technique to demonstrate that the drugs all came from the same batch. The Defendants objected to the neutron activation evidence as well as the government expert who discussed the technique in his testimony. A new trial is granted so the defense has the opportunity to attempt the technique. This is distinguishable because the new trial was connected to the scientific process in question and not the witness.

Further, *United States v. Richard Baum and Joseph Scapoli*, 482 F.2d 1325, 1331 (2nd Cir. 1973) is a criminal case involving criminal possession of radios. The Defendants/Appellants claimed prejudice based on the evidence provided by the government's final witness, Greenhalgh, to prove Baum's knowledge that the radios were stolen. The Court found "no reason for non-disclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. *Cf. Rovario v. United States*, 353 U.S. 53, 60 (1957); *United States ex rel. Wilkins*, 326 F.2d 135, 140 (2d Cir. 1964). The court held a new trial was required to afford Defendant Baum a fair opportunity to meet the critical and damaging proof of an offense not presented against him in the indictment. The government

failed to disclose the identity of the witness but did not justify a reason for non-disclosure. The case has no practical application to the present dispute.

Appellees respectfully submit more recent decisions which center upon a party's failure to disclose the identity of trial witnesses are far more relevant that those upon which Appellants rely.

For example, in *Lopez v. City of New York*, No. 11-CV-2607 (CBA) (RER), 2012 WL 2250713 (E.D.N.Y. June 15, 2012), Plaintiffs moved to preclude Defendants from offering at trial any witnesses not specifically disclosed to date. The Court granted the Order and the Defendants moved the Court to reconsider the motion. The Court stated, "[W]hat Rule 37 clearly prohibits, however, is for Defendants to knowingly fail to disclose percipient witnesses in violation of their obligations under Rule 26(a) and (e)(1), and then seek to have those witnesses testify at trial." The goal of the Rules is "to avoid surprise or trial by ambush." The Court also considers prejudice to Defendants. The Court held that there is no prejudice or harm to Defendants and upholding the previously granted Order. Here, as set forth above, Zarda himself either disclosed and/or testified as to the identity and relevance of each

trial witness in question. In light of such facts, there can be no "ambush".

Further, in *LaVigna v. State Farm Mut. Auto. Ins. Co.*, 736 F. Supp. 2d 504, 511 (N.D.N.Y. 2010), Plaintiff sued her former employer after termination. The employee argued Defendant should be precluded from relying on her supervisor's affidavit because Defendant violated Rule 26 and initially failed to identify him "as an individual likely to have discoverable information." The Court pointed out that Plaintiff, in a situation like here, "had full awareness of [his] role and involvement in the events at issue here."

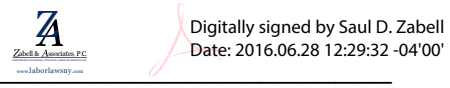
Plainly, the frequency with which Messrs. Shaw, Kellinger and Burrell appeared during the discovery period, particularly since Appellant himself disclosed their names and identified them as possessing relevant information, nullifies any claim that Appellees attempted to conduct a "trial by ambush." We respectfully submit this Court should disregard any argument to the contrary.

VII. CONCLUSION

For all the foregoing reasons, Appellees respectfully request this Court deny Appellants' appeal in its entirety because 1) there does not exist a cognizable claim for sexual orientation discrimination under Title VII and 2) because there was no reversible error at trial.

Dated: Bohemia, New York
June 15, 2016

ZABELL & ASSOCIATES, P.C.
Counsel for Appellees

By: 

Saul D. Zabell
One Corporate Drive, Suite 103
Bohemia, NY 11716
(631) 589-7242
(631) 563-7475
szabell@laborlawsny.com

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Attorney for APPELLEES

Dated: June 17, 2016