

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.

EN BANC REHEARING FROM THE PANEL OPINION REPORTED AT 855 F.3d 76

JOINT APPENDIX – VOLUME III

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¹ With permission by order on motion, an electronic appendix on disk, denoted EA or Elec. Appx., was submitted to the Panel appeal. Further allowed the same disks to remain as part of the En Banc hearing (Katzmann, J., June 20, 2017). Some color screen shots are printed in Volume II.

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1 MAYNARD
2 do you see that?
3 A. Uh-huh.
4 Q. Was that the name of the party?
5 A. I did not give the party a name and
6 they are referring to a lei that you wear
7 around your neck.
8 Q. Well, it appears that he hasn't
9 spelled --
10 A. I see that.
11 Q. He hasn't spelled it right. It's
12 referring to -- he's referring to a lei but he
13 didn't spell it right; correct?
14 MR. ZABELL: I'm going to advise
15 you that you need not make the assumption
16 that counselor made that there was a man
17 that wrote this e-mail and you may answer
18 the question.
19 A. Okay.
20 Q. The person who wrote this -- well,
21 withdrawn.
22 Do you know Jordan Miles?
23 A. Jordan is one of my employees.
24 Q. Is he a good employee?
25 A. Yes.

1 MAYNARD
2 Q. All right. If he wrote, "You
3 pulled your pork with us now come and get laid
4 at Skydive Long Island luau on dropzone.com,"
5 are you going to fire him?
6 A. Am I going to fire him now?
7 Q. Yeah.
8 A. I'm not sure. I'm going to go talk
9 to him.
10 Q. Why would you fire him for posting
11 that?
12 MR. ZABELL: Objection.
13 Q. Why might you fire him? You said
14 you're not sure.
15 MR. ZABELL: Objection to the
16 multiple questions. If you'd like to
17 withdraw any of them, you may.
18 If you like, you may pick one of
19 them and provide an answer to it.
20 A. I will talk to him.
21 Q. And what are you going to say when
22 you talk to him?
23 A. I will find out if he actually said
24 this or posted this.
25 Q. And if he says yes, are you going

1 MAYNARD
2 to fire him?
3 A. I don't know.
4 MR. ZABELL: Objection, asked and
5 answered.
6 Q. Why might you fire him?
7 MR. ZABELL: Objection.
8 You may answer.
9 A. I would have to think about it.
10 Q. He's a good -- he's a good
11 employee, isn't it?
12 MR. ZABELL: Objection, asked and
13 answered. You can answer it again.
14 A. Yes.
15 Q. Does it seem like something that
16 you would fire someone for?
17 MR. ZABELL: Objection to the form
18 of the question.
19 You may answer.
20 A. I'm not sure.
21 Q. Have you fired people in the past
22 other than Don?
23 A. I have let some ground crew people
24 go.
25 Q. Who?

1 MAYNARD
2 A. I don't remember the names. It was
3 a while ago.
4 Q. Any other instructors?
5 MR. ZABELL: Objection to the form
6 of the question.
7 You may answer.
8 A. I don't remember.
9 Q. You don't remember anyone that you
10 fired over how many years? You can't remember
11 a single instructor that you fired?
12 MR. ANTOLLINO: Objection to the
13 multiple questions posed.
14 You may pick a question and answer
15 it.
16 A. No.
17 Q. What about Willie?
18 A. What about Willie?
19 Q. Did you fire Willie?
20 A. No.
21 Q. What about Ben Lowe?
22 A. No.
23 Q. You didn't fire Ben Lowe?
24 A. No.
25 Q. What about Alex Allen?

1 MAYNARD

2 A. Yes.

3 Q. Okay. He was an instructor?

4 A. Yes.

5 Q. Why did you fire Alex Allen?

6 A. Because Alex Allen put his nose in

7 the business where it was not -- it did not

8 belong, questioning me about what I was doing

9 with another video guy and then he went on

10 videotape and gave me the finger and he was

11 fired.

12 Q. What do you mean he was questioning

13 you with what you were doing with another video

14 guy. Did he need that video guy on a jump or

15 something?

16 A. No.

17 Q. Explain it -- explain what his

18 problem was.

19 A. His problem was that he was trying

20 to tell me how to run my business. He was -- I

21 was on my way home and he called me up and

22 wanted to know why this guy was doing a video

23 and somebody else wasn't.

24 Q. When was that?

25 A. I think it was two years ago.

1 MAYNARD

2 Q. Why did he want the other guy in

3 the video?

4 A. It was none of his business, so it

5 didn't matter why he wanted the other guy in

6 the video.

7 MR. ZABELL: Just answer the

8 question that's asked of you if you know

9 the answer.

10 Q. Can you answer?

11 A. He wanted the other guy in the

12 video because the person that I was putting in

13 the video was somebody new that needed some

14 more experience. Everybody had equal number of

15 jumps across the day and the only way someone

16 is going to get experience is to give them the

17 chance to get to jump.

18 Q. And that's why you decided to

19 assign the video guy where you assigned him?

20 A. Yes.

21 Q. And would you say Alex's giving you

22 the finger is what you made fire him?

23 A. No, that was the icing on the cake.

24 Q. Okay. So what -- so the real

25 reason was his questioning you?

1 MAYNARD

2 MR. ZABELL: Objection to the form.

3 You may answer.

4 A. He was fired for putting himself in

5 the place of the business where he had no place

6 being.

7 Q. Did you ever fire Jerry Hannon?

8 A. Yes, I did.

9 Q. And Jerry Hannon was an instructor?

10 A. Yes.

11 Q. Was he a good instructor?

12 MR. ZABELL: Objection to the form.

13 You may answer.

14 A. He was -- I believe he was a

15 videographer when he was fired.

16 Q. And why was he fired?

17 A. He got into an altercation with

18 another employee.

19 Q. What altercation?

20 A. They had words and they went in the

21 back and he punched him.

22 Q. Who was the employee he punched?

23 A. Duncan Shaw.

24 Q. Did Duncan Shaw require any medical

25 treatment?

1 MAYNARD

2 A. No.

3 Q. Was Duncan Shaw hurt?

4 A. Jerry hit him once.

5 Q. It was inappropriate at the

6 workplace?

7 A. Yes.

8 Q. But you eventually rehired Jerry

9 Hannon, didn't you?

10 A. Yes, I did.

11 Q. Why did you rehire him?

12 A. I rehired Jerry because he is a

13 good man. It was over a year that went by. He

14 was egged on, as I would put it, by Duncan.

15 Duncan called him out to come in the back and

16 Jerry loss his temperature -- I mean, his

17 temper.

18 Q. Okay. How did Duncan egg him on?

19 A. Duncan didn't like Jerry so there

20 was always a little pushing going on, saying

21 things and they didn't see eye-to-eye.

22 Q. Did you ever fire Duncan Shaw?

23 A. Duncan was suspended.

24 Q. Why was Duncan suspended?

25 A. Because he was the victim of

1 MAYNARD
 2 getting hit.
 3 Q. So there are lots of level of
 4 discipline that you can use at the workplace;
 5 correct?
 6 MR. ZABELL: Objection to the form.
 7 You may answer.
 8 A. Yes.
 9 Q. All right. Short of termination,
 10 you can suspend someone; correct?
 11 A. Right.
 12 MR. ZABELL: Objection to the form.
 13 You may answer.
 14 A. Yes.
 15 Q. And you can reprimand them?
 16 A. Yeah.
 17 MR. ZABELL: That's a statement to
 18 which no response is required.
 19 Q. Correct? Correct?
 20 A. Yes.
 21 Q. You can counsel them; correct?
 22 A. I don't know if "counsel" is the
 23 correct word.
 24 Q. Well, you can retrain them;
 25 correct?

1 MAYNARD
 2 A. Yes.
 3 Q. When these parties that occur at
 4 the drop zone there is alcohol involved;
 5 correct?
 6 A. Correct.
 7 Q. And some people use recreational
 8 drugs?
 9 A. No.
 10 Q. Are you aware of any of your sky
 11 divers who, over the course of 26 years, have
 12 used recreational drugs at the drop zone?
 13 A. I've seen it.
 14 Q. Okay. Who have you seen use
 15 recreational drugs at the drop zone?
 16 A. I'm talking years ago. I don't
 17 even remember. I don't condone any of that.
 18 Q. So you don't allow it to take place
 19 in the drop zone?
 20 A. No.
 21 Q. Do you know anything about Don
 22 Zarda using any illegal drugs?
 23 A. No.
 24 Q. Do these parties at the drop zone
 25 get a little lewd --

1 MAYNARD
 2 MR. ZABELL: Objection to the form.
 3 Q. -- as the night goes on?
 4 MR. ZABELL: Objection to the
 5 multiple questions.
 6 A. I don't know what you mean by
 7 "lewd."
 8 Q. Well, do women take their shirts
 9 off?
 10 A. I never saw that.
 11 Q. All right. So you post -- you make
 12 postings on your Facebook pages, your two
 13 Skydive Long Island Facebook pages, yourself;
 14 correct?
 15 A. No, very rarely.
 16 Q. Very rarely, mostly it's Lauren?
 17 A. Yes.
 18 Q. But you do make some postings
 19 sometimes?
 20 A. I can't remember the last time I
 21 made a post.
 22 Q. Well, I have a few here. Did you
 23 make a posting about -- did you ever make a
 24 joke, what's grass -- what's green and has
 25 wheels?

1 MAYNARD
 2 A. Not that I remember.
 3 Q. And the answer being, grass, I lied
 4 about the wheels? Does that ring a bell?
 5 A. No.
 6 Q. Are there videos of these parties
 7 that you have at the drop zone?
 8 A. A video of the party itself?
 9 Q. Yeah.
 10 A. You're talking about nighttime?
 11 Q. Yeah.
 12 A. Not that I know of.
 13 Q. What the practice of keeping videos
 14 of the tandem jumps? Who keeps them?
 15 A. I believe they're kept on a file
 16 server now or I know they used to be videotapes
 17 we keep.
 18 Q. When did you change from tape to
 19 file server?
 20 A. With the technology.
 21 Q. When was that?
 22 A. Just started last year at some
 23 point in time.
 24 Q. All right. And you keep the tapes
 25 as well, the ones from before the new

1 MAYNARD
 2 technology?
 3 A. That's how we did it before, yes.
 4 Q. All right. And are there out takes
 5 of video jumps that remain at the drop site?
 6 A. What's kept at the drop zone is the
 7 raw footage.
 8 Q. So the raw footage is edited and
 9 put into, like, a five-minute presentation for
 10 the customer; correct?
 11 A. Correct.
 12 Q. And how long is the raw footage
 13 itself?
 14 A. I'm not a videographer. I would
 15 guess maybe ten minutes. I'm not sure.
 16 Q. Would it be fair to say there was
 17 raw footage in the jumps that were recorded by
 18 David Kengle and Rosana Orellana?
 19 MR. ZABELL: Objection to the form.
 20 A. Yes. Every video is done the same
 21 so there's always -- there's raw footage and
 22 then they convert it to a CD.
 23 + MR. ANTOLLINO: Just make a note
 24 I'll call for production and I'll follow
 25 it up with a demand.

1 MAYNARD
 2 MR. ZABELL: Please.
 3 Q. Have you ever flown to video a jump
 4 yourself?
 5 MR. ZABELL: Objection to the form.
 6 A. You mean as a videographer?
 7 Q. Uh-huh.
 8 A. No.
 9 Q. There are lots of pictures of Don
 10 on your -- one of your business Facebook pages;
 11 is that right?
 12 A. I don't know.
 13 Q. Well, I'll show you what I've
 14 marked as Exhibit 8?
 15 (Exhibit R-8, photographs from
 16 Facebook page, marked for
 17 Identification.)
 18 Q. I'm handing a one, two, three,
 19 four, five, six, seven page document and I'd
 20 like you to look at those and see if you
 21 recognize Don on every single one of those
 22 pages.
 23 MR. ZABELL: Just wait until he
 24 provides me with a copy.
 25 A. (Reviewing.)

1 MAYNARD
 2 MR. ZABELL: How many pages?
 3 MR. ANTOLLINO: What did I say?
 4 (Record read.)
 5 MR. ANTOLLINO: Could you read the
 6 question back?
 7 MR. ZABELL: Please.
 8 (Record read.)
 9 A. Yes.
 10 Q. All right. And those are currently
 11 on the Facebook page for Skydive Long Island;
 12 correct?
 13 A. I don't know that.
 14 Q. I see we have wifi, but we'll do it
 15 later, but you have no reason to believe that
 16 they're not there, do you?
 17 MR. ZABELL: Objection to the form.
 18 A. No, I don't. I know there's two
 19 different Facebook pages and I think one is not
 20 being maintained and I'm not sure.
 21 Q. Well, if they are there, are you
 22 going to take them down?
 23 A. Yes.
 24 Q. Why?
 25 A. It's a practice that we try to keep

1 MAYNARD
 2 anything that's out there from Skydive Long
 3 Island to its current employees and I know
 4 there's probably others.
 5 Q. I'm going to show you what I've
 6 marked as Exhibit 9. What is that?
 7 A. That's a picture of Richie
 8 Winstock.
 9 Q. And what is he wearing?
 10 A. A towel.
 11 Q. Is he on his way to the shower?
 12 A. Yes, or on the way back.
 13 Q. Why did you think that it would be
 14 appropriate to put a picture of Rich Winstock
 15 with a towel around him on your business
 16 Facebook page?
 17 A. I did not do that.
 18 Q. Do you think it's appropriate?
 19 A. I'm not sure.
 20 Q. It's a little personal, isn't it?
 21 MR. ZABELL: Objection to the form.
 22 A. That's an opinion.
 23 Q. Well, what is your opinion? Is it
 24 your opinion that it's a little personal or
 25 not?

1 MAYNARD
2 MR. ZABELL: Objection to the form.
3 You may answer.
4 A. It's not showing anything.
5 Q. Well, he has his shirt off;
6 correct?
7 A. Yes.
8 Q. All right. Do you like your
9 instructors to walk around the drop zone in
10 front of the customers with towels around them?
11 A. No, and this was at the end of the
12 day or very early in the morning when there was
13 nobody around.
14 Q. Okay. But it's on your Facebook
15 page; correct?
16 A. I guess so.
17 Q. All right. So would it be
18 appropriate -- I'm just asking you, would it be
19 appropriate for Rich to be walking around with
20 a towel around him in front of the customers?
21 A. No.
22 Q. Okay.
23 (Exhibit R-11, photograph, marked
24 for identification.)
25 Q. I'm going to show you what I have

1 MAYNARD
2 marked as Exhibit 12 and ask if you recognize
3 this. I'm sorry, is that Exhibit 12 or 11?
4 A. 11.
5 Q. Do you recognize this?
6 A. Yes.
7 Q. And that is a picture of you and
8 your current girlfriend; correct?
9 A. Yes.
10 Q. What is her name?
11 A. Barbara.
12 Q. What's her last name?
13 A. Schiano.
14 Q. So would you agree that you're
15 sharing to your Facebook followers your
16 relationship with Barbara Schiano?
17 A. I guess so.
18 Q. That's personal information, isn't
19 it?
20 A. It's my girlfriend.
21 Q. Okay. And that's personal
22 information; correct?
23 A. It depends on how one interprets
24 it.
25 Q. Well, what would you define as

1 MAYNARD
2 "personal information"?
3 A. Certainly not that I'm dating
4 somebody. I mean, it's common -- it's common
5 knowledge.
6 Q. Okay. It also conveys the
7 impression that you're heterosexual; correct?
8 MR. ZABELL: Objection to the form.
9 A. Yes.
10 Q. Okay. And that's personal
11 information; correct?
12 A. Yes.
13 Q. Are there any escapades going on in
14 this picture?
15 MR. ZABELL: Objection to the form.
16 A. Escapades?
17 Q. Yeah, any escapades?
18 A. I had my picture taken. I don't
19 understand.
20 Q. I'm wondering if you believe that
21 there are any escapades going on in that
22 picture?
23 MR. ZABELL: Objection to the form.
24 You may answer.
25 A. No.

