

15-3775

UNITED STATES COURT OF APPEALS *for the* SECOND CIRCUIT

MELISSA ZARDA AND DONALD MOORE AS INDEPENDENT CO-EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiff-Appellant,

— against —

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

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

JOINT APPENDIX – VOLUME VI

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1 A Yes.

2 Q And you answered, There are times, yes, there are
3 goofy times.

4 That was your answer, correct?

5 A Yes, but that wasn't what I said about Don. And I
6 didn't say that about Don's video.

7 Q But you would characterize the atmosphere as goofy
8 according to this, correct?

9 A He kept saying goofy so I agreed with you.

10 Q All right. And you agreed with me because it was the
11 truth, correct?

12 A We try to have our -- we try to make it fun up there.
13 Our first job is to make everything as safe as possible.
14 And by having a little fun atmosphere, we try to make the
15 customers relax, yes.

16 Q Okay. And by having them relax, you're funny, you
17 make jokes, you're goofy, you're childlike, all of those
18 things, correct?

19 MR. ZABELL: Objection.

20 THE COURT: We went through this already in his
21 testimony.

22 BY MR. ANTOLLINO:

23 Q All right now, you saw -- you have seen pictures of
24 someone putting their hand on someone else's behind as
25 they're getting out of an aircraft, correct?

JA1501

1 A Yes.

2 Q That's necessary because the person getting out of an
3 aircraft doesn't have something to stand on, correct?

4 A Yes.

5 Q Okay. When an instructor is exiting an airplane with
6 a passenger, his mouth is very close to the passenger's
7 ears, correct?

8 A Yes.

9 Q All right. And that's because if the instructor is
10 talking to the helmet, the passenger is not going to hear
11 as well as if he is on the right side or the left side,
12 correct?

13 A What you're saying, yes.

14 Q Now, do you remember the video where a bunch of
15 people were about to jump out of a plane and they all
16 exclaimed, Make shit happen?

17 A Yes.

18 Q Okay. And there is nothing inappropriate about that,
19 given the context in which it's happening, correct?

20 A Correct.

21 Q You saw a picture of Rich Winstock having his hand on
22 a passengers's shoulder and you thought nothing wrong of
23 it, correct?

24 A Correct.

25 Q Now, you were not aware, were you, at the time you

JA1502

1 fired Don, that Rosana was kissing the camera, were you?

2 MR. ZABELL: Objection as to facts not in
3 evidence.

4 THE COURT: Sustained to the form.

5 BY MR. ANTOLLINO:

6 Q You saw Mr. Kengle's video this morning, correct?

7 A Yes, I did.

8 Q And there was a portion there where Rosana was
9 pursing her lips at the camera, correct?

10 A She was going along with what was going on in the
11 airplane.

12 Q Can you answer the question, was she pursing her
13 lips?

14 A Yes.

15 Q In the form of a kiss, correct?

16 A Could be termed that way.

17 Q Now, Mr. Kengle did not tell you that there had been
18 a joke in the aircraft to the effect that, I bet you
19 didn't think that your girlfriend was going to get
20 strapped to another guy, correct?

21 A That said -- I read that more than once, yes.

22 Q And Mr. Kengle didn't tell you that when he called
23 you, correct?

24 A I'm not sure. I don't remember.

25 Q Why don't you take a look at your deposition,

JA1503

1 page 210, and I'll ask you if that refreshes your
2 recollection.

3 THE COURT: Do you have the deposition?

4 A You took my copy.

5 Q I'm sorry.

6 Do you see that? On line 15, Did Mr. Kengle
7 tell you that there has been a joke before the passengers
8 exited the airplane?

9 Answer: I don't recall.

10 Question: In fact, did he in fact tell you that
11 one of the instructors other than Don made a joke to the
12 effect that, Hey, I bet you didn't think that your
13 girlfriend was going to get strapped to another guy.

14 And you answered, I don't know.

15 Question: You don't know if he told you that?

16 No.

17 You answered -- you were asked those questions
18 and you were given those answers, correct?

19 A Yes.

20 Q All right. Now, if that joke was made, it wasn't an
21 inappropriate joke according to you, correct?

22 A Correct.

23 Q Now, that comment would have been on Mr. Kengle's
24 mind during the jump, wouldn't that be fair to say, it was
25 made before the jump?

JA1504

1 MR. ZABELL: Objection.

2 THE COURT: Sustained.

3 BY MR. ANTOLLINO:

4 Q You did not think it is inappropriate for Rich
5 Winstock to tell a customer that he was married and had
6 children, do you?

7 A No.

8 Q That's personal information, correct?

9 A Yes.

10 Q If he felt that was appropriate under the
11 circumstances, you respect his judgment, correct?

12 A Yes.

13 Q And you knew that when you took your deposition in
14 2011, right?

15 A Correct.

16 Q He used that personal information in his best
17 judgment to ease the tension, correct?

18 A That is what he said.

19 Q You didn't fire Rich Winstock for that, correct?

20 A Nobody complained.

21 Q You didn't suspend him, correct?

22 A Nobody complained.

23 Q If someone had complained --

24 MR. ANTOLLINO: Are you going to let me ask this
25 judge?

JA1505

1 Q If someone had complained, are you going to fire
2 someone for saying they're married and have children?

3 A No.

4 Q Now, you believe that Don's comment about being gay
5 is a comment about an escapade, correct?

6 MR. ZABELL: Objection.

7 THE COURT: Sustained to the form.

8 BY MR. ANTOLLINO:

9 Q What is an escapade?

10 A An escapade could be an event, be someplace you're
11 going, it could be a date. Just another word for doing
12 something.

13 Q And you heard on the tape last week that you referred
14 to Don telling Ms. Orellana about his escapades, correct?

15 MR. ZABELL: Objection.

16 THE COURT: Overruled. You can answer that.

17 A Yes.

18 Q And his escapades were being gay, correct?

19 A No.

20 Like I said, an escapade could be going
21 somewhere, doing something, going on a date.

22 Q So you don't know what escapades you were referring
23 to in that tape?

24 A Do I know what escapade?

25 Q Yes. You don't know what escapades you were

JA1506

1 referring to in that tape, do you?

2 A I don't understand.

3 Q You referred -- now, let's just focus for a minute.

4 You referred to escapades in a tape that you heard last
5 week, correct?

6 A Correct.

7 Q What escapades were you talking about?

8 A Don, you mean, with Ms. Orellana?

9 Q Yes.

10 A As you heard testimony from her, she told -- she
11 spoke about Don was talking about, he had just broken up
12 with his boyfriend and he was very unhappy. And that was
13 what I considered an escapade.

14 Q Breaking up with a boyfriend is an escapade?

15 A Why not?

16 Q All right. You never asked what it was about the
17 hips that made Rosana uncomfortable, did you?

18 A About the what?

19 Q You never asked what it was about her hips that made
20 Rosana uncomfortable, did you?

21 A No, I did not ask.

22 Q It could have been that Don was adjusting the straps
23 down there, correct?

24 A No.

25 Q All right. Take a look at your deposition, page 250.

JA1507

1 Do you have page 250 there?

2 A Yes.

3 Q All right. Take a look at page 149, line 25.

4 Question: And it could have been something,
5 page 250, like he was adjusting the straps down there,
6 correct?

7 Answer: It could.

8 Were you asked that question and did you give
9 that answer?

10 A Yes.

11 Q And then I also asked you, And if he was adjusting
12 the straps down there, that would not be a legitimate
13 complaint, correct?

14 Answer: Correct.

15 A If he was just adjusting the straps, correct.

16 Q That's okay.

17 You trusted Don's judgment in adjusting the
18 straps, to give as much safety and balance with
19 customers -- withdrawn.

20 You trusted Don's judgment in adjusting the
21 straps to give as much safety and balance with comfort for
22 the passenger.

23 Is that correct?

24 A Correct.

25 Q What Rosana felt might well have been -- withdrawn.

JA1508

1 Now, a tandem instructor wants to check the
2 attachments to make sure that they are in place, correct?

3 A Correct.

4 Q That would require him to touch the attachments,
5 correct?

6 A Correct.

7 Q Now, Mr. Kengle was paired with Duncan Shaw, correct?

8 A Correct.

9 Q And there is nothing wrong with the fact that Duncan
10 Shaw told Mr. Kengle that he was from New Zealand,
11 correct?

12 A Correct.

13 Q Even though being from New Zealand is personal
14 information, correct?

15 A Correct.

16 Q When you are under canopy -- before I forgot, I just
17 want to ask this question.

18 Rosana testified last week that she was in free
19 fall for ten minutes. Is that an exaggeration or is that
20 accurate?

21 MR. ZABELL: Objection.

22 THE COURT: Sustained to form.

23 BY MR. ANTOLLINO:

24 Q How long are you in free fall in a typical dive?

25 A About 60 seconds.

JA1509

1 Q So if she said ten minutes, that would be a
2 mis-memory, correct?

3 A She was --

4 Q Let me finish asking the question.

5 If she said ten minutes, that would be
6 incorrect, correct?

7 A Correct.

8 Q All right. Now, when you were under canopy, that's
9 when you go up after the parachute is deployed.

10 Is that correct?

11 A The parachute does not go up. It actually --

12 Q So the parachute opens and it takes you up, correct?

13 A No.

14 Q Explain what being under canopy means.

15 A Initially in a free fall, and when you deploy the
16 parachute you're throwing out what we call a drogue, a
17 drogue chute. And then when they're in free fall with the
18 drogue chute, that's stabilizing them at 120 miles an
19 hour, and you do that about 50 seconds. And when he pulls
20 the rip cord and releases the pin, it opens up a
21 container, a deployment bag comes out, you get what we
22 call line stretch. And then the parachute, or what we
23 call canopy, then opens up. But you don't go up.

24 Q It just comes down?

25 A Correct. What you're seeing on the videotape is

JA1510

1 because the videographer continues to fall and continues
2 to videotape. What you're seeing, it looks like you're
3 going up, but you're just slowing down and he is not.

4 Q Okay. Now under canopy you have to loosen the straps
5 as you land, correct?

6 A Yes.

7 Q And you have to loosen the straps at the hips at that
8 time, correct?

9 A Yes.

10 Q Otherwise an injury could occur, correct?

11 A It's more for comfort than you're worried about
12 injury.

13 Q And comfort is important, correct?

14 A Yes.

15 Q It makes it better to have them loosened up as you
16 reach the ground rather than loosen them just as you are
17 landing.

18 Is that true?

19 A Yes.

20 Q All right. Now, when an instructor is strapped to a
21 passenger, the instructor has to position his chin on
22 either the right or the left side of the passenger to
23 avoid hitting the passenger's head with his mouth,
24 correct?

25 A What are you talking about, on the jump?

JA1511

1 Q At any point.

2 A When you're sitting down in an airplane, that is
3 when is the closest proximity to that. In free fall you
4 can see that there is distance between them so that they
5 don't have their head to one side or the other. And under
6 the canopy, the same situation is because when they're --
7 after the parachute is opened and you're hanging from the
8 harness, you are lower than the tandem master.

9 So no, your head does not have to be on the
10 right or the left of him, you're directly behind him
11 because the distance is horizontally.

12 Q Take a look at page 259 of your deposition, line 6.

13 Are you there?

14 A 259, yes.

15 Q Line 6.

16 Question: Isn't it true that when an instructor
17 is strapped to a passenger, the instructor has to position
18 his chin on either the right or the left side of the
19 passenger to avoid hitting the passenger's head with his
20 mouth?

21 Answer: Sitting in the airplane?

22 Question: Either sitting in the airplane or up
23 in the air.

24 Answer: Yes.

25 Were you asked those questions and did you give

JA1512

648

1 those answers?

2 A Yes.

3 Q Okay.

4 MR. ZABELL: Your Honor, may we approach?

5 THE COURT: Yes.

6

7

650

8
13 WAYNE BURRELL

9 called as a witness, having been first duly sworn,
10 was examined and testified as follows:

11
16 12 THE COURT: Please state your name and spell
17 13 your last name for the record.

18 14 THE WITNESS: Wayne Burrell, B-U-R-R-E-L-L.

19 15 THE COURT: All right, Mr. Zabell.

20 16 DIRECT EXAMINATION

21 17 BY MR. ZABELL:

22 18 Q Mr. Burrell, are you currently employed?

23 19 A Yes.

24 20 Q By whom are you currently employed?

25 21 A I'm self-employed.

1 Q In what type of business?

2 A Custom carpentry.

3 Q Are you familiar with the company called Skydive Long
4 Island?

5 A Yes. I used to work there.

6 Q And how -- you worked there. How long did you work
7 there?

8 A 24 years.

9 Q What did you do there for 24 years?

10 A I was an instructor.

11 Q Do you remember working with an employee by the name
12 of Don Zarda?

13 A Yes, I do.

14 Q What do you remember of Mr. Zarda?

15 MR. ANTOLLINO: Objection.

16 THE COURT: No.

17 BY MR. ZABELL:

18 Q Did you have the opportunity to personally work with
19 Mr. Zarda?

20 A Yes, sir.

21 Q What does that mean to you?

22 A We would be on the plane together as an instructor.

23 Q Did you ever socialize with Don Zarda?

24 A Yeah, we would chit-chat when we would be jumping or
25 whatever at the end of the day.

JA1514

1 Q Did the two of you have any common interests?

2 A Yeah. I think he was into construction work. He did
3 a little bit of electrical work, a little bit of
4 carpentry, I believe.

5 Q Did you ever observe Don Zarda's skydiving skills?

6 A Yes.

7 Q Did you observe Mr. Zarda to be a competent skydiver?

8 A Yes.

9 Q Did you observe him to be a good skydiver?

10 A Yes.

11 Q Did you ever have occasion to see Mr. Zarda interact
12 with skydiving students?

13 A Yes, sir.

14 Q And how did you see that?

15 A Just being like, I'm with a student and he would be
16 with a student and we would get on the plane together and
17 be on the plane together.

18 Q Now, what did you actually observe of Mr. Zarda
19 jumping with skydiving students?

20 MR. ANTOLLINO: Objection to form.

21 THE COURT: Overruled. You can answer.

22 A Well, I mean on the plane, I just remember seeing him
23 being, especially with female students, being a little
24 unprofessional, rude, not talking to them, not being
25 friendly.

JA1515

1 Q And you only noticed that with Mr. Zarda with female
2 students?

3 MR. ANTOLLINO: Objection. Leading.

4 THE COURT: Overruled.

5 You can answer.

6 BY MR. ZABELL:

7 Q Did you ever say anything to him about that?

8 A I never said anything to Don.

9 Q Did you ever say anything about that to anybody else
10 at Skydive?

11 A I mentioned it to Ray's, but not formally.

12 Q Well, what did you mention?

13 A I would just say to Ray's that, you know, he's being
14 unprofessional. He's not being nice to some of the
15 students. And I don't agree with it and I don't like it.

16 Q And did you ever observe Mr. Zarda asking to trade
17 passengers with you?

18 A I think I recollect that, on occasion, yeah.

19 Q What was the occasion?

20 A Well, he would prefer taking the male students over
21 the female students.

22 Q Did you find that odd?

23 A Yes.

24 Q Why?

25 A You should just take whoever you're given.

JA1516

1 Q Is it easier to jump with a female student?

2 A Not necessarily, no.

3 Q Did you know that Don Zarda was gay?

4 A Yes.

5 Q How did you know he was gay?

6 A I just heard it at -- I just heard that the owner of
7 the Dropzone had hired a gay skydiver.

8 Q And did Mr. Zarda ever introduce himself to you?

9 A I don't really recall. You know, like, just formal
10 meeting. He didn't say anything. Just, you know, because
11 when you get -- an instructor comes on the Dropzone, we
12 just know he is a new instructor and you just get to know
13 each other when you're on the plane, so...

14 Q And did you ever hear Don Zarda introduce himself as
15 gay Don?

16 A I think I heard him say that on occasion.

17 Q And did you ever hear Don Zarda talk about his
18 sexuality on the plane?

19 A Sure.

20 Q Did you ever hear any of your, any co-workers other
21 than Don Zarda pick on Don because he was gay?

22 A No.

23 Q Did you ever hear any negative comments made to Don
24 about his sexual orientation?

25 A No.

JA1517

1 Q Do you think Don was treated differently at Skydive
2 Long Island because of his sexual orientation?

3 A No.

4 MR. ANTOLLINO: Objection.

5 THE COURT: Overruled.

6 BY MR. ZABELL:

7 Q Do you know why Don Zarda --

8 MR. ANTOLLINO: Is there an answer?

9 MR. ZABELL: I thought he already had.

10 THE COURT: Yes, the answer was no, right?

11 THE WITNESS: I'm sorry, what question?

12 THE COURT: The question was, did you think that
13 Don was treated differently.

14 THE WITNESS: No. I said no, he was not treated
15 differently.

16 BY MR. ZABELL:

17 Q How often would you hear Don Zarda bring up his
18 sexuality?

19 A I don't really recall exactly. It wasn't all the
20 time, no.

21 Q Do you know why Don Zarda was terminated?

22 A Yes, I do.

23 Q Why was he terminated?

24 MR. ANTOLLINO: Objection. Calls for --

25 THE COURT: Yes, you need to ask him how he

JA1518

1 knows first.

2 BY MR. ZABELL:

3 Q How do you know how Don Zarda was terminated?

4 A How do I know? Well, I worked with him and I heard
5 that he had been let go.

6 Q Did he tell you or did somebody else tell you?

7 A I heard from one of the instructors, I believe.

8 MR. ANTOLLINO: All right. I'm going to object
9 to that line of questioning.

10 THE COURT: Yes.

11 BY. MR. ZABELL:

12 Q Did you stay in contact with Don Zarda after he was
13 terminated?

14 A No, I didn't.

15 Q Did you ever have any discussion was Don Zarda about
16 base jumping?

17 A I had heard him talk about base jumping, but not
18 specifically talking with him about it.

19 Q Do you recall when you heard him talking about base
20 jumping?

21 A Well, I recall him being -- working at Skydive Long
22 Island in 2001 and I remember hearing him talk about base
23 jumping then.

24 Q Did you ever hear Don Zarda talk about jumping with a
25 wing suit?

JA1519

1 A Not that I recall.

2 MR. ZABELL: I have no further questions, judge.

3 THE COURT: Any cross-examination?

4 MR. ANTOLLINO: All right. No further
5 questions, no questions at all.

6 THE COURT: All right. You may step down, thank
7 you.

8 Mr. Maynard, if you can please take the stand
9 again.

10 You're still under oath.

11 THE WITNESS: Yes, sir.

12 DIRECT EXAMINATION (Continued)

13 BY MR. ANTOLLINO:

14 Q I don't know where I was.

15 But do you believe it was not reasonable for
16 Mr. Kengle to have felt uncomfortable about the comment
17 that Mr. Kengle's girlfriend was going to get strapped to
18 another guy, correct?

19 A Say that again.

20 Q Do you believe that it was not reasonable for
21 Mr. Kengle to have felt uncomfortable by the comment that
22 his girlfriend was getting strapped to another guy?

23 A I believe it was a joke. I don't think he took it
24 any other way.

25 Q So therefore, it would not be reasonable for him to

JA1520

1 feel uncomfortable about that, correct?

2 A I didn't say that.

3 Q Well, why don't you take a look at your deposition,
4 page 260, line 3.

5 The question is, Do you think it might have been
6 reasonable for Mr. Kengle --

7 A Sorry, 250?

8 Q 260, line 3.

9 A Okay.

10 Q Do you think it might have been reasonable for
11 Mr. Kengle or Ms. Orellana to have felt uncomfortable by a
12 comment that Mr. Kengle's girlfriend was getting strapped
13 to another guy?

14 Question: You can answer.

15 Answer: No.

16 Were you asked those questions and did you give
17 those answers?

18 A Yes.

19 Q All right. Did you think it was unreasonable that
20 Don might have felt uncomfortable about that statement?

21 A No.

22 Q Do you think that Don had to go along with the idea
23 that he was in a heterosexual triangle trying to hit on
24 another woman?

25 MR. ZABELL: Objection.

JA1521

1 THE COURT: Sustained.

2 BY MR. ANTOLLINO:

3 Q So someone who is making that comment or joke,
4 whatever you call it, is implying that Don is being
5 strapped up to his girlfriend, correct?

6 MR. ZABELL: Objection.

7 THE COURT: Sustained. I'll sustain this line
8 of questioning.

9 BY MR. ANTOLLINO:

10 Q Do you think it was unreasonable for Don to take
11 himself out of that situation and say, I have no interest
12 in you sexually by saying, Don't worry, I'm not gay?

13 MR. ZABELL: Objection.

14 THE COURT: Sustained as to form and I think he
15 already commented on that generally.

16 Q It was Don's reasonable choice to mention that he was
17 gay, in order to take himself out of that scenario,
18 correct?

19 MR. ZABELL: Objection.

20 Q It was Don's reasonable choice to take himself out of
21 the equation that suggested that he was heterosexual,
22 correct?

23 MR. ZABELL: Same objection.

24 THE COURT: Sustained as to all questions
25 regarding what was going on in Mr. Zarda's mind, okay?

JA1522

1 BY MR. ANTOLLINO:

2 Q Now, sometimes that is the atmosphere when you're up
3 in the air, people are making jokes like that, correct?
4 We have already established that.

5 A Yes, jokes are made up in the air.

6 Q And if any tandem passenger complained about the
7 goofy atmosphere, there would be nothing improper about
8 that, correct?

9 A It would depend on the content and what the exact
10 complaint was.

11 Q Okay. And you don't believe that this other comment
12 about being strapped to another guy was in any way
13 improper, correct?

14 A Correct.

15 Q Now, when you saw Don's jump, when it was played a
16 couple of days ago, you would have given him an 8 or 9 out
17 of 10, based on what you saw, correct?

18 A Correct.

19 Q You instruct your instructors to contribute to the
20 fun of the job and the skydive that these students are
21 taking, correct?

22 A Correct.

23 Q And you heard Rich Winstock testify that they're
24 supposed to, quote-unquote, enhance the video, correct?

25 A Correct.

JA1523

1 Q You agree with enhancing the video, correct?

2 A Correct.

3 Q On this particular video, the only thing that was
4 showing of Don was his face and his hand, correct?

5 A Correct.

6 Q So in his situation, the only way he could enhance
7 the video was with his face and his hand, correct?

8 A Correct.

9 Q Now, at some point you got annoyed that Don had
10 applied for unemployment benefits, correct?

11 MR. ZABELL: Objection.

12 THE COURT: We already went through that.

13 MR. ANTOLLINO: All right.

14 BY MR. ANTOLLINO:

15 Q What is the main skydive season?

16 A On Long Island it's about the beginning of April
17 through the middle of November.

18 Q How much do skydivers make per jump? It's \$40,
19 correct?

20 A That's correct.

21 Q Now, on a good day, how many jumps would there be?

22 A It would depend on the time of the year and the day
23 of the week.

24 Q All right. Well, from what to what?

25 A As low as one or two, to as many as 15, depending on

JA1524

1 the day of the week and what the time of the season is.

2 Q When it's colder there are fewer customers and when
3 it's warmer there are more customers --

4 A WELL --

5 Q Let me finish asking the question.

6 When it's colder there are fewer customers and
7 when it's warmer there are more customers, correct?

8 A Correct.

9 Q And they also get tips, correct?

10 A Yes.

11 Q What would you say would be a good take-home pay for
12 a tandem skydiver at the end of the summer?

13 MR. ZABELL: Objection.

14 THE COURT: What is the basis?

15 MR. ZABELL: He is asking him to speculate.

16 There is no limit as to time, this is now, this is then.

17 THE COURT: You should specify.

18 BY MR. ANTOLLINO:

19 Q At the time Mr. Zarda was working there, which was
20 2011 and 2010, what would be a good take-home pay at the
21 end of the summer?

22 A I would really have to look at the records in that.
23 I really don't know.

24 Q Would you say 25,000?

25 A I would have to look at the records and I really

JA1525

1 don't know.

2 Q So you couldn't say whether it was more or less than
3 25,000?

4 A I answered that, no.

5 Q You couldn't say if it was more or less than 30,000?

6 A I would have to look at the records. I don't know.

7 MR. ANTOLLINO: All right, judge, I think I'm
8 done. I would just like to approach on one thing.

9 THE COURT: Okay.

10 (Continued on the following page.)

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JA1526

1 (The following occurred at sidebar.)

2 MR. ANTOLLINO: When I talked about
3 unemployment, you stopped me, you said we've been over
4 this before. We have only been over it with another
5 witness. We've been over the Workers' Comp. with this
6 witness. Are you saying that because we brought it in
7 with another witness, we don't have to bring it in with
8 this witness or are you -- were you mistaken that Workers'
9 Comp. and Unemployment Insurance are the same thing?

10 THE COURT: I'm not sure. You already asked
11 this witness about if it was part of the discrimination --

12 MR. ANTOLLINO: No, no, that is Workers' Comp.

13 THE COURT: What are you asking him about now?

14 MR. ANTOLLINO: Unemployment Insurance.

15 THE COURT: I was confused. This is on damages.

16 MR. ANTOLLINO: This goes to damages and his
17 reasons.

18 THE COURT: I misheard. I'm sorry. Okay.

19 MR. ANTOLLINO: Okay. Thank you.

20 (Continued on the following page.)

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24

25

JA1527

1 (The following occurred in open court.)

2 THE COURT: There was a mistake. There were
3 some questions regarding Unemployment benefits, and I said
4 we've gone over this. I was thinking of Workman's Comp.

5 So I'm going let him question on Unemployment
6 benefits because of the issue of damages.

7 Go ahead.

8 MR. ZABELL: I object to your characterization
9 for the decision being a mistake, judge.

10 THE COURT: Okay, judges can make mistakes.

11 Go ahead.

12 MR. ANTOLLINO: Thank you, judge.

13 BY MR. ANTOLLINO:

14 Q At some point you got a notice that Don had applied
15 for Unemployment after you fired him.

16 Is that correct?

17 A Correct.

18 Q And you contested Don's Unemployment benefits.

19 Is that correct?

20 A I didn't contest it. I wrote a letter just to give
21 them -- they wanted more information, I believe, or
22 something. I think Lauren had gotten the -- that letter
23 and we discussed it and we sent a letter because they said
24 if we had any more information about this, we should send
25 it to them.

JA1528

I wasn't really sure what all of the
Unemployment laws and stuff were, but I knew that Don
owned a company, and in the year of 2010 which he did
testify he got paid money from, and he was working at that
company the entire time. So I was just letting them know
that while he was applying for Unemployment, and I thought
if you were working somewhere you were not eligible. And
we only sent a letter and told them what we knew.

9 Q But you also told them about the reason why he was
10 fired, correct?

11 A Lauren wrote that letter. The only thing I saw in
12 there and what I asked for was that he was fired for a
13 customer complaint.

14 Q That is right. And Lauren showed you the letter
15 before she sent it out, correct?

16 A I briefly saw it and asked her if what I said was in
17 there. And she sent it.

18 Q And you didn't ask her to add anything or take
19 anything out, did you?

20 A No.

21 MR. ANTOLLINO: No further questions.

THE COURT: Okay. We'll continue tomorrow.

23 The schedule I told you still applies. So we'll
24 complete the testimony and presentation of the evidence
25 tomorrow and summations will be on Wednesday morning.

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JA1530

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DONALD ZARDA, : CV-10-4334
Plaintiff, : US Courthouse
-against- : Central Islip, NY
ALTITUDE EXPRESS, INC., d/b/a :
SKYDIVE LONG ISLAND and :
RAY MAYNARD, :
Defendants. : October 20, 2015
: 9:30 a.m.
-----X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE, and a Jury

APPEARANCES:

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LAURA E. JOHNSON, ESQ.

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Proceedings recorded by mechanical stenography
Transcript produced by Computer
9A1531

THE CLERK: Calling case 10-CR-4334, Zarda vs Altitude.

(Appearances previously noted.)

THE COURT: We're still waiting for some jurors, so I just wanted to use this time to address what I think is the only outstanding issue in this case, which is the use of Mr. Zarda's declaration. I have read the letters on that. The one area of the declaration, I don't believe the other portion of the declaration should come in from the reading. But I'll explain that in a moment.

But the one Mr. Zabell that I need to directly address each and every entry. But at the end of the declaration, the highlighted portion at the very end that starts, I no longer feel like I can be myself, working jumping. And then it goes on.

MR. ZABELL: Can I just ask for that paragraph number, your Honor?

THE COURT: It's the last paragraph, 47.

I don't understand why that portion is not -- I understand your argument why the other portions aren't present and questioning the state of mind. But certainly the last couple of sentences seems to be that he is describing his state of mind as of April 2013 in terms of emotional distress and why he is continuing to still suffer.

JA1532

So I don't understand why that wouldn't be an exception to the hearsay rule because the goes purely to his current state of mind, which is relevant on the issue of damages.

I just want to give you a chance to respond to that.

MR. ZABELL: Sure.

My position is this, your Honor. This is, this was a document that was created solely for the purpose of opposing the summary judgment motion.

As your Honor -- as I have observed, I don't know what your Honor has observed -- but as I have observed, Mr. Antollino has a certain writing style. That writing style is echoed throughout this document. So it is clear that this is a document that was created by counsel for the plaintiff for purposes of opposing a summary judgment motion. This is not a document that I had an opportunity to examine or cross-examine Mr. Zarda about.

So to allow him to write down a statement about what he and his attorney think might be appropriate to oppose a summary judgment, would be highly prejudicial, even if it is relating to what was crafted as his impression or his feelings.

THE COURT: Yes?

JA1533

MR. ANTOLLINO: My client wrote this. I did not write this. He wrote most of this declaration.

THE COURT: Okay, I'm going to allow that last portion. You can, I guess read it into the record if you want, or redact the whole document so it just has that portion in it. It might be easier to just to read it into the record.

MR. ZABELL: I'll read it. Under penalty of perjury and then right there.

THE COURT: Right. State the date that it was sworn to, on April 7, 2013.

MR. ZABELL: Well, I don't believe it was sworn to, your Honor.

MR. ANTOLLINO: It's the declaration.

THE COURT: The declaration.

MR. ZABELL: And I don't believe he has made the requirements in the declaration necessary for it to be considered a sworn document. He does declare under penalty of perjury, but it doesn't have his physical address, which is a requirement, nor is it notarized.

MR. ANTOLLINO: It wasn't.

THE COURT: I'm going to allow it. This is the way he signed it. In terms of admissibility, a statement that is not hearsay can come in, even in it is not sworn, it is not critical that it be sworn for purposes of

JA1534

overcoming the objection to a document that is unsworn. A business record is unsworn, but that is an exception to the hearsay rule.

MR. ZABELL: Your Honor, my question is, and I don't want to belabor the point or over-argue. But if Mr. Zarda was alive today would this document be allowed in?

THE COURT: I think it could be allowed in, yes. That's my point.

You haven't told me what -- my ruling is, it is not hearsay. It is an out-of-court statement that goes to his state of mind. So that is why I'm giving you an opportunity to tell me why it shouldn't come in. The only thing you told me was that you didn't get a chance to cross-examine him, but --

MR. ZABELL: In addition, as we pointed out in our brief, it's also contradicted by his direct testimony.

THE COURT: If there are some other portions of his deposition that you want to read in your case in response to this, I'll obviously let you read some other portions of the deposition. I don't know if you read it already. I don't remember. But if there is something that addresses this directly in the deposition --

MR. ZABELL: Can I just get a clarification on what specific sentence, beginning and end point --

JA1535

THE COURT: Yes, okay.

I understand that he's going to read, Donald Zarda, the plaintiff herein, does hereby declare under penalty of perjury the following. And then he is going to start: I no longer feel like I can be myself working, jumping -- until the end of that paragraph.

And then he's going to say, signed on April 7, 2013, Dallas, Texas.

MR. ZABELL: Your Honor, the statement, I can no longer work in this industry without fear of having been branded as some kind of gay pervert?

THE COURT: That is his view. That is, that's, that goes to damages. That's his view of why he can't continue to work as a skydiver, at least at that time.

MR. ZABELL: And the language, a stark vivid remainder about what happened to me?

Including, No amount of personal loss, injury or death in this sport has ever pushed me away until now?

THE COURT: I don't understand why -- again, if he were sitting here today, and there is nothing objectionable about his describing what his emotional state is at the time, why he feels he can no longer work in the industry.

MR. ZABELL: Right. But if he was saying it on the stand, I would have the opportunity to examine him

JA1536

about it. Ans because he is not here it does not give me the opportunity to examine him about it.

It's highly prejudicial to the defendants's case. The fact that Mr. Zarda could not be here, is not here because of his death, can not be used as a shield to allow statements to go in unrebutted.

And that's what reading this in its entirety allows, just that paragraph in its entirety allows.

I do not have the ability to examine him on these statements, on these feelings with the contradictory statements, so --

MR. ANTOLLINO: -- contradictory statements.

Judge, he said he didn't want to belabor this. And we keep hearing one more argument, and one more argument, one more argument after you have already ruled.

THE COURT: I think you have sufficient use of the deposition. Again, if there is inconsistencies within the deposition, I think that you can bring those out. I understand obviously you need to cross-examine him on this particular statement. But I think under the circumstances there is no other way for Mr. Antollino to bring in that his emotional stress was continuing up to April 13, 2013 because his client had, his client passed away.

So it is an exception to the hearsay rule. It goes only to his state of mind. I'll give an instruction

JA1537

to the jury that this only goes to the state of mind on the issue of damages and nothing else. Okay?

MR. ANTOLLINO: There are a couple of other things I would like to bring up before the trial continues.

Number 1 is, I have a document that I would like to admit regarding the unemployment insurance that contradicts, I believe in some way, what Mr. Maynard said.

So there are three ways I can do this. I can recall him as a witness and introduce it through him. I can use it during cross-examination. Or I can call him as a witness if I can't get it in through cross-examination. Or, we can stipulate that it should come in for the sake of completeness of the unsworn record.

THE COURT: What is it? Just tell me what it is.

MR. ANTOLLINO: This is a document from the Unemployment Insurance Commission, Department of Labor, 2002 perhaps.

And the first question is, Why am I receiving this notice? And it explains why. And in it -- it is Don Zarda's claim for unemployment insurance benefits.

THE COURT: Okay, what is, what does it show?

MR. ANTOLLINO: Revisions to the claim of weekly benefits may also affect your total maximum potential

JA1538

MR. ANTOLLINO: Well, yes. There is one paragraph. Don had a habit of holding his finger like this. There is actually a picture that we have which we provided to defense counsel, where he is watching TV at Drop Zone where he is actually holding his finger in exactly that way.

And this goes to show that this was just his normal demeanor, nothing nefarious about it. It was just the way that he put his finger like someone might twirl their mustache or twirl, or a woman might or someone with long hair might twirl their curls. Or you know, count their fingers. I can cane show you the picture.

THE COURT: Did you show it to Mr. Zabell?

MR. ANTOLLINO: Mr. Zabell has seen the picture. Would you like to see it again?

THE COURT: Would you identify it in your exhibits?

MR. ANTOLLINO: Yes, I will.

All right, this is Exhibit 46, this one.

(Handing)

MR. ZABELL: Your Honor, our position is there is no indication of when this picture was taken, where it was taken. If it was taken after the lawsuit was filed or after the deposition occurred. There is no one here, unless this individual on the right is a witness. And I

JA1539

don't recognize him. There is nobody here to authenticate this picture. For all we know this picture could have been taken information for purposes of evidence here at the trial.

THE COURT: Where did this picture come from?

MR. ANTOLLINO: This picture came from, I believe -- I believe this came from the Drop Zone. One of the crewmen. And Don gave that -- well actually let me ask Bill if he recognizes this person here.

Okay, this is one of the cruise ships that Don went on. And this is Frank -- on the cruise, and they're watching TV.

THE COURT: Okay, that has no probative value.

First of all, if Mr. Maynard wasn't aware of it, assuming he had that mannerism, you know, in some other context, it has no probative value. The issue is what Mr. Maynard knew and what he based his decision on.

So I'm not allowing that in. Okay?