1 MAYNARD
2 (Exhibit R-12, photograph, marked
3 for identification.)
4 Q. Let me show you what I've marked as
5 Exhibit 12. And I'd ask you if you could
6 identify that.
7 A. That's a picture of myself and
8 Barbara after she made a jump and obviously I
9 did too.
10 Q. And you put that there; right?
11 A. Yes.
12 Q. Okay. And there are some comments
13 under the photo; isn't that correct?
14 A. Yes.
15 Q. And when did this occur?
16 A. Well, I would say in June.
17 Q. And this is on your business
18 Facebook page; correct?
19 A. Yes.
20 Q. All right. The very last comment
21 is a comment made by you; correct?
22 A. Yes.
23 Q. Can you read it for the record?
24 A. "Skydive Long Island: Thanks
25 everyone. Unfortunately my pathetic ex will

1 MAYNARD
2 not leave us alone and continues to try to
3 disrupt our lives by dancing as close as she
4 can to get to me at Dockers last Tuesday night.
5 It did not work. Barbara and I could not be
6 happier. As a matter of fact, this Wednesday,
7 June 29, 2011, will be the first of many
8 anniversaries we will share. That's the first
9 night we met and I have never been happier."
10 Q. All right. And in that post you
11 were talking about Joanne Maynard; correct?
12 A. Yes.
13 Q. And you referred to her as
14 pathetic; correct?
15 A. Yes.
16 Q. Because you believe she's pathetic?
17 A. Yes.
18 Q. And you said that she was trying to
19 make your life miserable; correct?
20 A. Correct.
21 Q. And one of the ways she was trying
22 to make your life miserable was by dancing too
23 close to you at Boxers?
24 A. Yes.
25 Q. What is Boxers?

1 MAYNARD
2 A. Dockers is a bar.
3 Q. Dockers is a bar?
4 A. It's a restaurant.
5 Q. And did you just happen to show up
6 there coincidentally, both of you, or do you
7 think she was following you?
8 A. I think -- I know that that is
9 where Barbara and I would hang out and all of a
10 sudden Joanne started coming down there.
11 Q. Is it close to where Joanne lives?
12 A. It's probably ten miles away.
13 Q. And how far is it from where you
14 live?
15 A. Maybe seven.
16 Q. So it's relatively close to both of
17 you?
18 A. Yeah.
19 Q. And they have dancing?
20 A. Yes.
21 Q. And was Joanne with someone else?
22 A. She was with some friends.
23 Q. All right. And you believe that
24 she purposefully tried dancing too close to
25 you?

1 MAYNARD
2 A. Absolutely.
3 Q. Why do you believe that?
4 A. Because Barbara and I were the only
5 two people out on the dance floor and she came
6 out by herself and got about two inches away
7 from me.
8 Q. She was dancing right next to you?
9 A. Right next to me, trying to evoke
10 whatever.
11 Q. Why did you feel a need to mention
12 this on your business Facebook page?
13 A. I just did.
14 Q. It's personal information, isn't
15 it?
16 A. Yes.
17 Q. All right. You put some of those
18 words in capitals, didn't you?
19 A. Yes.
20 Q. Why did you put some of those words
21 in capitals? Were you trying to emphasize
22 them?
23 A. Yes.
24 Q. All right. I believe you made a
25 mistake about the date there?

1 MAYNARD
2 A. Oh, right.
3 Q. You put 2001. It was really 2011
4 you should have put there; right?
5 A. It was actually 2010.
6 Q. So you met Barbara when? You met
7 her in 2010?
8 A. Correct.
9 Q. Did you meet her the same day you
10 fired Ray?
11 A. What?
12 Q. Did you meet her the same day you
13 fired Ray?
14 A. That I fired who?
15 Q. I'm sorry, withdrawn.
16 Did you meet her the same day you
17 fired Don?
18 A. No.
19 Q. There was a document I received --
20 you don't have to take this as truth, but do
21 you know of any reason why Barbara Schiano, is
22 that how you pronounce the name?
23 A. Yes.
24 Q. Was list -- would be listed as a
25 witness with information about this case?

1 MAYNARD
2 A. No.
3 Q. Did you ever learn that Barbara
4 Schiano was listed by your attorney on a
5 document as a person with discoverable
6 information in this case?
7 A. I might have heard something like
8 that.
9 Q. And did you discuss this with
10 Barbara?
11 A. Discussed what?
12 Q. Discussed her being listed as a
13 witness, with Barbara?
14 A. Yes, I might have.
15 Q. And what did you discuss with
16 Barbara about her being listed as a witness?
17 A. That I don't understand why she
18 would be because she doesn't know anything
19 about this.
20 Q. And so did she ask to be taken off
21 the list?
22 A. I don't remember.
23 Q. Do you have any -- do you know any
24 reason why she would have been listed as a
25 witness in this case?

1 MAYNARD
2 A. No, I do not.
3 Q. What have you discussed --
4 withdrawm.
5 What is an escapade?
6 A. What is a what?
7 Q. What is an escapade?
8 A. You go out somewhere and you have a
9 drink, if you have go out and have dinner, if
10 you have go to an event, if you go to a
11 football game.
12 Q. All of those are escapades?
13 A. Sure.
14 Q. It seems like --
15 A. It's a general term.
16 Q. -- it seems like there were some
17 escapades going on at Dockers then; correct?
18 A. Yeah.
19 Q. And it seems like in that earlier
20 exhibit where you're posing with Barbara,
21 you've got a drink in your hand, that there's
22 some escapades going on there; correct?
23 A. Well, I looked at that as a picture
24 being taken of us, so, yes.
25 Q. Okay. When you said in that post

1 MAYNARD
2 about Mrs. Maynard, that that did not work or
3 her dancing close to you at the -- at the
4 Docker -- is it Dockers?
5 A. Dockers.
6 Q. At Dockers. When you said that --
7 MR. ZABELL: How many questions are
8 you asking at once?
9 MR. ANTOLLINO: Please, please.
10 MR. ZABELL: Please what? I will
11 be more than happy to help you when you
12 say "please," but you have to identify
13 what question you need help with.
14 MR. ANTOLLINO: Be quiet. Remain
15 silent like you told me last week.
16 MR. ZABELL: Counselor, you will
17 keep a civil tongue in your mouth at this
18 deposition do you understand?
19 MR. ANTOLLINO: I am keeping a
20 civil tongue and I told you to remain
21 silent just like you told me last week.
22 MR. ZABELL: Okay. Form
23 appropriate questions and I will not
24 object to them and if you ask please,
25 tell me what you're asking please about.

1 MAYNARD
2 MR. ANTOLLINO: To remain silent.
3 Remember, the colloquy doesn't count to
4 the seven hours that I have for your
5 client. If you want to keep talking,
6 it's just stopping the clock.
7 MR. ZABELL: Counsel, ask
8 appropriate questions and I will not make
9 objections to your questions, if you're
10 capable.
11 Q. In the post -- there's no question
12 pending. I will withdraw whatever question or
13 questions were asked.
14 MR. ZABELL: Thank you.
15 Q. In your post you mentioned that
16 something did not work by Joanne getting close
17 to you on the dance floor at Dockers; correct?
18 A. Correct.
19 Q. What was it that did not work?
20 A. I didn't get upset and Barbara
21 didn't get upset and there was no scene.
22 Q. Has she tried -- has she --
23 withdrawm.
24 What other things has Joanne done
25 to make your life miserable?

1 MAYNARD
2 + MR. ZABELL: Objection to the
3 form. Counsel, I'm not going to allow
4 this question because I believe you are
5 attempting to harass my client.
6 You need not answer that question.
7 MR. ANTOLLINO: Well, I will say
8 that I think that Mrs. Maynard's
9 relationship to this case is relevant and
10 I'm trying to explore what the judge
11 suggested I do at the conference before
12 we litigate your motion to strike the
13 subpoena of Mrs. Maynard.
14 I'm trying to explore that and if
15 you're not going to allow me, that will
16 give me additional grounds to depose
17 Mrs. Maynard. So if you'd like to direct
18 him not to answer, that's fine. I'll
19 just point it out to the judge when I my
20 application or we actually litigate your
21 motion.
22 Q. Were you on a reality show? Did
23 you ever sign you up for a reality show?
24 A. It never got there, no.
25 Q. The name of the reality show that

1 MAYNARD
2 you agreed to participate in was The Marriage
3 Ref; is that correct?
4 A. Correct.
5 Q. And in that agreement that you made
6 with the company that produces The Marriage Ref
7 you invited videographers and other people into
8 your home; correct?
9 A. They were the producers, yes.
10 Q. Okay. You invited them into your
11 home to -- you just met with the producers?
12 A. No.
13 MR. ZABELL: Objection to the form.
14 You may answer.
15 A. It was the whole -- the workings of
16 what those people do, the video guys, the sound
17 guys, the crew.
18 Q. Okay. How long were they there
19 for, how many days?
20 A. They came to the house twice for an
21 hour or two.
22 Q. Okay. And they recorded you having
23 discussions with Mrs. Maynard?
24 A. Yes.
25 Q. And this is while you were still

1 MAYNARD
2 married?
3 A. Yes.
4 Q. Why did you agree to allow them
5 into your home?
6 A. Joanne wanted to be on TV.
7 Q. And you went along with it?
8 A. Yes.
9 Q. And there were things discussed
10 between you and Joanne while they were filming
11 you?
12 A. Yes.
13 Q. And they were only there for two
14 hours?
15 A. Yes.
16 MR. ZABELL: Objection. That was a
17 statement to which no response is
18 required. And I'm reminding you,
19 Mr. Antollino is not under oath. You,
20 therefore, may treat everything that
21 comes out of his mouth as suspect and you
22 are under no obligation to believe it is
23 accurate.
24 Q. Why did you not get put on the
25 show, do you know?

1 MAYNARD
2 MR. ZABELL: Objection to the form.
3 You may answer.
4 A. They said we didn't make the final
5 cut.
6 Q. Did they say why?
7 A. No.
8 Q. So The Marriage Ref is a reality
9 show. If you had made the final -- let me
10 withdraw that question, let me withdraw that
11 question and --
12 MR. ZABELL: The one question or
13 the three questions?
14 MR. ANTOLLINO: Counsel, your
15 comments and your derisive, insulting
16 behavior is taking away from the time of
17 the deposition. If you're going to
18 complain about me having two questions,
19 I'm going to withdraw the question. I
20 don't want you laughing if I change
21 questions and I am videotaping this
22 because of you, because I want to get all
23 of your comments and improper objections
24 on the record.
25 MR. ZABELL: Counsel, you asked

1 MAYNARD
2 three questions and withdrew one of them.
3 MR. ANTOLLINO: All right, but I
4 withdrew -- I withdrew everything. All
5 right.
6 MR. ZABELL: Okay. As long as you
7 clarify that you're withdrawing
8 everything then I won't have to ask you
9 to clarify that.
10 Q. Did you see the show?
11 MR. ZABELL: Objection to the form.
12 You may answer.
13 A. I have seen the show.
14 Q. All right. And the show is
15 essentially a husband and wife that have some
16 issues; correct?
17 MR. ZABELL: Objection to the form.
18 A. Correct.
19 MR. ZABELL: You may answer.
20 Q. And they present their issues to a
21 panel of celebrities; correct?
22 MR. ZABELL: Objection to the form.
23 You may answer.
24 A. Correct.
25 Q. And were you told who the

1 MAYNARD
2 celebrities might be?
3 A. No.
4 Q. And the celebrities come up with a
5 decision as to who's right; correct?
6 A. Correct.
7 Q. And you were willing to submit
8 yourself to that circumstance?
9 MR. ZABELL: Objection to the form.
10 You may answer.
11 A. Yes.
12 Q. Have you ever used the word
13 "gay" -- withdrawn.
14 Do you know what the word
15 "pejorative" means?
16 A. The word what?
17 Q. "Pejorative."
18 A. No.
19 Q. Have you ever used the word "gay"
20 in a nasty sense?
21 MR. ZABELL: Objection to the form.
22 You may answer.
23 A. No.
24 Q. So have you ever heard anyone say,
25 oh, that's really gay, to signify that that's

1 MAYNARD
2 really -- that really stinks?
3 MR. ZABELL: Objection to the form.
4 You may answer.
5 A. I've heard people say that.
6 Q. Okay. Have you yourself ever said
7 it?
8 A. No.
9 Q. Have you ever used the word
10 "faggot"?
11 A. No.
12 Q. In your entire life you've never
13 used the word "faggot"?
14 A. Maybe I have when I was younger.
15 Q. What age?
16 A. I don't remember.
17 Q. When did you stop using the word
18 "faggot"?
19 A. I don't remember.
20 Q. Have you ever used the word
21 "queen"?
22 A. What?
23 MR. ZABELL: Objection to the form.
24 Q. "Queen"?
25 A. No.

1 MAYNARD
2 Q. You've never used the word "queen"
3 at all, even when referring to the Queen of
4 England?
5 A. Yes.
6 Q. But you've never used the word
7 Queen in referring to a gay person?
8 A. No.
9 Q. Have you ever said anything
10 derogatory about gay people?
11 A. No.
12 Q. Do you have any gay friends?
13 A. Yes.
14 Q. Who?
15 A. Well, my sister was gay. She
16 passed away.
17 Q. She passed away. Who else?
18 A. I don't remember names, you know.
19 Not personally, I've known other people that
20 were gay.
21 Q. So really you don't have any
22 friends that are gay right now?
23 A. Not that I know of.
24 Q. Tell me about your sister. When
25 did she -- do you know what the phrase "coming

1 MAYNARD
2 out" means?
3 A. Yes.
4 Q. What does it mean?
5 A. I interpret that as when they
6 decided to go the other way, in the open, I
7 guess.
8 Q. So, did there come a point where --
9 what was your sister's name?
10 A. Mary Lou.
11 Q. When did she pass?
12 A. Last Mother's Day.
13 Q. I'm sorry. When did she come out
14 of the closet?
15 A. She was about 19 years old.
16 Q. So that was several years -- that
17 was many years ago. Was it the '60s?
18 A. Yes.
19 Q. And did that surprise you in any
20 way when she came out?
21 A. Yes.
22 Q. Did you ever tell her that you
23 wished she wasn't gay?
24 A. No.
25 Q. What was your parents' reaction to

1 MAYNARD
2 it?
3 A. They were surprised.
4 Q. Did they like it?
5 MR. ZABELL: Objection to the form.
6 You may answer.
7 A. I didn't ask them.
8 Q. Did they ever express an opinion?
9 A. Not to me.
10 Q. Did your sister ever tell you that
11 they had expressed an opinion about her being
12 gay?
13 A. No.
14 Q. Did she live openly as a gay woman
15 from the '60s to the date of her passing?
16 A. Yes.
17 Q. She had a partner?
18 A. One partner her whole life.
19 Q. She had one partner her whole life?
20 A. Yeah.
21 Q. And how did she introduce herself
22 to this partner? I'm sorry, how did she
23 introduce this partner? What was the partner's
24 name?
25 A. Santine.

1 MAYNARD
2 Q. Santine?
3 A. Yes.
4 Q. Is she deceased also?
5 A. Excuse me?
6 Q. Is she also deceased?
7 A. No.
8 Q. What's her last name?
9 A. Megneco.
10 Q. And where did they live?
11 A. They lived last in Holbrook, New
12 York.
13 Q. Holbrook?
14 A. Yes.
15 Q. Have you kept in contact with
16 Santine?
17 A. Yes.
18 Q. And have you talked to her about
19 this lawsuit?
20 A. No.
21 Q. Does she know about it, if you
22 know?
23 A. I don't think so.
24 Q. So, does Santine still live in
25 Holbrook?