Let's bring in the jury.

MR. ZABELL: I will proceed with Mr. Maynard?

THE COURT: Yes.

RAYMOND MAYNARD

called as a witness, having been first previously duly sworn, was examined and testified further as follows:

JA1540

don't recognize him. There is nobody here to authenticate this picture. For all we know this picture could have been taken information for purposes of evidence here at the trial.

THE COURT: Where did this picture come from?

MR. ANTOLLINO: This picture came from, I believe -- I believe this came from the Drop Zone. One of the crewmen. And Don gave that -- well actually let me ask Bill if he recognizes this person here.

Okay, this is one of the cruise ships that Don went on. And this is Frank -- on the cruise, and they're watching TV.

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MR. ZABELL: I will proceed with Mr. Maynard?

THE COURT: Yes.

RAYMOND MAYNARD

called as a witness, having been first previously duly sworn, was examined and testified further as follows:

JA1541

THE COURT: Good morning, members of the jury.

It's good to see everyone again this morning. I know there were some traffic issues this morning, so I appreciate you getting here.

We're ready now to continue with the trial.

As you recall, Mr. Maynard completed his direct examination yesterday at the end. So we'll start with his cross-examination.

I remind you, Mr. Maynard, you're still under oath.

Do you understand?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. ZABELL:

Q Good morning, Ray's. How are you?

A Good morning.

Q Yesterday you heard Mr. Kengle testifying about a complaint he made to you.

Is that correct?

A Yes.

Q Did he, in fact, make a complaint to you?

A Yes, he did.

Q What did he complain about?

A He felt very uncomfortable about the inappropriate

JA1542

touching. Again, that's putting his head on her shoulder, whispering in her ear. And to try to calm her down. Telling her that he was gay. And conversations he had like that under canopy. It really ruined her day of skydiving.

Q Was does that mean, under canopy?

A After you deploy parachute, that deals with that.

Q There were some questions yesterday about this.

How long does it take to go from the airplane to the ground, typically?

A If the parachute opens? No.

Q Yes, parachute opens.

A Normally a 60 second free fall and then you deploy your parachute about 5,000 feet. And the canopy ride, parachute ride, depending on the conditions of the day, it could be anywhere from four to seven minutes.

Q So you can be falling from the airplane for like eight minutes?

A Not really. You know, free fall is about 60 seconds, canopy ride, yes, I guess almost eight minutes.

Q Now about free fall, that's where they're falling fast, there is no parachute and everyone's face is getting pulled back?

A Yes.

Q Everybody looks like they're smiling, right?

JA1543

A Yes.

MR. ANTOLLINO: Objection. That is leading, judge.

THE COURT: It's cross-examination.

MR. ANTOLLINO: There is no client.

THE COURT: It doesn't matter. If he's covering new areas that you didn't cover, then he can.

BY MR. ZABELL:

Q I'm sorry. So my question was, everybody looks like they're smiling?

A Yes, they do.

Q Why do they look like they're smiling?

A You're falling at 120 miles an hour, so your skin is being pulled back and it looks like you're smiling.

Q Okay. After you received the complaint from Mr. Kengle, what did you do?

A I started my investigation by calling Don up and asking him about the jump. And he said he did not remember the jump, that it was three days before. So I told him, I described what I was told and tried to remind him that it was a couple, the girl was celebrating her birthday, and it happened midday on Friday. And I gave him all of the details that Mr. Kengle told me. And he said he still cannot remember it.

Q What did you do then?

JA1544

A I told him that I was going to suspend him. And I then went and watched the video.

Q Which video did you watch?

A Rosana's video.

Q This video?

MR. ZABELL: Your Honor, I'm going to play the video that has been introduced into evidence.

(The tape was played.)

(The tape was stopped.)

BY MR. ZABELL:

Q Mr. Maynard, is that the video you watched?

A Yes, it is.

Q Did you watch it in its entirety?

A Yes, I did.

Q And did you come up with any impressions after watching that video?

A I came up with -- I believe it corroborated Mr. Kengle's story to the extent that this videotape reenforced that.

Q What did you see on that videotape that reenforced that?

A I think that Don was doing it with his mouth and his eyes, looking at her. That kind of was creepy to me and something that is not normal. I know we try to have the instructors do things to enhance the video and have fun.

JA1545

And my -- my opinion, that was something that wasn't normal at all.

Q And what did you do after watching that video?

A I talked to my attorney and I told him the whole story including that this employee had a history before of customer complaints and was fired after two instances in 2001. And my attorney advised me that I should terminate Don because knowing this, and now it's three times, and something else happened, and my company could be in jeopardy.

Q And did you, in fact, terminate Don?

A Yes, I did.

Q Why did you terminate Don?

A Because of customer complaints. That happened multiple times. He was warned about it before he was hired back. I hired him back after the first firing in 2001 and in 2009 and we had a conversation. I hired him back because he was a good instructor. He was a good guy. I liked him. But I told him if there is one more complaint, if there is one more complaint, Don, I'm going to have to let you go. And he agreed to those terms.

Q Now counsel spent a fair amount of time yesterday talking about a release.

Do you recall that?

A Yes.

JA1546

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Q Just because Ms. Orellana couldn't sue you for the jump, is that any reason why you wouldn't take action against Don Zarda?

A No.

Q It was just that simple; you received a complaint, you investigated a complaint, you came to a conclusion and then you terminated him?

A It was really just that simple.

MR. ZABELL: I have nothing further.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. ANTOLLINO:

Q Now the complaints made in 2001 were simply that Don told the customers that he was gay.

Is that correct?

MR. ZABELL: Objection. Asked and answered.

THE COURT: You asked that.

MR. ANTOLLINO: But this is redirect and he just said that he spoke to his attorney about these complaints. I just want to make it clear.

THE COURT: Go ahead.

A My attorney said that Don, besides telling them that he was gay, told them what he was doing after work on Fire Island. That was the complaint.

Q Now in your deposition you were asked these questions

JA1547

and you gave these answers. Is it not true?

Question: And what was it that Don --

THE COURT: What page?

Q Page 139, line 22.

And what was it that Don said that made these women cry?

MR. ZABELL: Objection, objection, your Honor. This was gone over yesterday.

THE COURT: You don't have to go back and reread the deposition.

BY MR. ANTOLLINO:

Q You didn't testify to anything at your deposition about him improperly touching witnesses, correct?

Improperly touching anyone in 2001, correct?

MR. ZABELL: Objection.

THE COURT: We're not going through this again.

BY MR. ANTOLLINO:

Q Did your lawyer tell you that you could be held liable if Don Zarda told other customers that he was gay?

MR. ZABELL: Objection.

THE COURT: Sustained to the form.

BY MR. ANTOLLINO:

Q What did your lawyer tell you?

A I told my lawyer the entire story what was going on from 2001 to 2009 and 2015. He was hired, fired, rehired,

JA1548

got hurt, came back and was rehired again in 2010. And then within a very short period of time I received another customer complaint. And my attorney advised me this situation will continue, and you need to look at, to protect your exposure. And he told me to have a meeting with him and he told me use these words: Don, I'm sorry, this is not working out.

And that is why I used those words. And then I

--

Q All right.

A -- responded the whole time as you heard before.

Q And when you talk about a meeting and exposure, you're talking about exposure for Don telling customers that he is gay, correct?

A No, exposure.

MR. ZABELL: Objection.

THE COURT: You can answer that.

What did you mean by exposure?

A Exposure that my company is built on customer service and what people say after they experience a skydive. And so if I have employees that are to doing other things than their job, and their job is to talk about the skydive and not be talking about themselves. And it doesn't matter who they are talking to about themselves. If you're not talking about the skydive and making that skydive a great

JA1549

experience, they're not going to leave my place and recommend it. And that would be detrimental to my business.

Q So if -- the exposure is that some people will not like it that Don says he is gay, correct?

MR. ZABELL: Objection.

THE COURT: Overruled. You can answer that.

A People -- the instructors that I have, and I have had many of them, are told that when you are taking someone on a skydive, your job, your main job is to get them safely from the air to the ground. Part of your job is to make it an enjoyable experience. And that does not mean talking about yourself. And I don't care who it is, you're not supposed to talk about you, yourself.

If I get a complaint that somebody did that, then I will take action with it. Their job, and they know it, and it wasn't done, was to make sure that skydive was enjoyable and talking about the beautiful scenery on eastern Long Island and all of the other things that are going on there. Not talking about themselves, regardless of what they were talking about.

Q So the fact that these two women heard about Don's sexuality was what made them come to you in tears, correct?

MR. ZABELL: Objection.

JA1550

THE COURT: Sustained.

BY MR. ANTOLLINO:

Q What about Duncan Shaw's telling David Kengle that he was from New Zealand, correct? Do you remember that testimony yesterday?

MR. ZABELL: Objection.

THE COURT: We're not going to go back, Mr. Antollino, okay?

MR. ANTOLLINO: Okay.

BY MR. ANTOLLINO:

Q Now you said that when they're falling at 120 miles an hour everyone looks like they're smiling. But when you're in the aircraft, you're not moving at 120 miles, are you?

A No.

Q So any smile in the aircraft is completely voluntarily, correct?

A Yes.

Q And when you reach the ground, any smile is completely voluntary, correct?

A Correct.

Q All right. Now I want to show you what was part of Exhibit 6. And we'll call this 6 B. And I'll ask you if you recognize this.

MR. ZABELL: I'm sorry, it's not 6 B. I believe

JA1551

it's 13.

Q All right. We'll call this 13 B and I'll ask you if you recognize this.

A No, I do not.

Q All right. That is addressed to what company?

MR. ZABELL: Objection.

Your Honor, he has testified he doesn't recognize it.

THE COURT: Sustained.

BY MR. ANTOLLINO:

Q Have you received one of these -- well, let me ask you this.

Has any employee ever applied for unemployment --

MR. ZABELL: Objection.

Q -- in --

MR. ANTOLLINO: Can I finish the question?

THE COURT: Finish the question. Go ahead.

BY MR. ANTOLLINO:

Q Has any employee ever applied for unemployment while working at Skydive Long Island?

MR. ZABELL: Objection.

THE COURT: Sustained.

We'll discuss this at another time.

BY MR. ANTOLLINO:

JA1552

Q All right. Do you recognize the second page?

A No, I do not.

Q All right. Did you know that your response to the unemployment division may affect your total maximum potential charges to unemployment insurance?

MR. ZABELL: Objection.

THE COURT: Ask him if he knows.

A No.

MR. ANTOLLINO: No further questions.

MR. ZABELL: Nothing.

THE COURT: You can step down. Thank you.

Mr. Antollino, are you going to read a portion of the declaration?

MR. ANTOLLINO: Yes.

Do you want to say something about it first?

THE COURT: Yes. I am allowing Mr. Antollino to read a portion of a declaration that Mr. Zarda submitted in connection with this case. So he is going to read a portion of the declaration. This relates, the statement relates only to the issue of damages if you should find that there is a liability, okay?

Go ahead.

MR. ANTOLLINO: Okay. Donald Zarda, plaintiff, against Altitude Express, Incorporated and others. Donald Zarda, plaintiff herein, does hereby declare under penalty

JA1553

of perjury as follows:

I no longer feel like I can be myself working, jumping, especially tandem jumping, having to strap people to me and touch in so many places to perform the job because of what RAY MAYNARD did terminating me for such reasons, regardless of the bogus customer complaint, I can no longer work in this industry without having fear of having been branded as some kind of gay pervert. I cannot even enjoy non-work skydiving because there are tandem jumps taking place at every skydiving center. And it is a stark and vivid reminder about what happened to me, which takes away the enjoyment I get from jumping and keeps me from interacting with friends and social circles developed over two decades. No amount of personal loss, injury or death in this work has ever pushed me away until now.

Dated April 7, 2013, Dallas Texas, signed Donald Zarda.

THE COURT: Okay.

MR. ANTOLLINO: At this point the plaintiff rests.

MR. ZABELL: Your Honor, in response to that, there are a couple of portions of Mr. Zarda's deposition testimony that I would like to --

THE COURT: You can do that in your case.

MR. ZABELL: I think it would be an appropriate

JA1554

cross as if Mr. Zarda was here testifying to that.

THE COURT: No, I'm going let you do it during your case, okay?

The plaintiff rested. Okay.

Before we continue with the case we seem -- I know you just got out here but we just need to take a short break, okay? Take a ten minute break, okay? Thank you.

(The jury left the courtroom.)

THE COURT: Just so you know, my practice is to reserve decision on all 50 motions as a rule. Obviously, the motions can be reviewed at the -- if there is an unfavorable verdict, obviously you have to state the grounds for it so that it is preserved. But I just want to let you know that, okay?

MR. ZABELL: Yes, your Honor. I'll make it as quick as possible without any pomp or circumstance.

At this time I would like to make a motion for a judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, and will grant a judgment in defendants' favor against the plaintiff.

Although this case is before your Honor under the state human rights laws analyzed under the all too familiar McDonnell Douglas burden-shifting framework, I believe your Honor decided that in the Uranyi case, Uranyi

JA1555

v. MultiPlan, Inc. I have a 04-CV-2685. I believe that is the only citation I was able to find for that case.

Your Honor, under the McDonnell Douglas burden-shifting scheme, we'll concede the first three elements. The fourth element is that a decision or action occurred under circumstances giving rise to an inference of discrimination based upon Mr. Zarda's membership in the protected class of sexual orientation under the State Human Rights Law.

Now the only evidence that has been submitted that Mr. Zarda's sexual orientation was a factor in the decision to terminate his employment is the fact that he is gay. There has been no evidence submitted to indicate that Mr. Maynard's determination to terminate him was based upon anything other than a legitimate business decision.

Arguably the only comments that the plaintiff has been able to point out has to do with a fluorescent pink cast. And anyone can see that they were made, and if they were made, they were a year before the termination. They were separated by both a year and Mr. Zarda's rehiring by the very person who is alleged to have discriminated against him.

The testimony that came out during plaintiff's own case is that Don Zarda introduced himself as Gay Don

JA1556

even before he was hired by Mr. Maynard in 2001. He disclosed his sexuality. It was part of his over-sharing with a customer. That customer again, who came and testified as part of the plaintiff's case, very detailed, in a very detailed manner, explained exactly what she was complaining about; not the fact that he was gay and sharing his relationship information with her, but she was complaining because she felt he was getting familiar with her. He was hitting on her. He put his hands on her hips, whispering in her ear. And then when he says that she was uncomfortable, disclosed his orientation and stories regarding his orientation in an effort to allay her discomfort.

That is not discrimination because he disclosed his sexual orientation. That is a legitimate complaint. She wanted to know about what she was doing when she was jumping out of this plane. That is exactly what the other instructors did. That's not what he did.

That brings us to the same act or inference. There has been testimony that RAY MAYNARD hired Don Zarda not once, not twice, but three times. The Second Circuit has ruled that when the same person hires somebody and then terminates them shortly thereafter, you cannot impart that, and I believe the term they used is invidious motivation to the termination.

JA1557

Why would Mr. Maynard hire Don Zarda knowing full well that he is gay, and then terminate him as a basis, or terminate him because he is gay? They cannot overcome that hurdle.

The next issue is the legitimate business reason that Mr. Maynard had for terminating Mr. Zarda. He received a customer complaint. He investigated that customer complaint. He acted on his conclusion to that investigation.

Now the Second Circuit has said in *Byrn v. Town of Cromwell, Board of Education*, 243 F.3d 93, that courts should not act as super personnel departments second-guessing an employer's judgment.

Well, if courts shouldn't do it, then juries can't do it. And there have been decisions coming out of this court, saying that you can't second-guess an employer's non-discriminatory business decision regardless of their wisdom. And that is *Viruet v. Citizen Advice Bureau*, 01-Civ-4594. I'm sorry, that's out of -- 2002 WL 1880731. And that is a Southern District decision.

The Second Circuit has ruled on this in *Parshis v. Riese Organization*, 211 F.3d 30. And that's a 2000 case.

So whether or not we agreed with the conclusions that Mr. Maynard made, he had a right to make those

JA1558

decisions. And this Court and this jury is not empowered to second-guess those decisions. He stated a legitimate reason for making those decisions and he acted on them. And as of right now, there is nothing that came out in plaintiff's case that contradicts or chips away at the veracity of Mr. Maynard's decision-making process.

Any argument that there was an insufficient investigation always falls to the wayside under Sassaman v. Gamache, the case that we've discussed at length in this case over prior issues. That's Sassaman, S-A-S-S-A-M-A-N, v. Gamache, G-A-M-A-C-H-E. That is 566 F.3d 307. And that states only where plaintiff can point to evidence closely tied to the adverse employment action that could reasonably be interpreted as indicating that discrimination broke the decision and arguably insufficient investigation may not support an inference of discriminatory intent.

And I believe that is precisely what plaintiff's counsel argued to the jury. That, A, he believed that we had a sufficient investigation. But to the extent that counsel is arguing that we haven't, the Sassaman case clearly indicates that they have failed to meet the necessary burden of proving that.

And finally, there is the issue that was addressed earlier, the stipulation of Mr. Zarda signing

JA1559

the release. I believe your Honor has the release. It has been admitted into evidence based upon stipulation. That is a full and knowing release of all claims against the Dropzone, against the defendants herein.

Although there is case law that says such a release cannot work in the context of a Title VII claim, there is no such case law that says it cannot work in the context of a claim made for discrimination under the New York State Human Rights Law. If you read the content of that release, Mr. Zarda has waived his rights to sue under any intentional act, unintentional act. A claim of discrimination could be argued to be an intentional tort. It has in the past been categorized as an intentional tort.

Here --

MR. ANTOLLINO: Let me just make clear. That has not been admitted into evidence. I said that it was his signature, but that was never offered into evidence.

THE COURT: The agreement we reached was that you -- we agreed that signature was authentic, but it wouldn't be before the jury. That that would be before the Court. So I think it's before the Court.

MR. ANTOLLINO: Okay.

MR. ZABELL: I believe you identified it as a court exhibit.

JA1560

THE COURT: Right. Okay.

MR. ZABELL: Based upon the content of that release, Mr. Zarda has waived his right to sue based upon that release. And in addition, he even agreed to cover the costs of the legal fees of us having to defend in this matter.

THE COURT: There is a case up there that says that you can't waive your rights under the Human Rights Law. Why would it be different if you can't waive it under Title VII, why would you be able to waive them under the Human Rights Law? Wouldn't that be the same?

MR. ZABELL: My presumption is if the analysis was the same, there would be case law that says you can't waive them. There is no case law. I'm sure your Honor is going to view it.

THE COURT: You don't have a case that says that the Court has found such a waiver to apply to state law discrimination claims.

MR. ZABELL: There is a case law that has found waivers like this to be effective for waiving other types of claims, torts and intentional torts.

THE COURT: But not discrimination.

MR. ZABELL: But not discrimination. I don't want to mislead, your Honor.

THE COURT: I'm going to look at it. Go ahead.

JA1561

MR. ZABELL: So based upon all of the information, all of the evidence that has come out in the plaintiff's case, notwithstanding the fact that I understand what your Honor's practice is with regard to such motions, there just hasn't been a substantial enough showing that Mr. Zarda was terminated because of his orientation. And if there was, if evidence of that existed, it should have come out during plaintiff's case.

I would imagine defendants -- a lot was covered during plaintiff's case, and much of the defendants' case came out during it. I would expect to be done by lunch, judge. But even still, to make us go forward at this point given the overwhelming majority of testimony that has come out, and not any of it supports the indication that Don Zarda was terminated for his sexual orientation as opposed to a legitimate business reason. They received a complaint about his behavior, not about him being gay, but about his behavior. And the video supports that. And the two people who complained, well, the one person who complained testified that he complained, and his girlfriend relayed the information to him to testify.

It's unfair to the defendant at this point to make us proceed based upon the overwhelming evidence in support of the defendants' case.

THE COURT: Okay. Mr. Antollino?

JA1562

MR. ANTOLLINO: Well, it's clear that there is this treatment insofar as, for example, he wouldn't fire Rich Winstock for saying that he was heterosexual to a customer even if there were a complaint. That's number 1.

Number 2, a jury could very easily look at all those pictures and come to a completely different conclusion that they have come to. And *Sassaman v. Gamache* actually takes the position that we do not reach the issue as to whether a failure to investigate a claim of sexual harassment would in every case allow a claim of a violation to go forward. But in this case it clearly did.

In this case what they have argued again and again and again is that the young delicate flower was being touched and she didn't like it. And it wasn't what she expected. And all they have to back that up is a video where my client is making some funny faces, which was explained by Rich Winstock as being, enhancing the video.

As far as the same accurate inference is concerned, I addressed that in my opening statement. We acknowledge that RAY MAYNARD hired Don knowing that he was gay. And there was all sorts of testimony that the discussion of Don being gay was something that was mentioned again and again and again and again on the drop

JA1563

zone. But the one time Don mentioned it to a customer, all hell breaks loose like it's the worst thing in the world.

And if those customers didn't like the fact that my client told them he's gay, that is not something that you can use -- that they can use to protect themselves against an allegation of discrimination. It has been held again and again and again that customer preference for wanting to work with a particular class is not a legitimate reason for not hiring or firing or disciplining, except in the most extreme circumstances such as, for example, gynecologists or something like that.

In this case there was only one female skydiver at the drop zone. They were all men. We didn't see, obviously, any videos of women. So there was really no choice but for Don to -- or for men to carry women. And these people consented to that. The fact that they were unhappy afterwards and they interpreted Don's conduct three days later is a question, in fact, for the jury. Mr. Kengle said that he had -- he was very outspoken -- and yet he is looking right across from his girlfriend and he doesn't say anything.

Rosana Orellana has every excuse in the book for not saying everything. I was disoriented. I was afraid.

JA1564

It was really the wind pressing against my mouth, that is not really a smile, but you see her flirting with the camera in David Kengle's video. And the question is, when RAY MAYNARD is in the state where he has to make a decision as to whether or not that is a legitimate complaint, he allowed the issue of gay to influence that decision because he looked at the video. He saw nothing in that video that corroborated the allegation. And he even testified at his deposition, which was brought up yesterday, that he didn't fire him for making a creepy face. But it was the issue of gay and personal information. But yet other personal information such as Rich Winstock mentioning that he was heterosexual, and RAY MAYNARD mentioning that he was heterosexual on a professional website, that all is okay. That is all fair game.

So there is a double standard here about personal information. I think I have addressed everything that Mr. Zabell has addressed at this point. If there is something else that I have not, and you would like me to address, I'll be happy to. Otherwise, I think that covers it for now.

THE COURT: As I said, I'm going to reserve decision on the ruling. That is permitted. And I'm going to submit the claim to the jury. And then obviously if it

JA1565

is an unfavorable verdict, the defendants can renew it, at which time I would ask for a briefing on the issue, okay?

MR. ANTOLLINO: An unfavorable verdict for them.

THE COURT: Right, right. Okay, so...

MR. ZABELL: May I just have -- assuming your Honor wants to bring the jury now, if I could just have a few minutes?

THE COURT: I do want to -- now I want to rule on the -- there is one witness you said you wanted to think about. So you have two witnesses?

MR. ZABELL: That's correct.

THE COURT: They are?

MR. ZABELL: They are Mr. Shaw, Duncan Shaw and Curt Kellinger.

THE COURT: And you said one of them is going to testify that --

MR. ZABELL: That he said stuff. He had made comments to Don about Don's inappropriate treatment of a female jumper.

THE COURT: Okay. And which one is that?

MR. ZABELL: That's Duncan Shaw.

THE COURT: And the other one is going to testify to something similar, but he is also going to say he discussed it with Mr. Maynard?

MR. ZABELL: Correct.

JA1566

THE COURT: Okay. On the issue of 404(b), any information that was communicated to Mr. Maynard is critical. It's a critical issue in the case in terms of what his state of mind was with respect to the situation that he was confronted with respect to Ms. Orellana and the decision that he made. That is a central issue in the case.

So certainly it's admissible under the Section 404(b) as to his intent or knowledge. And obviously under 403, the analysis is highly probative. It is not substantially outweighed by the danger of unfair prejudice. This is the critical issue in the case.

On the witness who I guess observed something and then did not communicate to Mr. Maynard, but communicated back to Mr. Zarda. I believe based upon the way this trial has played out, although Mr. Zarda's state of mind as it relates to the claim is not an element of the claim, certainly the plaintiff has placed into question the credibility of Ms. Orellana. And has stated over and over again, stated in the opening through a whole series of questions of both Ms. Orellana and Mr. Kengle, and again just stated here in the context of the Rule 50 motion, that they essentially, that Mr. Zarda had no intentionality with respect to any inappropriate touching or gestures or a manner in which he interacted with

JA1567

Ms. Orellana.

So rather than just attack the information that Mr. Maynard received and how he dealt with that information and his state of mind, they have unquestionably and aggressively attacked the complaint itself and suggested to this jury that Mr. Zarda could not have had any intentionality with respect to inappropriate remarks or inappropriate touching.

And therefore, they had certainly placed his intent or lack of, or the absence of a mistake or misunderstanding as relates to Ms. Orellana into this case. And therefore, it certainly is fair game for the defense then to put in evidence what relates to what his intent may or may not have been with respect to his handling of customers, especially female customers, whether there was a misunderstanding or a mistake.

So under, I believe under 403, the balancing, because this has been a central attack of the plaintiff, that it is highly probative for the defendant to be able to rebut that, my observations of other individuals with respect to their interaction with the customers. And again, it also relates as well to Mr. Zarda's state of mind to the extent that it was communicated back to him by a co-worker, that he believed, the co-worker at least believed that there was some issue that goes to his state

JA1568

of mind on whether or not he understood there was an issue.

But for the reasons I already stated with respect to how the credibility of Orellana, Ms. Orellana, has been placed into question, Mr. Kengle has been placed into question, and the repeated assertion that Don Zarda could not have possibly had any intentionality with respect to his conduct here, I believe it should be come in under 404(b) and the 403 balancing.

I do not believe this is substantially outweighed by any danger of unfair prejudice, given how this trial has played out.

So I'll allow those two witnesses to testify.

And then you're resting.

MR. ZABELL: Then I'm resting.

THE COURT: You did want to read another portion, I think. So show him what you want to read so we don't have a sidebar.

MR. ZABELL: I don't think it's anything that is not, that hasn't already been read.

THE COURT: If it has already been read then you don't need to read it.

MR. ZABELL: I would for the context of cross-examining if we're going to the truth of the statement that Mr. Zarda has made. I would read, I would

JA1569

ask the questions and read the answers.

THE COURT: What page is it?

MR. ZABELL: To begin with, it's page 195, lines 10 --

MR. ANTOLLINO: -- if I --

THE COURT: Obviously you had a chance to cross-examine him regarding those statements, and I was going to let you then read the pieces regarding the deposition because it's a little different. I'm letting in a statement by your client that he never had a chance to question him regarding. So it's not exactly the same situation.

Mr. Maynard was sitting on the witness stand and you, in fact, did impeach him with the statements.

But what is the page?

MR. ZABELL: It's page 195, lines 10 through 17.

THE COURT: Okay.

MR. ZABELL: Page 7, lines 3 and 4.

And I would like some additional time. I do want to bring out some of the answers after he took his two-month vacation in, I believe it was Norway. He had given me an answer. I just haven't found that passage yet.

THE COURT: Okay.

MR. ANTOLLINO: I need to look at those.

JA1570

THE COURT: One is, How are you feeling today?

That was page --

MR. ZABELL: 7.

THE COURT: And then the other one dealt with, page 195, line 10. Just give me a second.

It's just demonstrating different tandems.

MR. ANTOLLINO: 195, 10 though 17?

THE COURT: Right. And then he is looking for the other one about the cruise?

MR. ZABELL: No, about the two-month vacation.

On page 181, beginning at line 5 he was talking about his two-month vacation.

I had a great time. That allowed me to get away from a horrible winter, which I was dealing with this case and the classes and other things that were going on and were difficult. And it was an unbelievable breath of fresh air and nice place.

THE COURT: That's fine. Okay?

MR. ZABELL: Your Honor, would it be okay if I read just both the question and the answer? Because it is such a small thing.

THE COURT: Yes.

Do you want to take break?

MR. ZABELL: No, I don't.

MR. ANTOLLINO: Before I forget, on two

JA1571

occasions during this trial, a juror had sneezed and Mr. Zarda had said, gesundheit, in the middle of the trial.

THE COURT: Mr. Zabell, you mean?

MR. ANTOLLINO: Mr. Zabell.

I think that that is inappropriate and against your ruling, we're not supposed to have contact with the jurors.

THE COURT: Yes. I mean lawyers sometimes do that just by habit. But I just ask you don't make any comments to the jury, okay? But I don't think that was intentional.

All right. Let's bring the jury in.

MR. ZABELL: So no gesundheit.

THE COURT: No gesundheit.

(The jury entered the courtroom.)

THE COURT: We're ready to proceed. And I know it's more than ten minutes, but you know by now my estimates are wrong. But we are going to finish today. That estimate will be correct.

So we are now going to proceed with the defense case. I have allowed Mr. Zabell to -- a witness was called yesterday on the plaintiff's case regarding the questions of Mr. Maynard, and he wished to question him during the plaintiff's case. But now he has an

JA1572

opportunity to present any other evidence he wishes to present.

Okay. Go ahead.

MR. ZABELL: Thank you, judge.

In response to the statement I read before.

THE COURT: He is going to read a few portions of Mr. Zarda's deposition into the record.

Okay. Go ahead.

MR. ZABELL: The question posed to Mr. Zarda, page 181, line 5.

Tell me what you did for the two months and why you're smiling when you're talking about it?

Answer: The reason I'm smiling when I talk about it is because it was a very good trip. I had a great time that allowed me to get away from a horrible winter that I had which was dealing with this case and the classes and other things that were going on that were difficult. And it was an unbelievable breath of fresh air and a nice place.

The next passage that I am going to read is page 195, lines 10 through 17. Mr. Zarda was asked this question and gave this answer.

Question: Did you look for any work, other than working for that company during that four or five weeks?

Answer: No, I didn't look for any. So I did

JA1573

some tandems, you know, a couple of weekends I'd drop down to Texas which is another drop zone that I worked at part time. I did some of those.

And then finally, judge, on page 7 Mr. Zarda was asked this question and gave this answer, lines 3 and 4.

How are you feeling today?

Answer: Great.

And I want to point out, your Honor, that that is the deposition that was taken on December 9th of 2011.

THE COURT: All right. You can call your witness.

MR. ZABELL: At this time I would like to call Duncan Shaw.

DUNCAN SHAW

called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT: If you could please state your name and spell it for the record.

THE WITNESS: Duncan Shaw.

THE COURT: Can you spell it.

THE WITNESS: D-U-N-C-A-N, S-H-A-W.

THE COURT: Okay. Go ahead, Mr. Zabell.

DIRECT EXAMINATION

BY MR. ZABELL:

Q Good morning, Mr. Shaw, how are you?

JA1574

A Okay.

Q Before you get asked, have you ever met me before?

A Yes.

Q Where have you met me before?

A At Skydive Long Island I met you.. and yesterday.

Q Are you currently employed?

A I am an independent contractor and I work at military skydive contracts in Southern California.

Q Did you ever work at Skydive Long Island?

A I worked there for 15 years.

Q And what 15 years did you work there?

A From May of 2000 to the end of 2014.

Q And when you worked there, what did you do when you worked for Skydive Long Island?

A I was a skydive instructor.

Q Were you a tandem instructor?

A Tandems and video.

Q How did your employment come to an end at Skydive Long Island?

A I left to pursue other stuff, military.

Q Where was that other stuff located when you left?

A Southern California, based in San Diego.

Q So you left Long Island for San Diego?

A Yes.

Q Do you know who Don Zarda is?

JA1575

A Yes.

Q Who is Don Zarda?

A He was a tandem instructor that was employed by us three times at Skydive Long Island.

Q When you say, employed by us?

A I'm sorry, employed by Skydive.

Q Were you ever a partner at Skydive Long Island?

A No. I'm sorry, no, I was not.

Q What was your relationship with Don Zarda?

A When he first worked for us we became friends and I was friendly with him through -- until he was -- his final termination, I guess. Through his final termination.

Q Did you just say through his final termination?

A Yes, the last time that he was employed by us we became less friendly.

Q Did you -- take a step back.

When he worked at Skydive Long Island, were you colleagues?

A Yes.

Q Did you ever socialize with him?

A Not really after work. But after he was first fired from us in 2001, we talked occasionally on the phone. I had dinner with him and his boyfriend in New York City once or twice.

Q You actually went out and broke bread with him and

JA1576

his boyfriend.

Is that correct?

A Yes.

Q On how many different occasions?

A Once or twice, I think. At least once.

Q And did you maintain telephone contact with Mr. Zarda?

A Yes, we pretty much talked on the phone.

Q During what period of time did you make these telephone contacts?

A After he was first terminated and through when, I guess, he was reemployed in 2009 we talked.

Q Okay. Did you know what Don Zarda's sexual orientation was?

A I do, everybody knows.

Q How did everybody know?

A He would tell you.

Q Well, how would he tell people what his sexual orientation was?

A It wasn't uncommon for him to introduce himself as Gay Don, which was, you know, no one seemed to care.

Q How was he introduced to you?

A I believe we were introduced to him as Don. We knew he was gay from knowledge.

Q Did you ever see any of your colleagues tease Don

JA1577

about being gay?

A I think there would probably be some joking, but Don would be quiet. He would be involved in it, but he didn't care.

Q How was Don involved in it?

A He would be making jokes back.

Q Did you ever see Don bring up the issue of his sexuality?

A Many times, yes.

Q Did he bring it up in a serious manner?

A Yes, he would. It wasn't uncommon for him to walk into our staff room and tell us what he had done the night before.

Q What does that mean?

A Partying and sleeping with people.

Q Do you recall any specifics of what he would tell you?

A He would say specifics of what happened during the night, yes.

MR. ANTOLLINO: Well, this goes beyond, I believe, your ruling, judge.

THE COURT: No, overruled. You don't have to go into every detail.

MR. ZABELL: No.

BY MR. ZABELL:

JA1578

Q Not going into every detail, but did he talk about physical acts that he engaged in?

A Yes.

Q And who was present when he was talking about those very physical acts?

A I believe it was the staff, a guy and his wife and a young baby, and -- who is a military vet.

Q Speaking of that accent, where is that from?

A New Zealand.

Q Did you ever tell anybody that you were from New Zealand?

A Yes. People ask me. They can't understand me.

Q I'm getting most of it.

Now you said that he had, on one occasion, walked into a staff room and had a discussion about physical acts that he had engaged in the night before in front of a husband, wife and a baby?

A Yeah. It would be more than one occasion. And it was like, it was socially awkward because he would walk in and just sat down with everybody and, you know, and ask them -- we'd be engaged in our own conversations. That became awkward.

Q The husband and wife, were they employees of Skydive Long Island?

A Yes.

JA1579

Q The baby, was the baby --

A No.

Q How old was the baby?

A Like nine months.

Q So the baby didn't know what was going on?

A No.

Q Now, did any other employees share stories about physical acts that they engaged in?

A No.

Q Over their evenings?

A No. We didn't talk about it, what happened in the bedroom.

Q So physical acts were bedroom-related acts, right?

A Yeah, yeah.

Q What was said to Don in response?

A Generally, well, people would get up and leave or it would be like, you know, throw their hands up. Ask, Why would you say things?

Q Did anybody ever tell Don that he was over-sharing?

A Possibly. I didn't. I would leave the room.

Q Did you believe that Don was over-sharing?

A Yes.

Q Did you ever have occasion to jump with Don?

A We shared an aircraft. We may have made a skydive together.

JA1580

Q So you were on the same jump. You weren't strapped to him but --

A No.

Q But you were on the same airplane jumping out with your own students, right?

A Yes.

Q Do you know why Don was fired in 2001?

A He had complaints against him, about what he was sharing.

Q Did you have occasion to see the jumps where the complaints were lodged?

A I had a friend of mine who I actually asked Don to take on tandem and he -- when I asked her that night how the jump was, she told me that it was --

MS. JOHNSON: Objection. Hearsay.