1 MAYNARD
2 A. I believe she does, yes.
3 Q. Do you know -- do you remember her
4 address?
5 A. I should know this.
6 MR. ZABELL: You're under no
7 obligation to provide it and, in fact,
8 I'm going to advise you not to provide
9 it. If counsel wants it, he'll have to
10 make an application to the court to get
11 it.
12 MR. ANTOLLINO: I think she has
13 discoverable information.
14 Q. Are you unwilling to provide it?
15 MR. ZABELL: I've advised you not
16 to provide it.
17 Q. And, therefore, you're not going to
18 provide it; correct?
19 MR. ZABELL: I've advised him not
20 to provide it.
21 MR. ANTOLLINO: I just want --
22 MR. ZABELL: You need not ask him
23 anything further.
24 Q. Did your sister marry Santine?
25 A. No.

1 MAYNARD
 2 Q. When Don was fired gay marriage
 3 wasn't legal; is that correct?
 4 A. I believe.
 5 Q. Okay. You agree that gay
 6 marriage --
 7 MR. ZABELL: I'm going to object to
 8 the form of that question. Are you
 9 specifying a locale?
 10 Q. In New York, in New York.
 11 MR. ZABELL: Why don't you ask your
 12 question again.
 13 MR. ANTOLLINO: Fair enough.
 14 Q. When Don was fired gay marriage was
 15 not legal in New York; correct?
 16 A. I guess.
 17 Q. Okay. Do you know where it was
 18 legal?
 19 A. I know there were several states
 20 that legalized it. I didn't follow it.
 21 Q. Did you ever discuss it with your
 22 sister?
 23 A. No.
 24 Q. Did you ever socialize with your
 25 sister and her partner?

1 MAYNARD
 2 A. Yes.
 3 Q. Have you ever been to a gay
 4 establishment?
 5 MR. ZABELL: Objection.
 6 A. No.
 7 MR. ZABELL: Objection to the form.
 8 Q. Do you know what I mean by a gay
 9 establishment, a gay bar, a gay restaurant?
 10 A. Yes.
 11 Q. It's probably pretty certain that
 12 you've had gay customers; correct?
 13 A. I would assume.
 14 Q. Have you had any gay skydivers
 15 other than Don?
 16 MR. ZABELL: Objection to the form.
 17 A. I don't ask anybody what their
 18 preferences are in that. I'm not -- I don't
 19 know.
 20 Q. Do you think that it's a preference
 21 or an orientation --
 22 MR. ZABELL: Objection to the form.
 23 Q. -- being gay?
 24 MR. ZABELL: Objection to the form.
 25 A. I don't know -- I don't ask people

1 MAYNARD
 2 what they do outside of my workplace. So if
 3 someone else is gay and they haven't expressed
 4 it, I don't know that. I don't ask that
 5 question.
 6 Q. Okay. I'm just asking you whether
 7 you think being gay is an orientation or a
 8 preference?
 9 MR. ZABELL: Objection to the form.
 10 You may answer, if you can.
 11 A. I don't know.
 12 Q. Do you think that gay people are
 13 born that way?
 14 MR. ZABELL: Objection to the form.
 15 A. I don't have an opinion on that.
 16 Q. Did your sister ever say that she
 17 was born that way?
 18 A. No.
 19 Q. Did Santine ever say that she was
 20 born that way?
 21 A. No.
 22 Q. So you believe that homosexuality
 23 is a choice?
 24 MR. ZABELL: Objection to the form.
 25 If you can, you can answer.

1 MAYNARD
 2 A. I don't know if somebody is born
 3 one way or they choose something else. I know
 4 how I am and what someone else does, that's
 5 in -- I don't know how they think or how
 6 anybody does anything else.
 7 Q. Did you choose -- you're
 8 heterosexual, correct?
 9 A. Yes, I am.
 10 Q. Did you choose to be heterosexual
 11 or were you just born that way?
 12 A. I've always been heterosexual.
 13 Q. So, therefore, it would be fair to
 14 assume that you were born that way?
 15 A. That's your assumption, I guess. I
 16 don't know.
 17 Q. Did you ever make a choice in your
 18 life and say, you know what, I'm going to --
 19 I'm going to date women rather than men?
 20 A. I only dated women. I never
 21 thought about dating a man.
 22 Q. But it doesn't sound like it was a
 23 choice, it was just natural; correct?
 24 MR. ZABELL: Objection to the form
 25 of that question.

1 MAYNARD
2 If you can answer it, you may.
3 A. It's my choice, yes.
4 MR. ANTOLLINO: Could you read back
5 the question and the answer?
6 (Record read.)
7 Q. So you believe it's a choice?
8 MR. ZABELL: Objection.
9 Q. Or that it's natural, it just
10 happened naturally?
11 MR. ZABELL: Objection, asked and
12 answered.
13 You may answer it again if you can.
14 A. I don't know if I can answer that
15 question. There's probably some people that
16 it's a -- that's what -- I don't know. I don't
17 know.
18 Q. Okay. I want to show you what I
19 have marked as Exhibit 18.
20 (Exhibit R-17, e-mail, marked for
21 Identification.)
22 MR. ZABELL: 18 or 17?
23 MR. ANTOLLINO: I'm sorry, 17.
24 Q. I'd like you to read that to
25 yourself and let me know when you're done.

1 MAYNARD
2 MR. ZABELL: Please.
3 A. (Reviewing.)
4 You want me to read this and what?
5 Q. Just let me know when you're done
6 reading it.
7 A. Yeah.
8 Q. All right. This appears to be --
9 have you seen this before?
10 A. No.
11 MR. ZABELL: Objection to the form
12 of the multiple questions.
13 Q. Do you know Kevin Beisler?
14 MR. ZABELL: Objection to the form
15 of the multiple questions.
16 A. I do not know Kevin.
17 Q. Do you recognize him as someone
18 who's been to Skydive Long Island?
19 A. No.
20 Q. It says in the e-mail that he's
21 been there five times; correct?
22 A. Yes.
23 Q. And how much does he pay for each
24 jump if he goes on a student jump?
25 MR. ZABELL: Objection to the form.

1 MAYNARD
2 You may answer.
3 A. I don't know if he's a student or
4 if he's up -- a fun jumper.
5 Q. What are the different prices?
6 A. If you're a fun jumper and you have
7 your own gear, it's \$25 a jump at 13,5.
8 Student jumps are, I believe -- I think -- I'm
9 not sure of the price structure, 70, 75, 80.
10 Q. And video?
11 A. Most video is for tandems. If the
12 video is for tandem, it's 125. If you're
13 getting video as a student, I believe it's
14 about \$80.
15 Q. And if you're going on a tandem
16 jump, how much is that?
17 MR. ZABELL: Objection.
18 A. That's 125.
19 Q. But without the video, how much is
20 it?
21 MR. ZABELL: Objection.
22 A. A tandem jump?
23 Q. Yeah.
24 MR. ZABELL: Objection.
25 A. If you come out there by yourself

1 MAYNARD
2 on a weekend it's 125, but there's also group
3 rates, weekday rates. There's many different
4 price structures.
5 Q. All right. So it looks like you've
6 lost a customer in Kevin Beisler, according to
7 this e-mail if it's true; is that correct?
8 MR. ZABELL: Objection to the
9 multiple questions.
10 You can pick one and answer.
11 Q. You can answer.
12 A. According to this, I guess we have.
13 Q. I'd like you to take a look at
14 Exhibit 18.
15 (Exhibit R-18, letter, marked for
16 Identification.)
17 Q. And read that and tell me when
18 you're done.
19 A. (Reviewing.)
20 I'm done.
21 Q. Have you read it?
22 A. I'm done.
23 Q. Have you seen this before?
24 A. No.
25 Q. Do you remember a time in 2010 when

1 MAYNARD
2 a group of gay sky divers went to Skydive Long
3 Island?
4 A. No, I don't.
5 Q. All right. If there were a group
6 of 24 people, how much would you charge them if
7 they were going up in tandem instruction and
8 video, what would be the group rate for that?
9 And if you need a second to calculate that,
10 take as much time as you want.
11 A. We don't discount the video. The
12 group rate for 24 people -- it's over 20 people
13 they get, I believe, \$20 off each and either
14 two or three other people go for free. And if
15 they choose to take that amount and split it
16 between the whole group, they can also do that.
17 Q. All right, so let me just get my
18 numbers straight. The tandem price itself, I
19 just want to get this clear in my mind --
20 MR. ZABELL: So you've moved on to
21 a different question?
22 MR. ANTOLLINO: There's no question
23 pending before the witness. Is there a
24 question pending before the witness? You
25 want to continue colloquy, it's just

1 MAYNARD
2 adding to the seven hours.
3 MR. ZABELL: Are you asking madam
4 reporter if there was a question pending
5 before the witness before you asked the
6 other question? If you were, then you
7 should give her an opportunity to answer
8 you before you start yelling at me,
9 Counselor.
10 (Record read.)
11 MR. ANTOLLINO: So there was no
12 question pending, Counselor.
13 MR. ZABELL: If you read the
14 answer, you did ask him to follow-up on
15 his answer.
16 MR. ANTOLLINO: And that's what I'm
17 doing now. You want to continue to do
18 this, Counsel? It's just increasing the
19 time your client has to sit here.
20 Q. All right. Now, let me take it
21 step-by-step for my own clarification. Is it
22 true that a tandem price in itself without
23 video is between 199 and 225?
24 A. We never charged 199. 225 is a
25 person goes out by themselves on a weekend, the

1 MAYNARD
2 weekend price is 225.
3 Q. Okay.
4 A. Do you want the whole breakdown?
5 Q. No. I want to take it
6 step-by-step. And the video would be an
7 additional 125?
8 A. Correct.
9 Q. Okay. And that's on a weekend or
10 is that the price for any time?
11 A. That's the price for video.
12 Q. Okay. So if 24 gay guys came out
13 or a group of 24 guys, whether they're gay or
14 not, came out, how much would you reduce the
15 225 to?
16 A. It would be reduced to -- if it's
17 over 20, I think it's either 20 or 25 dollars
18 off per person, so it's either 205 or 200.
19 Q. All right. So let's say it's 200.
20 A. And, in addition to that, they
21 would give two people for free.
22 Q. So if there were 24, two people
23 would go for free?
24 A. Right. A lot of times, the group
25 would take that amount of money and then the

1 MAYNARD
2 whole group would whack it up and decide how
3 much it would be.
4 Q. But that's between them?
5 A. Correct.
6 Q. Okay. So if there are 24 gay guys
7 that are out there and just getting tandems, no
8 video, that's \$4,000 coming in to the drop
9 zone; correct?
10 A. If that's what you computed.
11 Q. All right. If you'd like to do the
12 computation yourself, but it sounds about
13 right; correct?
14 A. Uh-huh.
15 Q. All right. And if they also all --
16 all 24 gay guys got video, that would be -- I
17 can't do hand calculations anymore.
18 MR. ZABELL: I don't doubt that.
19 Q. That would be another \$3,000; is
20 that fair to say?
21 A. Yes.
22 Q. So if 24 gay guys go there and go
23 on tandems with video, that's bringing \$7,000
24 into your business; correct?
25 A. Correct.

1 MAYNARD
2 Q. And, according to this e-mail,
3 Scott Ryan is not going to bring his gay group
4 there anymore; correct?
5 A. According to the e-mail, you're
6 right.
7 Q. All right.
8 MR. ANTOLLINO: Do you want to take
9 the break now?
10 THE VIDEOGRAPHER: Whenever you
11 want. We have four minutes left.
12 Q. It says in this e-mail that the
13 instructors who went up in the tandems were
14 telling the gay guys about the gay skydiver.
15 Do you see that?
16 A. Yes.
17 Q. Was that inappropriate for them to
18 do?
19 A. I can't answer that. I don't know
20 who started what or who said what. I don't
21 even know -- I don't even know that --
22 Q. Well what --
23 A. -- if this is even true.
24 Q. We're just assuming that it's true.
25 A. Hypothetically.

1 MAYNARD
2 MR. ZABELL: You're under no
3 obligation to assume it's true,
4 Mr. Maynard.
5 Q. We're assuming it's true and if
6 your skydivers mentioned Don's sexuality, was
7 that inappropriate?
8 MR. ZABELL: Objection to the form.
9 A. It would depend on what's being
10 said.
11 Q. It's personal information, isn't
12 it?
13 A. I guess so.
14 MR. ZABELL: Objection to the form.
15 You may answer.
16 MR. ANTOLLINO: You got the answer?
17 Q. If someone told these jumpers that
18 Don was gay, are you going to fire any of them?
19 A. No.
20 MR. ANTOLLINO: All right. Good
21 break.
22 THE VIDEOGRAPHER: We are now off
23 the record at 12:27 p.m.
24 (Luncheon recess taken at 12:27 p.m.)
25

1 MAYNARD
2 AFTERNOON SESSION
3 (Time noted: 1:03 p.m.)
4 RAYMOND MAYNARD, resumed and
5 testified as follows:
6 CONTINUED EXAMINATION
7 BY MR. ANTOLLINO:
8 THE VIDEOGRAPHER: This is tape
9 three of the deposition of Raymond
10 Maynard, we are now on the record at 1:03
11 p.m.
12 Q. So, that we were looking earlier at
13 Exhibits 17 and 18 and it appears on its face
14 that there are some gay people who will not go
15 back to Skydive Long Island because of what
16 happened to Don?
17 MR. ZABELL: Objection.
18 Q. It appears on its face; correct?
19 MR. ZABELL: Objection.
20 Q. Is that correct? That's what these
21 e-mails say basically.
22 MR. ZABELL: No, they don't.
23 A. They say they won't be going back
24 there any time soon.
25 Q. And the other one says --

1 MAYNARD
2 A. "Sorry to hear about this."
3 Q. Well, what does it say about
4 returning?
5 A. It doesn't say anything.
6 Q. You're right. How do you feel
7 about the guy who won't return?
8 MR. ZABELL: Objection to the form.
9 Q. How do you feel about that? How to
10 you feel that he won't come back soon? Do you
11 want him to come back soon?
12 MR. ZABELL: Objection to the form
13 of the multiple questions asked.
14 You may pick any one of those
15 questions asked and provide an answer to
16 one of them.
17 A. I'm in business and I have
18 thousands of people come through my place every
19 year. You can't have everybody happy and you
20 can't have everybody return. For whatever
21 reason it is, I don't know -- I don't know if
22 any of this is true. So how do I feel about
23 somebody not coming back? We'd like everybody
24 to come back if possible.
25 Q. He's a paying customer, this guy.

1 MAYNARD
2 A. Yup.
3 Q. You didn't give him a free jump?
4 A. No.
5 MR. ZABELL: Objection to the form
6 of the multiple questions.
7 MR. ANTOLLINO: He answered the
8 first question and I'm asking the second
9 one.
10 Q. You didn't give him a free jump,
11 did you?
12 MR. ZABELL: You may pick a
13 question and respond to it.
14 A. The question is?
15 Q. You never gave him a free jump, did
16 you?
17 A. No.
18 Q. Is Jordan Miles a good tandem
19 instructor?
20 A. Yes, he is.
21 Q. And he has a military background, I
22 understand?
23 A. Yes, he does.
24 Q. All right. Has he ever revealed to
25 any customers that he is a veteran?

1 MAYNARD
2 A. That what?
3 Q. Has he ever revealed to any
4 customers that he is a veteran?
5 A. I don't know.
6 Q. Would you think it inappropriate
7 for him to do so?
8 A. No.
9 Q. What if he was, say, diving with
10 someone and someone complained that this guy
11 Jordan Miles told me that he was a vet and I
12 didn't want to hear that information.
13 What if somebody called you and
14 complained about that? Would you consider that
15 a legitimate complaint?
16 A. I'm an American and I would not
17 take that very well at all. Without the vets
18 we wouldn't be having freedom.
19 Q. But his military service is
20 personal information, isn't it?
21 MR. ZABELL: Objection to the form.
22 A. It's personal information that's
23 not upsetting people and ruining the day.
24 Q. But it's personal information;
25 correct?