THE COURT: Sustained, sustained.

BY MR. ZABELL:

Q Did you ever have occasion to observe Don's jumps?

A We were sharing an aircraft. You don't see everything, of course, but yes.

Q Did you ever have occasion to observe Don jump with female passengers?

A Yes.

Q Did you ever have occasion to observe anything out of the ordinary in Don's jumps with those female passengers?

JA1581

A There was a couple of occasions where you could sense how awkward it was becoming. That if your boyfriend or girlfriend were jumping, you could see that my passenger was getting upset because the girlfriend would be getting upset.

Q On how many different occasions did that occur?

A I don't know, more than one.

Q Did you ever say anything to Don about that?

A Prior to Don getting rehired, he and I had a pretty lengthy phone conversation about the way that he treated people. And I asked him to sort that out. So I probably said something to him, but I couldn't honestly tell you what it was at the time.

Q Well, that lengthy conversation, what was the specific subject? What was the subject?

A Well, he was talking to me as if he was asking for his job back from Ray's. And Ray's I guess thought about it, and said we can make a decision and he needed to sort it out because Don was a good skydiver. But skydiving is just part of our job. You have to be able to be with people, to keep them, you know, comfortable I guess.

Q And did Don acknowledge his behavior with other skydivers?

A He acknowledged, yeah. He knew that we had a long conversation about it and he knew that. He said to me,

JA1582

Yes, I know I need to sort it out and keep people happy, yeah.

Q Did Don ever approach you about switching tandem students?

A He never approached me, no. I think that perhaps he did, but I don't know.

Q Did you ever observe him approaching anybody else about switching tandem passengers?

A Yes.

Q What did you observe?

A He would ask to swap if he had a girl and the other instructor had a guy, he would ask to swap. It was pretty common for him.

Q Did you ever ask him why he did that?

A No. It was pretty obvious.

MR. ANTOLLINO: Objection.

THE COURT: Sustained. Disregard the last comment.

BY MR. ZABELL:

Q Mr. Shaw, do you base jump?

A I do not.

Q Do you know what base jumping is?

A Yes.

Q What is base jumping?

A It is jumping off a span or a bridge.

JA1583

Q Do you know if Don Zarda base jumped?

A He base jumped for a pretty long time, yes.

Q Do you recall when he first starting base jumping?

A I do not recall exactly, but I thought it was in the middle of the 2000's. It was a long time.

Q Was he base jumping before he came back to Skydive Long Island for the second time?

A Yes, yes.

Q And did he discuss it with you?

A Yeah, we talked about it, you know, and his gear and stuff to check it out. This was a fairly new sport with equipment.

Q Did he express any enthusiasm when he discussed it with you?

A Yeah, they all do.

Q What do you mean, they all do?

A Everybody that base jumps expresses their enthusiasm.

Q Do you recall what he said to you about base jumping?

A Not necessarily specific, but I mean he was excited about it.

Q Do you know what a wing suit is?

A Yes.

Q What is a wing suit?

A It's like a parachute and you can fly.

Q And did Mr. Zarda ever talk to you about wing suit

JA1584

jumps?

A He made wing suit jumps from quite early on.

Q How early on, 2001?

A Yes. He was jumping, I believe, could be -- it was a new sport, new area.

Q But you do recall him talking to you about it back then?

A I do, yes.

Q So as far back as 2001 you know that Mr. Zarda was jumping with a wing suit, and then at some time in the mid-2000's you knew that Mr. Zarda was base jumping.

Is that correct?

A Yes.

THE COURT: Can you just clarify what he just testified about. I'll allow it.

Q I'm sorry, your answer was?

A I believe it was in 2001.

Q Did you ever hear Mr. Zarda refer to himself as being gay?

A Yes.

Q And how do you recall him referring to himself?

THE COURT: We don't --

MR. ANTOLLINO: He asked that.

THE COURT: We don't have to go through that again.

JA1585

MR. ZABELL: I'm asking specific comments that he would have made, terms that he would have used.

THE COURT: Go ahead.

A He would introduce himself as Gay Don. It was common knowledge that he was Gay Don in conversation.

Q Did he ever refer to himself as something other than Gay Don?

A No, well, Don, obviously.

Q Do you know why Don was terminated in 2010?

MR. ANTOLLINO: Objection.

THE COURT: Before he says that, he has to establish how he knows that.

MR. ZABELL: Yes.

THE COURT: Go ahead. You can answer that.

A Yes.

BY MR. ZABELL:

Q How do you know how he was fired?

A Because he was -- had a complaint against him.

Q No, how did you -- did you hear it from him or from someone else? Who did you hear it from?

A I probably heard it through the grapevine at the time.

MR. ANTOLLINO: Move to strike the testimony, judge.

THE COURT: Yes, the testimony regarding that

JA1586

issue should be disregarded.

BY MR. ZABELL:

Q I'm going to show you a video.

A Okay.

MR. ZABELL: It's a video that is already introduced in evidence, your Honor.

Q I'm going to ask you if you can identify any of the parties in that video.

THE COURT: We have more than one video. Just for the record, do you know the number of this one?

MR. ZABELL: It's the Orellana video, your Honor.

THE COURT: Okay. That is sufficient.

MR. ZABELL: That is a three minute or so video. As the video is playing, Mr. Shaw, if you can identify the people that you see in it, please.

(The tape was played.)

A Right. Don Zarda.

THE COURT: Hold on.

THE WITNESS: Sorry.

THE COURT: I have to stop the video because we can't hear him with the video playing. So if you want do identify a portion of the video, just stop it, okay?

MR. ZABELL: Yes.

So here is what is I'm going to do to make it

JA1587

nice and easy. If you recognize somebody, hold your hand up and I'll pause the tape and we'll go from there, okay.

Is that fair, your Honor?

THE COURT: Yes.

MR. ZABELL: Thank you.

BY MR. ZABELL:

Q So let me rewind it once.

(The tape was played.)

(The tape was stopped.)

A That is done on the left.

Q Do you know who the person is on the right?

A No. By name, no.

Q Have you seen her before?

A Yes.

(The tape was played.)

(The tape was stopped.)

A That was, on the very right, is Duncan Shaw.

Q Let me just back it up a couple of steps.

A That is me.

Q The guy with all of the hair?

A Yes.

Q So that was you on that jump, correct?

A Yes.

Q Do you remember that jump at all?

A I do, yes.

JA1588

Q What do you remember about that jump?

A I was taking the boyfriend and the girlfriend is jumping with Don. And she was becoming increasingly anxious or disturbed, I guess, and was causing my passenger to be disturbed. So I was trying to distract them, I guess after that so it could work.

Q Did you see anything in that video that would cause someone to be disturbed?

A The weird stuff he is doing with his fingers.

Q Did you see that already?

A Yes. It was creepy.

Q Okay. I'm going to play the video and raise your hand when you see something creepy, and I'll pause and you can please tell me what you see that is creepy.

(The tape was played.)

(The tape was stopped.)

Q Tell me what you saw that you thought was creepy?

A Just the way he puts his fingers in his mouth.

(The tape was played.)

(The tape was stopped.)

Q Now, what we saw just then on the video, were you putting your fingers in your mouth?

A No, not me.

Q Sorry?

A I don't usually put my fingers in my mouth.

JA1589

Q Is there a legitimate skydiving reason for putting fingers in your mouth?

MR. ANTOLLINO: Objection.

THE COURT: Sustained.

BY MR. ZABELL:

Q Let's talk about during a jump where you keep your hands.

Where do you typically keep your hands when you have a tandem suit strapped to you?

A Mostly to myself. It's always very close contact. I might use my hand on the shoulders in the aircraft, that you're here and you have to take the equipment on and stuff. So there is moving around a little bit but --

Q Is there any reason why you would keep your hands on someone's hips or thighs during that time?

A No. It's actually far away. It would be uncomfortable.

Q I'm going to play the remainder of the videotape and tell me if you see anything else.

(The tape was played.)

(The tape was stopped.)

Q Did you raise your hand?

A Yes. That was Marko Markovich.

Q Let me see if I can get that back.

(The tape was played.)

JA1590

(The tape was stopped.)

A Yes.

Q That was Marko?

A Yes.

(The tape was played.)

(The tape was stopped.)

Q And as you're falling, how fast are you falling before the parachute opens?

A About 120 miles an hour.

Q Now is there a reason why they're wearing goggles?

A So they can see.

Q And is there a reason why their skin is being pushed up?

A Speed.

Q Speed?

A Yeah.

Q That's the speed of falling through the air?

A Yes.

Q Kind of like the same reason why they're struggling to keep their arms down, correct?

A Yeah, just for flying, I guess.

Q Now do you recall seeing a video of your jump?

A A video?

Q With the boyfriend?

A Yes.

JA1591

MR. ZABELL: Your Honor, I would like to introduce the jump of Mr. Shaw and Mr. Kengle as --

THE COURT: Have you seen that? Had we seen that already?

MR. ZABELL: Plaintiff's 54. I would like to play that video, if I may.

THE COURT: Yes, go ahead.

BY MR. ZABELL:

Q I'm going play that video and I'm going to ask you questions afterward.

(The tape was played.)

(The tape was stopped.)

Q Do you recall that jump other than what you have just observed?

A Other than the awkwardness in the plane.

Q Is your answer yes or no?

A Yes, yes.

Q Now, did you discuss that awkwardness on the plane with anybody?

A No.

Q Why not?

A My job was to take care of the passenger and focus.

Q From the time you would jump out of the plane to the time that you land on the ground, about how much time elapsed?

JA1592

A Four or five minutes.

Q And what are the stages of those four or five minutes?

A We're in free fall for about a minute and then with the parachute for three or four minutes.

Q Do you talk to the student during the free fall?

A No.

Q Why is that?

A Because it's loud, you can't conduct a conversation.

Q And do you talk to the student after the free fall?

A Yes. Once the parachute is opened, it's quiet, you can talk to him.

Q What do you mean, talk about what is going on?

A Well, we make some adjustments and, you know, show him the view or talk about a landing or what is going on.

Q Do you recall that was something you did with Mr. Kengle?

A I would imagine I did. But I did hundreds of jumps.

MR. ZABELL: I have nothing further, your Honor.

THE COURT: Cross-examination?

MR. ANTOLLINO: I need a few minutes to set up.

Do you want me to do that now or take a break? It's up to you.

THE COURT: Why don't we take a break.

We'll take a brief break, okay? We'll take our

JA1593

morning break. Don't discuss the case.

(A recess was taken.)

(After recess the following occurred.)

CROSS-EXAMINATION

BY MR. ANTOLLINO:

Q Mr. Shaw, you worked for Long Island Skydive Long Island for 14 years?

A 14 years, yes.

Q So you started in or about 2000?

A Yes, I think it was 2000. I went to 2014.

Q You are here testifying today for RAY MAYNARD?

A Yes.

Q And you did not get subpoenaed, did you?

A I don't think so.

Q So you don't remember anyone delivering a demand to appear in court?

A No.

Q You voluntarily agreed to come from San Diego to testify for RAY MAYNARD?

A I was asked to come, yes.

Q And you agreed to, yes?

A That would be correct, yes.

Q And he, Mr. Maynard, paid for your flight.

Isn't that correct?

A He didn't pay for my flight yet.

JA1594

Q He did not pay for your flight?

A Not yet, no.

Q But he is going to?

A I hope so.

Q You hope so, but you're not sure?

A Yes.

Q Is he paying for your meals?

A No.

Q Where are you staying?

A At my girlfriend's sister's house.

Q So he is not paying for your housing?

A No.

Q Now, all three of you, Wayne Burrell, Curt Kellinger and yourself worked for Ray's starting in or around 2000.

Is that true?

A I started in 2000.

Q And they started shortly thereafter, correct?

A I can't speak for them.

Q Well, can you recall a time in 2003 where all three of you testified for Ray's before the Riverton [sic] Town Council to extend Skydive Long Island's lease?

A Yes. That was for me to keep my job.

Q Yes, it was a benefit for you to keep your job so you went and you testified for Ray's, correct?

A Yes.

JA1595

Q And the same is true, you believe, for Curt and Wayne, correct?

A I can't speak for them, no.

Q And did you write your statement, you, yourself, or did Ray's write it or someone else write it for you?

A I wrote it myself.

Q Now when you say that you're in San Diego now working as an independent contractor, you're an independent contractor, you work as a skydiver, correct?

A Yes.

Q All right. Now the skydiving community is very closely knit.

Would you not agree with that?

A Yes.

Q And, in fact, you belong to a Facebook group called, I Fucking Love Skydiving.

Is that not true?

A I don't know.

Q Well, let me just show you this and ask you if it refreshes your recollection.

A Possibly, yes.

Q And this particular organization on Facebook says everything looks better from 12,000 feet, correct?

A I don't know.

Q All right. Well, you believe that, don't you,

JA1596

everything looks better from 12,000 feet.

Would you agree with that statement?

A Sure.

Q You are an inveterate skydiver, correct?

A I have been skydiving for 21 years, yes.

Q Would you describe yourself as inveterate?

A Sure.

Q You want to continue working in that field for as long as you can, correct?

A Yes.

Q So when you say you left to pursue other stuff in San Diego, you really meant that you went to pursue the same stuff in San Diego, correct?

A It was training military. It is slightly different from doing tandems.

Q It is slightly different, but it's still skydiving, correct?

A It's still skydiving, yes.

Q Now on three occasions when you were asked questions during your direct examination, you, even though you're working somewhere else, you referred to Skydive Long Island as us.

Isn't that correct?

A Yes.

Q That was even after Mr. Zabell clarified that you're

JA1597

not a partner and you don't own any part of Skydive Long Island.

Is that true?

A Yes. When you work with somebody for so long you kind of feel like you're a part of it, so I said yes.

Q And were you there for 15 years and therefore you feel like you are part of them?

A Of course.

Q Okay. Now, not only did you come in here as a favor for Ray's, you were here all day yesterday.

Isn't that correct?

A Yes. Waiting, yes.

Q And so how many days in court, total, have you been waiting to testify?

A I waited yesterday afternoon and this morning since 9:30.

Q Now when we were in the hallway yesterday I recognized you from the video and I said to you, Are you Duncan Shaw? Do you remember that?

A Yes, I do.

Q And you said, Hello, how are you? Correct?

A I asked who you were.

Q And I told you that I was Don Zarda's lawyer, correct?

A Yes.

JA1598

Q And at that point you would not talk to me any further.

Is that true?

A I didn't see any benefit talking to you.

Q Any benefit to you?

A No benefit to me to talk to you.

Q It might have been a benefit to me, but you didn't care about that, correct?

A Not my job.

Q Okay. Your job is to be here to testify for Ray's, correct?

A My job is to be here and tell the truth, yes.

Q All right. Well, then why wouldn't you want to tell me about the truth?

A You're asking me stuff now.

Q Well, I wanted to find out what you were going to testify to before you got into court.

A Is that so you could hold that against me?

Q No. That was so I knew what you were testifying to.

A That's your job. You're a lawyer, right?

Q That was my job yesterday and you wouldn't allow me to question you yesterday.

You would agree with that, correct?

A I asked you if I had to talk to you and you said no, so.

JA1599

Q You didn't have to talk to me.

A So I said it's my choice, right?

Q That's right. It was your choice and you chose not to talk to me, correct?

A I did chose not to talk to you.

Q But you chose to leave with Ray's and his entourage yesterday. You all left court yesterday?

MR. ZABELL: I'm going to object to the term entourage.

THE COURT: Sustained to form.

BY MR. ANTOLLINO:

Q You left with Ray's and his group, his team yesterday from court.

Is that correct?

MR. ZABELL: Objection.

THE COURT: He can answer.

A I left, yes, with the people I know, yes.

Q The people you know are Ray's, his wife, his attorney?

A Yes.

Q Curt Kellinger and Wayne Burrell, correct?

A Wayne and Curt were not there yesterday.

Q But you left with all of the other people, correct?

A Yes. My girlfriend, yes.

Q Well, I didn't know about your girlfriend. Was your

JA1600

girlfriend out there?

A It's unfortunate, yes.

Q You brought her here too?

A She was driving me. I don't have a car here.

Q And does she live here or does she live in San Diego?

A She lives here.

Q Now, when you testified earlier, you said that you believed that David Kengle was getting upset at some point in the skydive.

Is that correct?

A I said in the aircraft, yes.

Q How did he express this upset to you in the aircraft?

A Looking in the direction of his girlfriend.

Q No. How did Mr. Kengle express his upset to you?

A He was trying to console his girlfriend and I needed him to do so for us.

Q What exactly did he do to try to console his girlfriend?

A His girlfriend was looking at him uncomfortably and he was trying to console her, I believe.

Q When you say uncomfortably, what is the basis upon which you come to the conclusion that she was uncomfortable?

A Her actions.

Q What were her actions?

JA1601

A She looked uncomfortable.

Q We're going around in circles. I'm trying to ask what was it about her that made you conclude that she was uncomfortable?

A Her actions were making my passenger uncomfortable and he was getting upset.

Q Okay. I understand that. I just want to know what the actions are. Can you remember any actions?

A I'm not too sure what you want me to do.

Q I want you to tell the jury what the actions were --

A And he --

THE COURT: Hold on.

Q You have to wait for me to ask the question.

THE COURT: Let him finish the question.

BY MR. ANTOLLINO:

Q I want to know what the specific actions were.

A They were conversing and then he would be trying to touch her and like hold on to her and hold her hand and stuff, I believe.

Q And so in between, were they facing each other?

A No, sitting on opposite sides of the aircraft.

Q And they were conversing about what?

A I don't know. She felt uncomfortable.

Q I don't understand.

A I didn't ask them specific.

JA1602

Q Okay, so you didn't ask them specific about what they were conversing about. As far as you know, she could have said, This is awesome, correct?

A Did not appear to be saying, This is awesome.

Q She did not appear to be saying, This is awesome.

But that is your conclusion. You didn't hear what she said.

Isn't that true?

A I did not hear what she said.

Q So you had to focus your client or your customer on his dive as opposed to his girlfriend's, correct?

A Yes.

Q And that is what you did?

A Yes, I did my job.

Q Were you aware that before the skydive, that someone, it could have been you, it could have been someone else, said, I bet you didn't know that your girlfriend was going to get strapped up to another guy?

A No.

Q You weren't aware of that?

A That's before the skydive, no, I didn't.

Q Have you ever heard that joke or comment made before?

A I'm sure it has been thrown around before.

Q Well, when someone said it in front of Don, they were implying that Don was being strapped up to Mr. Kengle's

JA1603

girlfriend, correct?

A Pardon me? Can you say that again?

Q Well, if someone -- you heard that phrase before, correct?

A I have, yes.

Q And the connotation in the phrase, is that, gee, I bet you didn't know that your significant other was going to be so close to a guy that you don't even know. Isn't that funny? Correct?

A I don't get the question.

Q Well, the connotation is that it's a surprise that your significant other is so close to someone that is unfamiliar to you, correct?

A You need to be close together, yes.

Q Need to be close together?

A Yes.

Q And it's a surprise when it happens right in front of a boyfriend or a girlfriend, correct?

A I can't speak for those people, no.

Q That is the reason why it is often stated because it brings out the humor in the atmosphere, correct?

A Yes. I don't use that, so I don't know.

Q Well, do you know -- you have been in this business for how many years before you started working for Ray's?

A 21 years.

JA1604

Q So six years before Ray's. And all of the time you have been working, you don't know why that comment is made?

A I don't use that, so I don't know why people use it.

Q So you have never inquired of any people, one which used it, why would you ask something like that?

A It makes no difference to my life, so.

Q Well, if someone said it to Don, don't you think that Don might feel uncomfortable being accused of hitting on someone's girlfriend?

MR. ZABELL: Objection.

THE COURT: Sustained.

BY MR. ANTOLLINO:

Q Don't you believe that a reasonable person would feel uncomfortable being strapped to someone else's girlfriend in that situation?

MR. ZABELL: Objection.

THE COURT: Sustained.

We're not going to ask an opinion for that, okay?

BY MR. ANTOLLINO:

Q Now the video we saw showed a portion where Don was swirling with his mouth and swirling with his finger, correct?

A Yes.

JA1605

Q And twirling the finger, correct?

A Putting it in his mouth, yes, and swirling.

Q You keep offering putting it in his mouth. Sometimes in life people put their hands in their mouth because something might be bothering them like lips sore or something like that.

Is that correct?

A I can't say.

Q All right. Now when you are up in the sky, you are taught to enhance the video.

Isn't that correct?

A Enhance the video?

Q Yes.

A I don't understand what you mean.

Q Well, to make the video a little bit goofy and more fun for the customer when he or she gets home to watch it, correct?

A I wouldn't say goofy. I don't like the term goofy, like I'm an idiot.

Q Well, as we were sitting here today, I played a video of you pointing your fingers and making your eyes go up and down to one of your tandem passengers.

Did you see that?

A I was trying to seem engaged and paying attention for the videographer, yes.

JA1606

Q Because you want him to be engaged, the video is on and you don't want to be sitting there like a lump. You want to be interacting with the video, correct?

A Sure. We sit in the plane for 20 or 30 minutes and for ten seconds we're on video, so.

Q So you have to wake up at that ten seconds and you have got to show some, show some feeling.

Would you agree?

A I wouldn't say wake up. I don't sleep in the aircraft, I converse with my passengers.

Q When I say you would never sleep in the aircraft. When I say wake up, I mean wake up mentally that you're on camera, correct?

A Sure.

Q Now there came a point in the video that you saw on cross-examination, in which Don's Zarda realized that he was on camera, correct?

A Yeah.

Q I want you to look at this picture here.

All right. Now can you see that picture?

A Yes.

Q All right. It doesn't look there like Don is having fun, does it?

A No, it looks like he's talking with another person.

Q I'm sorry?

JA1607

A He is in a weird position.

Q He is in a weird position?

A In the aircraft.

Q He has a tandem passenger on his lap, correct?

A No, sitting in front of him.

Q Okay, sitting in front of him but very close to his lap.

Is that not true?

A At this point, not attached, so there's space.

Q How do you know they're not attached at this point?

A I can see the hooks right here in the front.

Q So Don is not attached at this point and it doesn't look like he is paying attention or doing anything of interest.

Would you agree with that?

A It looks like he is getting ready for the camera to me.

Q What makes you think that he's looking at his hand, that he is getting ready to look at the camera?

A Because the cameraman is sitting right in front of him and it's pretty obvious, unless he was completely oblivious. The camera guy says sit up, so.

Q So at some point you're going to be completely oblivious that you're being taped and then you're going to pop into action, correct?

JA1608

A Pop into action? Those are your words. Sitting there, the camera is right in front of him about a foot way from him at this point, so.

Q So you understand what a neutral demeanor is, correct?

A Sure.

Q Would you agree that this is a neutral demeanor, correct?

A Sure.

Q This is just as the camera is turned on and before anyone realizes that it's turned on, correct?

A Well, the girl knows it's turned on, so --

Q How do you know the girl knows that it's turned on?

A She is looking directly at it.

Q The fact that she is looking directly at it, how do you know that means that she knows the camera is on?

A I mean, the same way you're saying that Don doesn't know it's on.

Q I don't understand. Can you explain?

A Well, she is looking directly at the camera and you're saying that Don is looking at his hand.

Q So she doesn't know what electronically the camera is doing at this point, does she?

MR. ZABELL: Objection.

THE COURT: Sustained, sustained.

JA1609

BY MR. ANTOLLINO:

Q Let's keep looking. Let's keep looking.

Now I want you to look at the change in Don's demeanor at this point.

(The tape was played.)

(The tape was stopped.)

Q All right. You just saw that Don woke up and he realized that the camera was on, and he made an expression to it, correct?

A Yes, a movement.

Q All right. Now was there anything that you saw that indicated to you that the girl was uncomfortable?

A She is playing for the camera just like we do.

Q So you're saying that she was playing for the camera and not showing her uncomfortability?

A That is what it appears to be.

Q That is what it appears.

And just to be clear, your only knowledge that she was uncomfortable is that she was talking to her boyfriend, correct?

A Yes.

Q And here is you?

MR. ZABELL: Excuse me, your Honor, I didn't hear that last part.

THE COURT: What did you say?

JA1610

THE WITNESS: I was sitting far behind her, offset from where they're sitting.

BY MR. ANTOLLINO:

Q You're sitting far behind them, so it's kind of difficult for you to know everything that's going on, either verbally or movement-wise.

Would that be fair to say?

A I can only say how my passenger was reacting, so.

Q All right. So let's go back to how your passenger was reacting.

A Okay.

Q Okay. Your passenger was reacting by talking to Orellana, correct?

A Yes. And he was --

Q And you know that they were boyfriend and girlfriend, correct?

MR. ZABELL: Your Honor, I am just going to ask the witness be allowed to finish his answer before the next question is asked.

THE COURT: Were you going to add something?

THE WITNESS: I think so, but I don't remember.

Q All right, did you want to add something?

THE COURT: He said he can't remember.

Go ahead, ask the next question. Let him finish the answer. Don't interrupt the answer.

JA1611

MR. ANTOLLINO: I thought he finished. I apologize.

(The tape was played.)

(The tape was stopped.)

BY MR. ANTOLLINO:

Q Is there anything there that makes you think that she is uncomfortable?

A I can't speak for her but it looks like she is playing for the camera.

Q Well, the question was simply whether there was anything there that made you believe that she was uncomfortable.

MR. ZABELL: Asked and answered.

THE COURT: Sustained.

(The tape was played.)

(The tape was stopped.)

BY MR. ANTOLLINO:

Q All right. Is she playing for the camera?

A She looks like she's scared out of her brain. She's about to jump out of an aircraft.

Q What is it about her look that makes you conclude that she is scared out of her brains?

A The body language.

Q What is it about her body language that tells you that she is scared out of her brains?

JA1612

A She looks tense.

Q She looks slightly tense?

A Yes.

Q Is there anything else that you can use to describe that characterization?

A Her body position.

Q But the body position is precisely in a position where it's supposed to be, correct?

A No.

Q All right. Don't you instruct the tandem passengers to cross their arms?

A I do not, no.

Q But some passengers -- some instructors do, correct?

A Yes.

Q And, in fact, on the video it says that you're supposed to cross your arms so that they don't get caught in the air, correct?

A So we don't have to deal with them when we first leave the aircraft.

Q I'm sorry, could you read that back?

A It was so that we do not have to deal with them when we exit the aircraft.

Q So it's a safety reason, their hands are put to her chest, correct?

A Yes.

JA1613

(The tape was played.)

(The tape was stopped.)

Q Now at this point, she wasn't smiling there, that is all a function of the air blowing in her face?

A I never said that.

Q So you believe that she was smiling there, you saw --

A Generally, once you leave aircraft people feel okay.

Q And she was smiling there, correct?

A It looks like it. I was smiling.

(The tape was played.)

(The tape was stopped.)

Q How would you rate that landing?

A It's okay.

Q Wouldn't you say it was very good?

A No, I would just say, okay.

Q What?

A Mine are better.

Q Yours are better, okay.

(The tape was played.)

(The tape was stopped.)

Q How do they look there? Do they look happy?

A She looks okay there.

Q She looks happy, doesn't she?

A She just jumped out of an aircraft, yes.

Q She is smiling, she looks happy, doesn't she?

JA1614

A She seems okay.

Q You won't admit that she looks happy, will you?

MR. ZABELL: Objection.

THE COURT: Sustained. The jury will disregard that.

(The tape was played.)

(The tape was stopped.)

Q All right. Now there was a video of you and David Kengle. You have seen that too, correct?

A I saw part of it this morning.

Q So let's take a look at that. That is already in evidence.

(The tape was played.)

(The tape was stopped.)

Q Who would that be, any final words?

A The video guy.

Q When you say, any final words, you're suggesting that these were going to be the last words that you're saying.

Would that be fair to say?

A In skydiving there is no guarantee we're going to live.

Q There is no guarantee you're going to live. And that's something that is explained to them in the video, correct?

A Yes.

JA1615

Q That is something that is explained to them in the waiver, correct?

A I believe so, yes.

Q So do you think there is any necessity in reminding them that these could be your final words before they get on the plane?

A That's up to the video guy. I don't use those words.

Q How do you think it makes the passenger feel?

A I don't know. He laughed.

(The tape was played.)

(The tape was stopped.)

Q Now that is you, correct?

A That would be me, yes.

(The tape was played.)

(The tape was stopped.)

Q By the way, what is that watch? We have seen that watch during this trial. What does that mean?

A It's an altimeter that tells us how high we are.

Q All right. So at 3.6, what is the height?

A 3,600 feet up.

Q So that is way above 12,000 feet, right?

A No, that is way below 12,000 feet.

Q So it's 3,600 as opposed to 12,000?

A This is in the aircraft on the way up.

Q So that shows that it's going on the way up and

JA1616

you're going to go how high?

A To 13,500 feet.

Q So you have 10,000 feet to go, correct?

A Correct.

(The tape was played.)

(The tape was stopped.)

Q Do you know what that helmet was?

A It's a video helmet.

Q Well, what did the helmet say?

A ToneFly.

Q ToneFly?

A It's a brand.

Q It's a brand. But doesn't it say, Get Some, on it?

A You have to show me again.

Q Let's look at it again.

(The tape was played.)

(The tape was stopped.)

Q All right. You just saw Rosana. Did you say she looks uncomfortable there?

A No.

Q Now it looks like, based on what we just saw, that you're catty-corner. Do you understand what the word catty-corner means?

A I know what the word catty-corner means, yes.

Q So it's not the case they were sitting next to each

JA1617

other, it's not the case that they were sitting in front of each other. They were sitting diagonally across from each other, correct?

A Sitting across and he is slightly behind her by one body length.

Q And it's diagonal, correct?

A He is across from me, yes.

Q I just want to focus on diagonal.

MR. ZABELL: Objection.

THE COURT: You can answer, go ahead.

A Diagonal, yes, on two separate benches.

Q Two separate benches that are diagonally opposed, correct?

A There were benches that run parallel to each other and we're sitting beside each other or slightly offset.

Q You're sitting here and she's sitting here, correct? Would you characterize --

A No, they would probably be even with where Don was sitting.

Q Let's go back and look at it again.

(The tape was played.)

(The tape was stopped.)

Q So does that not appear as you look at it again, that they are diagonal?

A Diagonal, yes.

JA1618

Q Okay. That's all I was asking.

(The tape was played.)

(The tape was stopped.)

Q All right. You just saw Ms. Orellana make a little kiss to the camera. Didn't you?

A Sure.

Q Does that, to you, express any fear, making a kiss to the camera, that in and of itself?

A Yes, she is playing for the camera, like I said.

Q She is playing to the camera.

But the question was, does kissing and playing to the camera demonstrate any fear or uncomfortability?

A Well, she is playing for the camera.

Q So the answer to the question is no, correct?

A No, sure.

(The tape was played.)

(The tape was stopped.)

Q All right. Did you notice that David Kengle's arms were crossed, at least partially?

A He was holding on to the harness.

Q He was holding on to the harness. You instruct your passengers to hold on to the harness?

A Yes.

Q Instead of putting their hands diagonally the way Kengle -- the way that Orellana did it, correct?

JA1619

A Yes, because I like them to get an arch in their body position.

Q That is your preference, correct?

A Correct.

(The tape was played.)

(The tape was stopped.)

Q Wait a minute. Did that landing look better or worse than Don's?

A I don't know. I didn't see very much of it.

Q You didn't see very much of it, but your passenger had his knees to the ground and yet Ms. Orellana --

Wait. Let me finish asking the question.

Your passenger had his knees to the ground and yet Ms. Orellana had landed flat on her feet.

Isn't that true?

MR. ZABELL: Objection.

A He is squatting.

THE COURT: Stop.

Sustained as to relevance. You don't have to answer that.

(The tape was stopped.)

(The tape was stopped.)

BY MR. ANTOLLINO:

Q That is you hamming up for the camera. Do you agree with that?

JA1620

A Sure.

Q Now you don't know, getting to a different subject, who gave Don the name Gay Don, do you?

A I think Don did.

Q You don't know that though, do you?

A I don't know that.

MR. ZABELL: Objection. Asked and answered.

THE COURT: That is okay.

A I don't know that. He just introduced himself to be Gay Don.

Q You don't know how Don felt about it originally when people started referring to him as Gay Don, do you?

MR. ZABELL: Objection.

THE COURT: Sustained.

BY MR. ANTOLLINO:

Q It might have been that he just went along with it to fit in with the other skydivers. Would that be a fair characterization?

MR. ZABELL: Objection.

THE COURT: Sustained.

BY MR. ANTOLLINO:

Q You're from New Zealand, correct?

A That is correct.

Q Is anyone ever -- and you know that New Zealanders are sometimes referred to as kiwis, correct?

JA1621

A Yes. That is our national bird.

Q Has anyone at the Dropzone ever referred to you as Kiwi Duncan?

A Not very often, no.

Q At all?

A I don't recall. I was there 15 years.

Q And you don't remember once anyone referring to you as Kiwi Duncan, correct?

A I had other nicknames.

Q And one of them was not Kiwi Duncan, correct?

A No, most people think it's a fruit.

Q And it's not -- it's a bird as well as a fruit, correct?

A Yes, a kiwi fruit.

Q A kiwi fruit and kiwi bird.

And were you never called Kiwi Duncan?

A They called me kiwi but they never called me Kiwi Duncan.

Q All right. You told Mr. Kengle, did you not, that you were from New Zealand, didn't you?

A Yes.

MR. ANTOLLINO: No further questions.

THE COURT: Redirect?

MR. ZABELL: No redirect, judge.

THE COURT: You can step down. Thank you.

JA1622

(The following occurred at sidebar.)

MR. ZABELL: I expect Mr. Kellinger to be done with my questioning in about 15 minutes. I do have a 1 o'clock telephone conference with Judge Gleeson. I thought we would be breaking during lunch.

THE COURT: Do you know how long you're going to be with this witness?

MR. ANTOLLINO: We'll see what he testifies to.

THE COURT: We'll stop at five to 1:00.

MR. ZABELL: Very good. Thank you, judge.

(Continued on the following page.)

JA1623

(The following occurred in open court.)

THE COURT: Your next witness.

MR. ZABELL: I'm calling Curt Kellinger.

MR. ANTOLLINO: Excuse me. If we could go to sidebar I just want to --

(Continued on the following page.)

JA1624

Ellen S. Combs, CSR
OFFICIAL COURT REPORTER

(The following occurred at sidebar.)

MR. ANTOLLINO: Judge, I just want to renew my objection on the grounds that we were never provided this person's name, even when we asked for it. We were never provided with his address. He was in the joint pretrial order but there was no way we could have contacted him. And he was not on the amended pretrial disclosures. And anything he testifies to would be cumulative.

So we again renew our objection under the circumstances to preclude this witness.

THE COURT: Okay. As I said, I was going to give a more detailed explanation later on. I don't want to keep the jury waiting.

MR. ANTOLLINO: Okay.

(Continued on the following page.)

JA1625

(The following occurred in open court.)

CURT KELLINGER

called as a witness, having been first duly sworn,
was examined and testified as follows:

THE COURT: State your name and spell it for the
record.

THE WITNESS: Curt Kellinger, C-U-R-T,
K-E-L-L-I-N-G-E-R.

DIRECT EXAMINATION

BY MR. ZABELL:

Q Good afternoon, Mr. Kellinger. How are you today?

A Fine.

Q Mr. Kellinger, did you ever work at Skydive Long
Island?

A I did.

Q From when to when did you work there?

A From 1992 to the last couple of years, about four
years ago when I moved away.

Q Where did you move to?

A Excuse me?

Q Where did you move to?

A Salt Lake City, Utah.

Q Is that where you currently reside?

A Yes.

Q What did you do when you worked for Skydive Long

JA1626

Island?

A All aspects of the flight line performance, tandems, cameraman, instructor, even pack and mow the lawn sometimes.

Q For how many of those years were you a tandem instructor?

A From about '85 on.

Q During your period of employment, did you ever meet somebody by name of Don Zarda?

A Yes, I did.