1 MAYNARD
2 A. It's personal information.
3 Q. What if it did ruin someone's day?
4 A. It would depend on what it is.
5 Q. Well, if he said -- if you got a
6 complaint, someone said, I don't want to hear
7 about war when I'm on a jump. I want to enjoy
8 the scenery. That ruined my jump. Does Jordan
9 get fired for saying that?
10 MR. ZABELL: That's an
11 objectionable question, but you can go
12 ahead and answer his objectionable
13 question.
14 A. No, he would not.
15 Q. Have you ever chatted about this
16 lawsuit on your personal Facebook page?
17 MR. ZABELL: Objection.
18 You may answer.
19 A. I don't remember if I have or not.
20 + MR. ANTOLLINO: All right. I'm
21 going to call for production of any
22 comments made about this lawsuit on his
23 Facebook page.
24 And I remind you of the --
25 MR. ZABELL: You may remind me of

1 MAYNARD
2 absolutely nothing. Remain silent.
3 MR. ANTOLLINO: Remain silent? I
4 remain silent at the deposition where I'm
5 taking questions?
6 MR. ZABELL: One can only hope.
7 Q. Did you ever complain about Joanne
8 at the drop zone in front of other employees?
9 A. I probably had.
10 Q. Pretty often?
11 A. Yes.
12 Q. Did you ever complain about Joanne
13 within the earshot of other customers?
14 A. I don't think so.
15 Q. So you're not certain one way or
16 the other?
17 A. Probably not.
18 Q. But you're not certain?
19 A. No.
20 Q. But if you had, it would be sharing
21 personal information with customers; correct?
22 MR. ZABELL: Objection to form.
23 A. If they heard me, I wasn't speaking
24 with them, so I would not be sharing something
25 with them.

1 MAYNARD

2 Q. Did you ever hear any situation
3 where a big busted woman is caught on videotape
4 in free fall and instructors rushing to the
5 video room to watch what it looks like?
6 MR. ZABELL: Objection to the form.
7 You may answer.
8 A. Yes.
9 Q. And have you participated in that?
10 A. I have been informed that they had
11 a videotape similar to that.
12 Q. And what was your reaction to that?
13 A. I don't remember.
14 Q. Did you fire anyone as a result of
15 looking at someone in a lewd manner on a video?
16 MR. ZABELL: Objection to the form
17 of the question.
18 You may answer.
19 A. I wasn't looking at anybody in a
20 lewd manner.
21 Q. Did you fire anyone else for
22 looking at this particular passenger in a lewd
23 manner to see her big breasts in free fall?
24 MR. ZABELL: Objection to the form
25 of the multiple questions.

1 MAYNARD

2 You may pick any one of those
3 questions and provide an answer to it.
4 A. No.
5 Q. Did you get any complaints about
6 Don from any other employees at Skydive Long
7 Island?
8 MR. ZABELL: During any particular
9 time period?
10 MR. ANTOLLINO: At any time.
11 A. There were no formal complaints,
12 no.
13 Q. Were there any informal complaints?
14 A. No.
15 Q. Don was well liked at the drop
16 zone, is that a fair statement?
17 A. Yeah.
18 MR. ZABELL: Objection to the form.
19 You may answer.
20 A. Yes, he was.
21 Q. When did you meet Don?
22 A. When did I what?
23 Q. When did you first meet Don?
24 A. In 2001.
25 Q. Under what circumstances?

1 MAYNARD

2 A. I believe my friend Kurt. I'm not
3 sure if he was working with us at the time or
4 not. He probably was. I met Don at another
5 drop zone. I believe he was working in Vermont
6 or New Hampshire and Kurt told Don about our
7 busy drop zone and we could use some help and I
8 encouraged him to come down and work for us.
9 Q. And what happened then?
10 MR. ZABELL: Objection to the form.
11 A. Don came to work for us.
12 Q. So you met Don in 2001 and what did
13 you know about Don at that time?
14 A. I knew he was an experienced
15 skydiver, an experienced tandem master.
16 Q. Anything else?
17 A. He told me he was gay.
18 Q. He told you he was gay. When did
19 he tell you he was gay?
20 A. When I first met him.
21 Q. What did he say to you?
22 A. I don't remember the exact words.
23 It came up in conversation just to let me know.
24 Q. What did you say in response?
25 A. "It doesn't matter to me."

1 MAYNARD

2 Q. Did you tell him not to reveal his
3 sexual orientation to anyone else?
4 A. No.
5 Q. Did you tell him not to reveal his
6 sexual orientation to any passengers?
7 A. All of my employees are told to
8 just report to their job. One is to make sure
9 that they are totally safe from the time that
10 they get into the airplane and back to the
11 ground; that they be safe and the only
12 responsibility of the tandem master is to make
13 sure they have a good time and not do or say
14 anything that's going to upset them.
15 + MR. ANTOLLINO: Motion to strike
16 as nonresponsive.
17 MR. ZABELL: Your motion is denied,
18 Counsel, to the extent that I'm permitted
19 to do so.
20 Q. Did you specifically ask Don not to
21 reveal his sexual orientation to any customers,
22 yes or no?
23 A. No.
24 Q. How long did Don work for you in
25 2001?

1 MAYNARD
2 A. It was several months, I believe.
3 Q. And was it discussed during those
4 several months that Don was gay among the
5 students at -- among the instructors at Skydive
6 Long Island?
7 A. Did you say was it discussed?
8 Q. Yeah.
9 A. It might have been.
10 Q. You don't remember one way or the
11 other?
12 A. It probably was.
13 Q. Was Don referred to as gay Don?
14 A. He referred to himself as gay Don.
15 Q. When you say "he referred to
16 himself as gay Don," when was that? When did
17 he refer to himself as gay Don?
18 A. In 2001.
19 Q. He said, I'm gay Don?
20 A. He would make jokes about it. He
21 was not always called gay Don. He was not
22 referred to as gay Don.
23 Q. Rich Winstock testified that, and
24 you don't have to accept this as true, that he
25 was introduced to Don by another person as gay

1 MAYNARD
2 Don. Do you believe that to be true?
3 A. It could be true. I don't know who
4 the person is.
5 Q. It could be true that other people
6 at the drop zone referred to Don as gay Don?
7 A. Very possible.
8 Q. You don't know where the phrase gay
9 Don originated, do you?
10 A. No.
11 Q. So you don't know if it originated
12 with Don or with someone else; correct?
13 A. Correct.
14 Q. Did there come a time in 2001 that
15 a passenger complained about Don?
16 A. There were several instances when
17 Don would be upset that he was taking the women
18 and the other guys were taking the guys and
19 there was more than one person that came down
20 upset about being told things by Don and there
21 was -- actually, I know of two women that were
22 almost in tears after their jump with Don. I
23 don't know their names. I don't know the date.
24 Q. And can you describe the
25 circumstance, why they were in tears?

1 MAYNARD
2 A. Because he was carrying on about
3 his after-hours activities and they didn't want
4 to hear it.
5 Q. In 2001?
6 A. Yes.
7 Q. And there was some women who were
8 crying because of this?
9 A. Yes.
10 Q. And what did they look like?
11 A. I don't remember.
12 Q. Did it happen more than once?
13 MR. ZABELL: He testified there
14 were two women.
15 A. There were two incidents that I
16 remember.
17 Q. Okay. Did they happen on the same
18 day?
19 A. It wasn't the same day. It was
20 close proximity. I would say within a month,
21 maybe two weeks.
22 Q. And what was it that Don said that
23 made these women cry?
24 A. Him talking about being gay.
25 Q. Anything else?

1 MAYNARD
2 A. No.
3 Q. All right. But, yet, even then you
4 didn't tell him not to tell customers that he's
5 gay; correct?
6 A. Say that one more time.
7 MR. ANTOLLINO: Could you read it
8 back?
9 MR. ZABELL: Please.
10 (Record read.)
11 A. I didn't tell him not to tell them.
12 Q. And you don't remember -- you don't
13 have any documentation whatsoever about these
14 complaints?
15 A. No, I don't.
16 Q. Do you have any record of any of
17 the passengers Don took on a flight in 2001?
18 A. No.
19 Q. Have you ever heard other
20 instructors ask to get women instead of men?
21 A. No.
22 Q. Have you ever heard instructors
23 or -- well, have you heard of instructors
24 agreeing to trade passengers?
25 A. I've heard of instructors agreeing

1 MAYNARD
2 to trade passengers?
3 Q. Yes.
4 A. No.
5 Q. So, is the assignment of the
6 instructor to the passenger something that is
7 made by you and it's not something that can be
8 changed by the instructors?
9 A. The assignment is made through
10 manifest. So as people come in and sign up,
11 that's how it's supposed to go, 1 through 10,
12 and then you get a list of instructors. And
13 unless there's a circumstance of somebody
14 being -- that has special needs, it should go
15 down the list and it's just a random of who
16 goes with who.
17 Q. And, so, the randomness is never
18 varied?
19 A. If there's a special need there
20 might be.
21 Q. But for no other reason?
22 A. There should not be.
23 Q. There should not be, but does it
24 ever happen?
25 A. Not that I know of.

1 MAYNARD
2 Q. Why would Don complain about having
3 to take women?
4 A. You'd have to ask him.
5 Q. What did he say exactly about
6 complaining about taking women?
7 MR. ZABELL: Objection to the form.
8 You may answer, if you can.
9 A. He would outwardly say to the other
10 people that the guys are always getting all the
11 guys and I'm getting the women.
12 Q. Did anyone else tell you this?
13 A. No.
14 Q. Do you remember anyone else who
15 might have heard this?
16 A. Not offhand.
17 Q. Are there any people working at
18 Skydive Long Island now that are currently
19 working -- that -- now that were working in
20 2001?
21 A. Yes, I believe there are.
22 Q. Who?
23 A. I believe Brian Petretti was with
24 us in 2001, Duncan Shaw. I'm not sure if
25 Winstock was there or not. He worked for me

1 MAYNARD
2 for a while and then he left and came back.
3 I'd have to look back.
4 + MR. ANTOLLINO: Okay. I call for
5 a production of the list of names of
6 employees -- I'm putting this on the
7 record.
8 MR. ZABELL: It's denied.
9 MR. ANTOLLINO: -- who were working
10 in 2001.
11 MR. ZABELL: Your request is
12 denied.
13 MR. ANTOLLINO: Well, we'll deal
14 with it. I'll send you the letter and
15 you'll put in your objection and we'll go
16 to the judge.
17 MR. ZABELL: But, just so you know,
18 your request is denied.
19 Q. Isn't it true that the only
20 customer complaint in 2001 was a male who
21 complained because Don did not do something
22 that he considered unsafe and that the
23 manufacturer of the rig considered unsafe?
24 A. No.
25 Q. If a passenger asks a customer to

1 MAYNARD
2 do something that the manufacturer considers
3 unsafe, is the instructor obligated to follow
4 the customer's request or obligated to follow
5 the manufacturer's request?
6 MR. ZABELL: Objection to the form
7 of the multiple questions.
8 You may pick one and respond.
9 A. No tandem instructor should do what
10 a customer asked him to do if it's unsafe.
11 Q. And so if a customer complains --
12 what is a head down student tandem?
13 A. A head down tandem is when you're
14 in free fall and your head is falling first.
15 Q. Would you agree with the statement
16 that a head down student tandem is unnecessary
17 and not in the best interest of giving the
18 student an educational experience?
19 A. Yes.
20 Q. Okay. So if a passenger asked Don
21 to do a head down student tandem and Don would
22 not do it, and then later complained, that
23 would not be a legitimate customer complaint,
24 would it?
25 MR. ZABELL: Objection to the form

1 MAYNARD
2 of the question. You may answer.
3 A. It would not be a legitimate
4 complaint because he should not do that.
5 Q. What about a flip out of a plane?
6 A. Back flip, front flip?
7 Q. Start with front. Is that allowed?
8 A. Yes.
9 Q. How about a front flip?
10 MR. ZABELL: Objection, asked and
11 answered. You said "front" twice.
12 MR. ANTOLLINO: I'm sorry.
13 MR. ZABELL: I accept your apology.
14 Q. How about a back flip?
15 A. Yes.
16 Q. Do you know of any manuals or
17 safety regulations that suggest that back flips
18 and front flips are unsafe?
19 A. No, I do not.
20 Q. If Don was asking to do something
21 that would result in his license suspension by
22 a passenger, he was permitted to deny that
23 request; correct?
24 A. Correct.
25 Q. So these two girls allegedly

1 MAYNARD
2 complained in tears and they happened shortly
3 one after another?
4 MR. ZABELL: Objection to the form
5 of the question and to the
6 characterization of the testimony.
7 You may answer.
8 Q. You can answer.
9 A. It was within a few weeks of each
10 other, yes.
11 Q. And so you fired Don after the
12 second one?
13 A. Yes.
14 Q. What did you say to Don when you
15 fired him?
16 A. I don't remember exactly what I
17 said to him.
18 Q. Did you think that Don was doing
19 anything unsafe as an instructor?
20 A. No.
21 Q. Can you think of any reason that
22 Don would prefer the male passengers rather
23 than the female passengers?
24 A. No.
25 Q. What is the USPA?

1 MAYNARD
2 A. It's the United States Parachute
3 Association.
4 Q. Do they have a manual?
5 A. Yes, they do.
6 Q. Is it the standard manual followed
7 by the most reputable drop zones in the
8 country?
9 A. Yes.
10 Q. In between 2001 and 2009, did you
11 have any dealings with Don whatsoever?
12 A. Don had made several phone calls
13 during that time. He asked about coming back
14 and initially I told him no. He did visit the
15 drop zone, I think more than one time.
16 Q. And when was that?
17 A. I believe he was there in 2008 and
18 he might have been there one time before that.
19 I don't remember the date.
20 Q. And when were these several phone
21 calls?
22 A. I don't remember exactly when they
23 were.
24 Q. Were they before 2005?
25 A. I don't remember.

1 MAYNARD
2 Q. So you would not be able to tell me
3 anywhere in between 2001 and 2009 when these
4 phone calls took place?
5 A. I don't remember the dates we had
6 the phone calls.
7 Q. You don't remember how many of them
8 there were?
9 A. There weren't many.
10 Q. What?
11 A. There were not many.
12 Q. Was it more than three?
13 A. I do not think so.
14 Q. Okay. And when -- it was 2008 that
15 Don visited the drop zone?
16 A. I believe that's when it was.
17 Q. All right. And when he visited the
18 drop zone, what did you say to him?
19 A. We talked. He made some jumps.
20 Q. So he was a paying customer --
21 A. Yes.
22 Q. -- at the time? And what did you
23 talk about?
24 A. We talked about him coming back to
25 work.

1 MAYNARD
2 Q. And that was in 2008?
3 A. I believe so.
4 Q. Who brought it up?
5 A. Don did.
6 Q. And what did you say?
7 A. What did I say?
8 Q. Yeah.
9 A. I said that I believed that he was
10 a good instructor, he was a safe instructor.
11 He was a good guy and I would give him a
12 chance.
13 Q. Earlier you testified that you
14 initially said no. When was it that you said
15 no?
16 A. In one of the earlier phone calls.
17 Q. Why did you say no?
18 A. Because I just said no.
19 Q. But there must have been a reason
20 for it.
21 A. No reason.
22 Q. Did you need people at the time?
23 A. Excuse me?
24 Q. Did you need people at the time?
25 MR. ZABELL: Objection. During

1 MAYNARD
2 what time?
3 Q. During the time you said no.
4 A. I don't even remember what time of
5 the year it was that we talked.
6 Q. So you don't remember why you said
7 no?
8 A. No.
9 Q. It might have been because you
10 didn't have any openings?
11 A. Very possible.
12 Q. So you rehired Don in 2009 and
13 there came a time that he had an injury and
14 could not work for the rest of the season; is
15 that correct?
16 A. That's correct.
17 Q. Did you see the video of the jump
18 in which he suffered an injury?
19 A. I probably did, but I don't
20 remember it.
21 Q. Do you remember if he did anything
22 improper in that jump that caused his injury?
23 A. No.
24 Q. Did it, in fact, just look like a
25 regular old jump?

1 MAYNARD
2 MR. ZABELL: Objection to the form
3 "regular old jump."
4 Q. All right, that would not have
5 resulted in an injury?
6 MR. ZABELL: Are you withdrawing
7 the previous question or are you adding
8 on to the previous question? In either
9 event, I object to both.
10 Q. You can answer.
11 MR. ZABELL: If you know what he's
12 asking you.
13 A. Yeah, I'm not sure.
14 MR. ANTOLLINO: Could the court
15 reporter read it back without the
16 objection. If you want to stay here
17 forever and play this game, we will.
18 MR. ZABELL: No, we won't.
19 MR. ANTOLLINO: I've got seven
20 hours and your colloquy doesn't count
21 towards that.
22 MR. ZABELL: What about your
23 colloquy, Counsel?
24 (Record read.)
25 MR. ZABELL: Objection to the form.

1 MAYNARD
2 You may answer.
3 A. It looked like a normal skydive.
4 Q. It did not look like Don did
5 anything negligent; correct?
6 A. No.
7 Q. He was carrying an overweight
8 passenger on that flight; is that correct?
9 MR. ZABELL: Objection to the form.
10 A. I don't know that.
11 Q. Do you pay your instructors extra
12 when they agree to exceed stated weight limits?
13 A. The posted weight, yes.
14 Q. What is the posted weight?
15 A. 225.
16 Q. And that includes what, that
17 includes just the passenger; right?
18 A. Right.
19 Q. So if the passenger weighs more
20 than 225, is the skydiver allowed to decline to
21 take the passenger?
22 A. Yes, absolutely.
23 Q. Was there an older instructor that
24 you used to have by the name of Willie?
25 A. Yes.

MAYNARD

1
2 Q. What's Willie's last name?
3 A. Tomares.
4 Q. And you fired Willie?
5 A. No.
6 Q. He's still working for you?
7 A. No. At the end of one season he
8 didn't come back.
9 Q. Do you know where Willie lives?
10 A. I believe Montana.
11 Q. Would you want him to come back?
12 A. I wouldn't say absolutely no. We'd
13 have to have a conversation about it.
14 Q. What problems did you have with
15 Willie Tomares?
16 A. Willie was just very unhappy a lot
17 of times.
18 Q. About what?
19 A. I never found that out.
20 Q. Did you pressure him to take the
21 overweight passengers?
22 A. No.
23 Q. If an instructor agrees to take an
24 overweight passenger, you pay the instructor
25 more; correct?

MAYNARD

1
2 A. Yes.
3 Q. Why is that?
4 A. To tell you the truth, I don't know
5 how that policy started, but the policy is in
6 place.
7 Q. Well, isn't it true that taking an
8 overweight passenger increases the risk for the
9 instructor?
10 A. No.
11 Q. Isn't it a harder job?
12 A. No.
13 Q. When Don was injured at work, he
14 did not -- the passenger was not injured in the
15 same tandem; correct?
16 A. Correct.
17 Q. Do you remember when that jump when
18 Don got injured was?
19 A. No.
20 Q. It was -- would it be fair to say
21 it was in either late June or early July in
22 2009?
23 A. Probably.
24 Q. Okay. Don didn't know how badly he
25 was injured when he hurt himself on that jump;

MAYNARD

1
2 is that correct?
3 A. I don't remember.
4 Q. He wasn't certain if he would be
5 returning that summer or not, correct, when he
6 went out on injury; correct?
7 A. Correct.
8 Q. In fact, you received an e-mail
9 from Don --
10 (Exhibit R-19, e-mail, marked for
11 Identification.)
12 Q. -- I hand you what I premarked as
13 Exhibit 19 -- shortly after the injury;
14 correct?
15 A. You want me to read it?
16 Q. That appears to be an e-mail that
17 Don sent to you after the injury?
18 A. Yes.
19 Q. And it indicates that he wants to
20 continue could have his job, he wants to get
21 better and get back to work; correct?
22 A. Yes.
23 Q. And there was no reason why he
24 could not return to work if his doctors cleared
25 him to work that summer; correct?

MAYNARD

1
2 A. Correct.
3 Q. And if his doctors had cleared him
4 to work that summer, you would have allowed him
5 to continue to do jumps; correct?
6 A. Correct.
7 Q. All right. Now, you have mandatory
8 staff meetings at the drop zone; is that
9 correct?
10 A. Not really.
11 Q. I'll hand you what I've marked
12 collectively as Exhibit 25 -- I'm sorry,
13 Exhibit 20 and ask you if you recognize these.
14 (Exhibit R-20, three e-mails,
15 marked for Identification.)
16 Q. There's three e-mails here.
17 A. Okay.
18 Q. These are all e-mails about staff
19 meetings; correct?
20 A. Okay. Yes, they are.
21 Q. Okay. And it's sent from Skydive
22 Long Island with the e-mail address
23 funjumps@skydivelongisland.com; correct?
24 A. Correct.
25 Q. And that is your e-mail address;

1 MAYNARD
 2 correct?
 3 A. Correct.
 4 Q. All right. And it's sent to a
 5 group, SDLI. It says "To SDLI"; correct?
 6 A. Correct.
 7 Q. And that is a shorthand name for a
 8 bunch of e-mail addresses; correct?
 9 A. Correct.
 10 MR. ZABELL: Objection to form.
 11 Q. And if Don was working in 2009 he,
 12 was included among this SDLI group; correct?
 13 A. Correct.
 14 Q. And all of these e-mails refer to
 15 staff meetings; correct?
 16 A. Yes.
 17 Q. And did you expect the instructors
 18 to attend the staff meetings?
 19 A. Yes.
 20 Q. What types of things are discussed
 21 at staff meetings?
 22 A. The business of the upcoming day --
 23 THE VIDEOGRAPHER: We are now off
 24 the record. At 1:38 p.m.
 25 (Recess taken.)

1 MAYNARD
 2 THE VIDEOGRAPHER: We are now on
 3 the record at 1:39 p.m.
 4 MR. ANTOLLINO: Could you read it
 5 back?
 6 (Record read.)
 7 A. The business of the upcoming day,
 8 the amount of tandems we have. The amount of
 9 videos we have. Just in general everything and
 10 just try to lay the day out. If we hadn't been
 11 busy for a while, we wanted to get people in
 12 there early to make sure we can get everything
 13 taken care of.
 14 Q. Do the instructors or other people
 15 that go to these staff meetings get paid to
 16 attend the staff meeting?
 17 A. No.
 18 (Exhibit R-21, e-mail, marked for
 19 Identification.)
 20 Q. I'm going to show you what I've
 21 marked as Exhibit 21 and there's a copy for you
 22 and this appears to be an e-mail from you to
 23 SDLI; correct?
 24 A. Yes.
 25 Q. And could you read that for the

1 MAYNARD
 2 record?
 3 A. "Just want to let you know we have
 4 a busy weekend lined up with 120 on the books
 5 for Saturday and almost 100 so far for Sunday.
 6 Let's hope the weather cooperates. Also, we're
 7 going to have a mandatory staff meeting this
 8 Saturday at 7:30 a.m. See you then."
 9 Q. And "mandatory staff meeting" is in
 10 bold; correct?
 11 A. Yes.
 12 Q. So you wanted to make it clear that
 13 it was mandatory; correct?
 14 A. Yes.
 15 Q. Don went to that meeting, did not?
 16 A. I imagine so. I don't remember.
 17 Q. Okay. Was that the first time you
 18 saw Don after his injury?
 19 A. I don't remember.
 20 Q. Did Don show up -- well, when is --
 21 do you remember the first time you saw Don
 22 after his injury?
 23 A. No, I don't.
 24 Q. When you saw Don for the first time
 25 after his injury he was wearing a pink cast;

1 MAYNARD
 2 correct?
 3 A. If you say so.
 4 Q. Well, I'm asking you.
 5 A. Well, I don't remember.
 6 Q. Did -- is it not true that Don
 7 showed up to this staff meeting with a pink
 8 cast and you looked at the cast and derisively
 9 said, "That's gay"?
 10 A. I don't remember that.
 11 Q. So are you denying that it happened
 12 or you just don't remember whether it happened
 13 or not?
 14 A. I don't remember that.
 15 Q. So you don't -- okay. Do you
 16 remember Don appearing at the jump zone, the
 17 drop zone, I should say, with his cast --
 18 A. Yes, sir.
 19 Q. -- after that meeting?
 20 A. Yes, I do.
 21 Q. You say anything to him about that?
 22 A. Yes, yes, I did.
 23 Q. What did you say?
 24 A. That I didn't appreciate anybody
 25 being at the drop zone in a cast and on

1 MAYNARD
 2 crutches. The students are nervous enough and
 3 if they see someone on crutches with a cast on,
 4 it's not going to be very good for the
 5 customers.
 6 Q. Did you comment about the color of
 7 his cast at that -- in that discussion?
 8 A. I don't believe I did. It had
 9 nothing to do with the color of the cast.
 10 Q. Did you tell him to cover up his
 11 foot so his pink toenails would not show?
 12 A. No.
 13 Q. Isn't it true that seeing skydivers
 14 on crutches is very common at a drop zone?
 15 A. No.
 16 Q. Have you been to any drop zone
 17 where -- other than yours where you've seen
 18 someone on crutches?
 19 A. Yes.
 20 Q. Where?
 21 A. I don't remember.
 22 Q. You have employees who don't do
 23 jumps who might break their legs; correct?
 24 MR. ZABELL: Objection.
 25 A. If I have employees that don't do

1 MAYNARD
 2 jumps that might break legs?
 3 Q. Yeah.
 4 A. Yes.
 5 Q. Okay.
 6 A. Like, anybody could break their
 7 leg.
 8 Q. So Lauren Doesn't do any jumps,
 9 does she?
 10 A. She jumps.
 11 Q. Okay. Well, what about the ladies
 12 in the office, Lauren, Megan and Jesse?
 13 A. Lauren is the only current jumper.
 14 Q. All right. So the other two, if
 15 they broke their legs, you wouldn't tell them
 16 not to come in to work, with you?
 17 A. I wouldn't want anybody, if
 18 possible, to be there on crutches in a cast.
 19 Q. So if those people -- if one of
 20 Megan or Jesse broke her leg and was on
 21 crutches, you would ask them to leave work?
 22 A. Yes.
 23 Q. Would you pay them?
 24 MR. ZABELL: Objection.
 25 A. She'd probably be on Workmen's

1 MAYNARD
 2 Comp.
 3 Q. Well, Workmen's Comp.
 4 A. That's not true --
 5 Q. They would only be on Workman's
 6 Comp. --
 7 A. If it happened on the job.
 8 Q. If it happened to the job. Do you
 9 know something with the Workers' Comp. System?
 10 A. Do I know something about it?
 11 Q. Yeah.
 12 MR. ZABELL: Objection to the form.
 13 A. Yes.
 14 Q. All right. Don did not return to
 15 work that summer; correct?
 16 A. Correct.
 17 Q. Eventually he applied for Workers'
 18 Compensation; correct?
 19 A. Yes.
 20 Q. He received his Workers'
 21 Compensation; correct?
 22 A. Correct.
 23 Q. Would you agree that Workers'
 24 Compensation is the right of a worker who has
 25 been injured on the job?

1 MAYNARD
 2 A. Yes.
 3 Q. What is Workers' Compensation?
 4 A. What is Workmans' compensation?
 5 Q. Yeah, what is it is?
 6 A. It's a benefit if someone gets
 7 injured on a job that they get paid while
 8 they're out of work.
 9 Q. You also know that workers are
 10 protected against discrimination for filing
 11 Workers' Compensation claims; correct?
 12 A. Correct.
 13 Q. And were you aware that if someone
 14 who is fired is discriminated against for
 15 filing a Workers' Compensation claim, they can
 16 get reinstated back pay and attorneys' fees and
 17 all sorts of things?
 18 A. I guess so.
 19 Q. All right. So you didn't
 20 discriminate against Don in any way because he
 21 filed a Workers' Compensation claim, did you?
 22 A. No.
 23 Q. People get injured on the drop zone
 24 pretty regularly, would that be fair to say?
 25 MR. ZABELL: Objection to the form.

1 MAYNARD
 2 A. No.
 3 Q. Well, it happens at your drop zone
 4 at least once a year; correct?
 5 A. Yes.
 6 Q. It's part of the hazard of
 7 skydiving; correct?
 8 A. Correct.
 9 Q. It is an inherently dangerous
 10 activity; correct?
 11 A. Correct.
 12 Q. And it's not grounds for discipline
 13 if you get injured; correct?
 14 A. Correct.
 15 Q. Now, you rehired Don for the 2007
 16 season, right? I'm sorry, 2010 season;
 17 correct?
 18 A. Correct.
 19 Q. Did you have any discussions with
 20 him in between the end of the 2009 season and
 21 the beginning of the 2010 season?
 22 MR. ZABELL: Objection, you may
 23 answer.
 24 A. Yes.
 25 Q. What was that?

1 MAYNARD
 2 A. One conversation I remember having
 3 with him is that he was working other places,
 4 he had his own business. He was making money
 5 while he collected Workman's Comp. and
 6 disability when he shouldn't have been.
 7 Q. Do you know how much he was making?
 8 A. Nope.
 9 Q. How did you find this out?
 10 A. He told me.
 11 Q. Is it your belief that a person
 12 who's getting Workers' Compensation is not
 13 allowed to do any clerical job or something
 14 that he's able to do to supplement the Workers'
 15 Compensation funds?
 16 A. My belief is that if you're out on
 17 Workmen's Comp. you're not allowed to work
 18 anywhere else and collect benefits. I may be
 19 wrong, but that's my belief.
 20 MR. ZABELL: You're not.
 21 Q. So, when you called Don, Don told
 22 you he was working?
 23 A. Yes, he did, and he owns a
 24 business.
 25 Q. What did you say about -- how did

1 MAYNARD
 2 you verify this?
 3 A. Don verified it to me.
 4 Q. What did he say exactly? Well,
 5 let's back up.
 6 Who initiated this phone call in
 7 which you learned that Don was doing work?
 8 A. I imagine I did.
 9 Q. Okay. And why did you make the
 10 call?
 11 A. I felt that if you're -- you got
 12 injured in my place, you're collecting
 13 Workmen's Comp. from the company that I am
 14 paying into and you are now fraudulently
 15 working somewhere else and making money, that
 16 it's not right.
 17 Q. All right. My question is,
 18 however, who initiated the phone call in which
 19 Don told you that he was working and making
 20 money?
 21 A. I don't remember who called who on
 22 that one.
 23 Q. So you said that Don told you that
 24 he was making money at his own business?
 25 A. Correct.

1 MAYNARD
 2 Q. And you don't know who initiated
 3 that conversation?
 4 A. I imagine I initiated that part of
 5 the conversation.
 6 Q. Okay. Well, I'm talking about the
 7 phone call. This was over the phone; correct?
 8 A. Correct.
 9 Q. You don't know --
 10 MR. ANTOLLINO: Counsel, could you
 11 not send e-mails or turn off the sound of
 12 your computer. It's distracting.
 13 Q. What was the purpose of the call?
 14 Was the purpose of the call the Workers'
 15 Compensation issue or something else?
 16 A. I believe the purpose of the call
 17 was talking about him coming back to work.
 18 Q. And in this conversation he told
 19 you that he was working?
 20 A. It came up in conversation.
 21 MR. ANTOLLINO: Counsel, I'm going
 22 to ask you again to turn off the sound.
 23 Q. And what did you say to Don about
 24 that?
 25 A. I told him I think it's wrong that

1 MAYNARD
 2 you're collecting Workmen's Comp. from my
 3 company or from my insurance company while
 4 you're making money and he asked me not to do
 5 anything about it because he said it was just a
 6 little bit to make sure his rent was paid and
 7 this and that, and I still expressed to him
 8 that I thought it was wrong.
 9 Q. Did you make any notation about
 10 this allegedly illegal activity?
 11 A. Notation to who? No.
 12 Q. Did you make any writings?
 13 A. No.
 14 Q. Did you mention it to anyone?
 15 A. No, I don't think I did.
 16 Q. Did you file a complaint with the
 17 Workers' Compensation Board?
 18 A. I'm not sure if I complained there
 19 or not.
 20 Q. Did you initiate a complaint?
 21 A. I don't remember.
 22 Q. Did you accuse Don of fraud?
 23 A. I probably said that.
 24 Q. Were you aware that the final
 25 administrative judge law decision was in Don's

1 MAYNARD
 2 favor against the assertion about him working
 3 while collecting benefits?
 4 MR. ZABELL: Objection to the form
 5 of the question.
 6 A. No.
 7 MR. ZABELL: You may answer.
 8 Q. Did you read the final decision of
 9 the Workers' Compensation judge?
 10 A. I don't think so.
 11 Q. All right. You would have to
 12 respect the final word from the Workers'
 13 Compensation judge as to whether or not Don was
 14 committing fraud; correct?
 15 MR. ZABELL: Objection to the form
 16 of the question to the misrepresentations
 17 made by counsel and to the attitude in
 18 which he's asking the questions.
 19 To the extent that you can answer
 20 the questions, you may.
 21 A. I'm not sure what the question was.
 22 MR. ANTOLLINO: Could you read it
 23 back?
 24 (Record read.)
 25 A. Yes.