Q Do you recall when you met Don Zarda?

A I met Don in Vermont.

Q Do you recall when?

A I'm sorry, but I don't remember what year it was.

Q Do you know how Don Zarda came to be employed at Skydive Long Island?

A Yes. I brought him down from Vermont. I was on a motorcycle trip and I met Don at Vermont Skydiving. Ray's was expanding and was looking for guys and I brought Don down.

Q Do you know how, specifically, Don got hired?

A Well, on my recommendation after I saw Don. I had taken a guy that I was on the trip with on a tandem and we went skydiving, and I met Don on the ground and in the airplane. And I watched him exit. And I had gotten down

JA1627

prior to him and I watched him land. He was highly rated.

At that time he had about 4,000 jumps. I called Ray's and told him I think he would fit in with us.

Q Did Don introduce himself to you or did you introduce yourself to him?

A I don't really recall how we met, you know.

Skydivers are on the flight line getting ready. We just met. I asked him where he was from. Originally, Kansas, in the midwest, and where I was from, Skydive Long Island, and I actually lived in New Jersey. But we had a discussion like that.

Q Did he ever express to you an interest in coming to be a tandem instructor on Long Island?

A Yes, he did. That was actually part of our first -- he asked if we were looking for anyone. And I said, yes. And I know Don was a very fit, handsome guy, you know, told him about the Hamptons, he would love it, it was great vacation area, you would fit in right out there. And he said, Well, I don't like the Hamptons. I like more of the clubs over in Fire Island. And I, you know, so I said okay. That is where the gays go. But fine, he is a great skydiver.

Q So in that first conversation you had with him where you were meeting for the first time, he revealed to you his sexual orientation.

JA1628

Is that correct?

A Before we were even on the plane.

Q Did that change in any way your recommendation of Don Zarda to RAY MAYNARD?

A I called Ray's from Vermont. Ray's was at a -- when I started with Ray's it was a small company, two little planes. And he was expanding at the time and had relayed to me to keep my eyes open for anyone, you know, talented. And I told him I watched, I watched him jump. I watched him land. He's a very nice guy and he wants to be near Fire Island because he is gay and that is his lifestyle.

And Ray's said, Tell him to come down. Bring him down.

Q Did Ray's say anything about Don being gay?

A No. He just asked me how many jumps he had and what his ratings were.

Q Ratings, to rate somebody.

Did there come a time where you saw Don Zarda introduce himself as Gay Don?

A Years gone by he would say that to some people.

Q Do you remember the first year that Don started at Skydive Long Island?

A No, I'm sorry, I don't.

Q Would it surprise you if it was 2001?

A I really don't remember.

JA1629

Q Okay.

A It's quite a long time ago.

Q Do you know how Don's employment ended that first year?

A Don had an incident in the landing area. I think that was the same year. I don't know, this was quite a long time ago. But Don had an incident in the landing area with one of customers and Ray's fired him.

Q Do you recall what that incident was?

A He -- I was on the load. He had a young woman and he was on the grounds in a very, you know, like I said, it was a long time ago but he was very agitated, very animated.

MR. ANTOLLINO: Who was agitated, your Honor?

THE COURT: Who was agitated?

THE WITNESS: Excuse me?

THE COURT: You're saying he was agitated. Who was agitated.

THE WITNESS: Don.

THE COURT: Okay.

A And it was one of the things that was always, you know, a rule with Ray's was you can have trouble and home troubles with --

MR. ANTOLLINO: Objection. Hearsay.

A -- the crew --

JA1630

MR. ANTOLLINO: One of the things that Don knew, that would be hearsay or speculation.

THE COURT: No, he can testify as to what he understood the rules to be at the employment. You can cross him on it.

Go ahead.

BY MR. ZABELL:

A People come in there to jump out of a plane, so it's a monumental undertaking. They're probably going to do it once in their life. So we didn't talk about it, if we were having trouble with the crew that day. Like you would not discuss anything that would take away from their experience. So his behavior that afternoon caused Ray's to fire him.

Q How do you know his behavior that day caused Ray's to fire him?

A Well, at the -- I was on the tarmac and Don was still out there, still ongoing. And Ray's was saying, What is going on out there?

And I said, he is having some type of meltdown over whatever happened on that little -- later on Ray's dismissed him.

Q Did you have any discussions with Ray's as to the reason why Ray's dismissed him?

A Well, there was some discussions afterward but it's,

JA1631

you know, on the flight line you had to act in a professional manner.

Q You used the term, load. You were on the load with Don. What does that mean?

A The plane holds about 18 people. So most loads would be one tandem passenger, one tandem instructor and one cameraman. So we would have anywhere from four or five tandem passengers and the staff to take that load up.

Q Did you ever have occasion to observe Don Zarda jumping with other female passengers other than that one?

A Yes, many times.

Q Did you ever have occasion to observe any of Don's interaction with those female passengers?

A Well, it was a common discussion amongst the staff.

MR. ANTOLLINO: Objection to it was a common discussion.

THE COURT: Sustained.

You can discuss the things that you talked to Don about or that you discussed with Mr. Maynard about, but not other staff people, okay?

THE WITNESS: Okay.

BY MR. ZABELL:

Q What did you observe?

A Don would become less enthusiastic about taking women, not women but younger women. Like not so much

JA1632

middle-aged housewife types by younger girls. His demeanor would change. And there was some speculation that he didn't like them.

Q So it would change in a positive or negative way?

A In a more withdrawn way. I mean, he would do the job. He was a very safe skydiver. But he just, you know, there was not that degree of, hey, we're going to have fun and the reassurance that people -- you're in a small window and you're trying to get someone you meet, you might shake their hand and you're trying get them to trust you in ten minutes so that they can go up in the plane and enjoy it and they're not terrified. So it takes a little bit of effort.

Q Did Don Zarda ever ask you to switch passengers with him?

A Quite a few times.

Q Could you explain to me what that was about?

A He would come up and say, you know, I have this girl and her boyfriend and we would switch. And it was almost like a no-brainer, a 100-pound girl or a 200-pound guy, I thought it was less work so I said sure.

Q Is it easier to jump with the 100-pound person as opposed to the 200-pound person?

A Yes, a lot easier.

Q Why?

JA1633

A Well, the weight you would use to carry a 200-pound sack of potatoes or a 100-pound sack of potatoes.

Q So you always went for the hundred pounds?

A Yes.

Q Did you ever hear Don bring up his sexuality on a jump?

A He certainly didn't hide it. But as far as -- I don't understand the question.

Q Did you ever hear Don refer to himself as being gay in a joking manner?

A Quite often. He had a little routine where if the pilot is starting the aircraft, it's a big aircraft and he can't see out or underneath the front of it, so it's in the flight operations, you yell out the window, Clear, to clear the props, and to turn the key. And there were times when the pilot would yell out, Clear, and Don would go, Queer, right here. You know, and we would all laugh, and it was just Don being Don.

Q Did you ever observe your co-workers bring up to Don his sexual orientation in jumps?

A I don't understand the question.

Q Did you ever see any of your colleagues, any of the fellow tandem instructors tease Don about his sexuality?

A Well, there was back and forth between the whole crew. I mean, my nickname was Fat Bastard. So it was a

JA1634

very gregarious crew.

Q Were you, in fact, a fat bastard?

A No, I was not. I don't think I was, but that was my nickname.

Q I'm sorry, it was a joke? I'm sorry.

A Yes.

Q Did you ever see Don being treated differently than any of his other co-workers?

A No.

Q Did you ever see Ray's make any comments about Don's sexuality?

A No.

Q Did Don dress any differently than anybody else?

A Did he what?

Q Dress any differently than anybody else?

A Slightly. You know, he had his court jester hat he used to wear over his helmet which was kind of, you know, unique and a little bit from time to time.

I mean Don was, you know -- this is very hard for a lot of us. Don was my friend, and I'm very, you know, upset about his passing. And for us to sit here through this. We worked with him for years. I liked Don. I went to dinner with Don. I saw him shortly before he left for Europe. It's hard for us to go through this and in this fashion.

JA1635

MR. ANTOLLINO: Judge, we're not asking for sympathy. I object.

THE COURT: Just object. No comments.

MR. ANTOLLINO: I object.

THE COURT: Sustained.

Okay, next question.

BY MR. ZABELL:

Q After Don -- did you know why Don was terminated in 2010?

A The last time?

Q The last time, yes.

A Yes.

Q And how did you find out that Don was terminated?

A Over the phone.

Q From whom?

A I was told from Ray's.

Q What did Ray's tell you?

A That he was, he had been fired once for acting inappropriately. Now this was many years later, and Ray's and I discussed that, discussed the problem. And I had suggested to Ray's that you should speak to an attorney because it's going to be sensitive.

Q Did you agree that Don should be terminated in 2010?

A Well, I had not spoken to him on the plane. I was far away at that point. But based on the information I

JA1636

got, it sounded --

MR. ANTOLLINO: Objection as to his opinion.

THE COURT: Sustained.

BY MR. ZABELL:

Q After Don was terminated in 2010, did you speak to him?

A Yes.

Q Where and when?

A I could not recall the dates or times but I did have dinner with him in New York City. I'm not sure how many times I saw him after he was terminated, but I stayed in touch with him.

Q Now when Don was hired back to Skydive Long Island in 2009, did you play any role in that?

A No.

Q Do you know, did you speak to Don about Don being hired back in 2009?

A He was happy to be back, and I saw him out on the tarmac. And I had not jumped that much that year, but then he broke his ankle and I remember seeing him and I felt bad for him. But not, you know, there was no discussion about -- I had not even seen any of it at all, if that's what you're asking.

Q Did you ever discuss base jumping with Don?

A Yes. We both base jumped and, you know, he used to

JA1637

talk about the antennas out in the west. He used to jump off antennas.

Q And do you recall when Don first starting base jumping?

A No, I'm sorry, I don't.

Q Do you know if it was, if he had base jumped before he started working at Skydive?

A I don't recall.

Q Do you recall when you would discuss base jumping with Don, if it was during the period of his employment or not?

A You're talking a span of quite a few years. So I don't even know when I started. Maybe middle '80s. I'm not really sure.

Q Do you know if Don had started base jumping before his employment ended at Skydive Long Island?

A Yes. I believe he was up in Twin Falls with a crew of younger guys at some point during his employment there. Twin Falls, Idaho, is a place where you can legally base jump. And I think, I do recall a group of the younger guys going.

Q And this was before 2010 when he was terminated?

A I think it was, but I'm not sure.

Q When you met up with Don after he was terminated in 2010, did he appear happy?

JA1638

A He was going to Europe.

MR. ANTOLLINO: Objection.

THE COURT: At a specific point in time.

No, that is okay, you can answer. Go ahead.

A He was going to Europe so he was excited to get over there. And I was very envious. It sounded like a trip that, you know, I would love to have gone.

Q Did he tell you what he was doing in Norway?

A He was going to base jump.

MR. ZABELL: I have nothing further, judge.

THE COURT: We'll take a lunch break now.

MR. ANTOLLINO: I just have one question, judge.

THE COURT: One question, okay. We will do it.

MR. ZABELL: Is that one total or just one before lunch?

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. ANTOLLINO:

Q I just want to clarify, Don went to Norway in 2011, not 2010, correct?

A I wouldn't know.

MR. ANTOLLINO: All right. No further questions.

THE COURT: You can step down. Thank you.

Do you have any other witnesses?

JA1639

MR. ZABELL: I have no further witnesses, judge.

THE COURT: The defense rests?

MR. ZABELL: The defense rests.

THE COURT: Is there any rebuttal case, Mr. Antollino?

MR. ANTOLLINO: We would like to discuss that and perhaps we can take the lunch break and/or if you would like us to discuss it in ten minutes.

THE COURT: Why don't you wait ten minutes. If there is nothing else in the case, I'm going to send you home. So just wait in the jury room for ten minutes and I'll come back. Don't discuss the case.

(The jury left the courtroom.)

MR. ANTOLLINO: Judge, I want to put on the record. I don't want him, counsel making jokes of me in front of the jury. He just said when I went up there, Is that one question total or is it one question followed by another bunch after that?

THE COURT: Let's just get through the day okay?

MR. ZABELL: If I can just be excused for five minutes and I'll be right back.

(A recess was taken.)

(After recess the following occurred.)

THE COURT: I asked the jury to wait. You said you wanted to hold the witness. So I'll let the jury take

JA1640

their lunch break.

MR. ANTOLLINO: I have about six or seven questions, depending on whether there is objections or anything.

THE COURT: Who are you calling?

MR. ANTOLLINO: Mr. Moore.

THE COURT: What is he going to be testifying about?

MR. ANTOLLINO: He is going to be testifying to the fact that Don had a chronic condition in his mouth. And I would not be bringing this up but for the fact that they have been mentioning mouth, mouth, mouth, touching his mouth, mouth, mouth, mouth, throughout the trial. They have been pointing at his mouth. And they have been trying to disparage him because he touches his mouth.

And so I am just going to ask Mr. Moore whether he had a chronic condition in his mouth, and what he did to allay the pain in his mouth. That's it.

MR. ZABELL: Your Honor, the issue of whether or not Mr. Moore would be called as a witness was something that was brought up by your Honor. And you said that he could be called as long as he was willing to submit to a deposition.

Mr. Antollino said, well, if he has to sit for a

JA1641

deposition, for various reasons, we're not going to call him as a witness.

We have specific representation from Mr. Antollino to the Court and to myself saying that he was not going to be called as a witness. If he was, I would have deposed him.

MR. ANTOLLINO: We didn't anticipate this. This is a rebuttal witness. We did not say we would not call him as a rebuttal witness.

This is a small point that has come up and it is pertaining to rebuttal. We never would have put him in our direct case.

THE COURT: My ruling is the same on this issue as it was on the photo.

In other words, whether or not he had some condition or not in his mouth has zero probative value unless someone is going to testify that they told Mr. Maynard that he had a condition with his mouth, the condition with his mouth. But the issue is what Mr. Maynard was aware of, what was told to him, what he observed. If the information was not conveyed to Mr. Maynard it has zero probative value. How would Mr. Maynard know that he has a condition in his mouth?

MR. ANTOLLINO: Mr. Maynard testified that he saw the videotape and he saw him putting his fingers in

JA1642

his mouth. And that confirmed the complaint.

THE COURT: Right. I heard that testimony.

MR. ANTOLLINO: And there is a reason why he put it in his mouth. It had nothing to do with --

THE COURT: But it doesn't mean he had a reason. Again, it's the same ruling I made on the photo. Whether he had a reason or not, unless Mr. Maynard is aware or Mr. Maynard confronted him with the video or what happened, and Mr. Zarda said, I wasn't doing anything wrong, I have a condition in my mouth, that would be some probative value on his decision-making.

But what Mr. Moore knows has no probative value on Mr. Maynard's decision making. So I'm not going to allow that.

All right. Let's bring in the jury.

Do you have anything else?

MR. ANTOLLINO: Well, I guess the reason I believe that it's relevant is that they have opened the door by saying it's inappropriate for him to touch his mouth. Duncan Shaw kept mentioning his mouth. And I think it's prejudicial for Mr. Zarda's estate to have to listen to that without giving a logical explanation as to why he was putting his fingers in his mouth. It was to allay the pain of the canker sores.

THE COURT: Again, I understand what you're

JA1643

arguing but it has -- it simply has no probative value unless the decision-maker is aware of it, okay?

So we can bring in the jury.

(The jury entered the courtroom.)

THE COURT: I appreciate your patience. I know you want to be able to go home rather than take a lunch break and I can understand that.

We finished the presentation of the evidence now. There is no rebuttal case. The evidence presentation is complete. And therefore, I'm going to send you home.

Just so you understand what is going to happen tomorrow. First of all, I want you to come in at 10 o'clock tomorrow rather than 9:30 because I need to go over my instructions on the law with the lawyers. So I'm going to meet with them first and I don't want you to sit back there unnecessarily. So you can arrive at 10:00, and then we'll have the summations or the closing statements of the attorneys.

In Federal Court the order of the summations is that plaintiff has the burden of proof, so plaintiff goes first, followed by counsel for the defendants. And then plaintiff gets a short rebuttal summation, again because the plaintiff has the burden of proof. So that is the order that we'll follow tomorrow.

JA1644

I haven't talked to the lawyers about how long that will take, but depending on how long it is I'll instruct you -- depending on how long it is I'll send you to lunch and instruct you after, or I'll instruct you before the lunch break.

Sometimes people ask, well, what are the hours of deliberations. The hours are the same, 9:30 to 4:30. The hours of deliberations do not change from what we follow. So that is the schedule that we'll follow.

The one thing that does change is, you're provided lunch during your deliberations by the United States government. So because it's possible you will be deliberating by lunchtime tomorrow, you don't need to bring your lunch. You don't need to bring lunch tomorrow. When you get here. Michelle will bring back a menu from the deli and she will put orders in for you so that you will have your lunch in the jury room tomorrow either deliberating, or it will allow you to go quicker so we can bring you back in more quickly.

So just to remind you between now and then, don't discuss the case among yourselves or anyone else. Even though the presentation of the evidence is complete, you haven't heard the summations and you haven't heard my instructions on the law, so it's not proper to start discussing the case. You'll have plenty of time to do

JA1645

that at the appropriate time.

All right, have good night.

I'll see you tomorrow morning at 10 o'clock.

(The jury left the courtroom.)

THE COURT: So just to -- we have to work on the instructions and they'll be posted at some point later today on ECF. They're not long, it's only one claim. But just so you know, the Part I is the standard instructions even though I think at one point you proposed certain language on burden of proof and direct and circumstantial evidence. I have standard instructions that I think are equivalent to what was proposed. So that is Part I.

Part II is the sexual orientation claim. I have decided that pretty much, I think it's verbatim, the PJI instruction. My practice is on a New York State claim to pretty much go with the pattern jury instructions. A State judge I think it usually does. It has been modified slightly to reflect the type of claim. But just in case you're wondering where the language came from, that is where we got it from.

The damages part is pretty much the damage instruction that I use on Title VII in terms of the language. Obviously in this case there are two categories of damages; lost wages and the emotional distress/non-monetary damages. So I think that is my instructions on

JA1646

that. Again, I think they're equivalent under Federal and State law. I think mine do a better job of it, explaining that.

And then Part III is just rules for deliberations. But if you want to let me know tomorrow if there are any issues. I did put an instruction in, and I'm not going to give -- when I state what the law is in New York and what categories are included in the protected classes, there is just a sentence after that that says, sexual orientation was added to the statute in 2003. So that you can obviously make whatever arguments to the jury about what happened in 2001. But I'm not -- they are more detailed instructions that I'm not going to utilize because that is really just argumentative.

MR. ZABELL: Your Honor, we had enclosed some proposed language about the legitimate business decision. And how it's not the Court's purview or the jurors' purview to act as a superhuman resources department. We believe that would be appropriate considering all of the testimony that we heard regarding the business decision for the termination. They would have to determine that, A, that business decision was suspect. That they can determine. But if they don't determine that the business decision or the complaint was suspect, then they have an obligation to follow the business owner's decision with

JA1647

regard to the termination.

THE COURT: Again, I'm using the pattern jury instruction.

My recollection is, there is a line in there that doesn't use the language super personnel business, or something in the PJI talks about the fact that an employer can file for a termination for any reason as long as it is not discriminatory. I think that is the language I'm going to use. And I know what language you're referring to, it is one of my opinions. But for the purpose of jury instruction, I'm not going to use the language of the personnel language. I'm going to stick with the New York language. You can obviously argue that in terms of business judgment deference by the jury, I'm not going to give them an instruction to defer to a business judgment. The law is that, that -- was reflecting that type of statement. In other words, that as long as it is not discriminatory, they are not to analyze whether there was a good reason or a bad reason. I think that is as far as I'm going to go.

MR. ZABELL: I guess the proper time for me to voice my objection will be when I see the charge.

THE COURT: You can. It's not in there. I saw the language you proposed, I'm familiar with the language. But especially because we're under New York law, I'm just

JA1648

going to utilize the PJI.

MR. ZABELL: May I inquire if this was under Title VII, would that language --

THE COURT: Why don't we go back to my Title VII instruction. I think I used something along the lines of, An employer may terminate someone for good reason, bad reason or no reason at all, as long as it is not discriminatory. I definitely don't use super personnel. But, so I have used that language in Title VII, but I think the New York language, I go back to the New York language. I saw what you were proposing. I went to see if there was something in New York that reflects that. They're not to look at any condition and say, well, I wouldn't have fired him if I was RAY MAYNARD. And I don't -- whether it was a good or bad reason. They only have to find whether it is discriminatory. But I'll make sure that line is in there. But we can discuss it more tomorrow. That is what my reasoning is.

MR. ZABELL: I appreciate that. Thank you.

THE COURT: I'm sorry, you have something?

MR. ANTOLLINO: Do you have a verdict form?

THE COURT: The verdict form, yes. I think it's pretty straightforward.

I just want to highlight one other thing, Mr. Antollino. That in your instruction you are, I think

JA1649

that in your verdict form you're asking for a separate determination about the suspension or withholding of wages.

I went back and looked at the amended complaint. The only area of liability mentioned in the complaint was terminated based on his sexual orientation. I was a little surprised when it came up during the trial to hear you start arguing and questioning about, for that one week period between, one week period that his pay was withheld, that that is somehow a separate theory of liability based on that. Because as far as I can tell.. I don't remember that ever coming up in this case. And it has been pending for five years. Maybe I'm wrong about that.

MR. ANTOLLINO: I actually did ask in the interrogatories. They wanted us to pinpoint every single discriminatory act. And we told them every single discriminatory act, and that included all of those things. The pleadings of course, you know, this is modified -- but the pleading was a short and plain statement. And I believe that the complaint talks about the withholding of pay during the suspension. So I don't think that is unreasonable to include that as one of the aspects of adverse inference. But you're going to make whatever ruling you are. And I'm not going to argue with you on it like Mr. Zabell is. That is my point. And you can make

JA1650

the ruling and you will make the ruling whether I like it or not.

MR. ZABELL: I apologize for arguing with you, judge.

THE COURT: What?

MR. ZABELL: I apologize for arguing with you.

THE COURT: What is your position?

MR. ZABELL: The amended complaint was submitted after discovery was responded to.

MR. ANTOLLINO: That is not true.

MR. ZABELL: The amended complaint came after the summary judgment motion.

MR. ANTOLLINO: That is not true. There was a second amended complaint, there was a -- no, wait, hold on. There was no amended complaint because you said it was inoperative because we didn't need it because I did say at one point in excess of the jurisdictional amount of this Court. The complaint, however, does talk about the suspension and the withholding of pay, I believe.

THE COURT: I looked at if there is an amended complaint there not. I don't know if there is a second amended complaint. I think --

MR. ANTOLLINO: The second amended complaint was the inoperative one.

THE COURT: But the amended complaint which I

JA1651

Looked at last night, I think it doesn't, in the discussion of facts, reference the suspension. I don't remember if it referenced withholding of pay, but again, I don't, just because something is referencing that does not mean that is a theory that you can pursue the theory of liability. And I have a real concern that, for example, on the issue of what the damages would be for withholding the wages you made reference to the emotional distress that would result in someone for a week, I guess, not knowing whether they're going to get paid or not. But I don't think Mr. Zarda was questioned on that. I don't think there is any testimony about any emotional distress except for during that one week period. I don't think Mr. Zabell questioned him during that one week period withholding pay. So if it is in the complaint and both sides know that it's in the complaint, obviously certain questions would be asked. I don't know, what would the damages be for that? What would be the damages?

MR. ANTOLLINO: Some emotional distress and loss of wages in between the suspension. He didn't get any pay for that week that he was suspended. And his pay was withheld for a week. So I'm not saying that they are major damages. I'm not saying that I would have come into court if someone was suspended for a week. But there is an element of damages.

JA1652

So all I'm asking you is to take a look at what I have put in there based on what I said now and make your ruling.

THE COURT: I have done that already. I did look at what you put in and I'm surprised because, again, I assumed this was a termination case. It's not in the complaint in the causes of action. Causes of action clearly states only termination. I think it would be prejudicial to allow an amended complaint to include that as a theory of recovery for the reasons I indicated. That to the extent the argument is that is emotional distress damages in that one week period, Mr. Zarda testified to what his stress level was that related to that particular issue, making no discovery on that. Mr. Zabell didn't get a chance to question him on that.

It would be prejudicial to add that. I don't believe that simply having it in the body of the facts puts the defendant on notice.

MR. ANTOLLINO: I believe there was some testimony on that. I'll find it if it was.

THE COURT: So that's my ruling.

MR. ANTOLLINO: Okay.

THE COURT: All right now. So come in at 9:30. That should give us enough time to get ready by 10:00.

MR. ZABELL: Thank you, judge.

JA1653

MR. ANTOLLINO: Thank you.

THE COURT: Have a good night.

(Whereupon, the trial adjourned to October 21,
2015 at 9:30 a.m.)

JA1654

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JA1655

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DONALD ZARDA, : CV-10-4334
Plaintiff, :
-against- : US Courthouse
ALTITUDE EXPRESS, INC., d/b/a : Central Islip, NY
SKYDIVE LONG ISLAND and :
RAY MAYNARD, :
Defendants. : October 21, 2015
: 9:30 a.m.
-----X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE, and a Jury

APPEARANCES:

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Proceedings recorded by mechanical stenography
Transcript produced by Computer
JAT1656

1 (The following took place at 9:47 a.m. outside
2 the presence of the jury.)

3 Calling case 10-CR-4334, Zarda vs Altitude.

4 (Appearances previously noted.)

5 THE COURT: Good morning.

6 We posted a copy of the proposed instructions
7 and the verdict sheet. I ask you both if you reviewed
8 that last night?

9 MR. ANTOLLINO: Yes.

10 MR. ZABELL: Yes, your Honor.

11 THE COURT: I just want to note two things that
12 happened after we talked yesterday.

13 The one was, in response to Mr. Zabell, your
14 request, I went back and I looked at the PJI, and it did
15 not have a line similar to the one you were requesting.
16 And when I looked back it did not give anything reflecting
17 that. So I did incorporate the short two sentences that
18 reflect what I think is correct under both federal law and
19 New York law.

20 And also Mr. Antollino had submitted a proposed
21 instruction to make clear that customer preference, in
22 terms of if a customer did not want to be served by a
23 person of a particular sexual orientation, that an
24 employer couldn't just fire someone because of a customer
25 complaint. But I did add a second sentence just to make

JA1657

1 clear that if there was something beyond, if the person's
2 status in a protected class was the basis for the
3 complaint, that the court could take action.

4 So those are the two things. Obviously you
5 could object to those. But those are the two things that
6 I did in addition, that I did discuss yesterday.

7 So let me go through it section by section.
8 We'll start with Part I, which is relatively
9 noncontroversial. Are.

10 There any issues or any objections to the Part I
11 instructions, Mr. Antollino?

12 MR. ANTOLLINO: First line.

13 THE COURT: The first line?

14 MR. ANTOLLINO: First one goes up to page.

15 THE COURT: 16. Yes, sir, 15.

16 MR. ANTOLLINO: Well, okay. On part 2 of part
17 2.

18 THE COURT: No, I'm still on Part I, up to page
19 15. I want to know if there are any objections.

20 MR. ANTOLLINO: I understand. The parts are
21 separated by numbers. The jury charge Part I, general
22 rules, judge of the facts. No problem.

23 THE COURT: Okay. You don't have go through
24 each one. I just want to know from page 2 or page 1 to
25 page 15 if you have any objections to any of those

JA1658

1 instructions.

2 MR. ANTOLLINO: Yes, I do.

3 THE COURT: What?

4 MR. ANTOLLINO: I would like you to add under
5 page 3, unless and somewhere else. However, do not
6 abandon your comments and/or life experience. That
7 somewhere else, that is fine.

8 THE COURT: That instruction, the first sentence
9 of the instruction says, Although as jurors you are
10 encouraged to use all of your life experiences.

11 So, I'm not going change that.

12 MR. ANTOLLINO: All right on page 4, I would ask
13 you to add, If you heard testimony about the advice of a
14 lawyer from either side, you are to apply these rules and
15 not speculate about the directions given by either party
16 by another lawyer.

17 And that might not fall under this particular
18 subheading, but I did submit that as a proposed charge
19 because there has been testimony that Ray Maynard went to
20 his lawyer and his lawyer told him that he could be
21 liable.

22 MR. ZABELL: I don't believe that the testimony
23 bore that out. And I think that the content of at least
24 Part I of your charge addresses how the jury should
25 consider the facts and the law as you charge them, judge.

JA1659

1 THE COURT: Yes. I tell them this is the law.
2 And I don't think there is any, any issue that any
3 testimony -- there wasn't any testimony about what the
4 lawyer said in terms of what the law is. So I don't think
5 I'll give any instruction specific to that.

6 MR. ANTOLLINO: And at page 7, the section
7 Conduct of Counsel.

8 THE COURT: Yes.

9 MR. ANTOLLINO: I would get rid of, procedural,
10 the words, procedural and other, and just say these
11 involve matters that are beyond your consideration.

12 THE COURT: I'm not changing that. These have
13 been my instructions for ten years. Nothing problematic
14 by telling them procedural and other matters.

15 Let's not nitpick, okay?

16 MR. ANTOLLINO: Okay. I'm not, judge.

17 Page 8. I would ask you for, unless it's
18 included elsewhere, add the letter G. In the event there
19 is a dispute about what you recall as evidence, you may
20 ask for a read-back, or in some cases the court might have
21 a printed transcript for you to read in the jury room.

22 THE COURT: In the closing remarks it tells them
23 that they can request a read-back. During deliberations
24 you can request a read-back.

25 In terms of sending in the transcript, that is
JA1660

1 not my practice.

2 MR. ANTOLLINO: Okay.

3 THE COURT: So I'm not going to put that in.

4 MR. ZABELL: I have a question. I'm looking at
5 document 241 on the ECF. I don't see a G.

6 THE COURT: He said just to add G, right? Am I
7 correct?

8 MR. ANTOLLINO: Right, add G.

9 MR. ZABELL: Okay.

10 MR. ANTOLLINO: On page 13, Prior Inconsistent
11 Statements, which is Section 11 under part 1, Prior
12 Inconsistent Statements.

13 I would like to add that the inconsistent
14 statement of a party, that is, in this case that is either
15 Donald Zarda or Raymond Maynard, may be considered by you
16 to be actual or affirmative evidence for the opposing
17 side. We know that's true.

18 I could get up there and read depositions for
19 Mr. Maynard as I had intended to do until Don Zarda died.
20 And so his deposition testimony is not just impeaching,
21 it's actual evidence.

22 MR. ZABELL: I'm not sure I understand that
23 basis. And I think that your Honor's charge regarding
24 prior inconsistent statements, which is the charge that I
25 have seen both from your Honor and from other judges

JA1661

1 before, appropriately advises the jury as to how they can
2 consider the prior inconsistent statements.

3 MR. ANTOLLINO: But it's just that --

4 THE COURT: What he is asking me for doesn't
5 really go to prior inconsistent statements. He wants a
6 straight charge that basically says, for example;
7 Mr. Zarda's deposition transcript comes in as affirmative
8 proof. That deposition -- I think that's what you're
9 asking.

10 MR. ANTOLLINO: Yeah.

11 THE COURT: And Mr. Maynard, I guess to the
12 extent he's a party to a deposition could be affirmative
13 proof under the rules of civil procedure, not just
14 impeachment. I think is what he -- is that what you're
15 saying?

16 MR. ANTOLLINO: Precisely.

17 THE COURT: I'm not going to give -- there is
18 another instruction that just says deposition testimony
19 should be considered in the same way as any other
20 testimony. I'm not going to put any prior inconsistent
21 statement instruction, because I think that by
22 inconsistent statements being deposition statements can
23 mean anything. I don't want to put in a particular
24 instruction. But if you want to call that an instruction,
25 a two sentence instruction. Okay?

JA1662

1 MR. ZABELL: I have no objection.

2 MR. ANTOLLINO: And both sides could ask for a
3 falsus in uno falsus in omnibus charge. I don't know that
4 you put that either.

5 THE COURT: Yes. The Second Circuit -- I don't
6 have the case in front of me -- this comes up more, quite
7 often. The Second Circuit has suggested and Judge Sand in
8 the federal jury instructions has suggested that that
9 instruction, it's recommended it not be given.

10 And the way I have -- so I don't give that
11 instruction. But I do put in, as you can see, in the
12 inconsistent statement section, states that, If you find
13 something to be inconsistent, whether it be under oath,
14 not under oath, you can use that to determine whether you
15 should believe all or part or none of the witness
16 testimony.

17 So I specifically put, you know, put that in
18 there so that it allows you to argue that if you want,
19 that somebody said something inconsistent under oath or
20 not under oath then they should reject all of their
21 testimony. But to propel evidence instruction the Second
22 Circuit says, they said, I can't remember the words of the
23 case. That it's not inconsistent with life experiences,
24 that simply because someone says something false about one
25 matter, that all their testimony should be rejected.

JA1663

1 So I don't think -- I don't give that
2 instruction.

3 MR. ANTOLLINO: All right. On page 15 a couple
4 of little nicks here.

5 In this case one of the defendants is a
6 corporation and one is an estate. And I would just ask,
7 the mere fact that one or more parties or that a party --
8 you should change it to, the mere fact that one or more,
9 or the mere fact that a party.

10 THE COURT: I'll put, a party.

11 MR. ANTOLLINO: And then after the next
12 sentence.

13 MR. ZABELL: If I could, if I may.

14 I think that, as I'm reading it, the mere fact
15 that one of the parties is not a live person, that one of
16 the parties -- I think a corporation is not a live person.
17 So I don't -- I think it would be the mere fact that some
18 of the parties are not a live person does not mean that
19 they are, should have any lesser,

20 THE COURT: Just saying, a party, just talking
21 about general, a party, whether it be a corporation, an
22 estate, any party, that is not a live person, doesn't get
23 lesser consideration. It's just generalizing it. Okay?

24 MR. ZABELL: Okay.

25 MR. ANTOLLINO: The next sentence. All

JA1664

1 litigants are equal before the law.

2 And I would add or estates, big or small,
3 etcetera. And the rest I have no objection to.

4 THE COURT: I just want point out that I got
5 this instruction from you. You're talking about your own
6 instruction now.

7 MR. ANTOLLINO: And that's it for Part I.

8 THE COURT: Mr. Zabell, anything on Part I?

9 MR. ZABELL: No. We have addressed it.

10 THE COURT: All right, let's just do Part II,
11 the claim under damages. Let's just do pages 16 to 18.

12 Mr. Antollino?

13 MR. ANTOLLINO: All right, under A. In this
14 case plaintiff claims the defendants terminated
15 Mr. Maynard because he was gay or because he had
16 identified as such.

17 I'm sorry -- in this case plaintiff claims
18 defendants terminated Mr. Zarda because he was gay or
19 because he identified as such.

20 THE COURT: I think that is fair.

21 Do you have any objection to that?

22 MR. ZABELL: Yes. The only places that has been
23 claimed was in Mr. Antollino's opening statement. Their
24 claim throughout the complaint and the amended complaint
25 was that he was terminated because he was gay. And

JA1665

1 counsel has chosen to make the argument that, and I
2 believe I'm quoting him, one pinkie out of the closet was
3 all that it took.

4 But that is not what his claim is. The claim
5 was that he was terminated because the decision to
6 terminate him was made because he was gay. That's
7 different than the proof that came out.

8 The proof that came out indicates that, no, he
9 was terminated because of the complaint. Was the
10 complaint because he was gay, or was the complaint for
11 some other reason is ultimately what we believe the jury
12 is going to have to decide.

13 THE COURT: I mean we could slice his complaint,
14 his claim, that when someone says because, they were
15 terminated because they were gay. I don't think this is a
16 surprise to you. It's always been the facts in this case
17 that they allege that because he said that he was gay that
18 that is why he was terminated. This is your claim, the
19 first time we ever heard it, because he was gay, that was
20 it, you know, for five years.

21 MR. ZABELL: Correct.

22 THE COURT: In addition to, that he terminated
23 him because he was gay -- your client says over and over
24 on the stand that he didn't care if he was gay. I didn't
25 care if he identified as gay.

JA1666

1 So that is not what this case is about, right.

2 MR. ZABELL: Could you repeat that? Could I ask
3 you to repeat what you just said to the jury.

4 THE COURT: No. But it's not, that is not what
5 the case is about. So obviously he couldn't, he couldn't
6 be terminated just for identifying himself as gay. That
7 if someone knows someone is gay, and the party has
8 identified himself as gay, I think they're intertwined. I
9 don't think the controversial -- addition to his claim.

10 MR. ZABELL: My point is, if we put in the two
11 statements --

12 THE COURT: -- someone says they're gay, they're
13 identified as gay.

14 MR. ZABELL: So then perhaps it should be
15 changed so that in this case plaintiff claims the
16 defendant terminated Mr. Zarda because he identified
17 himself as gay.

18 THE COURT: Well, it could be either though. It
19 could be because he was gay, or because he identified
20 himself as gay. It could be either.

21 MR. ZABELL: Okay. I just object to that. I
22 don't think it's necessary. But I have your ruling.

23 THE COURT: Okay.

24 MR. ANTOLLINO: All right, on page 17. I'm just
25 going to make a point. And this comes up again and again.

JA1667

1 I would ask you change the word from terminating
2 to motivating because when you change, when you use
3 motivating, it takes it out of what the federal courts
4 have interpreted the state courts, and to hold. So a
5 motivating factor is different than a determining factor.
6 And I think that it's a lesser standard. And if you
7 charge on terminating factor, it makes it different under
8 Title VII.

9 And the Second Circuit has always, except for
10 the A D D A, which we know is but for, the Second Circuit
11 has always interpreted Title VII as motivating factor, not
12 determining factor.

13 MR. ZABELL: I think that the, determining, word
14 was taken right out of the PJI. And I think determining
15 factor is the proper standard. I have an issue with that
16 sentence not for what it says, but just how it's worded.
17 But not with determining.

18 THE COURT: I spent sometime, because I could
19 see you used the word motivating. And I looked at this a
20 long time. The PJI does use the term determining factor
21 in a mixed motive case. The word, motivating factor, is
22 used by the mixed motivating, which this is not a mixed
23 motivating case, which is when someone may have budgetary
24 issues and terminated someone because of a legitimate
25 reason, budgetary issues, but also based upon something

JA1668

1 from the permissible category. That would be a mixed
2 motivation case. But when you use motivating factor that
3 context, then the employer has the ability to show -- this
4 is in pattern jury instruction 2 under mixed motive, that
5 they would have made the decision, the same decision but,
6 but even, even regardless of the person's protected class.

7 So there, when you use motivating factor in the
8 context of a mixed motive instruction, it's a different
9 paradigm. This case is a pretext case. The instruction
10 that PJI 91 utilizes is for a pretext case.

11 It uses, this is the 2014 pattern jury
12 instruction, New York law, which uses determining factor.
13 And in fact I looked at the federal law, a Third Circuit
14 case. Maybe I'll put it on the record later. I don't
15 have it in front of me. Actually I read it last night.
16 It makes clear the difference between determining factor
17 under pretext cases and mixed motive cases where
18 motivating factor is used.

19 So as I said, this is what the New York courts
20 utilize. I don't believe it is inconsistent with federal
21 law. I'm going to use determining factor.

22 I do want to say that the instruction says, a
23 determining factor, not -- and it makes clear that there
24 is more than one determining factor. So it doesn't
25 suggest that has to be the only cause. It defines a

JA1669

1 determining factor is that would make a difference in the
2 decision.

3 So there is still room to argue that doesn't
4 have to be the only factor under the determining factor
5 instruction. Okay?

6 So I'm overruling that objection.

7 MR. ZABELL: Your Honor?

8 THE COURT: I just want to make sure he is done.

9 MR. ANTOLLINO: I'm done on page 17.

10 MR. ZABELL: On that passage, I am not objecting
11 to what it says. But as I read it, and I have to read
12 that a couple of times over, I think how it's worded, it
13 might be a little misleading to the jury.

14 I'm reading, In order for plaintiff to recover
15 on his claim, Mr. Zarda's estate must prove by a
16 preponderance of the evidence that Mr. Zarda's sexual
17 orientation was a determining factor in Mr. Maynard's
18 decision to terminate him.

19 Is there a way we can make that somewhat more
20 condensed? Because it requires me to read that two or
21 three times to get the gist of what the court was saying.
22 And I'm concerned that the jury is not going to take the
23 time to parse it out as a lawyer would.

24 THE COURT: I don't have any problem -- first of
25 all, the language is right out of the PJI. And I'm not

JA1670

1 sure what is confusing about that. It's not a long
2 sentence. It just has to be a determining factor. And
3 the remainder of the paragraph defines what a determining
4 factor is that would have to make a difference in whether
5 or not he would continue to work there or not.

6 I really -- if anything the PJI is, you know,
7 shorter and clearer than the federal instructions. So I
8 don't, I don't know how I can make that sentence any
9 simpler. It's as simple as I can make it. So I don't
10 know what you're asking me to change it to. But this is
11 completely clear. Maybe it's just you.

12 MR. ZABELL: Maybe.

13 THE COURT: Just kidding.

14 MR. ZABELL: I get it. In this trial many
15 things -- so forget that.

16 THE COURT: Just kidding.

17 MR. ZABELL: That is fine. I get that. I have
18 your Honor's ruling.

19 THE COURT: Anything else on that?

20 MR. ZABELL: No.

21 THE COURT: All right, then we go through
22 damages.

23 MR. ANTOLLINO: Wait a minute. Page 18.

24 THE COURT: Okay.

25 MR. ANTOLLINO: We have some problems with 18,

JA1671

1 judge.

2 First, the portion, the first portion from a
3 paragraph and the second paragraph are basically -- the
4 Second Circuit has instructed judges not to give the jury
5 McDonald Douglas factors to consider. That is an issue
6 for the court.

7 And so I think that that issue just ended at
8 other, discrimination is really, may be inferred from the
9 existence of other facts. On page 17, cut out the next
10 two paragraphs. And then talk about, defendant's have
11 produced. Because you're getting into McDonald Douglas
12 here. And that first summary judgment, that's not for
13 trial.

14 THE COURT: Well first of all, obviously the
15 elements are the elements that, you know, the part of the
16 McDonald Douglas test is the fact that a person, there has
17 to be an adverse action in order to be in a protected
18 class, part of the McDonald Douglas test. Those are the
19 elements.

20 In terms of the Second Circuit saying, don't
21 give the McDonald Douglas test to the jury. I'm aware of
22 those cases. I would say two things in response to that.

23 First of all, again under New York law, this is
24 how the New York courts instruct under New York law. So
25 what the Second Circuit thinks should be done under a

JA1672

1 federal law claim, does not necessarily apply to New York
2 law.

3 The second thing is, this doesn't really, even
4 though it tracks sort of the framework of this case, what
5 the Second Circuit doesn't like to do, and it's usually
6 the defendants that object to the McDonald Douglas
7 instruction, that it shifts the burden to the, back and
8 forth. And what the Second Circuit says, is that is
9 confusing to say that once the, once the plaintiff makes a
10 prima facie case then the burden shifts. And they said
11 it's too confusing for a jury to be concerned about burden
12 shifting to the defendant.

13 Here we don't talk about any shifting of burden.
14 It just says, these are the threshold questions. And if
15 those are met, then you should look at the reasons. So,
16 it does track McDonald Douglas. But I don't think it goes
17 so far to evoke a concern that the Second Circuit has even
18 under federal law, which is that it moved the burden back
19 and forth. That's the concern.

20 But this, again this is the PJI instruction.
21 You don't have any issue with that, Mr. Zabell?

22 MR. ZABELL: I do not. I agree it's just the
23 elements.

24 MR. ANTOLLINO: All right, and then if I get
25 overruled on that. After Mr. Zarda was qualified for the

JA1673

1 tandem skydiving instructor position, I would ask you to
2 put, or its -- because that is what all of the evidence
3 says.

4 THE COURT: Mr. Zabell?

5 MR. ZABELL: I think it's ultimately for the
6 jury to determine. I'm not arguing that he wasn't
7 qualified for the position. I don't think any testimony
8 came out that he wasn't qualified for the position other
9 than the fact that on the jump he couldn't behave himself.
10 And the jury gets to determine if that impacted his
11 qualifications.

12 THE COURT: I don't -- Mr. Antollino, you can
13 handle that in the summation. If both sides agree that
14 something is undisputed and they want me to highlight that
15 and focus the jury, I'll do it. But if he doesn't want
16 this particular instruction on what is disputed or
17 undisputed, I don't think there is any reason for me to
18 get into that.

19 MR. ANTOLLINO: All right. It says -- and then
20 you would also overrule my suggestion that a second
21 statement for Mr. Zarda was terminated, the parties
22 disagree on this -- you would overrule that objection on
23 the same ground?

24 THE COURT: Yes. I think you have established
25 -- I don't think -- maybe Mr. Zabell, maybe has a problem.

JA1674

1 You can certainly get up and say, there is no, there is no
2 evidence, there is no argument that he wasn't qualified or
3 that he wasn't terminated -- I mean, I think, if we
4 haven't convinced the jury of that, we're in a lot of
5 trouble. All right?

6 MR. ANTOLLINO: I have a problem with the second
7 full paragraph beginning, defendants. Are you with me?

8 THE COURT: Yes.

9 MR. ANTOLLINO: Defendants have produced
10 evidence Mr. Zarda was terminated based on a customer
11 complaint.

12 I would like to add the following clause.
13 Although plaintiff agrees there was a customer complaint,
14 he claimed that this is not the real reason for his
15 termination.

16 MR. ZABELL: I think that is implicit in your
17 Honor's sentence, that plaintiff claims that this is not
18 the real reason.

19 THE COURT: I don't think -- he just wants to
20 clarify that that complaint was made.

21 MR. ANTOLLINO: Right.

22 THE COURT: That's fine.

23 So read that again, Mr. Antollino.

24 MR. ANTOLLINO: Although plaintiff agrees there
25 was a customer complaint --

JA1675

1 THE COURT: Hold on. I can't write that fast.

2 Although plaintiff agrees --

3 MR. ANTOLLINO: -- there was a customer
4 complaint, he claims that this is not the real reason for
5 his termination. And that follows --

6 THE COURT: Okay, that is fine.

7 MR. ZABELL: And I have no objection.

8 MR. ANTOLLINO: And I have no other problems
9 with 18.

10 THE COURT: Okay, and then so damages pages 19
11 through 23.

12 MR. ANTOLLINO: I have no problem with 19.

13 MR. ZABELL: Your Honor, I do.

14 THE COURT: Let me just go through. I just want
15 to go through the whole damages section with him. And
16 then I'll go through with you.

17 MR. ANTOLLINO: All right, I have no problem
18 with 19.

19 When we talk about mitigation. On this
20 particular issue if you find the plaintiff has proven lost
21 wages. I would add a carat and say, It is the defendant's
22 burden then to prove by a preponderance of the evidence
23 that Mr. Zarda failed to mitigate his damages. In other
24 words -- I'll read it as I would like it read.

25 On this particular issue if you find that

JA1676

1 plaintiff has proven lost wages by a preponderance of the
2 evidence, it is then the burden to the defendant to prove
3 by a preponderance of the evidence that Mr. Zarda failed
4 to mitigate his damages, etcetera, etcetera.

5 THE COURT: No. I'll put in the word then, must
6 then prove.

7 MR. ANTOLLINO: And then, after the date of his
8 death, I would add the sentence. If the defendant proves
9 work was available that would lead to compensation to
10 replace the lost work, the lost employment that was of
11 like nature, or another similar area of work because he
12 doesn't have to take the same job. He can go to school.
13 There are any number of ways he can mitigate damages.

14 MR. ZABELL: Judge, there has been no testimony
15 on damages at all. We don't even know that they said he
16 passed. That is not information that the jury even knows.

17 So I think the charge to provide any charge on
18 damages would be damages for lost wages is inappropriate,
19 considering there is no testimony that was elicited at
20 trial regarding damages for lost wages.

21 MR. ANTOLLINO: Yes. The Mr. Koplan (ph)
22 testified that Mr. Zarda died in October of 2014. So, and
23 I believe I put the, and you put in here October 4th.
24 That was the actual date. If you want to change it to
25 October 1st, that is fine. But Mr. Helfand testified it

JA1677

1 was October of 2014.

2 MR. ZABELL: We're checking that now. I don't
3 think that is the case. I don't recall that.

4 THE COURT: I'm not going to strike their
5 ability to recover damages because they didn't put in the
6 date of his death, if that is what you're asking me to do.
7 The real date to put in the date of his death, that is
8 ridiculous, Mr. Zabell.

9 MR. ZABELL: Is it judge? Because we spent more
10 days here.

11 THE COURT: Yes, because the jury heard that he
12 died. You know -- yes, that's not appropriate. I don't
13 have Mr. Helfand's testimony in front of me. Do we have a
14 transcript for that?

15 MR. ZABELL: We do. We're looking for that now.

16 THE COURT: Check the index for the word
17 October. That would probably make it easier.

18 MR. ANTOLLINO: There is more on the date of
19 death if he is going to make a stink about this. We even
20 have the court file, his death certificate, which you can
21 take additional notice of.

22 MR. ZABELL: The only mention of October was a
23 reference to coming back tomorrow. Or we're in October
24 now.

25 MR. ANTOLLINO: Mr. Zabell made a suggestion

JA1678

1 that if that is on the record of October 5th, 2014, the
2 day after my client died. Thereafter a couple of months
3 we substituted the date.

4 THE COURT: I don't understand what Mr. Zabell's
5 -- reopening the evidence is a discretionary matter for
6 the court. It's clear on the issues here, lost wages.
7 It's clear that lost wages would end at the, on the date
8 of his death.

9 And I'm not going to allow the jury to go back
10 in there not knowing what the date of his death is,
11 because the money would probably calculate the lost
12 damages. So it's my discretion, if you want to put
13 Mr. Moore on to say the date, or you can stipulate that he
14 deed October 4, 2014. Or you can put Mr. Moore on the
15 stand.

16 MR. ZABELL: I'll grudgingly stipulate to
17 October 14th, judge.

18 THE COURT: 4th.

19 MR. ZABELL: 4th, excuse me.

20 But I object because I believe this is something
21 that should have come out during plaintiff's lengthy
22 presentation of their case. I think it's --

23 THE COURT: Well it's a discretionary matter. I
24 understand you're objecting to preserve. But it's
25 discretionary matter. Everybody knows the date he died.

JA1679

1 It has been in the record for years. If you failed to put
2 the actual date, in my view it should be reopened. There
3 is no prejudice. And the jury needs to have it to
4 calculate damages appropriately.

5 MR. ZABELL: That figure is set back to just
6 general damages, judge.

7 Again, my argument is there has been no
8 testimony about damages. There has been no testimony
9 about how much he made, or how much he could have made.
10 There is no testimony about how much he made after he
11 left.

12 MR. ANTOLLINO: That is not true.

13 THE COURT: Well, first of all, I think there
14 was a document that Mr. Antollino put in.

15 MR. ANTOLLINO: Yes.

16 THE COURT: About what he made.

17 MR. ANTOLLINO: And I also questioned Ray
18 Maynard.

19 MR. ZABELL: No. He tried. There was one
20 document that went in that talked about quarter's worth of
21 earnings. But it does not by any stretch of the
22 imagination encompass what his earnings were. No
23 discussion of income tax returns for any of the years that
24 he was either employed there or not employed there.

25 MR. ANTOLLINO: I also questioned Mr. Maynard

JA1680

1 about what a skydiver on a good day, how many jumps on a
2 good weekday, how much per jump on a good weekend, how
3 many jumps. And we know that the summer is one-fourth of
4 the year, which it is 13 weeks. So that is how I'm going
5 to argue to them.

6 THE COURT: Okay, there is an objection that has
7 been lodged. I'm going to let the loss of wages issue go
8 to the jury, whether or not there is sufficient evidence
9 to support whatever verdict may come out, then obviously
10 again, if there is an unfavorable verdict to the
11 defendant, you can make a motion after trial if you don't
12 think it was supported by the record. Okay.

13 MR. ZABELL: Thank you, judge.

14 THE COURT: All right, I think we lost track.

15 Any other objections to damages, Mr. Antollino?

16 MR. ANTOLLINO: Well, you know, perhaps that, I
17 think that you cover my mitigation issues with the second
18 sentence. But if you could put in there, that something
19 like a, a person can mitigate damages by studying for
20 another degree or going to school.

21 If they want to argue he was going to school
22 anyway, let them do it. We're going to argue that he
23 ramped up his studies. And there was evidence through Ira
24 Helfand and through Mr. Zarda that it was that.

25 MR. ZABELL: If they want to argue it, they can

JA1681

1 argue it, judge. I believe that your charge adequately,
2 over-addresses the issue of damages. I don't think that
3 it needs to be any modification.

4 THE COURT: I'm not going to say anything about
5 schooling. It does talk about earned by reasonable
6 effort. And you can argue to the jury that he was going
7 to school.

8 MR. ANTOLLINO: Okay.

9 THE COURT: He couldn't work. I'm not going to
10 put anything more in like that.

11 MR. ANTOLLINO: All right now, as far as the
12 rest of the part, the rest of damages, we have no other
13 objections.

14 THE COURT: Mr. Zabell?

15 MR. ZABELL: Nothing other than what I have
16 already put up, judge.

17 THE COURT: Okay.

18 The closing remarks, 24 to the end.

19 There was one thing I did want to highlight,
20 actually. It relates to the verdict sheet. Because I
21 don't think, Mr. Zabell you submitted a verdict sheet.

22 But on page 24 I instruct them at the bottom
23 that the decision reached must unanimous. That you should
24 also consider each claim. That's wrong because there is
25 only one claim. And you should consider them separately.

JA1682

1 But on that issue, if you saw my instructions, I
2 basically tell them that, because Mr. Maynard is being the
3 sole owner, and with the decision there is no evidence
4 there was any other decision-maker that essentially in the
5 company are -- for purposes of this case.

6 So I just want to make sure that you have on the
7 verdict sheet, that we only have one question. It doesn't
8 separate out by defendant. And it also doesn't cover the
9 other, for example you could have a special interrogatory
10 saying, did the plaintiff prove that he was terminated,
11 did the plaintiff prove that he was in a protected class.
12 You could break it down. '

13 But as we talked about it, those aren't disputed
14 here. So I just want to make sure that you're okay with
15 the verdict sheet and with me not instructing them that
16 they should treat each defendant separately. Because I
17 think under New York law, and federal law is obviously
18 different though. But under New York law Mr. Maynard
19 would be liable as well as the company.

20 MR. ZABELL: I understand your Honor's reasoning
21 behind that. I'm not objecting.

22 MR. ANTOLLINO: Yes. So that was the only
23 objection we had to Par III, to take out the second
24 sentence.

25 THE COURT: So I'm taking that out. And again,
JA1683

1 just so I'm clear. If the jury found, answered yes to
2 question 1 on the verdict sheet, then you agree that the
3 judgment, whatever damages would be -- obviously I'm not
4 suggesting damages, but the judgment would be against both
5 Altitude Express, Inc and Mr. Maynard.

6 MR. ZABELL: I believe that that is what the
7 current case law is.

8 THE COURT: And you don't want me to instruct
9 separately?

10 MR. ZABELL: No. If you were to instruct
11 separately on each defendant then you would have to put
12 aider and abettor language in.

13 THE COURT: That would be confusing to do that.
14 But I just want you to know -- first of all I think if
15 they would find one and not the other it would be an
16 inconsistent verdict and I would have to send this back
17 in. Because I don't see how in this particulars case one
18 could be liable and not the other. Because there is no
19 one else involved in the decision making. But I just want
20 to make sure you're okay with that.

21 MR. ZABELL: I am, judge.

22 THE COURT: Okay. So are there any issues? If
23 I take out that second sentence on 24, do you have any
24 issues on Part III, Mr. Zabell?

25 MR. ZABELL: No, judge.

JA1684

1 THE COURT: Okay. And then on the verdict
2 sheet, Mr. Antollino?

3 MR. ANTOLLINO: Well, based on your Honor's
4 ruling, we have no objection to the verdict sheet.

5 But we carry over our objections to determining
6 factors.

7 THE COURT: Right, I understand. It is
8 preserved.

9 Mr. Zabell, do you have any objection to the
10 verdict sheet?

11 MR. ZABELL: No objection, judge.

12 MR. ANTOLLINO: Are we going take a break before
13 we start?

14 MR. ZABELL: Once last thing before we start.

15 I think it appropriate that I renew my motion
16 for a judgment in the defendant's favor against the
17 plaintiff as a matter of law pursuant to 50(a). Under the
18 federal rules I believe I need to do that at this point to
19 preserve my right.

20 THE COURT: Sure. It's preserved. And my
21 ruling is again that I'm going to submit the claim to the
22 jury, and if there is an unfavorable verdict to your
23 client --

24 MR. ANTOLLINO: We found out that it is not
25 required any more. Renewal is not required any more. I

JA1685

1 made that argument in another case and they changed the
2 rules. So the rule is, not required.

3 THE COURT: I think you're right. But whenever
4 a defense lawyer does it, every defense lawyer does it.
5 Also there is another law in that state court
6 practitioners, that every time I rule against them, with
7 the exception.

8 MR. ANTOLLINO: The exception.

9 THE COURT: Exception noted. The exception is
10 noted. But I looked at the federal, and it specifically
11 says it is preserved, you don't have to say it if the
12 judge rules against you. That is a state court thing.

13 MR. ANTOLLINO: No, it is not. The state courts
14 don't have the exceptions. I have been practicing for
15 many, many years and that is what I remember.

16 THE COURT: Okay.

17 MR. ZABELL: Judge, I have one thing I want to
18 bring up before closing.

19 THE COURT: Yes.

20 MR. ZABELL: I so desperately don't want to have
21 to object during Mr. Antollino's closing.

22 I'm going to ask your Honor to remind all of us
23 that only documents that are displayed to the jury that
24 are introduced into evidence, nothing else gets shown to
25 the jury that is not part of the evidence. I think that

JA1686

1 that's --

2 MR. ANTOLLINO: Well let me bring one thing up,
3 judge in terms of the wage claim. I just want to
4 demonstrate to the jury how I reach, how much they make
5 per summer. And I'm going to say \$40 per jump times 12 on
6 a good day, six jumps on a weekday times 40. So that
7 makes so much per week. And then how many weeks in a
8 summer, and round it down.

9 And I have a document that I just make those
10 calculations. And I can do it on a -- I was going to
11 bring a big poster board to do it as we spoke. But
12 instead I did it on the iPad, and it can go up as we
13 speak.

14 THE COURT: That is demonstrative. Where you do
15 the math it's okay. It wouldn't go back to the jury room.
16 Obviously it is not an exhibit. But for purpose of your
17 summation, if you have a document that does math, that's
18 fine.

19 MR. ANTOLLINO: All right, so I'll explain to
20 the jury that this is just demonstrative. It didn't come
21 into evidence. I'm just showing you the math and how I
22 reached this number.

23 THE COURT: That is fine.

24 MR. ZABELL: Two things. One, as long as what
25 he is referencing is referencing to actual testimony.

JA1687

1 And two, he mentioned the wage claim. I'm
2 assuming he is talking about damages because he has
3 withdrawn his wage claim.

4 THE COURT: Lost wages.

5 MR. ANTOLLINO: Lost wages, of course.

6 THE COURT: In terms of again whether or not
7 it's supported by the record. You know, I give a general
8 instruction to the jury in the beginning of the summations
9 that they're arguments by counsel, not evidence. If the
10 evidence is different from what they say, your
11 recollection controls. And then I give the instruction
12 that if you say something about the law that is different
13 from what I say, what I say controls.

14 So I hope that those instructions eliminates a
15 number of objections. But if someone makes a -- you can
16 obviously point that out to the jury. But I don't want
17 constant objections for either side. I don't think that
18 is fair.

19 So let's take a short break.

20 MR. ANTOLLINO: Thank you.

21 MR. ZABELL: Thank you, judge.

22 (A recess was taken.)

23 (After recess the following occurred.)

24 THE COURT: Good morning, members of the jury.
25 Good to see you again. I apologize for keeping you

JA1688

1 waiting, but we are ready to proceed now and proceed with
2 the summations or closing statements.

3 Before we begin I just want to give you a few
4 instructions about closing statements. The first one, I
5 said at the beginning of the case, but I just want to
6 reiterate. The statements by the attorneys, the opening
7 statements and now closings statements are not evidence.
8 These are argument they're making to you about the
9 evidence or lack of evidence. And you're free to accept
10 or reject those arguments as you see fit. But the
11 lawyers' statements to the jury are not evidence.

12 The second thing is, if a lawyer says something
13 about what the evidence was, and your recollection of the
14 evidence differs from what the lawyers said it was, it's
15 what your recollection is of the evidence that controls,
16 not what the lawyer says it was. And if you have any
17 doubt about that during your deliberations, again as I
18 said at the beginning of the case, you can ask to have the
19 testimony ready back by the court reporter. You can ask
20 for any exhibit. But it is your recollection that
21 controls, not the lawyers' statements.

22 And finally. I have gone over my instructions
23 on the law with the lawyers. That is what we, the time
24 was that we were spending. So they make reference during
25 their summations, to say something along the lines of, I

JA1689

1 anticipate that Judge Bianco will tell you that or why.
2 They're permitted to make reference to my instructions.
3 But I just want to emphasize if they say something about
4 the law in their summations, and then when you hear my
5 instruction on the law it's different from what the
6 lawyers said, obviously my statement of the law is what
7 controls, not what the lawyers say during his or her
8 summation.

9 Okay, so with those explanations, we'll begin.

10 Go ahead, Mr. Antollino.

11

12 **SUMMATION FOR THE PLAINTIFF**

13 MR. ANTOLLINO: Thank you, judge.
14 And thank you, ladies and gentlemen for being so
15 attentive for these two weeks. This experiment in
16 democracy, which is exactly what it is. It's quality is
17 not given. It has to be fought for and it has to be won.
18 This is a theme we have seen throughout world history.
19 And I'm not going to start from the very beginning, but
20 I'll give you some highlights.

21 We have seen it from the tensions between the
22 negotiations of the landlords and the king in the
23 establishment of the Magna Carta, which is the very
24 foundation of democracy; and to the US revolutionary war.
25 We've seen conflict and the fight for equal rights; to the

JA1690

1 liberation of the slaves; to the fight for women and the
2 right to vote; to the civil rights movements of the 1960's
3 and the fight for equal opportunity in employment for
4 African-Americans.

5 And this leads us to the gay rights fights of
6 the last several decades. These fights are never
7 pleasant. But this is one of the more pleasant of the
8 ones that I have mentioned.

9 This trial might have been unpleasant for you at
10 times. I know it was for me. It was tough for me to
11 cross-examine a young woman about what we contend were her
12 bogus allegations of sexual impropriety against her by a
13 gay man. She, with claustrophobic tendencies, had no idea
14 what she was getting into when she signed up for a
15 skydive. And in the end, someone had to be there and ask
16 her the tough questions.

17 Considering all of the evidence, her story
18 simply does not hold up. Duncan Shaw, really what
19 happened was this; that she was scared out of her mind to
20 be going on a skydive and risking her life. Duncan Shaw,
21 the man from Zealand testified yesterday that there are
22 only ten minutes between someone getting strapped up and
23 going into the airplane and going up in the air.

24 And what happened in those ten minutes to Rosana
25 Orellana? One, they make a joke to her boyfriend about

JA1691

1 his last words, suggesting that he is not going to speak
2 any more. Suggesting of course that he is going to die.
3 That is not going to make anyone happy.

4 Two. A joke about his girlfriend being strapped
5 to another guy. Gosh that certainly is not a reasonable
6 way to make people comfortable.

7 Rosana couldn't remember who made the jokes.
8 But then all of a sudden she said it was my client. But
9 you remember David Kengle said he was certain that it was
10 not my client who made that joke.

11 You also heard Rosana testify that she looked
12 around the airplane and she saw that her instructor was
13 acting differently from other instructors. But in fact
14 she also testified that she could not see behind her. And
15 as you saw on the video, and I'm not going to play the
16 video again, but you can ask for it in deliberations if
17 you would like to see it a tenth time, that she could not
18 see in the back of her head because she was right in the
19 front of the airplane.

20 Now, after the joke about sexual content, and
21 after the joke about death, she had an opportunity to
22 learn what was going to happen to her. This was not a
23 fine dining experience in the sky. This was a rowdy bunch
24 of yahoos who were going to go up and jump out of a plane
25 to their potential death.

JA1692

1 She didn't complain during the episode. We saw
2 that in the tape. And I'll show you a few pictures. But
3 she complained to her boyfriend as they were leaving the
4 drop zone. And her boyfriend relayed those complains to
5 Ray Maynard.

6 Ray Maynard did not ask her any questions. So
7 it's the situation where I tell two friends, and they tell
8 two friends, and they tell two friends, and so on and so
9 on and so on. But the one thing that Ray Maynard did
10 remember is that Don Zarda said he was gay.

11 Ray Maynard was too afraid to speak to her about
12 those allegations. And too afraid to speak about the
13 boyfriend's allegations. But he knew that telling the
14 client that he was gay was true.

15 You know that a false allegation of touching
16 hurts both men and women. Because if a woman is to be
17 believed, the woman is going to be placed on some societal
18 pedestal and not treated as equal. And the man, when the
19 circumstances do not call for it, is going to get in
20 trouble, possibly lose his job, possibly go to jail.

21 In this case, as you saw in David Kengle's
22 video, and as you heard in his testimony, he didn't notice
23 anything was wrong until the car ride was home. Or if he
24 said that he noticed something was different, you didn't
25 see that on the tape.

JA1693

1 What we do know is that he was very happy after
2 the jump. And he was very happy on the plane.

3 His position versus says Rosana was, as I
4 described catty-corner, diagonal. They could not talk to
5 each other. And it was not until three days later after
6 talking to Rosana and thinking about it that he made any
7 complaint whatsoever. If it were so horrible that he had
8 to make a complaint, one would think that he would make a
9 complaint immediately, not think about it for three days.

10 But as Mr. Kengle testified, he is a bartender
11 and he knows the culture in restaurants. He knows that
12 some restaurants will comp you if you don't like the food.

13 At the time of the skydive, he was unemployed.
14 He testified that he did remember that he was unemployed.
15 But if you look at his waiver, there is a space there for
16 occupation, and it is left blank.

17 So \$660 was a lot for an unemployed person at
18 the time. And he figured out a way over the course of
19 three days to get his money back. And he was successful.

20 But even now, five years later, Don's activity,
21 Don's activities on the plane didn't ruin the experience
22 for him. He testified that it was, quote-unquote,
23 tainted, quote-unquote, less than perfect.

24 But as Ray Maynard explained, he makes it clear
25 to all of his potential passengers that no skydive is

JA1694

1 perfect, no parachute is perfect, no customer is perfect,
2 no skydive instructor is perfect.

3 So the fact that it was less than perfect and
4 ended up with his life and no injuries means that it was
5 as good as it could possibly be.

6 Ray used the complaint to invoke the gay issue,
7 which he tried to morph into personal information. But
8 Don brought up that personal information to protect
9 someone's life. He testified, as you heard in his
10 deposition, that Rosana was uncomfortable about the
11 comment that I didn't know your girlfriend was going to
12 get strapped up to another guy. And he reassured in his
13 best judgment, that he had no interest in her, and she
14 should disregard that comment. That's completely fair
15 game.

16 She was uncomfortable because there was an
17 implication of some sexual interest. And he took himself
18 out of it as best he could.

19 Rosana said afterwards she didn't like it that
20 Don's mouth was one inch from her ear. Well, I'm sorry,
21 Rosana but that's just the way it works. The instructor,
22 as Ray Maynard explained, can not bump his teeth into the
23 back of the skydiver's head. He has got to go either to
24 the left or to the right. And because they're strapped so
25 closely together, it's going to be about an inch that

JA1695

1 they're going to be separated.

2 That way no one gets injured; not the passenger
3 nor the instructor, and the passenger keeps her life
4 without injury. Would she rather that he had loosened the
5 straps and they'd been farther apart, and that perhaps she
6 had fallen to her death? Certainly not. Don's job was to
7 protect her and give her appropriate instructions as his
8 4000 jumps and experience taught him to.

9 She, Rosana, didn't like it because they simply
10 didn't explain it well enough at the drop zone. They
11 didn't explain the process, or she didn't read the waiver,
12 or listen to the video, or understand the process as well
13 as she should have..

14 All she had walking to the plane was her woman's
15 intuition that Don was being sensual when he was talking
16 to her. He was using, in fact, the voice thank God gave
17 him, to get her attention so that she would follow
18 instructions and be safe. And instead of investigating,
19 Maynard chose to accept the secondhand allegation of
20 Kengle, who was one step removed from the drop and wasn't
21 always there.

22 Perhaps her woman's intuition should have told
23 her not to engage in an inherently dangerous activity in
24 which you can die. The reality is, that either she
25 shouldn't have gone on the skydive or perhaps she is proud

JA1696

1 to have done it, but there were some complications along
2 the way. She didn't want to complain, but David Kengle
3 saw this as an opportunity to get his money back.

4 This was a life or death experience with
5 goofiness in the sky. This is not first class on United.
6 This is not a fine dining experience. This is where the
7 instructor has to maintain a balance between making the
8 customer safe and making the experience fun.

9 Don had had over 4000 dives. And in this
10 particular situation, he was put in a corner when someone
11 else accused him of strapping up to a woman for sexual
12 gratification. And we know that that's not true because
13 he was gay, and he mentioned that to make her feel better.
14 He had no physical interest in her despite what someone
15 else had said at the drop zone.

16 He was between the proverbial rock and a hard
17 place. When he is told in front of the woman, in front of
18 her boyfriend that he is getting too close to her he did
19 the best thing that he could have under the situation.
20 There is nothing else that he could have done other than
21 to say, Oh, I'm not interested in her. She's not my type.

22 I'm not going to play the video again as you
23 have watched it over again, including the part where Don
24 touches his lip. Not one second of that video, however,
25 shows that Rosana was uncomfortable. Not one second of

JA1697

1 that video shows that her boyfriend was uncomfortable.
2 Not one second of that video shows that Don Zarda, a gay
3 man, felt her up in any inappropriate way. She was given
4 full notice that there was no perfect skydive. And at the
5 very end of it they both said, Awesome.

6 What more can you expect from something
7 inherently dangerous and as unusual as a skydive, no
8 injury, have an awesome time, and no death.

9 The only thing they didn't like was that Don
10 said he was gay. But there were no rules that Maynard
11 showed at the workplace that said that an employee could
12 not share personal information with customers. And in
13 fact the evidence shows that employees shared personal
14 information with customers all the time.

15 Duncan Shaw testified that he shared with
16 customers that he was from New Zealand. That is personal
17 information. That is an identification of who you are,
18 just as it is an identification of who you are when you
19 say you are gay.

20 Even Ray Maynard went into detail both at the
21 drop zone and on his business Facebook page that he was
22 having a bad divorce, and he was having a great time with
23 his new girlfriend.

24 I don't need to hear that. I don't really care.
25 But that's personal information. So don't say that

JA1698

1 personal information is not allowed at the workplace. It
2 was the fact that he said he was gay.

3 Rich Winstock told customers, you heard Rich
4 Winstock who worked for Ray for many years and now owns
5 his own drop zone, that he saw nothing improper in the way
6 Don was handling the drop. And he also said that in his
7 judgment he mentioned at times that he is married and has
8 children to ease the tension that someone might feel.

9 That is personal information. Ray's testified
10 he knew that and he would not fire Rich Winstock for that.

11 Now if Don told women in 2001 that he was gay,
12 as the judge will instruct you, it was not until 2003 that
13 it was against the law to discriminate against gay people.
14 Gay people could be fired simply because they were gay
15 until 2003 in this state. In other states they can still
16 be fired. But in New York in 2003 the legislators and the
17 governor got together and they said, we have to have this
18 new law.