1 MAYNARD
 2 Q. And, in fact, the final decision of
 3 the Workers' Compensation board was in January
 4 2011?
 5 MR. ZABELL: Objection.
 6 Q. Correct? I'm sorry, January 2010;
 7 correct?
 8 MR. ZABELL: Same objection.
 9 A. I don't remember.
 10 MR. ANTOLLINO: Counsel, I'm asking
 11 you now for the fourth time to turn off
 12 the sound. It is distracting. It's bad
 13 enough that you're clicking away, but the
 14 sound of sending and the dings is
 15 distracting.
 16 Do we need to call the court on
 17 this?
 18 MR. ZABELL: Counsel, remain silent
 19 on the issue.
 20 MR. ANTOLLINO: Are you going to
 21 stop that or do we need to call the court
 22 on this?
 23 MR. ZABELL: You may do whatever it
 24 is you feel the need to do. If you are
 25 distracted by your own inability to

1 MAYNARD
 2 perform this deposition, then you and
 3 your client will have to suffer with your
 4 distractions.
 5 MR. ANTOLLINO: If it happens one
 6 more time, I'm going to call the judge.
 7 Okay. All right, let's call the judge.
 8 Unless you're going to agree right now to
 9 turn off the sound.
 10 MR. ZABELL: I thought I did,
 11 actually.
 12 MR. ANTOLLINO: All right. Would
 13 you try again? Why don't we take a
 14 five-minute break. You decide -- you
 15 figure out how to turn off the sound.
 16 MR. ZABELL: If you would like to
 17 take a five-minute break, then we can
 18 take a five-minute break.
 19 MR. ANTOLLINO: I would like you to
 20 turn off the sound of your computer. It
 21 is distracting and I have a right to have
 22 you turn it off. There's a way for you
 23 to do what you're doing without me having
 24 to hear the dings and whistles of your
 25 computer.

1 MAYNARD

2 Do you want to turn it off or
3 should we call the court to get a ruling
4 on this?

5 MR. ZABELL: Counsel, I thought I
6 shut it off. You can do whatever it is
7 you like and if you want to have a
8 tantrum and misrepresent facts, you are
9 free to do so.

10 In fact, if you want to take that
11 five minutes that you just suggested for
12 the sole purpose of having a tantrum and
13 showboating for your client, you may do
14 so, but do not expect my consent when you
15 do so.

16 MR. ANTOLLINO: I'm asking you to
17 turn off the sound on your computer. Are
18 you willing to do so or not?

19 MR. ZABELL: Counsel, as I've said
20 to you three times now, I believe I have.

21 MR. ANTOLLINO: All right. I have
22 heard several e-mails since -- or several
23 dings and whistles since you said you
24 thought you had. Would you do me the
25 courtesy of trying again because

1 MAYNARD

2 obviously, you have not.

3 MR. ZABELL: You have heard no
4 whistles. You may have heard a ding and,
5 again, I believe I have turned it off. I
6 will endeavor again to turn off any sound
7 from the computer, but if you want to
8 showboat, grandstand and be petulant, you
9 may do so.

10 I strongly suggest you do it off
11 the record because all I'm doing now is
12 responding to your comments.

13 MR. ANTOLLINO: I don't want to
14 continue until you --

15 MR. ZABELL: So would you like to
16 go off the record for a moment?

17 MR. ANTOLLINO: Okay, let's go off
18 the record.

19 MR. ZABELL: There you go. Was
20 that so hard? Was that really so hard?

21 THE VIDEOGRAPHER: We're off the
22 record at 1:56 p.m.

23 (Recess taken.)

24 THE VIDEOGRAPHER: This is tape
25 four of the deposition of Raymond

1 MAYNARD

2 Maynard. We are now on the record at
3 2:02 p.m.

4 MR. ANTOLLINO: I'm sorry, I don't
5 have copies.

6 Q. But I'm going to show you what I've
7 marked as R-25.

8 (Exhibit R-25, page from the Sigma
9 tandem system owner's manual, marked for
10 Identification.)

11 MR. ANTOLLINO: Would you like to
12 take a look at it first, Counsel.

13 MR. ZABELL: I would. Do you want
14 to see if we can get copies made here?

15 MR. ANTOLLINO: I'm sure we can,
16 but we're just back on the record and
17 this is pretty simple so let's just
18 continue, if you don't mind.

19 MR. ZABELL: I do.

20 MR. ANTOLLINO: I'll get you copies
21 after we're off the record.

22 MR. ZABELL: When?

23 MR. ANTOLLINO: Because, I'd just
24 like to get --

25 MR. ZABELL: Not why. When?

1 MAYNARD

2 MR. ANTOLLINO: After. Remind me
3 before you go.

4 MR. ZABELL: Why can't you -- I can
5 have this one? So your client said I can
6 have this one. Thank you.

7 MR. ANTOLLINO: I want a copy
8 before we go.

9 MR. ZABELL: Okay. Give me an
10 opportunity to read it. I have had an
11 opportunity to read it.

12 MR. ANTOLLINO: Thank you.

13 Q. The exhibit is now being handed to
14 the witness and I'm asking you, do you
15 recognize this?

16 A. Yes.

17 Q. It appears to be the page from the
18 Sigma tandem system owner's manual. Could you
19 read how many points of adjustment is on the
20 Sigma tandem rig?

21 A. Points of adjustment?

22 Q. Yeah.

23 A. You've got the shoulder-top
24 adjustment, the chest strap, the belt strap,
25 the main lift webs, diagonals, leg straps.

MAYNARD

1
2 Q. Does it say how many there are in
3 total in this document? Maybe I can just show
4 you, point to you. If you look at the
5 paragraph that says, "The student harness was
6 designed," does it say how many points of
7 adjustment?
8 A. Twelve.
9 Q. Okay. So does this change your
10 testimony about how many points of adjustment
11 are on the Sigma tandem?
12 A. When you asked me that, I thought
13 you asked me points of attachment.
14 Q. Okay. I'm glad you made that
15 clarification. So, there are twelve points of
16 attachment --
17 A. No, there's four points of
18 attachment.
19 Q. Four points of attachment.
20 A. Right.
21 Q. Twelve points of adjustment.
22 A. Yes, correct.
23 Q. What is the difference between an
24 attachment and an adjustment?
25 A. An attachment is where the hardware

MAYNARD

1
2 attaches to the rings on the tandem master and
3 on the -- on the side hooks and that's all
4 hardware, 5,000 pound test each.
5 Adjustments, obviously, are all the
6 different belts and harness points that can be
7 adjusted to the person's size.
8 Q. Okay. Would you agree with the
9 statement that there is no single right way to
10 fit every size or shape of the human body when
11 putting a passenger in that rig?
12 A. That there's no single way to do
13 it?
14 Q. Yeah, there's no single right way
15 to fit every size or shape of the human body
16 with that particular rig?
17 A. That's probably a fair statement.
18 Q. All right. The points of
19 adjustment have to totally surround and contain
20 the student's body comfortably; correct?
21 A. Correct.
22 Q. And safely?
23 A. Correct.
24 Q. So how did this discussion you had
25 with Don on the telephone end?

MAYNARD

1
2 A. He was coming back to work for the
3 2010 season.
4 Q. Okay. And he worked between when
5 and when?
6 A. I don't remember the exact dates;
7 the beginning of the season until he got
8 hurt -- I mean, until he got fired.
9 Q. So before June 18, 2010, were there
10 any complaints about Don or his work?
11 A. What's June 18th?
12 Q. What?
13 A. What is June 18th?
14 Q. Well, did there come a time that
15 David Kengle -- when David Tenge (phonetic)
16 called you to make a complaint?
17 MR. ZABELL: Tenge or Kengle?
18 Q. Tenge --
19 A. Yes.
20 Q. -- called you to make a complaint
21 about Don? Yes?
22 A. Yes.
23 Q. Okay. And that was when, do you
24 remember?
25 A. I don't remember the exact time.

MAYNARD

1
2 Q. All right. Was it on or about June
3 21st or something like that, 2010?
4 A. I know it was on a Monday.
5 Q. Okay. Did it concern a jump that
6 happened on or about June 18, 2010?
7 A. Yes.
8 Q. All right. It was -- when you got
9 the call, it concerned a jump a few days
10 earlier; correct?
11 A. Correct.
12 Q. Okay. Who received the first call
13 from David Kengle?
14 A. The office.
15 Q. When you say "the office," what do
16 you mean?
17 A. He called in to Skydive Long
18 Island. One of the girls in the office
19 answered the phone.
20 Q. Who answered the phone?
21 A. It would be a guess. It could have
22 been Lauren, it could have been Megan. I was
23 not available right then at that point.
24 Q. What did Lauren or Megan tell you
25 that the call was about?

1 MAYNARD
2 A. That there was a customer complaint
3 and they gave me a name and a phone number.
4 Q. Did they say anything else, either
5 Lauren or Megan, about this customer complaint?
6 A. Not that I remember.
7 Q. Okay. And, so, how soon after you
8 got this customer complaint did you call the
9 number on the message pad?
10 A. When I was given the message pad, I
11 went into the office and called him.
12 Q. All right. And did he answer?
13 A. Yes, he did.
14 Q. Okay. And what was said in that
15 conversation?
16 A. He told me who he was, when him and
17 his girlfriend or fiancée was out on the Friday
18 before and his disappointment in the company
19 with the tandem master, who was representing
20 Skydive Long Island, did.
21 He said that his - it was either
22 his girlfriend or his fiancée, I'm not sure
23 which, it was her birthday. It was a present
24 to her for her birthday and that her birthday
25 was completely ruined and he would never

1 MAYNARD
2 recommend our company to anybody in the future.
3 And then he went on to tell me that -- what
4 transpired with Don and her.
5 Q. Well, what did he say?
6 A. He said that he had his hands on
7 her hips and made her feel very uncomfortable.
8 He put his head on her shoulder and was
9 whispering to her. And he kept reinforcing
10 that, "Don't worry that I'm so close because
11 I'm gay," and that made her feel very
12 uncomfortable.
13 And there was more -- according to
14 the gentleman, there was more of that
15 conversation when they were under canopy that
16 don't worry we're so close. You have nothing
17 to worry about, I'm gay.
18 Q. Anything else?
19 A. No.
20 Q. Okay. And what did you do in
21 response to that call?
22 A. At first I offered to give them a
23 free jump. They said they wanted nothing to do
24 with doing another skydive. I then offered to
25 give them their money back. He told me -- he

1 MAYNARD
2 said, "This call is not about me getting my
3 money back. I don't care about getting my
4 money back. I don't want my money back. I
5 just want to let you know how disappointed we
6 are in your company and what happened with my
7 girlfriend and how upset she was that she had
8 to be listening to these things from Don."
9 Q. And these things were --
10 A. Talking about -- about him being
11 gay and that subject matter.
12 Q. Well, was there -- the subject
13 matter of being gay?
14 A. Correct.
15 Q. And I believe that as -- in
16 response to this complaint, you met with Don
17 shortly thereafter; correct?
18 A. Yes, I did.
19 Q. Okay. And you asked him about the
20 jump; correct?
21 A. Yes.
22 Q. And it was three days after the
23 jump; correct?
24 A. Yes.
25 Q. All right. And he didn't remember

1 MAYNARD
2 the jump; correct?
3 A. I don't remember if he said he
4 didn't remember the jump.
5 Q. He also asked to see the video;
6 correct?
7 A. Yes, he might have.
8 Q. And you didn't allow him to see the
9 video, did you?
10 A. No, I did not.
11 Q. Wouldn't it have been easier for
12 Don to respond to the complaint if you had
13 shown him the video and refreshed his memory
14 about what happened?
15 MR. ZABELL: Objection.
16 You may answer.
17 A. No.
18 Q. Why not?
19 A. Because most of the skydive was
20 under canopy and the talk under canopy was no
21 one else is around to hear. It wouldn't be
22 there.
23 Q. Well, Don didn't remember who the
24 customer was; correct?
25 A. Well, but that's what he said.

1 MAYNARD
 2 Q. Well, would it be a fair assumption
 3 to make that if someone complained to you 30
 4 jumps ago that he might not remember who was
 5 complaining?
 6 A. He might not.
 7 Q. Okay. So wouldn't showing Don the
 8 video have allowed him to remember who was
 9 making this complaint?
 10 A. It might have.
 11 Q. Okay. Now, you didn't even speak
 12 to Rosana Orelana, did you?
 13 A. No, I did not.
 14 Q. So, for all you know, David Kengle
 15 could have been lying about the whole thing?
 16 A. There was no reason to lie. This
 17 man didn't want anything but to express his
 18 disappointment of what happened to his fiancée
 19 or girlfriend from things that were said that
 20 made her very uncomfortable and it made my
 21 customer very unhappy.
 22 Q. You gave him his money back though?
 23 A. Yes, I did.
 24 Q. You sent him a check and he cashed
 25 it?

1 MAYNARD
 2 A. Yes, he did.
 3 Q. He didn't have to do that, did he?
 4 A. No, he didn't have to.
 5 Q. Did you know that he was an
 6 unemployed waiter at the time?
 7 MR. ZABELL: Objection.
 8 A. No.
 9 Q. So you're telling me that in this
 10 conversation he didn't want his money back and
 11 he insisted he didn't want his money back, but
 12 yet he took his money back?
 13 A. When I hung up the phone with him,
 14 he said he did not want his money and I decided
 15 to send it to him anyway.
 16 Q. Did you include a cover letter?
 17 A. I don't remember.
 18 + MR. ANTOLLINO: I'm going to call
 19 for production of the cover letter. I'll
 20 follow it up.
 21 Q. And did you say before the end of
 22 this conversation that you would be sending him
 23 a refund?
 24 A. Yes, I did.
 25 Q. And what did he say?

1 MAYNARD
 2 A. He said he didn't want his money.
 3 He said, "This is not about the money."
 4 Q. But, yet, he cashed the check
 5 anyway?
 6 A. Well, that's -- that has -- you
 7 know, that has nothing to do with me.
 8 Q. All right. Now, you met with Don
 9 shortly after speaking to Mr. Kengle; correct?
 10 A. Correct.
 11 Q. And how soon after?
 12 A. I don't remember exactly, probably
 13 fairly soon.
 14 Q. Within an hour?
 15 A. Probably, if Don was there.
 16 Q. Okay. And what did you say to Don
 17 at that time?
 18 A. I told him about the customer's
 19 complaint. I was very upset. I reminded him
 20 that when he was hired back that if there was
 21 any incidents whatsoever he would have to leave
 22 and I suspended him for a week.
 23 Q. What do you mean by this; that you
 24 reminded him when you hired him back that if
 25 there were any incidents whatsoever he would

1 MAYNARD
 2 have to leave, what does that mean?
 3 MR. ZABELL: Objection.
 4 A. If there was any complaints from
 5 the customers of him talking about what he does
 6 after work.
 7 Q. You told Don this when?
 8 A. Before he was hired back.
 9 Q. When?
 10 A. In 2009.
 11 Q. But yet -- and so you suspended
 12 him; correct?
 13 A. Correct.
 14 Q. And you also docked his pay;
 15 correct?
 16 A. Yes, I did.
 17 Q. Did you feel you had the right to
 18 do that?
 19 A. It was an emotional moment. I
 20 returned his pay to him in full.
 21 Q. Were the customers complaining
 22 about what Don -- what Don did after work? Don
 23 was gay during work, wasn't he?
 24 A. Excuse me?
 25 MR. ZABELL: Objection.