19 So in 2001, when the women mentioned they were
20 gay or these women mentioned that Don said he was gay,
21 apparently they came to Maynard in tears. I ask you in
22 your collective judgment; do you really think that someone
23 is going to cry because they learn that someone is gay?
24 And don't let them try to fool you that there was anything
25 other than him saying that he was gay, because he

JA1699

1 testified at his deposition.

2 Question: What was it that Don said that made
3 these women cry?

4 Answer: Him talking about being gay.

5 Question: Anything else?

6 Answer: No.

7 That is what he testified to at his deposition.

8 They try to embellish it now, but in his deposition he
9 was under oath and he was sworn to tell the truth.

10 So in 2010, when Don said he was gay, he was
11 protected under the law to do that. He said he was gay
12 because he was gay, and because he was gay he said he was
13 gay. It's okay to say you're gay. That's what the law
14 says. Gay rights are human rights, and human rights are
15 gay rights.

16 This whole nonsense about personal information
17 is a code word for gay. The personal information that Ray
18 Maynard didn't like, was gay. But as I told you before,
19 what was Don supposed to do in the situation in which he
20 was presented as moving in on someone else's girlfriend.
21 He had the right as a gay person to take himself out of
22 the insinuation that he was interested in someone's woman.

23 Ray's admitted -- and don't tell me by the way
24 that any complaint leads to termination. Ray admitted
25 several scenarios that would not be grounds for

JA1700

1 termination, including the scenario that someone
2 complained that Rich Winstock was married with children.

3 Also, take a look at the rip off report. I'm
4 not exactly sure what number exhibit that is, but the rip
5 off report says all sorts of things about the drop zone.
6 And Ray's doesn't fire anyone. He merely questions the
7 person who makes the complaint. The person who makes the
8 complaint even goes so far as to say that the skydive
9 instructors were feeling our girlfriends' breasts.

10 And what does Ray say in response to that?

11 Personally, if someone was feeling up my girlfriend I
12 would do something on the spot to defend her dignity,
13 unless of course I am a fourth grader.

14 David Kengle did nothing to defend his
15 girlfriend's dignity because Don did nothing to insult her
16 dignity.

17 There is also in evidence Exhibit 6, a Yelp
18 complaint where a customer complains about a videographer
19 who didn't give him a tape that he paid for on time, and
20 the receptionist who was in his words, incredibly rude.

21 No one was fired. No investigation was undertaken.
22 Anyone can complain in any service industry. It's very
23 common. Clients have even complained about me as a
24 lawyer. But sometimes they might not understand what I
25 have to do in order to get my job done. Sometimes they

JA1701

1 might not understand, for example that cases take five
2 years to get to trial.

3 So, Don gave Rosana proper instructions,
4 protected her person. And because of that, she is here
5 today to tell her story. And she is alive without a
6 scratch from that dive.

7 Her boyfriend's complaint got Don fired. And
8 there is no testimony that anyone got fired because of any
9 of these other complaints. But in Don's case it did,
10 simply because while Don was doing his job he mentioned
11 that he was gay. And Maynard refused to probe the
12 ridiculous claim of improper touching. Something he knew
13 that he could rely on because it's so inflammatory.

14 And so when you fire someone for touching a
15 woman, it's almost self-evident that that is a reason to
16 fire someone. But you wouldn't think someone was going to
17 take him and expose his lies to a jury.

18 Now all he has is witnesses telling you over and
19 over again about Don touching his mouth while he is in the
20 aircraft. That's all they got. And they keep making that
21 scene like it's so obscene as to justify a termination.

22 But remember, Rosana never complained about
23 that. She complained that she was touched at the hips
24 where the straps are. And that he whispered in her ear.
25 Even though, I don't believe that she testified to that.

JA1702

1 I'm not sure. But you have to whisper in someone's ear to
2 get their attention.

3 Don had done 4000 jumps. And if she didn't like
4 Don's sensual voice, that's her right. But that's not a
5 termination offense. That was his voice and that was the
6 voice he used to get the client's attention so the client
7 was safe.

8 Now, Maynard also testified that he did not fire
9 Don because of any creepy expression you made, that he
10 made on his face. They use that over and over again.
11 They start every showing of that video with the face and
12 him touching his mouth, because they want to put in your
13 mind that he is a sick pervert weirdo. But you heard from
14 Rich Winstock that what instructors are taught to do is to
15 enhance the video, so that when a person comes home, it's
16 not simply an instructor sitting there with his eyes
17 closed or just looking out into space.

18 Don was on film. And you can see the minute
19 before he realized he was on film he was just looking at
20 his thumb. And then when he realized he was on film, he
21 started pointing to the camera and going all over and
22 making all sorts of expressions. In fact, Rosana was in
23 front of him. And so the only thing that Don had to
24 enhance the videos and make it interesting was his head
25 and his hand. So he used them in whichever way he felt or

JA1703

1 that came to him naturally.

2 You saw another video of him behind an
3 African-American man where he had both hands available.
4 And you saw him doing things like this and putting his
5 hands on his head and shaking back and forth.

6 The rule in the sky is to be goofy, so that when
7 you bring your video home there is some entertaining value
8 to it. You went up in the sky with these goofy people.
9 You fell out of the sky. And you landed without any
10 accident.

11 Now, why do we know that it was Ray's -- I'm
12 sorry -- Don's being gay that made Ray so angry? There
13 are lots of forms of evidence. There's paper evidence.
14 There's evidence by testimony. And there is also evidence
15 in the tone of one's voice. If one speaks slowly and
16 softly, that is evidence that they are timid. If someone
17 shows rage in his voice, that shows that they're angry.

18 Now, when this case was taken, it was a week
19 after the complaints, and a week after Don was sent home
20 without any pay. And Ray Maynard is still angry.

21 All right, this picture has nothing to do with
22 the case. It's only the voice, so I'm going to unplug the
23 picture. And play the tape of the firing.

24 (The tape was played.)

25 (The tape was stopped.)

JA1704

1 You can hear at the very end of that video, Don
2 begging to see -- I'm sorry -- you can hear in that audio
3 Don begging to see the, the video for the precise reason
4 that he knew that video had been taken and it would
5 exonerate him.

6 And I'm just going to try to show you a few
7 pictures of the video which are in evidence. And this is
8 Orellana just before she is about to jump. She looks very
9 happy there.

10 Here is another picture of her. She looks like
11 she is in ecstasy. If you close up on her face you see
12 the expression of a very happy person. And this is pretty
13 much the same thing from a different angle. And that's
14 it.

15 The one thing you notice about what Ray said of
16 the video, and I didn't hope you can forgive me, is that
17 Don was telling people that he's doing what he's doing.
18 No. Being gay is not doing something. Being gay is being
19 something. He also referred to being gay as escapades.
20 No. Being gay is not escapades. Being gay is how you
21 are, and how you are either born or socialized and have an
22 attraction to the same sex. It's not an escapade. It's a
23 way of being. It's a protected class written in the books
24 of law.

25 You heard the rage in Ray's voice. And you

JA1705

1 heard him use the excuse, personal information. But
2 remember, personal information is the code word for gay.
3 Because everyone else who talked about personal
4 information was allowed to, even people who talked to Don
5 Zarda about his personal information.

6 You heard Maynard say on the tape, I don't care
7 what they do as long as my customers don't hear it. But
8 they're making fun of Don in the process. So they're
9 taking to Don about his personal information and poking
10 fun of him. And maybe Don gets used to it for some
11 reason. That's okay.

12 And for some reason telling someone who you are
13 when you're put in a corner and accused of hitting up on
14 someone's girlfriend is not. It just does not make any
15 sense. And, you can reasonably conclude that there is no
16 belief in Maynard's mind that Don was feeling her up,
17 because he knew he was gay. He knew Don had to touch the
18 passenger for safety.

19 These women who were crying in 2001, cried
20 because Don was gay. I would suggest that that is an
21 outright lie. People don't cry because strangers say that
22 they're gay.

23 Finally, you have got the unemployment response
24 which mentions nothing about touching. And you have got
25 the rip off report which is not so important in the

JA1706

1 complaint, but in Ray's response where he says if someone
2 was hitting up on my girlfriend I would defend her dignity
3 on the spot. In this case Kengle waited three days.

4 Since 2001 or 2003, society has evolved
5 precisely because law makers don't want gay people to be
6 defamed because of their sexuality. They don't want them
7 to be defamed because they are sexual perverts. That is a
8 stereotype that Mr. Maynard wants you to rely on, and that
9 he relied on to validate the preposterous contention that
10 a gay man who was hired to hold and protect only wanted a
11 squeeze.

12 Don was proud to be gay. He walked to the beat
13 of his own drum. People joked about him in the workplace.
14 And according to the testimony you heard, he got used to
15 it.

16 But Don couldn't for some reason tell customers
17 that he's gay. Why? Why? I'll tell you the reason why.
18 It's homophobia. He was allowed to be gay in the
19 workplace with the workers, but don't stick your pinkie
20 out of the closet and let my customers know that you're
21 gay, because I don't want my customers to know that anyone
22 here is gay.

23 And the judge will instruct you customer
24 preference is not a basis upon which you can discriminate
25 against a worker. In fact, Don didn't tell everyone that

JA1707

1 he was gay. He just so happened to tell this one person
2 that he was gay, because it came up and he was put in a
3 corner.

4 The skydive jump is something so predictable
5 that even an experienced skydiver has to improvise as best
6 he can in each circumstance. Someone accused him of
7 wanting to move in on his girlfriend and he used his best
8 judgment; one, to make the woman comfortable; and two, to
9 take him out of the situation. There is nothing else he
10 could have done other than say, I'm not going to do this
11 jump.

12 Now, the judge is going to give you a verdict
13 sheet. And the first question on the verdict sheet is
14 going to be, Do you find Altitude Express liable for
15 discrimination on the basis of sexual orientation. And
16 your answer to that should be, yes, for all of the reasons
17 that I have given you, and all of the reasons the judge
18 will describe to you in describing the law. And without a
19 finding that Don's gayness was a determining factor in his
20 termination.

21 Now remember, there can be many determining
22 factors in a termination. You might make a decision for
23 any number of reasons. But you can't let an illegal
24 reason enter the thought-making process. Because that, if
25 you let the illegal reason come in, that's discrimination.

JA1708

1 And so, when you check, yes, for discrimination,
2 that will allow you to go on and calculate damages. And I
3 want to talk to you about damages.

4 Damages is, might be easier for you to reach or
5 it might be harder. But I have figured out a way for you
6 to ascertain what Don lost in the four years that he could
7 not work at Skydive Long Island. And remember, he
8 testified in his declaration that he no longer feels like
9 he can be himself working, jumping, specially jumping,
10 having to strap people to me and touching so many places
11 to perform the job because of what Ray Maynard did
12 terminating me for such reasons, regardless of the bogus
13 customer complaints. I can no longer work in this
14 industry without fear of having being branded some kind of
15 gay pervert. I can not even enjoy non-work skydiving
16 because there are tandem jumps taking place at every
17 skydiving center, and it is a stark and vivid reminder
18 about what happened to me which takes away the enjoyment I
19 get from jumping, and keeps me from interacting with
20 friends in social circles developed over two decades. No
21 amount of personal loss, injury or death in this sport has
22 ever pushed me away until now.

23 Don supported himself by skydiving for years.
24 You heard testimony that he did a couple of skydives in
25 Texas after this happened but his heart wasn't in it. And

JA1709

1 whose would be with this hanging over your head, this
2 allegation of sexual impropriety.

3 When Don was fired, he was fired with double
4 whammy. Number 1, he was discriminated against on the
5 basis of saying he was gay.

6 And number two, perhaps worse, he was
7 discriminated against on the pretext of touching a woman
8 he was supposed to touch to protect her life.

9 I can't imagine the horror that he went through
10 in those years. And you heard Ira Helfand testify that
11 during this period he was depressed and even suicidal.
12 And yes, he did go on a couple of cruises. But for the
13 rest of the year he was in a snowed-in airport in Missouri
14 trying to get food.

15 And yes, he did go to Norway. And that was
16 precisely because he was trying to develop a career as a
17 base jumper, something he had flirted with for many years
18 that he was trying to use to take over skydiving in its
19 entirety.

20 Whether or not that led to any income is not the
21 question. The question is simply, did he try to find
22 another field that was similar given his credentials? You
23 also heard that he doubled up on his studies, and he got
24 A's in all of his classes in these condensed semesters
25 that they had at Emory Brill University.

JA1710

1 Now Maynard told you that on a good weekday a
2 skydiver would make -- no, a skydiver always made \$40 per
3 jump no matter when the jump was and whatever day. But on
4 a good weekday a skydiver could get 12 jumps. 40 times 12
5 is 2400. In addition, as Ray Maynard testified, it's
6 about half that; 6 jumps on a good weekend day, that's
7 240.

8 The Skydive drop zone is open seven days a week.
9 So 200 and -- I'm sorry -- \$2400 plus 480 is \$2800
10 hundreds.

11 In one year we all know we have 52 weeks. And
12 in each of the seasons is one-fourth of that, which is 13
13 weeks.

14 So what you have is \$2800, the maximum. I'm not
15 saying this is what he would have gotten, but the maximum
16 is \$2800 times 13 weeks, times the four years that he
17 could not work in skydiving. You can do the calculations
18 yourself. But it comes out to around \$140,000 for those
19 four years.

20 Remember they were getting tips as well in
21 addition to the \$40 jumps, times 12, times 5, times 13.
22 Customers left tips. And you heard Lauren Callahan say
23 that there were many happy customers, just like the e-mail
24 that was put into evidence. Just wanted to drop a note
25 and compliment your tandem jump instructor, Don from

JA1711

1 Kansas. He was very professional in every way, and that
2 made the entire experience even better. Employees like
3 Don would be a reason for the continued success. Looking
4 forward to my next jump. Jim McVee. This was in 2009.

5 Now another element of damages is pain and
6 suffering. Now we are not looking for any physical pain
7 and suffering, but emotional pain and suffering.

8 Depression hurts. Being suicidal hurts. One has to think
9 of the horror, the nightmares one would have had to have
10 experienced having been accused of something so horrific,
11 whether or not it was true. Because it was attacks to him
12 and third parties could see it.

13 Whether or not Raymond Maynard believed this, he
14 would not even let Don review the tape to refute it. It
15 was not until a year after he was fired, a year
16 and-a-half, that he finally saw that tape and he saw that
17 he had done nothing wrong.

18 And I would suggest to you that the reason
19 Maynard withheld that tape is because he knew the
20 allegation of touching was a load of nonsense, and he
21 didn't want Don calling him out on it.

22 So how much money do you award a man who lives
23 with this horror for four years as I have read to you?

24 I in my role as a lawyer will not suggest a
25 number to you. It is your collective wisdom that can come

JA1712

1 up with a number for emotional distress that would fairly
2 compensate a man who was fired for telling someone he was
3 gay, and under the aegis of touching a woman.

4 For me to pick a number would be to pick a pig
5 in a poke. It is for your deliberations to decide what is
6 fair, so I'm going to leave that number blank.

7 I believe the maximum in lost wages is \$140,000.
8 But the maximum in emotional distress, that is up to your
9 discretion as the finders of fact.

10 Now this is an important case. And you're being
11 asked to find something very important, not just for Don
12 Zarda and his memory, but for all victims of
13 discrimination, both gay and straight.

14 And imagine if these quote/unquote shenanigans
15 had taken place in a straight bar, in a gay bar, and a
16 heterosexual who plays a piano in the bar was fired for
17 not being gay enough. I would stand here just as proudly
18 and defend this person as I defend Don Zarda, as I
19 advocate for his rights.

20 John F Kennedy says, In giving rights to others
21 which belong to them, we give rights to ourselves and to
22 our country.

23 As I told you in the beginning of this trial,
24 one of the highest calls you can have as a citizen is not
25 only to sit on a jury, but to be in a position to enforce

JA1713

1 its civil rights laws.

2 In the end Don was fired for being who he was.

3 And we are here today because Don would rather be a rebel
4 than a slave. Fights for equality are never pleasant. I
5 had to take on a young lady half my age to expose the
6 holes in her claim of women's intuition.

7 I too would rather be a rebel than a slave to
8 injustice even if it meant I had to take her on and ask
9 every single question until the judge made clear that I
10 had gone one question too far.

11 So I know that I asked everything that I could
12 have to expose the ridiculousness of her complaint under
13 the circumstances of going up in a plane and falling out
14 to your possible death.

15 Don protected Rosana. She didn't like the
16 entire experience. She liked some of it, but she had a
17 few complaints. She can complain to her boyfriend. Her
18 boyfriend can complain to Maynard. But the fact that the
19 experience was not perfect was not Don's fault, because no
20 skydive is perfect. It's a highly unusual, inherently
21 dangerous activity. And you might not like every aspect
22 of it. But the most important thing is that you end up
23 out of it alive.

24 Rosana doesn't like to get into small places.
25 She shouldn't have gone on this jump.

JA1714

1 You were selected from a whole courtroom of
2 potential jurors. And you were chosen for a reason;
3 because you could be fair to a gay man, and you could be
4 fair to a man gay or straight who is accused of touching a
5 woman.

6 You also all took an oath that you would sit
7 fairly. And my colleagues and I have watched you closely
8 throughout the trial. I have observed you personally when
9 I could. And I have observed that you listened to the
10 testimony extremely carefully. You have paid attention.

11 I have done the best job that I can do for Don
12 Zarda and his memory. And I trust you to do the right
13 thing for him too. I will have a few more words to say on
14 rebuttal. But now it's time for me to give the case to
15 you for justice to the estate of a dead man who did
16 nothing except say he was gay in his attempt to defuse a
17 situation and make a passenger more comfortable. No
18 matter whether it was personal information, it was the
19 information he had at his fingertips that he used as best
20 he could.

21 Ray Maynard should have done a competent
22 investigation and not tainted this complaint with such
23 gross accusations which would turn out to ruin the
24 remaining years of a young man's life.

25 THE COURT: We'll take a break.

JA1715

Summation - Defense/Mr. Zabell

860

1 Your lunch is supposed to come at one o'clock.

2 So we'll take a ten minute break and we'll continue with
3 the summations until your lunch comes. All right?

4 Don't discuss the case.

5 (A recess was taken.)

6 (After recess the following occurred.)

7 THE COURT: Ready, Mr. Zabell?

8 MR. ZABELL: I am.

9 THE COURT: Bring in the jury.

10 (The jury entered the courtroom.)

11 THE COURT: Members of the jury, now we're going
12 to hear the summation by defense counsel, Mr. Zabell.

13

14 **SUMMATION FOR THE DEFENSE**

15 MR. ZABELL: Thank you, your Honor.

16 Your Honor, ladies and gentlemen of the jury.

17 Law is reason, free from action. Aristotle said
18 that.

19 Some people think Elle Woods said that in
20 Legally Blonde. But the meaning behind that is there is
21 no place for passion in the presentation of the facts when
22 determining the law.

23 You know that's not what you just heard. What
24 you heard isn't the facts. What you heard was the
25 passion.

JA1716

1 Counsel was so blinded by his passion for this
2 case and his desire to help his client --

3 MR. ANTOLLINO: Objection, judge.

4 THE COURT: Overruled.

5 Go ahead.

6 MR. ZABELL: -- and his desire to help his
7 client that he was blinded by all of the facts that were
8 presented at this trial.

9 Now I said to you during my opening statement, I
10 don't think he can prove any of that. And think about all
11 of the fantastical things counsel told you he was going to
12 prove in his case, and how many of them actually came out
13 in the testimony of the witnesses.

14 All the hubris about one pinkie out of the
15 closet being the reason why Don Zarda was terminated, and
16 nobody testified that that was the reason why he was
17 terminated. They testified that a couple jumped. She
18 complained to him. He complained to him. He took action
19 based upon that complaint.

20 That's what the testimony is.

21 Let's look at the witnesses that the plaintiff
22 called to support his case.

23 Now first there was Ira Helfand. Ira Helfand
24 was the emergency room doctor that for some reason
25 befriended Don Zarda. Aside from the oddness of that

JA1717

1 relationship --

2 MR. ANTOLLINO: Objection.

3 THE COURT: Overruled.

4 MR. ZABELL: He could not tell you how many
5 times he spoke to Don Zarda, how many times he saw Don
6 Zarda. He didn't know if Don Zarda was terminated in 2001
7 and for what reason he was terminated in 2001. He didn't
8 know about Don Zarda being snowed into his apartment. He
9 didn't know about Don Zarda getting all A's. If fact he
10 testified that, yeah, I imagine he got A's because he
11 reduced his case load.

12 You heard counsel correctly relate to you that
13 Don Zarda didn't reduce his class schedule after 2010. He
14 took the same amount of classes that he had always
15 intended to take.

16 He, Doctor Helfand didn't know about Don Zarda's
17 partner losing his husband. He didn't know about Don
18 Zarda taking two relaxing cruises. He didn't know about
19 the fun jumps. He didn't know about the tandem jumps that
20 Don Zarda did after he was terminated in Texas.

21 But what did he know? He knew that Don Zarda
22 was somebody that he wanted to help, and that was a friend
23 of his. And he thought that skydiving and base jumping
24 was suicidal conduct. And he tried to talk him out of it
25 for as long as he knew Don. That didn't come out during

JA1718

1 the closing argument.

2 Look, Doctor Helfand was here to testify to help
3 a friend. But it just wasn't relevant because he didn't
4 know the full story. I didn't know.

5 Now the next person that the plaintiff called
6 was Laura Callahan. She was here for a little bit. I'm
7 not quite sure what she testified to other than to the
8 only complaints about an instructor she recalls were
9 complaints about Don. And look, she said on page 155, 156
10 of this transcript, the transcript of this proceeding.

11 Question: How many complaints have there been
12 about Don?

13 Answer: I couldn't tell you off the top of my
14 head.

15 Question: Were there more than one?

16 Answer: There may have been.

17 Question: You don't know if there were or not,
18 correct?

19 Answer: I can not remember specific complaints
20 but I do believe that, yes, multiple complaints had been
21 made.

22 Do you know why Don Zarda was terminated?

23 I believe so.

24 Why do you think he was terminated?

25 I believe it was because the customer complaint

JA1719

1 that we talked about earlier. That a gentleman came in
2 and he was upset with the experience.

3 That was Laura Callahan. That was their
4 witness. They called her.

5 Now, then they brought in Rich Winstock. Rich
6 Winstock similarly testified -- well I'm sorry, Rich
7 Winstock testified just like everybody else that Don Zarda
8 introduced himself as Gay Don. In fact Rich Winstock
9 testified that Don Zarda introduced himself to him as Gay
10 Don, not even at Skydive Long Island, but in Vermont,
11 another drop zone. At a previous time before he started
12 working at Skydive Long Island.

13 All of the testimony that you heard was that Don
14 Zarda was out and open, and his sexuality was known when
15 he was hired by Ray Maynard all three times. It's not a
16 matter of sticking a pinkie out of the closet. He said he
17 was gay. He talked about being gay.

18 Duncan Shaw related a situation where not only
19 did he talk about being gay, he was talking about graphic
20 sexual experiences in front of other staff members. He
21 didn't get fired for that. It wasn't impacting the
22 customer. It was just stuff that he was talking about in
23 the workplace. Nobody cared. It wasn't an issue.

24 Now, in terms of Rich Winstock sharing his
25 personal information. Rich Winstock related -- I just

JA1720

1 want to make sure I get it quoted correctly -- see I don't
2 want my passion for this case to interfere with the
3 presentation of the accurate facts.

4 Have you ever informed a passenger at a tandem
5 jump that you were married and have children?

6 Answer: Yes, I have.

7 Question: For what reason?

8 Answer: Usually I do that usually with older
9 women when they are extremely nervous. You tell them you
10 are married with children. Tends to calm them down.

11 You're giving them a little bit of security knowing you
12 have a reason to make this work.

13 That sounds like a legitimate reason for sharing
14 some personal information. It's different than saying,
15 You know what? I was married. I'm now broken up and I
16 have no reason to live. And you know what? We might
17 crash.

18 Now there was no testimony that that was said.
19 I just made up that story. But there is a difference
20 between relating to someone that you just broke up with
21 your boyfriend while you're falling from the sky and
22 saying to someone, Look, I'm married. I got kids. I have
23 a reason to make it to the ground. You're going to be
24 safe. There is no need to worry here.

25 I think that there is a difference, and I think

JA1721

1 that, I know that you guys are smart enough to pick up on
2 that.

3 Now, then we have Rosana Orellana. Counsel
4 wants to make Ms. Orellana out as the villain here because
5 she was on a skydive and she sensed something
6 inappropriate.

7 Now again, I don't want to put words in her
8 mouth. This is her testimony. Page 344. In response to
9 questions from Mr. Antollino. Mr. Antollino asked her:

10 Don Zarda did not make that joke, did he?

11 Answer: He was part of the joke. I don't
12 remember who exactly -- actually he did make the joke.
13 Yes, he did make the joke.

14 Question from Mr. Antollino: He was part of the
15 joke?

16 Answer: He made the joke. He said to my
17 boyfriend, How do you feel that I'm strapped to your
18 girlfriend, or something along those lines. I don't
19 remember the exact words.

20 That was her testimony. And that was her
21 testimony in response to questions asked by Mr. Antollino
22 during his case. He called her in. He subpoenaed her
23 here to testify.

24 And she goes on to testify on page 354. Again,
25 I'm not summarizing her testimony, I'm reading it. This

JA1722

1 is exactly what you heard. Page 354, line 10.

2 Question by Mr. Antollino: Oh, it was the
3 whispering that you didn't like?

4 Answer: It was the sensual whispering that I
5 didn't like, yes.

6 Question: What does sensual whispering mean?

7 Answer: What exactly did he say? I have no
8 idea. But talking to me in a very sensual, sexual manner.

9 Question: Sensual, sexual manner?

10 Answer: Sensual. Well, you know what sensual
11 is, like very soft in my ear, right in my ear, very close
12 to my head.

13 Question: Perhaps he was trying to make you
14 feel comfort?

15 Answer: It made me feel uncomfortable. Because
16 like I had mentioned before, I communicated with my
17 boyfriend sitting right next to me and I could hear him
18 perfectly okay. There was no need for him to whisper in
19 my ear in a sensual way.

20 That's Ms. Orellana.

21 Now she goes on to talk about what made her,
22 what else made her feel uncomfortable.

23 Now in response to a question asked, What made
24 you feel uncomfortable with regard to Mr. Zarda's
25 interactions with you on the jump?

JA1723

1 That's at page 369.

2 Answer: On the jump the constant, I felt like
3 every woman you have your, you know, you have your
4 intuitions or whatever. It just felt like sensual, not as
5 a woman but as a human being, you know, when someone is
6 being sensual. It just felt like he was being that, you
7 know, I didn't see my boyfriend's instructor whispering in
8 his ear. So I was like, why is he whispering in my ear,
9 so close in a sensual way? And after that he kept, you
10 know, putting his chin on my shoulder which I found to be
11 like inappropriate. My boyfriend's instructor didn't put
12 his chin on his shoulder. I didn't see anybody putting
13 their chin on anybody's shoulder. And I felt like he did
14 that and it made me uncomfortable.

15 Question: How about Mr. Zarda's hands. Were
16 his hands at any place that made you feel uncomfortable?

17 Answer: I do remember him putting his knees
18 near my legs or on like around. I don't remember which
19 part of my leg, but around the leg which was unnecessary.

20 Question: I'm sorry, could you repeat that? He
21 was putting his what?

22 Answer: His hands, his hands on my legs.

23 That's her testimony. That's the witness
24 Mr. Antollino called.

25 She goes on to say what was said under the

JA1724

1 canopy, or under the parachute as they were coming down.

2 Page 375. He was talking about his personal
3 life. I can't remember the whole conversation, but
4 something about a breakup with his, you know, significant
5 other, and how upset he was because they had broken up.

6 That's, that was the main conversation that period of
7 time.

8 That's not telling somebody, Don't worry, I've
9 got a partner. We've got a reason to make it to the
10 ground. That's saying, I just broke up with my boyfriend.
11 I don't know. That's comments that are made to somebody
12 that aren't meant to calm somebody down.

13 Now she goes on to explain what her issue is
14 with those comments on page 376.

15 And then I had mentioned, you know, my boyfriend
16 had mentioned that, you know, did you know what was on the
17 other side? And he, you know, said that was this body of
18 water, which I can't remember because I never know where I
19 am. That was that. And I said, Oh, that's funny my
20 instructor didn't. I felt disappointed that he didn't
21 mention any of this to me. He just, you know, talked
22 about his personal life. Which, you know, is not what we
23 were there for. I was there to experience a skydive. And
24 you know, had it been under different circumstances, you
25 know, maybe if we were on the ground and, you know, he is

JA1725

1 Like I need a friend, can I talk to you? It would have
2 been different. But I just felt that the time was
3 inappropriate. Like we were, you know, my life is in his
4 hands, we're free falling. And you know, I know knowing.
5 I don't know him. I have no interest in anything that has
6 to do with him to be honest, you know. I'm interested in
7 my funds that I paid, that we both paid \$1,000 together to
8 jump out of a plane. We wanted it to be a fun experience
9 and I just thought it was just out of line for him to tell
10 me this about his life.

11 That is not what Mr. Antollino characterizes as
12 Rosana Orellana being upset because Don Zarda put one
13 pinkie out of the closet and said he was gay. That is a
14 complaint about something other than the landscape, the
15 bodies of water, what's happening as we're falling. There
16 is no need to discuss your personal life when you're
17 falling.

18 Now Mr. Antollino will tell you that he just
19 said that to make her feel more comfortable. More
20 comfortable because somebody made a joke about her being
21 strapped to her boyfriend in a sexual way. Well first of
22 all, there was plenty of testimony about the harnesses. I
23 don't think anybody said that the fact that they were
24 strapped to somebody, meant that they were strapped to
25 somebody in a sexual way. In fact, Ms. Orellana was able

JA1726

1 to differentiate between appropriate touching on that jump
2 and inappropriate touching.

3 She said, during the jump when he reached out
4 and grabbed her hand to give it to the cameraman, that
5 that was appropriate and that was normal. She also talked
6 about times where it was appropriate to touch her in the
7 airplane.

8 But Mr. Antollino wants to make that all about,
9 well, he had to tighten the harness, he had to adjust the
10 harness. If we hear any more testimony about this harness
11 it's really just a waste of time. Because that's not what
12 she was talking about.

13 She testified that he rested his hands on her
14 legs and nobody else did. She testified that he was
15 whispering into her ear when nobody else was whispering in
16 anybody else's ear. You saw the video. I don't need to
17 play it again.

18 Yes, there is a portion of the video that looks
19 creepy. Everybody testified to it. You get to make the
20 determination with your own observations if it was
21 reasonable that when Ray Maynard saw that video said,
22 Yeah, it kind of does look creepy and it supports the
23 complaint that I received about Don Zarda in his jump with
24 Ms. Orellana.

25 She doesn't work for Skydive Long Island. She

JA1727

1 is not getting paid to come here. You can make all the
2 references you want to having lunch before your
3 deposition, but she wasn't bribed to give that testimony.
4 You saw her testify. Did she testify honestly? Why was
5 she called by Mr. Antollino if she wouldn't testify
6 honestly? I'm not characterizing her testimony. I'm just
7 reading it.

8 Now, after that you have David Kengle, the
9 boyfriend. Now he didn't look happy to be here. And I
10 don't know if I blame him. This is a skydive that he paid
11 money for years ago, that he made a complaint about, and
12 now he is getting dragged back into this.

13 But the most important thing to remember is that
14 he testified that he actually made the complaint. He
15 testified that he called up Ray Maynard and said, Look,
16 this guy was inappropriately touching her. He was being
17 sensual with her. And he ruined the skydive.

18 What else is Ray Maynard to do? This wasn't the
19 first time. He was terminated before because there were
20 two other complaints made by female jumpers. Not that
21 they were crying. The only person who said they were
22 crying was Mr. Antollino. That was deposition testimony
23 that they had come to him almost in tears.

24 Well, that is what you call an inferential leap
25 or a stretch. Not that they were crying. Nobody is

JA1728

1 asking you to say, if somebody tells you they're gay, does
2 that mean you should cry? No, that's not the truth. That
3 is a passionate misrepresentation of facts.

4 Two other people complained about him in 2001.
5 We took action in 2001. The testimony that was read in
6 from Mr. Zarda said he had no idea why he was fired,
7 doesn't believe it was discriminatory. It was read into
8 the testimony. You'll see it.

9 Now, notwithstanding the fact that he was
10 previously terminated, nobody is disputing that he was a
11 competent jumper. He was a good jumper.

12 So eight years later he asks for his job back.
13 The testimony was from Mr. Maynard, You can have your job
14 back, but you have got to behave. You have got to make
15 sure you treat everybody appropriately, not just men, not
16 just women. Your job is to get them from here to there
17 safely, and to have a good time. And make sure they're
18 having a good time. Why? So they come back.

19 So the second time there was a complaint --
20 actually no, in 2009 there was no complaint. That is when
21 he broke his ankle. So he left with his broken ankle.
22 That's the only time that he left Skydive on good terms.
23 He left. Went back to Texas, did whatever he did. Asked
24 to come back another year in 2010, and we let him come
25 back another year.

JA1729

1 Ray Maynard made the decision to hire him in
2 2001 knowing his sexual orientation. In 2009 knowing his
3 sexual orientation. And again in 2010, knowing his sexual
4 orientation.

5 Why would we discriminate against Mr. Zarda
6 because he is gay when we hired him knowing he was gay?

7 It just strains all credibility to think that.

8 Now Duncan Shaw, Wayne Burrell, Curt Kellinger
9 all testified. They were all friendly with Don Zarda and
10 they maintained contact. Actually it was Curt Kellinger
11 and Duncan Shaw who maintained contact with him after he
12 left employment. They all said, Look, this guy has been
13 base jumping forever, certainly since the beginning of his
14 employment. Yes, he had been doing wing suiting since the
15 mid-2000's. They never once thought he was treated
16 differently based upon his sexual orientation.

17 They never once said he was made fun of, or
18 teased, or acted like it was uncomfortable. In fact they
19 testified to quite the opposite. They testified that he
20 introduced himself as Gay Don.

21 They testified that he would make jokes about
22 his orientation. They testified that he openly discussed
23 his orientation and in some instances discussed it in
24 graphic detail.

25 And they all testified that that was not the

JA1730

1 reason why he was terminated. In fact it was Curt
2 Kellinger who said, Yeah, he also had this joke that when
3 the pilot started the plane and was saying, clear, to make
4 sure nobody is under the propeller, Don's response was,
5 Queer? I'm right here. That didn't get him fired. That
6 is more than a pinkie out of the closet. That is out of
7 the closet.

8 He was out of the closet when he was hired. He
9 was out of the closet when he was fired in 2001. He was
10 out of the closet when he was rehired in 2009. And he was
11 out of the closet when he was rehired in 2010.

12 This is not about Don Zarda being gay. This is
13 about a customer complaint.

14 Now, Mr. Antollino brought up the tape of the
15 termination meeting where Don Zarda surreptitiously taped
16 when he was being terminated. If you listen to the tape,
17 the very first person to bring up gay was Don Zarda. Ray
18 didn't bring it up. In fact Ray's response is, This is
19 not a gay thing.

20 Again, Mr. Antollino wants to bring up the word,
21 escapades. Well the first time escapades were used in
22 that termination meeting was Ray saying, and I'm not happy
23 that he used the term chick. But he said, If Rich
24 Winstock was telling some chick about his escapades, he
25 would be out of here too. That's the first time escapades

JA1731

1 was used.

2 Now Don is there. Don is taping it and he knows
3 he is taping it and he is baiting Ray. But you didn't
4 hear the passion and the anger in Ray's voice when he was
5 terminating him. You heard him say, It's over. I have
6 made my decision. It's done.

7 And you heard Don trying to get more and more
8 information out of him. But he just said, It's not a gay
9 thing. You don't share your personal information when
10 you're coming down the sky with a skydiver strapped to
11 you.

12 Now is that a hard and fast rule? Nobody said
13 it's a hard and fast rule. This is a termination meeting.
14 Nobody is at their best. And I certainly wasn't there
15 writing down everything on the script and handing it to
16 him to say. He is a skydive owner, company owner, not a
17 human resources professional. He is not a lawyer. He is
18 not a judge. He is telling him, Look, I received a
19 complaint. You touched her. You were sensual. You were
20 whispering in her ear. I made the decision.

21 Now during the opening statement Mr. Antollino
22 said many times, there was no investigation. Except the
23 testimony of Don Zarda confirmed that there was an
24 investigation. He talked about how Ray asked him about
25 the jump, told him what the allegations were, and asked

JA1732

1 him if he remembered anything about the jump. And he
2 said, no, he didn't remember anything about the jump. And
3 then you heard Ray testify that he took a look at the
4 video afterwards. And the video to him confirmed that
5 something weird was going on.

6 Look, it's not a matter of somebody opening
7 their mouth like that. We all do that. Everybody in this
8 courtroom at some point during this trial did it. I know,
9 I looked.

10 But what you saw was, Hey, look at this one I'm
11 jumping with.

12 That's my interpretation of it. He doesn't say
13 that. I'm not presenting that as fact. But I'm
14 presenting that as a reasonable conclusion based upon what
15 is observed. That certainly was Ray Maynard's conclusion.

16 So we had a customer saying that Don Zarda
17 ruined his girlfriend's jump. Ruined it because he was
18 touching her inappropriately. He was whispering in her
19 ear. And then when they were jumping, rather than talking
20 about what they were observing, what they were flying
21 over, what they're landing on, decided to tell her,
22 decided to say, that that was a perfect time to say, I
23 just broke up with my boyfriend. I don't know what I'm
24 going to do.

25 You heard Ms. Orellana say words to the effect

JA1733

1 that she wasn't his psychologist. There is no reason for
2 that. That doesn't make somebody relax, does it?

3 Unlike when you compare it to what Rich Winstock
4 said, Look, I've got a wife. I've got kids. There's a
5 reason for me to land. I just broke up my boyfriend. I
6 don't know what I'm going to do. There is no reason for
7 me to land? There is no reason for me to get you safely
8 to the ground? There is a difference.

9 There is also a difference with Ray bitching at
10 the drop zone about a bad divorce he's going through. Now
11 yes, he should not be doing that, nobody should do it.
12 But it happens. And it's realistic. But he is not
13 sharing it with customers during the free fall to the
14 ground. And I know that there may be some discussion
15 about free fall and falling. There is the free fall
16 before the parachute opens. And then there is a fall
17 after the parachute opens. And I'm sorry for using the
18 two incorrectly.

19 But Ray Maynard is not complaining about his
20 ex-wife. He is not talking about anything that is going
21 on with his then girlfriend while somebody is strapped to
22 him falling from an airplane. Just wasn't happening. And
23 to say that they're the same thing -- really? It's just a
24 disingenuous representation to you. They're trying to
25 pull on heart strings, and it's just not appropriate.

JA1734

1 Now, Don Zarda acknowledged that Mr. Kengle made
2 a complaint about him. In fact on page 48 -- I'm sorry,
3 408 -- of the trial transcript beginning at line 5.

4 Do you believe that Mr. Kengle actually called
5 up Ray, Ray Maynard and complained?

6 Oh, yes. I believe he called.

7 Do you believe that he complained that you were
8 getting familiar with his girlfriend on the jump?

9 Yes. I believe he made a complaint. I believe
10 that he was testifying under oath that the day he said
11 that. I wasn't privy to the conversation that he had with
12 Ray, so I have to take him at his word under oath that
13 that is what he said when he called Ray. To that extent,
14 yes.

15 Question: It doesn't sound like Mr. Kengle
16 complained about you being gay, correct?

17 Answer: In that one complaint, no, no, not in
18 that part.

19 You in fact testified that Mr. Kengle complained
20 that you were getting familiar with his girlfriend,
21 correct?

22 That's what I said.

23 Now, I think now is the time you should probably
24 talk about the release for about an hour. What do you
25 think? No. Okay, I'm sorry. I couldn't pass that up.

JA1735

1 I guess Mr. Antollino wants you to believe that
2 because the release said that Ms. Orellana could not sue,
3 then; A, she got what she deserved; or B, we didn't have
4 to take any steps to make sure that she enjoyed her jump
5 or that her jump was safe. That's not the case.

6 Yes, there is a release. The release is to
7 protect the liability of the company from the jump. It
8 does not mean that we have no interest in protecting the
9 safety of our jumpers or taking every possible step we
10 could possibly take to make sure they have fun. Because
11 let's face it, I know I said it in the opening, nobody has
12 to jump out of a plane. It's not one of those mandatory
13 things.

14 Now, let's talk about emotional damages for a
15 little bit. Counsel brought it up.

16 Don Zarda left the jump zone, went and did fun
17 jumps, something he calls fun jumps in a place called
18 Chicago. After that he went to take classes. Classes
19 that he said, and I don't want to misrepresent the facts
20 here.

21 Page 414 of the trial transcript.

22 So, since 2006 every November you're going to be
23 attending school on line?

24 Answer: I hadn't made that commitment to the
25 level back in '06 or '07. But certainly in the last, I

JA1736

1 think four Novembers, I have been at that, yeah.

2 Question: So from November of 2008?

3 I believe so. I would have to look and see
4 about that. But I think that's right, 8, 9, 10, 11, yes.

5 So he had committed himself to taking his
6 classes. That was his decision. That has nothing to do
7 with whether or not he was terminated from Skydive Long
8 Island. And he testified that after he took his first
9 semester of classes he went out to California and went on
10 a cruise to Mexico. His testimony. Said he had a great
11 time.

12 Said after the cruise he went and did some more
13 fun jumps out in California. His testimony. Nobody is
14 putting those words in his mouth. Then he came back, took
15 some more classes because that's what he scheduled himself
16 to do. And after that he went and took a cruise to the
17 Caribbean. He testified he had a great time.

18 He had fun, got to socialize, got to have
19 friends, got to hang out with his friends and not attend
20 to his class work. Then, after that he testified that he
21 went on a two month vacation to Norway. Not one week, not
22 two weeks, two months.

23 What college kids take a two month vacation?
24 And when he came back he talks about the great time he
25 had. Hold on, I don't want to put words in his mouth.

JA1737

1 Page 423 of the testimony.

2 Tell me did what you for the two months and why
3 you're smiling when you're talking about it?

4 Answer: The reason I'm smiling when I talk
5 about it is because it was a very good trip. I had a
6 great time that allowed me to get away from the horrible
7 winter that I had, which was dealing with this case and
8 the classes and other things that were going on that were
9 difficult. And it was an unbelievable breath of fresh air
10 and a nice place.

11 That's even after the two fatalities that
12 occurred on that trip to Norway. Can you imagine how
13 great this trip must have been if two people he was
14 jumping with were killed and he still had a fantastic
15 time?

16 The testimony, Don Zarda's testimony does not
17 support the story that is being presented to you in the
18 passionate opening and closing statements that
19 Mr. Antollino has presented.

20 The facts, the testimony that you heard supports
21 the premise that Don Zarda was terminated because of a
22 customer complaint. It has nothing to do with the fact
23 that he was being gay, or gay, other than the fact that he
24 brought up on the fall down that he had just broken up
25 with his partner. That's it.

JA1738

1 The fact that Don Zarda was gay was out and
2 discussed with everybody. He brought it up. He made a
3 point of bringing it up. Hi, Gay Don, nice to meet you.
4 That's what the testimony was.

5 If you're introduced to me as Gay Don, nice to
6 meet you, and I hire you, do you think I have a problem
7 with gay people? Just doesn't make sense.

8 One thing, something else that doesn't make
9 sense. When Mr. Antollino was explaining to you damages,
10 and doing the math calculations that he did, something
11 that he tried to kind of slip by you. He said, 40 times
12 12 is 2400. His testimony. Now, is 40 times 12, 2400?
13 40 times 10 is 400. 40 times 2 is 80. When you add the
14 two together you get 480, not 2400.

15 So I need you to be real skeptical about the
16 presentation that Mr. Antollino was making to you.

17 Now, he wants you to believe that in four years
18 at Skydive Long Island Don would have made \$140,000 based
19 upon; A, his math; and B, the premise that he would have
20 jumped every day. But did he talk to you about rainy
21 days?

22 Now I know we didn't have many this summer. But
23 I'm pretty sure you guys remember rainy days in the
24 summer. It gets really hot. If I had hair it would
25 frizz. We had rain days. Did he bring those up? How

JA1739

1 about days off? Did he bring those up? How about foggy
2 days where you can't jump? How about windy days where you
3 can't jump? How about presenting to you some evidence of
4 what Don actually made? How about presenting you with
5 some evidence of what Don made after he left Skydive Long
6 Island?

7 Now, there was a document that was introduced
8 into evidence, and that is Exhibit 13 A, it's in evidence.

9 Now you can see, or can you zoom in on it a
10 little bit, a little bit more, out a little bit.

11 Okay, so from April 1st of 2010 to June 30th of
12 2010 he made \$5,085. That's what he made in the 2010
13 season.

14 Let's multiply \$5,085 by 4. We'll wipe out the
15 85 to make it easy. That's \$20,000.

16 Let's say that he made double that. Let's say
17 that he made \$10,000, you times that by 4. That's
18 \$40,000. How do you get \$140,000? I tell you how you get
19 it. You get it by saying 40 times 12 is \$2400 when it's
20 really 480. So be careful about what's presented to you.
21 It's being presented with the passion that belongs in the
22 pursuit of the facts, but not the passion that belongs in
23 the presentation of those facts.

24 This is not a gay rights case. This is not even
25 a case about discrimination. This is a case about taking

JA1740

1 ownership for one's actions. He made a mistake. He made
2 a mistake. You own up, I made a mistake. I ruined the
3 jump for somebody. Which by the way, you also heard from
4 his friends the other jumpers that he was constantly
5 trying to haggle with them to take the male passengers as
6 opposed to the female passengers. And you heard Ray say,
7 and you heard some of the jumpers say, he has got a
8 history of problems with female jumpers.

9 What happened on this jump, I don't know. I was
10 not in between Don Zarda and Rosana Orellana. All I know
11 is, the testimony that you heard was from Rosana Orellana,
12 and you heard some from Don Zarda, from his deposition.

13 Ray Maynard had a reasonable basis to believe or
14 a legitimate business reason to believe that Don Zarda did
15 what he was accused of doing. And for counsel to say,
16 impossible, couldn't happen, no way he was acting sensual
17 to her because he was gay; doesn't comport to the facts.

18 There was testimony that came out that Don Zarda
19 had physical relationships with members of the opposite
20 sex. That was his testimony.

21 If Ray was to believe that Don Zarda could not
22 possibly have touched this woman inappropriately or acting
23 towards this woman inappropriately because he's gay,
24 wouldn't he be discriminating against gay people by
25 concluding that they could never touch a woman

JA1741

1 inappropriately? Don Zarda said it's possible for a gay
2 man to touch a woman inappropriately. This wasn't about
3 sex. It was about a customer complaint. And that's it.

4 Ray Maynard had that complaint. He made a
5 legitimate business decision based upon that complaint.
6 And the previous behavior with Don Zarda was terminated
7 back in 2001. He saw the video. There was some support
8 for the allegations.

9 He asked Don, What do you remember.

10 Don said, I don't know.

11 And most importantly, in that tape-recording Don
12 was the first person to bring out the word gay.

13 Ray immediately said to him, It's not a gay
14 thing. If Rich Winstock was taking some chick up there
15 talking about his escapades, I would fire him too.

16 And then the first statement Don says is, Ray,
17 Marco says gay this gay that. It was a specific complaint
18 that Ray made to protect his business. It's a legitimate
19 business reason and he terminated him.

20 And you're going to get instructions on the law
21 from the judge. I'm not going to comment about that. I
22 would love to tell the judge what the law is, but I don't
23 get to do that. That's his decision.

24 You're also going to get a jury verdict. And
25 the jury verdict is going to ask you if Ray Maynard

JA1742

1 discriminated against Don Zarda because of his sexual
2 orientation. I think all the facts, the fact that you
3 actually heard, not the stories that you were told,
4 indicates that he wasn't.

5 I want to thank you very much for your time
6 and your patience. And I know we've tried your patience.

7 Thank you very much.

8 THE COURT: Members of the jury, again it's
9 1:05. The lunch isn't in the jury room yet. So the
10 rebuttal summation is supposed to be about ten minutes.
11 So I'm going to try to get that in now.

12 So go ahead, Mr. Antollino.

13

14 **REBUTTAL SUMMATION FOR THE PLAINTIFF**

15 MR. ANTOLLINO: All right, judge. Thank you. I
16 just need a second to get some notes.

17 I admit being extremely passionate about this
18 case. I admit looking at the facts and knowing what the
19 law is, that I am passionate about the facts. But as you
20 know, for nearly an hour I talked to you about the facts.
21 I very rarely quoted from the testimony because you as the
22 jury have the right to hear the testimony read back in
23 case you have any questions.

24 In addition, Mr. Zabell read only snipits and
25 parts of the testimony without putting them in the right

JA1743

1 context. He also misrepresented certain things that I
2 did.

3 Number one. I never said 480 times 12 equals
4 2400. I said 40 times 5 times 12 is 2400. That's what I
5 said.

6 And I also told you that the maximum amount at
7 the end of the summer would be somewhere in the range of
8 147, and that you could cut down that amount. That you in
9 your discretion could say, well, you know maybe ten
10 percent of the days are going to be rain and so we're not
11 going to give him that.

12 With regard to what money Don earned after he
13 was fired. As the judge will explain to you, that's their
14 obligation to show that he didn't earn money that he was
15 supposed to have earned to mitigate his damages.

16 As you know, Don felt that the only thing that
17 he could do, that he was trained to do, was Skydive. And
18 he felt afraid to Skydive because he was afraid of being
19 accused of touching another woman, a horrific accusation
20 that ruined the rest of his life.

21 I am passionate about this because I know that
22 an accusation -- forget about what I know -- anyone knows
23 what an accusation of improper touching would be when it
24 had not happened. Anyone knows about that, especially
25 when there is no investigation.

JA1744

1 And Mr. Zabell wants to say that the
2 investigation was that he called Don in on the date of the
3 complaint. But you heard testimony that Don said, who
4 were these people? Can I see the video? Can I at least
5 have an opportunity to rebut these allegations?

6 And then a week later when he had the recorder
7 in his hands, you can hear him begging, Lauren, can you
8 see if these people got videotapes? I want to know who
9 these people are who thought that I had improperly touched
10 someone.

11 And yes, it was Don that brought up the sex, the
12 issue of gay first. But as you heard Don testify in his
13 deposition during the suspension meeting a week later, Ray
14 brought him in and spoke to him. And someone, and told
15 him that someone said that a gay issue came up.

16 And so what Don was trying to do was clarify
17 what the allegation was. And we don't dispute in any way
18 whatsoever that he was trying to collect evidence so that
19 he would be able to prove a wrongful termination case.
20 And he heeded the advice of his friends, including Ira
21 Helfand. And there were many statements that Mr. Zabell
22 made in his closing arguments that were homophobic and
23 that appealed toward the idea that a gay person has
24 perverted sexual tendencies.

25 Number one, the oddness of the relationship

JA1745

1 between Ira Helfand and Don Zarda.

2 You heard that Ira Helfand testified that he was
3 a doctor. And he treated Don and they stayed in touch.
4 And Don looked up to him as a father figure. His father
5 had died as Ira testified, and Ira --

6 MR. ZABELL: Objection.

7 THE COURT: Sustained.

8 MR. ANTOLLINO: He looked up to Ira --

9 MR. ZABELL: Objection.

10 MR. ANTOLLINO: -- as a figure to whom he could
11 obtain advice. And he gave him that advice. To call it
12 an odd relationship is an insult that calls into
13 question --

14 MR. ZABELL: My objection?

15 THE COURT: Sustained as to what Don Zarda's
16 relationship was. I don't remember testimony about that.

17 MR. ANTOLLINO: All right.

18 What Ira testified to --

19 MR. ZABELL: Your Honor, I move to strike that
20 portion of the closing argument that made reference to
21 that.

22 THE COURT: There is no testimony about the
23 reason for their relationship. You can disregard that.

24 MR. ANTOLLINO: He did refer to the oddness of
25 the relationship.

JA1746

1 THE COURT: I'm just saying there was no
2 testimony testifying about what the reason for the
3 relationship was. There was no testimony about that.

4 MR. ANTOLLINO: There was testimony that people,
5 rather Don called Ira and they stayed in touch and Don
6 spoke to Ira repeated times about what had happened to him
7 and what he was feeling.

8 To refer to that relationship as odd is just
9 like them pointing again and again and again to Don
10 touching his finger, trying to invoke passion on their
11 point, Oh, isn't that disgusting. There must have been
12 something disgusting going on between Ira Helfand and Don
13 Zarda. The same too witness mentioned graphic sexual
14 experiences.

15 Now, very interesting that Mr. Zabell argues
16 that Rich Winstock mentioning his reason to get to the
17 ground by mentioning his relationship with his wife and
18 his children is legitimate. But somehow when someone
19 accused Don of moving in on his girlfriend, it was not
20 okay, not exactly the same situation. But it was not okay
21 for Don to take himself out of that situation.

22 You know that she never complained to Don about
23 anything that he was doing. She gave every excuse in the
24 book for not complaining. But there was no way Don would
25 know, especially with those pictures that I showed you.

JA1747

1 And there is nothing passionate about those pictures.

2 Those pictures were just pictures, and they were of a
3 woman who was very happy on her skydive.

4 How would she know what an appropriate skydive
5 is and how a skydiver is supposed to manipulate the
6 handles and the straps.

7 Furthermore, David Kengle never said that the
8 experience was ruined. All he said was that it was
9 tainted and less than perfect.

10 Well nothing in life is perfect, as we all know.
11 And the reason you give the release to the passengers is
12 to explain to them that they are going on something that
13 is going to be extremely unusual, and that there is no
14 perfect parachute, airplane, skydiver, student, etcetera,
15 and so on.

16 Don was the one who brought up the issue of gay.
17 But Ray was the one who referred to being gay as
18 escapades. And the only thing we know that Don said was,
19 that I broke up with my boyfriend. There is a difference
20 of the testimony between Don Zarda and Rosana Kengle. But
21 it's very small.

22 Don testified that he believed he said, You
23 don't have to worry about me, I'm gay and I have an
24 ex-husband to prove it. She said something similar. But
25 the bottom line is that he used his judgment under the

JA1748

Rebuttal Summation - Plaintiff/Mr. Antollino

893

1 circumstances to take himself out of the situation. That
2 was the little pinkie he was sticking out of the closet to
3 the customer to let the customer know that I'm not, I'm
4 not on your team, so to speak.

5 THE COURT: Mr. Antollino, you're coming up to
6 ten minutes.

7 MR. ANTOLLINO: All right. Just give me one
8 more minute.

9 I just wanted to say in the end that Ray Maynard
10 did testify that women were crying. He was asked, And
11 what was it that Don said that made these women cry?

12 Answer: Him talking about being gay.

13 That was in 2001 when it was illegal to
14 discriminate against people because they're gay.

15 The fact that he took two months in Norway was
16 his way of trying to start a new career in base jumping.
17 It was him mitigating his damages.

18 I'm not going to go through every single point
19 of the testimony that Mr. Zabell read to you. If you have
20 any question about it you can ask for it to be read.

21 I have done my very best in presenting the case
22 as it is. And you listened to that tape. You can hear
23 the anger in Ray Maynard's voice. And that tape is
24 evidence. That is not passion.

25 And if its anyone's passion, it's Ray Maynard's

JA1749

Rebuttal Summation - Plaintiff/Mr. Antollino

894

1 passion and it's Ray Maynard's passion because he didn't
2 want Don to tell his customers that he was gay, which is
3 what he was.

4 Thank you.

5 THE COURT: Okay, members of the jury, that
6 completes the summations.

7 Michele was just bringing your lunch into the
8 jury room so it should be there when you go back there.

9 Again, when you're having lunch together you
10 can't start deliberating yet. You don't have my
11 instructions on the law. So do not start deliberating.
12 Again, you will have plenty of time to do that in a little
13 while.

14 So I'm going to try to, if the court reporter is
15 okay, shorten the lunch break a little bit. Since you're
16 not going out I think you can probably eat in 40 minutes.
17 Is that enough time?

18 So we'll reconvene at two o'clock and I think my
19 instructions on the law will be about 45 minutes to an
20 hour. And then you'll be in deliberations. Okay?

21 Have a good lunch.

22 (The jury left the courtroom.)

23 THE COURT: You can be seated.

24 Two things. First, in terms of the objections
25 during Mr. Zabell's summation. There were two objections.

JA1750

1 One made reference to Mr. Antollino's passion rather than
2 the facts. I overruled that objection for two reasons.

3 The first is, if Mr. Antollino did numerous
4 times during his summation insert himself into the case.
5 I didn't, I can't remember every instance. But he talked
6 about the difficulty in questioning Ms. Orellana. He said
7 he asked every question he could have, so I stopped him,
8 for Don. For the fact that he would rather be a rebel, I
9 don't remember the exact line but a rebel.

10 MR. ANTOLLINO: And a slave.

11 THE COURT: And a slave.

12 So in light of that by inserting himself into
13 his own summation. And independent of that, even if he
14 hadn't done that, what Mr. Zabell said is I think fair for
15 a lawyer. He wasn't personally insulting him. At this
16 point his argument was that it was a lot of passion, not a
17 lot of facts. I think a lawyer can say that. I don't
18 think that crosses the line to personally disparaging an
19 attorney.

20 The other objection was on him characterizing
21 the relationship between the doctor and Mr. Zarda as odd.
22 Again that is fair for a lawyer to do in terms of the
23 credibility of witnesses, what relationships may have
24 existed is fair argument, arguing that it was odd. He
25 obviously responded to that and that is what trials are

JA1751

1 for. So that's why I overruled that objection.

2 We placed the, the things I said I would place
3 in the instructions, new copies of the charge. There is
4 one thing, Mr. Antollino, I just wanted to ask you because
5 I heard it one way and my clerk in another way.

6 You wanted to say chided Mr. Zarda because he
7 was gay, or because he identified -- the way I have it now
8 is because he identified as such, or because he identified
9 as gay?

10 MR. ANTOLLINO: I said identified as gay.

11 THE COURT: Okay, that is what I heard.

12 So we'll make that, you should come back at like
13 five to two to just to look at the corrections and make
14 sure they're accurate. Okay?

15 All right, thank you.

16 MR. ZABELL: Your Honor, one last issue.

17 I would like your Honor to consider -- I am
18 actually moving for your Honor to strike that portion of
19 Mr. Antollino's closing that referred to parts of my
20 closing as homophobic. It's inappropriate. That crosses
21 the line, and that becomes an attack on an attorney.

22 THE COURT: Yes. I would prefer that he not
23 characterize it that way. But I'm not going to give an
24 instruction on that.

25 I don't think it so crossed the line that I

JA1752

1 should give an instruction. So I'm not going to give an
2 instruction on that. Okay?

3 MR. ZABELL: Thank you, your Honor.

4 THE COURT: All right.

5 (A luncheon recess was taken at 1:21 p.m.)

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JA1753

1 **AFTERNOON SESSION**

2 (Outside the presence of the jury.)

3 THE COURT: My law clerk is going to give each
4 of you a final version of the charge. If you would just
5 take a minute to just look at the pages that we made the
6 corrections.7 MR. ANTOLLINO: I have one aspect on something
8 Mr. Zabell said in summation. I wanted to add to the
9 charge.10 I have what is known as an adverse witness
11 charge. And it's simply a couple of sentences.12 The parties are free -- an it went something
13 like this. The parties are free to call adverse
14 witnesses. One or more parties has called an adverse
15 witness in this case. A party may call an adverse witness
16 for any reason he or she deems fit. That party is not
17 bound to the testimony and you are to treat the testimony
18 of an adverse witness like any other.19 Something simple like that. It's in Judge
20 Sand's rules. And there is a specific one for adverse
21 witness. And I proposed it in many cases. And it hasn't
22 come up until today.23 THE COURT: Look, I don't think -- I think that
24 it's self-evident. It's fair for a lawyer to point out
25 that he didn't call, to the extent that there was an**JA1754**

1 argument made that certain witnesses that he called were
2 part of the Maynard team. It's fair game for him to say,
3 I didn't call these witnesses, the plaintiff's counsel
4 did. That's fine.

5 In terms of whether they be treated like any
6 other witness, I think the jury knows that. And that fact
7 that they are adverse, I think the jury knows that as
8 well.

9 So I'm not going to add that. Okay?

10 MR. ANTOLLINO: Okay.

11 THE COURT: Just take a minute. I just want to
12 make sure.

13 MR. ANTOLLINO: Where are the changes, did you
14 note them?

15 THE COURT: We didn't note them, but I think my
16 prior version -- on page 15 we made a change about, we
17 added the words, or estates, and changed, one of the
18 parties, to, a party.

19 MR. ANTOLLINO: Okay.

20 THE COURT: On the next page we added, because
21 he was gay, but because -- well actually the next page we
22 added the deposition instruction from Judge Sand.

23 On page 16 you wanted to consider the deposition
24 separately from impeachment purposes.

25 MR. ANTOLLINO: Okay.

JA1755

1 THE COURT: The next page, we put in, because he
2 was gay, or because he identified as gay.

3 MR. ANTOLLINO: Okay.

4 THE COURT: And on page 19 the second full
5 paragraph, it says, although plaintiff agrees there was a
6 customer complaint, plaintiff claims that this was not
7 the real reason for Mr. Zarda's termination.

8 MR. ANTOLLINO: Okay.

9 COURT: Page 21, we added the word, then, so the
10 defendants must then prove by a preponderance of the
11 evidence.

12 MR. ANTOLLINO: Okay.

13 THE COURT: And then on page 25 we took out the
14 second sentence, so that paragraph at the bottom.

15 MR. ANTOLLINO: Do you remember what that
16 referred to?

17 THE COURT: I'm sorry?

18 MR. ANTOLLINO: Do you remember what that
19 referred to?

20 THE COURT: You all must consider each claim,
21 each defendant separately. We took that out.

22 MR. ANTOLLINO: Yes.

23 THE COURT: I think that was it.

24 MR. ANTOLLINO: Okay.

25 THE COURT: All right, so my practice is to tell

JA1756

JURY CHARGE

901

1 them that they can request a copy of the instructions,
2 because otherwise the note takers on the jury are
3 frantically trying to get down every word that I say. So
4 I tell them that. There are always some note takers.

5 So let's bring the jury in. We'll mark the
6 final version as Exhibit F.

7 Let's bring the jury in

8 (The jury entered the courtroom.)

9

10 JUDGE'S CHARGE TO THE JURY

11 THE COURT: All right, I hope you all enjoyed
12 your lunch. If you didn't, you can complain to Michele,
13 because she picked the place, not me. But we're ready to
14 continue now with my instructions on the law.

15 I just want to let you know up front that as you
16 already know, I think, I don't do these from the top of my
17 head. Everything I'm about to tell you I have written
18 down, and I'm reading it to you. The law requires me to
19 read it out loud to you. But I just want you to know that
20 if you want a copy of the instructions I'm reading to you,
21 you can just send a note during your deliberations saying,
22 I want a copy of your legal instructions. And I'll send
23 the back.

24 You're obviously free to take notes during my
25 instructions, but I didn't want you to think you couldn't

JA1757

JURY CHARGE

902

1 have a printed version of it if you wanted. Okay?

2 Members of the jury, you have now heard all of
3 the evidence in the case as well as the final arguments of
4 the parties. We have reached the point where you're about
5 to undertake your final functions as jurors. You have
6 paid careful attention to the evidence. And I am
7 confident that you will act together with fairness and
8 impartiality to reach a just verdict in the case.

9 At this point it is my responsibility to
10 instruct you as to the law that governs this case. My
11 instructions will be in three parts.

12 First, I will give you instructions regarding
13 the general rules that define and govern the duties of a
14 jury in a civil case.

15 Second, I will instruct you as to the legal
16 elements of the causes of action relative to this case.

17 And third, I will give you some general rules
18 regarding your deliberations.

19 Part I.

20 It is your responsibility and duty to find the
21 facts from all the evidence in this case. You are the
22 sole judges of the facts, not the parties and not I. I
23 want to impress upon you the importance of that role. It
24 is for you and you alone to pass upon the weight of the
25 evidence, to resolve such conflicts as may have appeared

JA1758

JURY CHARGE

903

1 in the evidence, and to draw such inferences as you deem
2 to be reasonable and warranted from the evidence or lack
3 of evidence.

4 Although as jurors you are encouraged to use all
5 of your life experiences in analyzing testimony and
6 reaching a fair verdict, you may not communicate any
7 personal or professional expertise you might have, or
8 other facts not in evidence, to the other jurors during
9 deliberations. You must base your discussions and
10 decisions solely on the evidence presented to you during
11 the trial, and that evidence alone. You may not consider
12 or speculate on matters not in evidence or matters outside
13 the case.

14 With respect to any question concerning the
15 facts, it is your recollection of the evidence and yours
16 alone that controls. You must apply the law in accordance
17 with my instructions to the facts as you find them. While
18 the parties may have commented on some of these rules, you
19 must be guided only by what I say about them. You must
20 follow all the rules as I explain them to you. You may
21 not follow some and ignore others. Even if you disagree
22 or do not understand the reason for some of the rules,
23 you're bound to follow them. You must not substitute your
24 own notions or opinions of what the law is or ought to be.

25 This case should be considered and decided by

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1 you as an action between parties of equal standing in the
2 community. You are to evaluate the evidence calmly and
3 objectively without prejudice or sympathy. You are to be
4 completely fair and impartial. Your verdict must be based
5 solely on the evidence developed at this trial or the lack
6 of evidence.

7 The parties in this case are entitled to a trial
8 free from prejudice and bias. The parties here are
9 entitled to your equal consideration and none are entitled
10 to sympathy or favor.

11 Under your oath as jurors you're not to be
12 swayed by sympathy. You should be guided solely by the
13 evidence presented during the trial without regard to the
14 consequences of your decision. You have been chosen to
15 try the issues of fact and reach a verdict on the basis of
16 the evidence or lack of evidence.

17 If you let sympathy interfere with your clear
18 thinking there is a risk that you will not arrive at a
19 just verdict. All parties to a civil lawsuit are entitled
20 to a fair trial. You must make a fair and impartial
21 decision so that you will arrive at a just verdict.

22 It is the duty of representatives for each side
23 to object when the other side offers testimony or other
24 evidence that they believe is not properly admissible.
25 Therefore, you should draw no inference from the fact that

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1 a party objected to any evidence, nor should you draw any
2 inference from the fact that I might have sustained or
3 overruled an objection.

4 From time to time the parties and I have sidebar
5 conferences and other conferences outside of your hearing.
6 These conferences involve procedural and other matters and
7 none of the events related to these conferences should
8 enter into your deliberations at all.

9 You will look to the evidence in order to decide
10 what the facts are. Evidence comes in several forms.

11 A. Sworn testimony of witnesses both on direct
12 and cross-examination and regardless of who called them;

13 B. Exhibits that the court received in
14 evidence. On the other hand, certain things are not
15 evidence. Let me list them for you. A, arguments or
16 statements by lawyers are not evidence. In this regard,
17 what they said to you in their opening statements and in
18 their summations is intended to help you understand the
19 evidence to reach your verdict. If your recollection of
20 the facts did differs from the parties' statements,
21 however, it is your recollection that controls.

22 C. The questions put to the witnesses are not
23 evidence.

24 D. Objections to questions are not evidence.

25 In this regard, the parties have a duty to object when

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JURY CHARGE

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1 they believe evidence should not be received. You should
2 not be influenced by the objection or by the court's
3 rulings on it. If the objection was sustained, ignore the
4 question. If the objection was overruled, treat the
5 answer like any other answer.

6 D. Anything the court may have said including
7 these instructions is not evidence.

8 E. Testimony that has been excluded, stricken
9 or that you have been instructed to disregard is not
10 evidence.

11 F. Anything you may have seen or heard outside
12 the courtroom is not evidence. I told you that evidence
13 comes in various forms, such as the sworn testimony of
14 witnesses and exhibits. There are in addition different
15 kinds of evidence; direct and circumstantial.

16 Direct evidence is the communication of a fact
17 by a witness who testifies to the knowledge of that fact
18 as having been obtained through one of the five senses.
19 So for example, a witness who testifies to knowledge of a
20 fact because he saw it, heard it, smelled it, tasted it or
21 touched it, is giving evidence which is direct. What
22 remains is your responsibility to pass upon the
23 credibility of that witness.

24 Circumstantial evidence is evidence which tends
25 to prove a fact in issue by proof of other facts from

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1 which the fact in issue may be inferred. The word, infer,
2 or the expression, to draw an inference, means to find a
3 fact exists from proof of another fact.

4 For example, if a fact in issue is whether it is
5 raining at the moment, neither of us can testify directly
6 to that fact sitting as we are in this windowless
7 courtroom. Assume however that as we are sitting here a
8 person walks into the courtroom wearing a raincoat that is
9 soaking wet and carrying an umbrella dripping water. We
10 may infer that it is raining outside. In other words, the
11 fact of rain is an inference that could be drawn from
12 the wet raincoat and the dripping umbrella.

13 An inference is to be drawn only if it is
14 logical and reasonable to do so. In deciding whether to
15 draw an inference you must look at and consider all the
16 facts in the light of reason, common sense and experience.
17 Whether a given inference is or is not to be drawn is
18 entirely a matter for you, the jury, to decide. Please
19 bear in mind however that an inference is not to be drawn
20 by guesswork or speculation.

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

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1 Now I will give you an instruction about burden
2 of proof.

3 The burden of proof rests on the plaintiff.
4 That means that it must be established by a fair
5 preponderance of the credible evidence that the claim
6 plaintiff makes is true. The credible evidence means the
7 testimony or exhibits that you find to be worthy to be
8 believed.

9 A preponderance of the evidence means the
10 greater part of such evidence. That does not mean the
11 greater number of witnesses or the greater length of time
12 taken by either side. The phrase refers to the quality of
13 the evidence, that is, its convincing quality, the weight
14 and the effect that it has on your minds.

15 The law requires that for the plaintiff to
16 prevail on a claim the evidence that supports plaintiff's
17 claim must appeal to you as more nearly representing what
18 took place than the evidence opposed to plaintiff's claim.
19 If it does not, or if it weighs so evenly that you are
20 unable to say that there is a preponderance on either
21 side, then you must decide the question in favor of the
22 defendant. It is only if the evidence favoring the
23 plaintiff's claim outweighs the evidence opposed to it
24 that you can find in favor of plaintiff.

25 Now I'm going to give you an instruction

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1 regarding witness credibility.

2 You had the opportunity to observe the
3 witnesses. It is now your job to decide how believable
4 each witness was in his or her testimony. You are the
5 sole judges of the credibility of each witness and of the
6 importance of his or her testimony.

7 You should carefully scrutinize all the
8 testimony of each witness, the circumstances under which
9 each witness testified, the impression the witness made
10 when testifying, and any other matter in evidence that may
11 help you decide the truth and the importance of each
12 witness's testimony.

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

20 This is an instruction on prior inconsistent
21 statements. I made reference to this during the trial.
22 I'm going to give you the complete instruction.

23 You have heard evidence that at some earlier
24 time witnesses have said or Don something that one party
25 argues is inconsistent with their trial testimony.

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

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

16 It is exclusively your duty, based upon all the
17 evidence and your own good judgment to determine whether
18 the prior statement was inconsistent, and if so how much,
19 if any, weight to give to the inconsistent statement in
20 determining whether to believe all, or part, or none of
21 the witness's testimony.