1 MAYNARD
2 Q. Withdrawn. Don is gay during work;
3 correct?
4 A. It has nothing to do with him being
5 gay.
6 Q. But Don is gay during work;
7 correct?
8 A. I believe so. You can ask him.
9 Q. Do you believe that Don is gay?
10 A. He told me he was gay.
11 Q. Okay. Do you believe that he's
12 gay?
13 A. It doesn't matter what I believe.
14 Q. You're here and you have to answer
15 that question. Do you believe that Don is gay?
16 A. Yes.
17 Q. So Don is gay at work and after
18 work; correct?
19 A. I guess.
20 Q. All right. So you suspended Don
21 for a week and you took away his pay and it was
22 an emotional reaction that you took away his
23 pay?
24 A. Correct.
25 Q. So you didn't felt -- after

1 MAYNARD
2 reflection that you didn't have the right to do
3 that?
4 A. Correct.
5 Q. If you steel something from someone
6 and give it back later, does it take away the
7 fact that you've stolen something from them?
8 MR. ZABELL: Objection.
9 A. I didn't steal anything.
10 Q. Well, is that your Blackberry
11 there?
12 A. Yeah.
13 Q. Okay. If I take your Blackberry
14 and take it home and return it to you in a
15 week, is that legal?
16 MR. ZABELL: I could tell you,
17 Counselor, that I wouldn't let that
18 happen.
19 Q. If I do that, is it legal?
20 A. No.
21 Q. Okay. Had you ever docked
22 someone's pay before?
23 A. No, I do not think I did.
24 Q. The issue as to suspension, how
25 many times have you suspended other skydivers?

1 MAYNARD
2 A. There's been one other occasion.
3 Q. The one you testified to?
4 A. Excuse me?
5 Q. What was the occasion when you
6 suspended someone?
7 A. This past summer I suspended
8 somebody.
9 Q. Who did you suspend?
10 A. Duncan Shaw.
11 Q. And that was the fighting incident?
12 A. No.
13 Q. What did you suspend him for?
14 A. He was sent home halfway through
15 the day for flying into a wind blade, which
16 everyone was told not to do, in front of TV
17 cameras that were rolling for something that
18 was going on at the airport.
19 Q. So, you basically did not allow him
20 to work for half a day?
21 A. Correct.
22 Q. And he -- you gave him a specific
23 direction not to do something and he defied
24 your instruction; correct?
25 A. Correct.

1 MAYNARD
2 Q. And all he got was half a day?
3 A. He just hit a wind blade.
4 Q. He just -- did he do this
5 deliberately or was it a mistake?
6 A. I believe he did it deliberately.
7 Q. Why do you think he did it
8 deliberately?
9 A. Because I saw it.
10 Q. And why did you tell him not to do
11 it?
12 A. Because they're expensive and they
13 break and it's not his property.
14 Q. And so how much did this cost?
15 MR. ZABELL: Objection to the form.
16 A. It cost between 350 and \$500.
17 Q. How much does the -- does Altitude
18 Express make in a year?
19 A. How much does Altitude Express
20 make?
21 Q. Yeah, gross and net.
22 MR. ZABELL: Objection to the
23 compound nature of the question.
24 Q. All right. We'll start with gross.
25 MR. ZABELL: Objection. It's not a

1 MAYNARD
2 question. Are you withdrawing your
3 previous questions and attempting to ask
4 a new question?
5 MR. ANTOLLINO: Yes, I am. I'll do
6 it again. We all know what we're talking
7 about here, but if you want me to be --
8 MR. ZABELL: Appropriate.
9 MR. ANTOLLINO: Perfectly correct,
10 I will.
11 MR. ZABELL: Perfect, no, just
12 appropriate.
13 Q. What is the gross that you take in
14 at Altitude Express on an annual basis?
15 A. Last year?
16 Q. Yes.
17 A. Last year was 2.4 or 2.5 million.
18 Q. And how much of that was profit?
19 A. I don't recall exactly.
20 Q. Approximately?
21 A. The profit was less than 200,000.
22 Q. Are you the sole owner of Altitude
23 Express?
24 A. Yes.
25 Q. So those were all of your profits,

1 MAYNARD
2 yes?
3 A. Correct.
4 Q. And is that average for a year?
5 A. No.
6 THE VIDEOGRAPHER: We are now off
7 the record at 2:21 p.m.
8 (Recess taken.)
9 THE VIDEOGRAPHER: We are now on
10 the record at 2:27 p.m.
11 Q. All right, your profit was less
12 than \$200,000 last year and you said that that
13 was not typical?
14 MR. ZABELL: Objection.
15 Q. Is that correct?
16 MR. ZABELL: Objection.
17 You can answer.
18 A. Last year was a banner year
19 weather-wise. Skydiving, what the business
20 does is really based on how much we can jump
21 and last year was the best year we've ever had.
22 Q. And what is it usually, what is
23 your profit usually?
24 MR. ZABELL: Objection to the form.
25 A. I don't know exactly. It was less

1 MAYNARD
2 than what that was. Like I said, last year was
3 a banner year.
4 Q. So is it usually in the range of
5 100,000, 150,000?
6 A. 140, 150.
7 Q. And what is the net worth of the
8 company?
9 MR. ZABELL: Objection.
10 A. It depends on who you talk to. I
11 really don't know.
12 Q. If you gave it a guesstimate.
13 A. Probably a million and change.
14 Q. And what is your personal net
15 worth?
16 MR. ZABELL: Objection.
17 A. I guess that would be the same.
18 Q. All right. Now, after you met with
19 Don, was there anything else that you discussed
20 with him in the first suspension meeting that
21 we haven't covered already?
22 MR. ZABELL: Objection to the form.
23 You may answer.
24 A. I don't remember.
25 Q. How long did it take?

1 MAYNARD
2 MR. ZABELL: Objection to the form.
3 How long did what take?
4 MR. ANTOLLINO: The suspension
5 meeting.
6 A. Twenty minutes, a half an hour.
7 I'm not sure.
8 Q. And what did you discuss in this 20
9 minutes or 30 minutes?
10 A. We discussed the complaint from the
11 gentleman about his girlfriend and that he made
12 his girlfriend feel very uncomfortable with the
13 way he was touching her on her legs, the way he
14 was putting his head on her shoulder and just
15 the girl was very, very uncomfortable for the
16 entire jump and she even thought that maybe he
17 was hitting on her and he was covering up this
18 stuff by telling her that he was gay.
19 Q. Did you think that Don was hitting
20 on her?
21 A. It doesn't matter what I think.
22 Q. I'm asking you if you think that
23 Don was hitting on her?
24 A. I couldn't say if I thought he was
25 or not.

1 MAYNARD
2 Q. You knew Don was gay at the time;
3 correct?
4 A. He told me he was gay.
5 Q. Do you think it logical that he was
6 hitting on her?
7 A. I don't know anything about that
8 of -- of when someone is whatever, because I
9 don't know what someone does. I don't know
10 what anybody else does, whether they're
11 heterosexual, if they're gay or they're
12 bisexual other whatever. I don't know what
13 they're going to do a day-to-day basis, whether
14 they're going to change their mind about
15 something. So I can't say what I -- my thought
16 means nothing. I don't know what anybody else
17 is going to do.
18 Q. Well, didn't you have an obligation
19 to inquire as to whether or not he was hitting
20 on her?
21 MR. ZABELL: Objection, obligation
22 to what?
23 Q. You can answer.
24 MR. ZABELL: Obligation to what?
25 A. I was told.

1 MAYNARD
2 Q. Did you have an obligation to
3 inquire as to whether or not Don was hitting on
4 her?
5 MR. ZABELL: Objection, obligation
6 to what?
7 A. I have an obligation to my customer
8 to make sure that they are treated correctly
9 and they are not put in a position that they
10 were put in.
11 Q. But you didn't speak to
12 Ms. Orelana?
13 A. No, I did not.
14 Q. And you had no reason to believe
15 that she thought she was being hit on; correct?
16 A. Her boyfriend was a little nervous
17 and he thought that himself.
18 MR. ANTOLLINO: Could you read back
19 the prior question?
20 (Record read.)
21 THE WITNESS: What was that?
22 MR. ZABELL: You've answered the
23 question. If he wants to ask you a new
24 question, he can do that.
25 MR. ANTOLLINO: I will.

1 MAYNARD
2 Q. Other than Mr. Kengle's report, you
3 had no reason to believe that Ms. Orelana was
4 being hit on; correct?
5 A. Correct.
6 MR. ZABELL: Objection.
7 Q. You didn't speak to anyone who was
8 in the plane --
9 MR. ZABELL: Objection.
10 Q. -- correct?
11 MR. ZABELL: Objection. He already
12 told you he spoke to Don.
13 Q. Other than Don.
14 MR. ANTOLLINO: Thank you.
15 Q. Is that correct?
16 A. Correct.
17 Q. You didn't look at the video, did
18 you?
19 A. Yes, I did.
20 Q. You looked at the video
21 immediately?
22 A. I looked at the video that day.
23 Q. That day. Why didn't you show it
24 to Don?
25 A. I don't remember.

1 MAYNARD
2 Q. And what did you see on the video
3 that you thought was -- well, we'll look at the
4 video later, but as you sit here today, what do
5 you remember about seeing on that video that
6 was improper?
7 MR. ZABELL: Objection to the form
8 of the question.
9 You may answer.
10 A. I remember him sitting behind her
11 and looking at her and looking at the camera
12 and making kind of a weird look and there was
13 something with his hand like this (indicating)
14 and as he's doing this, he's looking back at
15 her, which I don't know what that meant at all.
16 MR. ZABELL: Let the record reflect
17 that the deponent was taking his right
18 hand and doing circles around the right
19 side of his face with his pointer finger.
20 Q. Isn't there usually a goofy
21 atmosphere that goes on in the rig --
22 MR. ZABELL: Objection.
23 Q. -- before a jump?
24 MR. ZABELL: Objection to the form
25 of the question.

1 MAYNARD
2 Q. You can answer.
3 MR. ZABELL: You may answer.
4 A. There are times -- yes, there are
5 goofy times.
6 Q. All right. Let's take a look at
7 what we have marked as Exhibit 3 to the
8 Winstock deposition, which is a 29-page
9 document of screen shots.
10 And I want you to look through
11 these and tell me if you think that there's
12 anything going on in any of these pages which
13 are numbered that is inappropriate, unsafe, or
14 improper.
15 A. (Reviewing.)
16 I'm not sure if when someone giving
17 someone else the finger on the plane is so
18 traumatic, but other than that, I don't see it.
19 Q. All right. So someone giving
20 someone the finger on the plane is not
21 something that is worthy of termination;
22 correct? You wouldn't want to terminate an
23 instructor who gave someone the finger on the
24 plane; correct?
25 A. No.

1 MAYNARD
2 Q. But if you saw it, you'd say don't
3 do that; right?
4 A. Yes.
5 Q. And you wouldn't suspend him for
6 that, would you?
7 A. No.
8 Q. All right. Giving someone the
9 finger is pretty extremely disrespectful, don't
10 you think?
11 MR. ZABELL: Objection.
12 A. I'm just looking at a photo and
13 these two guys are probably friends. No one
14 came in and complained and this guy wasn't
15 feeling bad and said that he was -- that he
16 was, you know, upset.
17 Q. Okay. Do you know this person?
18 MR. ZABELL: Ray, calm down.
19 THE WITNESS: Okay.
20 Q. Do you know that person?
21 A. I don't know who that person is.
22 Q. Do you know anyone in this plane?
23 A. Actually, I do know. Yeah, that's
24 Joe Fresh. That's one of our regular jumpers
25 and these two guys hang out all the time and

1 MAYNARD
2 that's Super John in the background.
3 Q. All right. So among -- other than
4 this, which you thought was mild, you didn't
5 think that there was anything else in here that
6 was inappropriate, improper or unsafe; correct?
7 A. Correct.
8 Q. And that would include, for
9 example, this goofy expression at page four
10 that Rich Winstock is giving the camera;
11 correct?
12 A. Yeah.
13 Q. And that would include this goofy
14 expression that Rich Winstock is giving the
15 camera in Number 6; correct?
16 MR. ZABELL: Object to the form of
17 the question.
18 A. That's correct.
19 Q. And that would include someone
20 putting someone's hand on one's posterior in
21 picture seven; correct?
22 A. Correct.
23 Q. And that would include someone
24 sticking their tongue out, one of your
25 instructors sticking his tongue out in number

1 MAYNARD
2 nine; correct?
3 A. Correct.
4 Q. And that would include someone
5 exiting the airplane where his mouth is very
6 close to her ear; correct?
7 A. Correct.
8 Q. And that would include -- that's
9 number eleven and that would include Number 12
10 where someone is wearing a mask?
11 A. Correct.
12 Q. Could that pose any safety hazard
13 at all?
14 A. No.
15 Q. And that would include hang fives
16 signals. You know what a hang five signal is,
17 right? Well, have you ever seen this signal
18 before that that girl on page 13 is showing?
19 A. Isn't that a -- a love symbol or
20 something?
21 Q. It's called a hang five signal, I
22 think, or maybe it's something else. You tell
23 me?
24 A. I don't know.
25 Q. Have you seen it before?

1 MAYNARD
 2 A. I've seen it, but I don't know what
 3 it means.
 4 Q. All right. It's pretty common;
 5 right?
 6 A. I guess.
 7 Q. And that would include someone
 8 trying to give someone water in number 14;
 9 correct?
 10 A. Correct.
 11 Q. And that would include in page 16
 12 someone sticking his tongue out to the camera;
 13 correct?
 14 A. Correct.
 15 Q. And that would include on page 20
 16 Rich Winstock crossing his fingers to the
 17 camera?
 18 A. Correct.
 19 Q. He's crossing his fingers because
 20 he's saying let's wish us all good luck that we
 21 don't get injured or die; correct?
 22 MR. ZABELL: Objection.
 23 A. You'll have to ask Rich Winstock
 24 why he crossed his fingers.
 25 Q. Well, have you ever seen anyone

1 MAYNARD
 2 cross their fingers in a plane like that on a
 3 video?
 4 A. I've seen it.
 5 Q. Why do people do that?
 6 A. Wishing them luck, wishing luck.
 7 Q. You want to good jump.
 8 A. Yup.
 9 Q. You don't want there to be any
 10 injuries; correct?
 11 A. I want it to be a good jump.
 12 Q. What is this that's happening in
 13 number 21 with all of these people attached to
 14 each other? What is that? Is that a boogie?
 15 A. No, that's freestyle -- not
 16 freestyle. I've got a brain fart. It's a
 17 hybrid jump.
 18 Q. And there's nothing unsafe about
 19 that, it's allowed?
 20 A. There's nothing unsafe about that.
 21 Q. It's pretty extreme though; right?
 22 A. It's skydiving.
 23 MR. ZABELL: Objection to the form
 24 of the question.
 25 Q. There's nothing improper -- in page

1 MAYNARD
 2 22, do you recognize the person in this
 3 picture?
 4 A. Yeah.
 5 Q. Who is that?
 6 A. That's Kurt.
 7 Q. Kurt who?
 8 A. Kurt Gellinger (phonetic).
 9 Q. He works for you?
 10 A. Not anymore.
 11 Q. Why not?
 12 A. Because he moved.
 13 Q. You didn't fire him, did you?
 14 A. No.
 15 Q. All right. And he was a good
 16 instructor?
 17 A. Yes, he was.
 18 Q. And he's making in this picture a
 19 face as if he's scared; correct?
 20 A. He's got his mouth open.
 21 Q. It looks like he's making a
 22 feigned -- a pretend scared expression. Would
 23 that be a fair characterization?
 24 MR. ZABELL: Objection.
 25 Q. How would you read his expression?