22 In deciding whether to believe a witness you
23 should specifically note any evidence of hostility or
24 affection that a witness may have toward one of the
25 parties. Likewise, you should consider evidence of any

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1 interest or motive that a witness may have in cooperating
2 with a particular party. You should also take into
3 account any evidence that a witness may benefit in some
4 way from the outcome of the case.

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

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

22 In this case one of the defendants is a
23 corporation and one is an estate. The mere fact that a
24 party is not a live person does not mean it is entitled to
25 any lesser consideration by you. All litigants are equal

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1 before the law, and corporations or estates, big or small,
2 are entitled to the same fair consideration as you would
3 give any other individual parties. In addition, since a
4 corporation is not a natural person, it can only act
5 through its officers, employees or other agents. Thus, any
6 act by any of Altitude Express, Inc doing business as
7 Skydive Long Island's officers or employees that is
8 undertaken in the scope of employment is an act by
9 defendant Altitude Express, Inc doing business as Skydive
10 Long Island.

11 Conduct is undertaken within the scope of
12 employment if it is reasonably foreseeable in light of the
13 employer's business or the employee's responsibilities.
14 In this case the plaintiff has not claimed that anyone
15 other than Raymond Maynard committed any act in violation
16 of the statute that I have described to you. And it is
17 undisputed that Mr. Maynard was the sole owner of Altitude
18 Express, Inc doing business as Skydive Long Island.

19 A claim for money damages to be won at trial is
20 like any asset that can be handed down from a plaintiff to
21 his estate, just like an inheritance that is in the bank,
22 or any other personal property owned by the deceased at
23 the time of his death. You may not sympathize with the
24 estate because of Mr. Zarda's death, but if the estate has
25 proven Mr. Zarda's claim by a preponderance of the

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1 evidence, you must find for his estate. Conversely, and
2 again, if the estate has not proved Mr. Zarda's claim by a
3 preponderance of the evidence, you must find for the
4 defendants.

5 Some of the testimony before you is in the form
6 of depositions which have been received in evidence. A
7 deposition is simply a procedure where prior to trial the
8 attorneys from one side may question a witness or an
9 adversary party under oath before a court stenographer.
10 This is part of the pretrial discovery, and each side is
11 entitled to take their positions. You may consider the
12 testimony of a witness given at a deposition according to
13 the same standard you would use to evaluate the testimony
14 of a witness given at trial.

15 That ends Part I.

16 Beginning Part II.

17 Part II. Principles of law.

18 I will now discuss the second part of these
19 instructions, the principles of law that you must apply to
20 the facts as you determine them to be.

21 The plaintiff, the Estate of Donald Zarda
22 represented by executors Melissa Zarda and William Allen
23 Moore, Junior is asserting a legal claim under New York
24 State Human Rights Law, which makes it an unlawful
25 discriminatory practice for an employer to discriminate

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1 based on sexual orientation.

2 I will now proceed to explain the elements of
3 plaintiff's claim. Let me remind you, that should you
4 find for the plaintiff you must find that the plaintiff
5 met its burden to prove each of the elements by a
6 preponderance of the evidence.

7 Moving to employment discrimination under New
8 York State Human Rights Law, Section 296.

9 As you have heard, this is an action to recover
10 damages for employment discrimination. The law prohibits
11 employment discrimination based on sexual orientation,
12 whether that discrimination is intentional or not. In
13 this case plaintiff claims that defendants terminated
14 Mr. Zarda because he was gay or because he identified as
15 gay.

16 The New York State Human Rights Law, Executive
17 Law 296, defines and prohibits unlawful discriminatory
18 practices by private and public employers. Executive Law
19 296(1)(a) provides in pertinent part that it is -- and now
20 I'm quoting the pertinent part from the statute.

21 "An unlawful discriminatory practice for an
22 employer because of an individual's sexual orientation, to
23 refuse to hire or employ or to bar or to discharge from
24 employment such individual, or to discriminate against
25 such individual in compensation or in terms, conditions or

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1 privileges of employment." Sexual orientation was added
2 to the statute as a protected class in 2003.

3 An employer must follow non-discrimination laws
4 that protect his or her employees, even if the employer's
5 customers might hold biases against the protected class at
6 issue, which in this case is sexual orientation. An
7 employer cannot take adverse action against an employee on
8 the grounds that one or more customers might not prefer to
9 associate with or are offended by the employee's protected
10 class, whatever that might be. However, an employer can
11 take adverse action against an employee if the customer
12 complaint is not based upon the employer's protected class
13 -- the employee's protected class.

14 In order for plaintiff to recover on his claim,
15 Mr. Zarda's estate must prove by a preponderance of the
16 evidence that Mr. Zarda's sexual orientation was a
17 determining factor in Mr. Maynard's decision to terminate
18 him. There can be more than one determining factor in any
19 decision. Therefore, Mr. Zarda's estate need not prove
20 that his sexual orientation was the only reason for
21 Mr. Maynard's decision. Mr. Zarda's sexual orientation is
22 a determining factor if he would have continued to work
23 for Altitude Express doing business as Skydive Long Island
24 and Mr. Maynard, except for the fact that he was gay. In
25 other words, sexual orientation is a determining factor if

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1 it made a difference in whether or not Mr. Zarda would
2 have continued working for defendants.

3 Mr. Zarda's estate is not required to produce
4 direct evidence that Mr. Maynard discriminated against him
5 on the basis of his sexual orientation. Discrimination is
6 rarely admitted and may inferred from the existence of
7 other facts.

8 In deciding whether the fact that Mr. Zarda was
9 gay was a determining factor in Mr. Maynard's decision,
10 you must first consider whether Mr. Zarda's estate has
11 established the following facts by a preponderance of the
12 evidence.

13 First. Mr. Zarda's estate must prove that
14 Mr. Zarda was qualified for the tandem skydive instructor
15 position.

16 Second. The estate must prove that Mr. Zarda
17 was terminated.

18 Third. The estate must prove that the
19 termination occurred under circumstances giving rise to an
20 inference of discrimination.

21 If you find that the estate of Mr. Zarda failed
22 to prove any of these facts, you will find for the
23 defendants. If you find that the estate proved all of
24 these facts, then you must proceed to consider the reason
25 defendants have given for terminating Mr. Zarda.

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1 Defendants have produced evidence that Mr. Zarda
2 was terminated based upon a customer complaint. Although
3 plaintiff agrees there was a customer complaint, plaintiff
4 claims that this is not the real reason for Mr. Zarda's
5 termination. Mr. Zarda's estate has the burden of
6 establishing by a preponderance of the evidence, that the
7 reason offered by the defendants was not really the reason
8 Mr. Zarda was terminated, and that Mr. Zarda's sexual
9 orientation was a determining factor in the decision. An
10 employer may take adverse decisions against an employee
11 for any reason good or bad, as long as it is not
12 discriminatory. However, you should scrutinize the
13 reasons proffered by the defendants, just as you would any
14 other evidence.

15 If you find Mr. That Zarda's estate has failed
16 to prove that the reason offered by the defendants was not
17 really the reason Mr. Zarda was terminated, you will find
18 for the defendants. If you find that the Estate of
19 Mr. Zarda has proved that the reason offered by the
20 defendants was an excuse for discrimination, then you will
21 find for Mr. Zarda's estate and you should proceed to
22 determine the amount of damages.

23 I'm going to provide you with a written verdict
24 form.

25 I'm now moving to the instructions on damages.

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JURY CHARGE

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1 If you find that the plaintiff has proven its
2 claim then you must consider the issue of damages. I will
3 now give you instructions regarding computing the amount
4 of damages. The fact that I am giving you instructions on
5 damages, however, should not be considered as an
6 indication of any view of mine on what your verdict should
7 be. Rather, instructions on damages are given only so
8 that you will have them in the event that you should find
9 in favor of the plaintiff on the question of liability.

10 In computing damages, should you award damages,
11 you may not engage in speculation or arbitrary guesswork.
12 On the other hand, the law does not require a plaintiff
13 to prove the amount of his or her losses with mathematical
14 precision, but only with respect to as much definiteness
15 and accuracy as the circumstances permit. I instruct you
16 that the plaintiff's attorney's statements, if any, to you
17 of the amount of damages you should award the plaintiff
18 are not binding upon you. It is not evidence. It is only
19 the statement of the plaintiff's attorney. It is the sole
20 and exclusive function of the jury to determine the amount
21 of money, if any, that will justly and fairly compensate
22 the plaintiff for any injuries and damages she has
23 sustained. You are to make that determination based, that
24 determination solely on the basis of the evidence in this
25 case, and on the law I will give you, and not on the basis

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1 of an attorney's or party's statement, claim or argument.

2 I will now discuss each category of damages in
3 turn.

4 First. Damages for lost wages.

5 With respect to the issue of lost wages, you may
6 award as actual damages an amount that reasonably
7 compensates the plaintiff for any lost wages and benefits
8 taking into consideration any increases in salary and
9 benefits that Mr. Zarda would have received from the
10 defendants had he not been subject to the intentional
11 discrimination.

12 The plaintiff has the burden of proving these
13 lost wages and benefits by a preponderance of the
14 evidence. If you chose to award the plaintiff damages for
15 lost wages, damages would apply from the date that
16 Mr. Zarda's employment ended until the date of his death.
17 Therefore, any award of damages for lost wages to the
18 plaintiff must be determined only for the period between
19 June 21, 2010 and October 4, 2014. The parties have
20 stipulated that October 4, 2014 was the date of
21 Mr. Zarda's death.

22 In addition, if you award damages for lost wages
23 to plaintiff, you must deduct from the amount whatever
24 wages Mr. Zarda obtained from other employment during this
25 period. You are not required to deduct from the award of

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1 Lost wages social security benefits, unemployment
2 compensation and pension benefits. You must also reduce
3 any damages for lost wages you award to the plaintiff by
4 the amount of expenses Mr. Zarda would have incurred in
5 making those earnings.

6 You are further instructed that Mr. Zarda was
7 required to make every reasonable effort to minimize or
8 reduce his damages for loss of compensation by seeking
9 employment. This is referred to as mitigation of damages.
10 On this particular issue, if you find that the plaintiff
11 has proven lost wages by a preponderance of the evidence,
12 defendants must then prove by a preponderance of the
13 evidence that Mr. Zarda failed to mitigate his damages for
14 loss of compensation.

15 If you determine plaintiff is entitled to
16 damages, you must reduce these damages by; one, what
17 Mr. Zarda earned; and 2, what Mr. Zarda could have earned
18 by reasonable effort during the period from his discharge
19 until the date of his death. Mr. Zarda must have accepted
20 employment that was of a like nature. In determining
21 whether employment is of alike nature you may consider;
22 one, the type of work; two, the hours worked; three, the
23 compensation; four, the job security; five, the working
24 conditions; and six, other conditions of employment.

25 You must decide whether Mr. Zarda acted

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1 reasonably in not seeking or accepting a particular job.

2 If you determine Mr. Zarda did not make reasonable efforts
3 to obtain a similar job, you must decide whether any
4 damages resulted from his failure to do so.

5 You must not compensate plaintiff for any
6 portion of plaintiff's damages resulting from Mr. Zarda's
7 failure to make reasonable efforts to reduce his damages.

8 Moving to emotional damages.

9 With respect to emotional damages, you must
10 award plaintiff such sum of money that you believe will
11 fairly and justly compensate plaintiff for the damages you
12 believe Mr. Zarda actually sustained as a direct
13 consequence of the allegedly discriminatory conduct of the
14 defendants.

15 You should award compensatory damages only for
16 those injuries that you find plaintiff has proven by a
17 preponderance of the evidence. Moreover, you shall award
18 compensatory damages only for those injuries that you find
19 plaintiff has proven by a preponderance of the evidence to
20 have been proximately caused by defendants' unlawful
21 conduct. In other words, to recover compensatory damages
22 plaintiff must prove by a preponderance of the evidence
23 that the defendants' actions were a proximate cause of
24 Mr. Zarda's injuries.

25 Proximate cause means that there must be a

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1 sufficient causal connection between the act of the
2 defendants and any injury or damage sustained by
3 Mr. Zarda. An act is a proximate cause if it was a
4 substantial factor in bringing about or actually causing
5 the injury. That is, if the injury or damage was a
6 reasonably foreseeable consequence of the defendants'
7 acts. If an injury was a direct result or a reasonably
8 probable consequence of the defendants' acts, it was
9 proximately caused by such act. In other words, if
10 defendants' acts had such an effect in producing an injury
11 that reasonable persons would regard as being a cause of
12 the injury, then the acts were a proximate cause. A
13 proximate cause need not always be the nearest cause
14 either in space or time. In addition, there may be more
15 than one proximate cause of an injury or damage.

16 Many factors or the conduct of two or more
17 people may operate at the same time, either independently
18 or together, to cause an injury. Defendants are not
19 liable if Mr. Zarda's injury was caused by a new or
20 independent source of an injury that intervened between
21 the defendants' act and the injury, and that produced a
22 result that was not reasonably foreseeable by the
23 defendants. Likewise, defendants are not liable for an
24 injury that they did not cause, such as for example an
25 injury that existed before the defendants conduct in

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1 question.

2 With respect to proximately caused injuries,
3 compensatory damages in this case can include any
4 suffering, inconvenience, loss of enjoyment of life, and
5 oath non-monetary losses that plaintiff proves were
6 experienced as a consequence of the actions of a
7 defendant.

8 There is no requirement that evidence of a
9 monetary value of such intangible things as injury, pain
10 and suffering be introduced into evidence. There is no
11 exact standard for fixing the compensation to be awarded
12 for these types of damages, and no expert testimony need
13 be introduced. Any award you make should be fair in light
14 of the evidence presented at the trial.

15 Compensatory damages must not be based upon
16 speculation or sympathy. However, they must be based on
17 the evidence presented at trial, and only on that
18 evidence.

19 Plaintiff can only recover for damages, if any,
20 that plaintiff proves by a preponderance of the evidence
21 were caused by the unlawful conduct of the defendants. If
22 you find that plaintiff has proven that Mr. Zarda suffered
23 an injury and that these injuries were caused by the
24 defendants' conduct, you must fix the amount of damages
25 that will, as much as money can, fairly compensate the

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1 plaintiff for such injuries.

2 The purpose of such an award of damages is not
3 to punish the defendants, nor is plaintiff entitled to be
4 compensated for any injury not caused by unlawful conduct.

5 In determining the amount of any damages that
6 you decide to award, you had should be guided by
7 dispassionate common sense. You must use sound discretion
8 in fixing an award of damages, drawing reasonable
9 inferences from the facts in evidence.

10 Part III. The closing remarks.

11 They're a little shorter.

12 Before I allow you to retire to the jury room to
13 deliberate, I would like to offer you some closing
14 remarks. By way of reminder, I charge you once again that
15 it is your responsibility to judge the facts in this case
16 only from the evidence presented during the trial, and to
17 apply the law as I have given it to you to the facts as
18 you find them from them evidence. Keep in mind that
19 nothing I have said in these instructions is intended to
20 suggest to you in any way what I think your verdict should
21 be. That is entirely for you to decide.

22 Your deliberations should include a rational
23 discussion of the evidence in the case by all of you. In
24 your deliberations you are entitled to your own opinion,
25 but you should exchange views with your fellow jurors and

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1 Listen carefully to each other. You should not hesitate
2 to reconsider your opinions from time to time and to
3 change them if you are convinced that they are wrong.
4 However, do not surrender an honest conviction as to
5 weight and effect of the evidence simply to arrive at a
6 verdict.

7 If the plaintiff has carried its burden of proof
8 by establishing every essential element of the claim by a
9 preponderance of the evidence, your sworn duty is to find
10 for plaintiff. If the plaintiff has failed to establish
11 any essential element of a claim, your sworn duty is to
12 find for the defendants.

13 I instruct you that the decision you reach must
14 be unanimous. I instruct you to consider each question on
15 the verdict sheet separately. And your decision on each
16 question must be unanimous.

17 Remember also that your verdict must be based
18 solely on the evidence in the case and the law as the
19 court has given it to you, not on anything else. Opening
20 statements, closing arguments or other statements or
21 arguments of the parties are not evidence. If your
22 recollection of the facts differs from the way the parties
23 have stated the facts to be, then your recollection
24 controls.

25 When you get into the jury room, before you

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begin your deliberations your first act will be to select one of you to be the foreperson. The foreperson will be responsible for signing all communications to the court, and for handing them to my deputy Michele, during your deliberations. But of course the foreperson's vote is entitled to no greater weight than any other juror.

During the trial I permitted the taking of notes by those of you who wish to do so. At that time I pointed out that while you could take notes, there is no need for you doing so, because the court reporter takes down everything that is said in the courtroom. And during your deliberations the court reporter will read back to you any portion of the transcript you may ask for.

For those of you who did take notes during the trial, I point out to you and your fellow jurors that your notes are simply an aid to memory for the particular juror who takes the notes. You are instructed that your notes are only a tool to aid your own individual memory. You should not compare your notes with other jurors in your deliberations. Jurors who did not take notes should not be influenced by the fact that other jurors have taken notes. Your notes are not evidence. They may be inaccurate, and are by no means a complete recording of the trial testimony. Any difference between a juror's recollection and another juror's notes should be settled

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1 by asking to have the court reporter read back the
2 transcript, for it is the court record rather than any
3 juror's notes upon which the jury must base its
4 determination of the facts and its verdict.

5 It is very important that you not communicate
6 with anyone outside the jury room about your deliberations
7 or about anything touching this case. There is only one
8 exception to this rule. If it becomes necessary during
9 your deliberations to communicate with me, you may send a
10 note through my deputy Michele signed by your foreperson
11 or by one or more members of the jury.

12 No member of the jury should ever attempt to
13 communicate with me except by a signed writing. And I
14 will never communicate with any member of the jury on any
15 subject touching on the merits of this case, other than in
16 writing or orally here in open court.

17 If you send any notes to the court, do not
18 disclose anything about your deliberations. Specifically,
19 do not disclose to anyone, not even to me, how the jury
20 stands numerically or otherwise until after you have
21 reached a unanimous verdict or have been discharged.

22 If during deliberations you want to see any of
23 the exhibits, they will be sent to you in the jury room
24 upon written request. If you want any of the testimony
25 read, that can also be done. But please remember that it

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JURY CHARGE

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1 is not always easy to locate what you might want, so be as
2 specific as you possibly can requesting exhibits or
3 portions of testimony which you may want.

4 If you request a read-back of testimony, please
5 be patient as it may take some time to locate and agree
6 upon the specific testimony required. Your request for a
7 read-back may be as narrow or extensive as you decide it
8 to be.

9 I just want to emphasize that if you do request
10 a read-back, and I don't bring out immediately, that
11 doesn't mean that I didn't get the note. That just means
12 once I get that, we have to work with the court reporter
13 and the lawyers to isolate that testimony for you before I
14 bring you out.

15 I have prepared a verdict sheet which will be
16 given to you. The verdict sheet is given to you to record
17 your verdict after you have reached a verdict in this
18 case. When you have reached a decision, have the
19 foreperson sign the verdict form and put the date on it
20 and notify my deputy, Michele, by a note that you have
21 reached a verdict. I reiterate that any verdict you reach
22 must be unanimous.

23 Your oath sums up your duty, and that is without
24 fear or favor to any person you will well and truly try
25 the issues in this case according to the evidence given to

JA1784

JURY CHARGE

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1 you in court and the laws of the United States.

2 This concludes my instructions.

3 I want to thank you for your close and careful
4 attention. Members of the jury, and then you will retire
5 to deliberate after I swear in my deputy. I do ask that
6 your first order of business you elect a foreperson and
7 send me a note, dated and timed, identifying that
8 foreperson.

9 Okay, we will give you a copy of the verdict
10 sheet. I'm just going to give a copy of the verdict sheet
11 to Juror Number 1 to bring back into the jury room. You
12 will see the verdict sheet is self-explanatory.

13 It has questions and it has instructions on how
14 to answer question one. And it has instructions following
15 question one.

16 If you have any questions regarding the verdict
17 sheet, obviously you just send me a note. I also want to
18 -- I just noticed this that there is no line here on the
19 second portion. There should be a signature line there.
20 It's missing. That is where the foreperson would sign
21 once the verdict has been reached.

22 Okay. Let me give the oath to Michele.

23 (The court's deputy was duly sworn.)

24 THE COURT: Just one other the thing I want to
25 point out.

JA1785

JURY CHARGE

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1 When you're deliberating, if a juror is using
2 the restroom or sometimes we have jurors that are smokers
3 and want to go outside for a smoke, Michele will escort
4 you out for a smoke break, out of the building. You can't
5 continue deliberations when a juror is missing. The only
6 time the jury should deliberate is when all eight of you
7 are together. So if somebody, if a juror is not present,
8 you have to stop and wait for the juror to come back. All
9 right?

10 Do the lawyers need to speak to e before I send
11 the jury back? Is there anything you need to speak to me
12 about?

13 MR. ANTOLLINO: I have nothing.

14 MR. ZABELL: Defendant has nothing, your Honor.

15 THE COURT: Okay, I'm asking ask you to retire
16 to the jury room to begin your deliberations.

17 (Whereupon, the jury left the courtroom to begin
18 deliberations at 2:52 p.m.)

19 THE COURT: I don't require lawyers to stay in
20 the courtroom the whole time they're deliberating. As
21 long as you're in the building and as long as Michele has
22 your cell phone number, that is fine. If you want to hang
23 around for a few minutes, because usually we get a few
24 notes right away, and I want to put other things on the
25 record as soon as I get my notes together.

JA1786

1 MR. ANTOLLINO: There were a couple of mistakes.

2 I think you took care of them.

3 THE COURT: There were a couple of typos and I
4 caught them early. And my law clerk marked them down to
5 make sure she got them too. If they ask for the written
6 instructions we will make those corrections.

7 MR. ANTOLLINO: Is there bathroom in the jury
8 room?

9 THE COURT: There is. I was telling them if
10 someone is in the bathroom. But you won't see the jurors.
11 There is bathroom in there.

12 I just want to put -- there was an objection to
13 the business judgment rule. But I want to put in what
14 that was based upon.

15 As I discussed yesterday when Mr. Zabell raised
16 that. And I do give that language which is referred to as
17 the business judgment rule language in Title VII cases.
18 And I have given that before. I think it's an accurate
19 statement of the law. And even though it was not in the
20 pattern jury instruction, I first determined that I
21 thought it was necessary, given some of the arguments that
22 were made in the case.

23 I'm not suggesting they were improper arguments,
24 but because those arguments were made, I think it
25 important that the juror understand that they can't

JA1787

1 second-guess the lawyers' decision for non-discriminatory
2 reason. In other words, if they were sitting in the jury
3 room thinking, Well, if I were Mr. Maynard I would have
4 Don more investigation, or I would have only suspended
5 him, I wouldn't have terminated him. That would not be a
6 proper assessment in the absence of a discriminatory
7 motive. And because there were arguments, certainly
8 arguments, and a lot of arguments in the case about how
9 much investigation should have been Don; whether he should
10 have spoken to Ms. Orellana. There was testimony about
11 the different levels of employment actions that could be
12 taken. And I think that instruction was necessary in this
13 case, even though it was not in the pattern jury
14 instructions. Even though it was not in the pattern jury
15 instructions, it is an accurate statement of New York law.

16 There is a case, Murhanda V E S A Hudson Valley,
17 Inc. It's a Third Department case, 124 AD 3rd 1158,
18 January of 2015, which actually was, it was a sexual
19 orientation case like this one is. It was a summary
20 judgment case. It wasn't in the context of a jury
21 instruction. But in reciting New York law there is a
22 statement in there of the business judgment. It was a
23 challenge by a discharged employee to the correctness of
24 an employer's decision.

25 It does not without more give rise to the

JA1788

1 inference that the employer's discharge was due to
2 discrimination. Stated another way, there is enough of
3 plaintiff to show that the employer made an unwise
4 business decision or an unnecessary personnel move, nor is
5 there enough to show that the employer acted arbitrarily
6 or with ill will. And I think that's just another
7 characterization of the business judgment rule that I
8 instructed them on.

9 The motivating factor versus determining factor,
10 I have already stated the basis for that ruling, and it's
11 the language of the PJI. But there is also a case, a New
12 York case that described it in the terms of a determining
13 factor. That is Dickerson v Health Management Corporation
14 of America, 21 AD 3rd 326, a First Department case of
15 2005.

16 Just getting back to the business judgment rule
17 for a minute. There actually are federal cases, they're
18 not in this circuit -- that show the importance of giving
19 that instruction. And the Second Circuit hasn't found
20 this, but again this is the Eighth Circuit in a case
21 Walker v AT&T Technologies, 995 F.2d 846, a 1993 case,
22 actually reversed a jury verdict where the judge refused
23 to give a business judgment instruction.

24 Other courts, I believe in the Fifth Circuit in
25 a case called Julian v City of Eastern Texas, 314 F.3d

JA1789

1 721, Fifth Circuit, 2002. It's not gone that far. In
2 fact there is an Eighth Circuit case that says that it's
3 not reversible in every situation. But it is clear under
4 federal law that that type of instruction should be part
5 of the discrimination instruction. And I think it's
6 similar under New York law.

7 I said I was going to give a -- Hill ruling with
8 regard to why the witness -- Mr. Burrell and Mr. Kellinger
9 testified over the objection of plaintiff.

10 The first thing is, even though they were not in
11 the initial disclosure, the amended disclosure, they were
12 in the pretrial order as witnesses. And I didn't get the
13 transcript, but it's --

14 We just got a note which we marked as Court
15 Exhibit 1. I'll give a copy to both sides in the case.
16 That Mr. Niczky, Juror Number 1 is the foreperson.

17 I have a copy of the transcript of that
18 conference. But my recollection is similar to Mr.
19 Zabell's at the time. Which was that Mr. Antollino raised
20 an objection to -- and I think that when this came up
21 during the trial that there was an objection to the number
22 of witnesses that Mr. Zabell had identified in the
23 pretrial order. I don't remember what the number was.
24 And there was a discussion and Mr. Zabel explained the
25 transient nature of people who work in the skydiving

JA1790

1 industry, and that he was doing that in an abundance of
2 caution, because he wasn't sure who he was going to
3 actually be able to obtain as a witness at the time of the
4 trial.

5 I went to, the other day I went to look back at
6 the docket sheet to see if there was any other motion made
7 with respect to that list of witnesses. And I don't, I
8 didn't remember, and I wasn't able to find any further
9 motion to preclude based on, for example that an address
10 wasn't provided for Mr. Kellinger. I wouldn't have
11 granted a motion to preclude him if that had been Don.
12 But I would have at least asked Mr. Zabell to provide
13 whatever the last known address was for Mr. Kellinger.

14 So there was no motion practice with respect to
15 the witnesses on this list, other than there were too
16 many. I would have, Mr. Antollino, on that issue if you
17 had asked me a couple of weeks ago, to ask Mr. Zabell to
18 narrow at least who he anticipated his witnesses would be,
19 you know. When we were arriving closer to the trial I
20 would have asked him to narrow the list of people who he
21 thought he was going to have out of the 60. But that
22 request wasn't made. So, and I did, there were mentions
23 of these individuals.

24 I remember reading excerpts of Mr. Zarda's
25 transcript where he was asked questions about, I think

JA1791

1 all, I'm not sure Mr. Shaw and Mr. Kellinger. But, so I
2 don't think this was a surprise that those weren't names
3 that nobody ever encountered. And I believe that their
4 testimony was important to the case. And that given that
5 they were in the pretrial order, the remedy was not to
6 preclude them simply because they were not in the amended
7 disclosure.

8 I don't believe that, there is no basis for me
9 to conclude that Mr. Zabell inflated the number, that the
10 pretrial order was gamesmanship on his part. And again, I
11 would have tried to address any other issues with respect
12 to people on the list if a motion was made prior to the
13 trial. So, and I think based upon that analysis that it
14 was appropriate to allow them to testify in the case.

15 On the issue of the -- this is the last thing I
16 have, I promise.

17 On the issue of Mr. Zarda's declaration. I just
18 want to clarify two actions -- of the ruling. First, I
19 want to clarify why I allowed the portion that I allowed
20 in.

21 The first is, I determined that because it
22 related to his current state of mind as of the time of the
23 declaration, 2013 I believe it was, that it's an exception
24 to the hearsay rule. And therefore, it's not qualified as
25 hearsay. Independent of that, I would admit that in the

JA1792

1 alternative under Rule 807, the residual exception to the
2 hearsay rule.

3 The requirements for that are, that the
4 statement has an equivalent circumstantial guarantee of
5 trustworthiness.

6 Two, it is offered into evidence of a material
7 fact.

8 Three, it is more probative on the point for
9 which it is offered than any other evidence that the
10 proponent could obtain through reasonable efforts.

11 And four, admitting it will serve, will best
12 serve the purpose of these rules and the interests of
13 justice.

14 Under those factors I think Mr. Zabell has a
15 fair point that it was prepared in connection with a
16 summary judgment motion. And so under normal
17 circumstances when something is prepared in connection
18 with litigation, and this is not particular to his desire
19 or this is a general view that those types of documents do
20 not have the highest degree of trustworthiness because
21 they're prepared in connection with litigation.

22 However, that is only one factor. And here,
23 notwithstanding that I determined that it was offered as
24 evidence of a material fact, which is his ongoing
25 emotional state, it is more probative on that point for

JA1793

1 which it is offered than any other that the proponent can
2 obtain through reasonable efforts. Because obviously if
3 Mr. Zarda were still alive I would not have allowed it
4 under the residual exception, because he could certainly
5 testify as to his current state of mind. But he is
6 deceased, so there was no other way for Mr. Antollino to
7 put in what his mental state was in the past. Not the
8 only way, he did have a doctor testify to that. But there
9 is no other way to do it from Mr. Zarda's standpoint
10 itself then through that declaration. He had no other
11 means to do that. He couldn't call Mr. Zarda. And I
12 believe that it would serve the purpose of the rule and
13 the interests of justice, again, to allow him to make
14 arguments regarding the ongoing nature of emotional
15 distress.

16 To the extent that Mr. Zabell's argument was a
17 reasonable argument that he didn't get a chance to
18 cross-examine Mr. Zarda on that statement, I believe that
19 the deposition, certain questions -- he certainly
20 questioned Mr. Zarda on his emotional state in the
21 deposition and read in portions of it in rebuttal to that
22 declaration. And so I believe there were sufficient items
23 in the deposition for him to attack that declaration in
24 terms of what his emotional distress was and whether or
25 not he continued to skydive or not, notwithstanding his

JA1794

1 ability to question Mr. Zarda regarding it. And in fact
2 he, I think in addition to Mr. Zarda's deposition, got
3 that out through some other witnesses as well as in terms
4 of his ongoing activities and mental state after the
5 termination.

6 So I believe that it was admissible and
7 non-hearsay. It's admissible under the residual exception
8 to the hearsay rule.

9 With respect to the rest of the declaration
10 which I excluded, the rest of it. First of all, it's not,
11 doesn't lead to his present state of mind. It doesn't
12 relate to -- he is recounting essentially all of the
13 circumstances from the time he was employed. And so it
14 doesn't come under the state of mind exception to the
15 hearsay rule. He is just recounting his version of events
16 leading up to that point in the litigation. Those other
17 portions were completely covered in the deposition and
18 statements regarding those in the deposition. So there
19 was no reason, no necessity for the statement to put in
20 the declaration on those issues. There was a complete
21 opportunity to explore those issues. And they were
22 explored thoroughly in the deposition.

23 So under the residual exception, I believe the
24 analysis is different. I did not think it was more
25 probative on the point for which it was offered and on the

JA1795

1 other evidence that was already in the record. And again,
2 because it's a declaration in connection with a summary
3 judgment, it's not as trustworthy as other documents would
4 be. And I did not believe that it would serve the
5 interests of justice to put those other statements in,
6 when they were fully covered in the deposition.

7 So that was the basis for that ruling. Okay?

8 So we'll take a break. And just give Michele
9 your phone number if you're going to go downstairs or
10 something like that. Okay?

11 (A recess was taken.)

12 (The following took place at 3:39 p.m. outside
13 the presence of the jury.)

14 THE COURT: I have received a note that has been
15 given to both sides, saying -- this note has been marked
16 as Court Exhibit 2 saying: We have unanimously reached a
17 verdict.

18 So we'll bring in jury for the verdict.

19 (The jury entered the courtroom.)

20 THE COURT: Members of the jury I have received
21 your note which is marked Court Exhibit 2, saying: We
22 have unanimously reached a verdict.

23 Mr. Foreperson, has the jury reached a unanimous
24 verdict?

25 THE FOREPERSON: Yes, we have.

JA1796

1 THE COURT: Can you hand it up to my deputy so I
2 can inspect the verdict sheet?

3 (Handing)

4 We will mark it as Court Exhibit 3.

5 Hand it back to the foreperson, and we can read
6 the verdict.

7 Mr. Foreperson, if you could stand.

8 With respect to Part I, liability question one:
9 Did plaintiff prove by a preponderance of the evidence
10 that Donald Zarda's sexual orientation was a determining
11 factor in the termination of his employment at Altitude
12 Express, Inc, doing business as Skydive Long Island in
13 2010?

14 Is the jury's unanimous verdict yes or no?

15 THE FOREPERSON: No.

16 THE COURT: Okay, you can be seated.

17 Members of the jury, please listen to your
18 verdict as recorded by the court.

19 With respect to liability, Part I, question one.

20 Did plaintiff prove by a preponderance of the
21 evidence that Donald Zarda's sexual orientation was a
22 determining factor in the termination of his employment at
23 Altitude Express, Inc, doing business as Skydive Long
24 Island in 2010?

25 The jury's unanimous verdict, No.

JA1797

1 Members of the jury, is that your unanimous
2 verdict, so say you all?

3 THE JURORS: Yes.

4 THE COURT: I'm going to poll the jury.

5 Juror Number 1, is that your verdict?

6 JUROR 1: Yes.

7 THE COURT: Juror Number 2, is that your
8 verdict?

9 JUROR 2: Yes.

10 THE COURT: Juror Number 3, is that your
11 verdict?

12 JUROR 3: Yes.

13 THE COURT: Juror Number 4, is that your
14 verdict?

15 JUROR 4: Yes.

16 THE COURT: Juror Number 5, is that your
17 verdict?

18 JUROR 5: Yes.

19 THE COURT: Juror Number 6, is that your
20 verdict?

21 JUROR 6: Yes.

22 THE COURT: Juror Number 7, is that your
23 verdict?

24 JUROR 7: Yes.

25 THE COURT: Juror Number 8, is that your

JA1798

1 verdict?

2 JUROR 8: Yes.

3 THE COURT: Okay, the jury has been polled. The
4 verdict is unanimous. I'll let the lawyers inspect the
5 verdict sheet before I dismiss the jury at sidebar.

6 (The following occurred at sidebar.)

7 THE COURT: Is there anything before I dismiss
8 it jury.

9 MR. ANTOLLINO: No.

10 MR. ZABELL: Not for the defendant.

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11 Thank you for your service. You're excused.

12 (The jury left the courtroom.)

13 THE COURT: Is there is anything else we need to
14 address?

15 MR. ANTOLLINO: No, I don't think so.

16 Thank you very much.

17 THE COURT: You're welcome.

18 MR. ZABELL: Thank you, judge, for your time and
19 effort.

20 (The proceedings were concluded at 3:48 p.m.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA ZARDA AND WILLIAM)
MOORE AS CO-INDEPENDENT)
EXECUTORS OF THE ESTATE OF)
DONALD ZARDA,) NOTICE OF APPEAL
)
)
Plaintiff) 10-4334 (JFB)
)
)
vs.)
)
ALTITUDE EXPRESS AND RAYMOND)
MAYNARD)

Defendants

NOTICE IS HEREBY GIVEN that Plaintiff, the Estate of Donald Zarda, appeals to the United States Court of Appeals for the Second Circuit from the Judgment of the District Court of the Eastern District of New York, dated October 27, 2015 and entered in this action on or about the same day, bringing up on review every part of said judgment.

Dated: New York, New York
 20 November 2015

/s/

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JA1800

(end)