1 MAYNARD
 2 MR. ZABELL: Objection to the
 3 multiple questions. Are you intending on
 4 asking three questions at once, Counsel?
 5 Q. You can answer.
 6 MR. ZABELL: You can pick any of
 7 one of those three questions and provide
 8 an answer to any one of them.
 9 A. My answer is that I don't think he
 10 looks scared at all.
 11 Q. What does that expression mean to
 12 you?
 13 A. He's just having fun. He's got his
 14 mouth open. He might be screaming, but he's
 15 happy.
 16 Q. He's goofy?
 17 MR. ZABELL: Objection.
 18 Q. Would you characterize it as being
 19 goofy?
 20 A. No.
 21 Q. No?
 22 A. He's having fun.
 23 Q. Would you characterize it as being
 24 goofy or not?
 25 MR. ZABELL: He just said -- asked

1 MAYNARD
2 and answered.
3 A. No.
4 Q. Here is page 28. We have Rich
5 Winstock sticking his tongue out at the camera.
6 There's nothing inappropriate about that?
7 A. No.
8 Q. Would you characterize it as goofy?
9 A. No.
10 Q. No.
11 A. He's having fun.
12 Q. And here is Rich Winstock pictured
13 in page 29 with a first time tandem jump -- let
14 me put it this way, the album that it purports
15 to be from says, "First time tandem jumps";
16 correct?
17 A. Uh-huh.
18 Q. Do you recognize the passenger?
19 A. No.
20 Q. And Rich appears to have his hand
21 on her shoulder and their heads to be close to
22 each other; correct?
23 A. Correct.
24 Q. And there's nothing inappropriate
25 about that; correct?

1 MAYNARD
2 A. Correct.
3 Q. Did you happen to watch the video
4 made for Mr. Kengle?
5 A. No, I did not.
6 Q. At any time?
7 A. No.
8 Q. Were you aware that Ms. Orelana was
9 flirting with the camera in that video?
10 MR. ZABELL: Excuse me? Could I
11 have his question read back, please?
12 (Record read.)
13 MR. ZABELL: Objection.
14 A. No.
15 Q. Did Mr. Kengle tell you that there
16 had been a joke made before the passengers
17 exited the airplane?
18 A. I don't recall.
19 Q. Did he not, in fact, tell you that
20 one of the instructors other than Don made a
21 joke to the effect that, hey, I bet you didn't
22 think that your girlfriend was going to get
23 strapped to another guy?
24 MR. ZABELL: Objection, asked and
25 answered.

1 MAYNARD
2 A. I don't know.
3 Q. You don't know if he told you that?
4 A. No.
5 Q. If that joke was made, was it an
6 inappropriate joke?
7 A. I don't believe so.
8 Q. Why not?
9 A. Because I don't.
10 Q. Do you think it is standard
11 practice to make a joke like that?
12 A. That you're going to be strapped to
13 a guy?
14 Q. Yeah, that your girlfriend is going
15 to be strapped to another guy?
16 MR. ZABELL: Objection, asked and
17 answered. No matter how you place the
18 emphasis on the syllables, Counselor, you
19 still have asked the question at least on
20 three separate occasions.
21 Q. You can answer.
22 A. No, I don't think -- I don't think
23 that's a joke. It's a statement. They're all
24 male instructors.
25 Q. Well, what if someone complained

1 MAYNARD
2 about that joke being made, is that legitimate
3 complaint?
4 A. The statement of you didn't think
5 your girlfriend was going to be strapped to a
6 man today?
7 Q. Yeah. What if somebody complained
8 about that?
9 A. Well, they wouldn't be there to
10 skydive to begin with.
11 Q. Why?
12 A. Because, except for this year,
13 every instructor was a male. It's an
14 observation.
15 Q. But it's an observation that calls
16 attention to the fact that someone's girlfriend
17 is in close contact with another man; correct?
18 A. Correct.
19 Q. What if someone complained about
20 that joke?
21 A. No one has.
22 Q. Well, what if someone did, would
23 you instruct your instructors not to engage in
24 that type of banter?
25 A. Yes.

1 MAYNARD
2 Q. All right, now, you indicated that
3 you talked for 20 minutes to Ray in the
4 suspension meeting and what else did you talk
5 to Ray about -- I'm sorry, to Don about during
6 that suspension meeting other than what you
7 testified about to now?
8 MR. ZABELL: Object to the form of
9 the question.
10 You may answer.
11 A. The meeting was about him being
12 suspended. I said 20 minutes. I'm not sure if
13 it was 20 minutes. I don't remember the exact
14 amount of time. We were in there and we were
15 talking and I told him that I had to let him
16 go.
17 Q. No, this is the suspension meeting.
18 A. The suspension, I'm sorry.
19 Q. So it could have been five minutes
20 from what you can recall?
21 A. It might have been. I don't
22 remember.
23 Q. All right. Did there come a time
24 later that you saw Rich Winstock and Don
25 speaking about this suspension?

1 MAYNARD
2 A. Before Don left that day, you mean?
3 Q. Yes.
4 A. I think I did see them talking.
5 Q. And did you not say, oh, you're
6 talking about this and then run out of the door
7 and slam the door?
8 A. I don't remember that.
9 Q. Did you slam the door that day at
10 any time?
11 A. I don't recall.
12 Q. I understand that during the week
13 between the suspension and the termination, you
14 spoke to a lawyer; is that correct?
15 A. That's correct.
16 Q. Who was that lawyer?
17 THE WITNESS: Is that lawyer
18 confidentiality?
19 MR. ZABELL: You can identify him.
20 A. Harvey Arnoff.
21 Q. What?
22 A. Harvey Arnoff.
23 Q. Okay. Well I'm going to show you
24 what I've marked as Exhibit 23.
25 (Exhibit R-23, transcription of

1 MAYNARD
2 tape, marked for Identification.)
3 Q. And I'll just let you know that
4 this is a transcript that I've had written
5 up -- I've attempted to write up, have written
6 up, someone else wrote it up and I made some
7 changes. You don't have to believe anything
8 I'm telling you, but we're going to read the
9 transcript and listen to the tape and I'm going
10 to ask you whether it fairly and accurately
11 represents what is on the tape or if there are
12 some changes you'd like to make, we'll make
13 those changes. But before I go there --
14 MR. ZABELL: Do you have a copy for
15 me, Counselor?
16 MR. ANTOLOINO: Yes, I do.
17 Q. But before I go there you said you
18 met with Harvey Arnoff. How long has Harvey
19 Arnoff been your lawyer?
20 A. Since the early '90s.
21 Q. And what type of law does he
22 practice?
23 A. I think he practices everything.
24 He's not --
25 Q. He's a general practitioner?

1 MAYNARD
2 A. Yes.
3 Q. Did you call him or did you go in
4 and meet with him?
5 A. I drove in and met with him.
6 Q. How long was the meeting?
7 MR. ZABELL: Objection.
8 A. I don't know the exact amount of
9 time.
10 Q. Where does he work?
11 A. Excuse me?
12 Q. Where does Harvey Arnoff work?
13 A. In Riverhead.
14 Q. Do you know the exact address?
15 A. 206 Roanoke Avenue.
16 Q. Okay. Did you have a conversation
17 with Rich Winstock during this week before you
18 terminated Don? Did you have a conversation
19 with Rich Winstock about Don?
20 MR. ZABELL: Objection.
21 A. Yes.
22 Q. All right. And when did that
23 conversation take place?
24 A. I don't remember the day.
25 Q. All right. And how long did the

1 MAYNARD
 2 conversation take?
 3 A. I don't remember that either.
 4 Q. What was said in the conversation?
 5 A. We just talked in general what
 6 happened.
 7 Q. Okay.
 8 A. And what I was told.
 9 Q. Are you aware that Rich Winstock
 10 testified that you didn't tell him anything
 11 about the complaint that was made?
 12 A. No.
 13 Q. He did say that. Do you think he's
 14 mistaken or -- do you recall telling him what
 15 had happened?
 16 MR. ZABELL: Objection to the
 17 form --
 18 A. No, I did not.
 19 MR. ZABELL: -- for the multiple
 20 questions. You have may now, and only
 21 now, answer the question.
 22 A. No, I really don't remember what we
 23 talked about.
 24 Q. All right. And what did Rich
 25 recommend that you do?

1 MAYNARD
 2 A. I don't remember.
 3 Q. Is it not true that Rich
 4 recommended that you write up a reprimand and
 5 put it in Don's file and say that this has
 6 nothing to do with your sexual orientation to
 7 give him clear direction as to how he is to
 8 behave in the future; is that not true?
 9 MR. ZABELL: Objection to the form
 10 of the multiple questions. You may pick
 11 a question and answer it.
 12 A. I don't remember that.
 13 Q. Did he tell you that he thought
 14 that Don was a good instructor and he didn't
 15 want you to fire done Don?
 16 A. No, I don't remember that at all.
 17 Q. Are you aware that he testified to
 18 that?
 19 MR. ZABELL: Objection.
 20 A. No.
 21 Q. If he testified to that, would that
 22 be a lie or would that be just a
 23 misunderstanding?
 24 MR. ZABELL: Objection. There are
 25 other options as well and feel free in

1 MAYNARD
 2 answering that question to utilize them.
 3 A. I don't know.
 4 Q. Did he tell you to fire Don?
 5 A. No.
 6 Q. Did he and Don have a good
 7 relationship?
 8 A. I guess.
 9 Q. Do you respect Rich Winstock's
 10 opinion in general?
 11 A. In general.
 12 Q. Do you think that he is -- well,
 13 what is his role at Skydive Long Island?
 14 MR. ZABELL: Objection to the form.
 15 You may answer.
 16 A. He's the chief instructor.
 17 Q. And you've hired him for many
 18 years; correct?
 19 A. Correct.
 20 Q. Were you aware that on occasion
 21 he's told certain skydivers -- he's offered the
 22 information that he's married and has kids?
 23 A. I guess.
 24 Q. Are you aware of that?
 25 A. It's common knowledge that he's

1 MAYNARD
 2 married and has kids.
 3 Q. Well, if someone comes in to the
 4 drop zone for the first time, has never met
 5 Rich Winstock, it's not common knowledge to
 6 that person that he's married and has kids;
 7 correct?
 8 A. Correct.
 9 Q. Are you aware that Rich Winstock
 10 has offered, without being asked, tandem
 11 passengers that he is married and has kids?
 12 MR. ZABELL: Objection to the form
 13 of the question and the manner in which
 14 it has been asked. You may, if you can,
 15 answer the question now.
 16 A. I don't know that for a fact.
 17 Q. All right. If he did, was there
 18 anything improper about that?
 19 A. I wouldn't think so.
 20 Q. It's personal information; correct?
 21 A. Personal information.
 22 Q. The answer is yes?
 23 A. Yes.
 24 Q. All right. So here is the proposed
 25 transcript and I'm going to ask you to take a

1 MAYNARD
 2 look at this and before we start reading it, I
 3 want to ask you, were you aware at the time
 4 that you fired Don that you were being
 5 recorded?
 6 A. No, I was not aware.
 7 Q. Okay. Do you think there was
 8 anything improper in Don recording that
 9 meeting?
 10 A. I don't know. I don't know.
 11 Q. So you have no opinion one way or
 12 the other?
 13 A. I think I should have been told if
 14 I was going to be recorded like everyone is
 15 supposed to do, I guess.
 16 Q. Why?
 17 A. Because that's what people do.
 18 You're told ahead of time I'm going to record
 19 this conversation for whatever purposes. So if
 20 there was nothing to hide, he should have said
 21 I'm recording it.
 22 Q. Well, if he had told you he was
 23 recording it, would you have spoken as much, do
 24 you think?
 25 MR. ZABELL: Objection.

1 MAYNARD
 2 A. We'll never know.
 3 Q. You've heard the tape by now,
 4 right?
 5 A. Yes, I have.
 6 Q. We're going to get it out and
 7 listen to it and we can stop at any time.
 8 MR. ZABELL: Uh, what?
 9 MR. ANTOLLINO: Don't make fun of
 10 me when I say "uh" or something like
 11 that. You really are extremely rude when
 12 you make fun of me for misspeaking. Your
 13 attempt is to be a bully and I'm not
 14 going to take it anymore. I'm
 15 documenting every single time that you do
 16 it, and at the end of the litigation the
 17 judge is going to have a whole list
 18 including when you said something that
 19 you're -- that I heard at a deposition
 20 about me.
 21 MR. ZABELL: Counselor, your
 22 threats are unavailing. I am simply
 23 trying to get you to clear up this
 24 record, which you are butchering. If you
 25 are incapable of asking a question

1 MAYNARD
 2 appropriately, I have a right to object
 3 to it.
 4 And if you are going to make a
 5 false start for a question, I have a
 6 right to ask you to clear the transcript
 7 of your false starts.
 8 Your failures to do so are not my
 9 issue and do not be ashamed that I am
 10 calling them to your attention.
 11 MR. ANTOLLINO: I'm not ashamed.
 12 MR. ZABELL: Well you're clearly
 13 acting that way.
 14 MR. ANTOLLINO: You're a bully.
 15 Q. All right, we're going to listen to
 16 the tape now.
 17 (Whereupon video is played.)
 18 Q. All right, hold on. Let's start
 19 over.
 20 MR. ZABELL: Start what over,
 21 Counselor.
 22 MR. ANTOLLINO: We're going to
 23 start over because the court reporter
 24 needs to pick up the tape?
 25 MR. ZABELL: I think you should

1 MAYNARD
 2 because we're not obligated to accept
 3 this homemade transcript of the audio.
 4 So I'm going to request that you take
 5 down everything that's said on the video.
 6 MR. ANTOLLINO: Try your best.
 7 TRANSCRIPTION OF AUDIO:
 8 "Mr. Maynard: All right, after a
 9 week of me thinking about the entire
 10 situation, from day one that you came
 11 here years ago and everything, uh, first
 12 off, I'm going to give you the refund
 13 back of the people because I thought
 14 about it and I shouldn't take that money
 15 from you.
 16 Mr. Zarda: All right.
 17 Mr. Maynard: But also, I'm going
 18 to let you go because this just isn't
 19 working.
 20 Mr. Zarda: What's not working,
 21 Ray?
 22 Mr. Maynard: It's not working.
 23 Mr. Zarda: Well what is 'it'?
 24 Mr. Maynard: That's all I have to
 25 say. I went -- I went -- I went and

1 MAYNARD
2 spoke to my attorney. I explained
3 everything to him exactly the history of
4 everything and that and he said that, you
5 know, I have to let you go.
6 Mr. Zarda: Well, Ray --
7 Mr. Maynard: He's -- I'm letting
8 you go.
9 Mr. Zarda: All right. Okay, well
10 let me --
11 Mr. Maynard: I'm not going to --
12 that's all, I'm going to say.
13 Mr. Zarda: Well, Ray, you haven't
14 told me what I've been accused of.
15 What did they --
16 Mr. Maynard: It's not -- let me
17 just put it this way, it's not working
18 and that's all I'm going to say. It's
19 not working for me for you to be here
20 anymore and that's -- there's no more
21 explanation. There's nothing else I'm
22 going to say. That's all on my
23 attorney's advice.
24 Mr. Zarda: Well, you just told me
25 that a gay issue came up with these

1 MAYNARD
2 people.
3 Mr. Maynard: It wasn't a gay
4 issue. It was a personal issue. When I
5 told you the other day -- that's -- I'm
6 not going to get into it. Because if it
7 was a heterosexual thing -- if Richie
8 Winstock was telling some chick of his
9 escapades, he would be in the same
10 situation. It's not about gay. It's
11 about your personal life, talking to
12 people about it. Not -- I don't care --
13 I don't care what you do and I don't care
14 what those guys do, but what I do care
15 about is that it's not shared with my
16 customers.
17 Mr. Zarda: Okay, well --
18 Mr. Maynard: Okay? So don't take
19 this as a gay thing. It's not a gay
20 thing. It's about your personal
21 escapades and what you're telling people,
22 what you're saying. So --
23 Mr. Zarda: Okay, well, can I
24 before -- can I say something?
25 Mr. Maynard: Sure.

1 MAYNARD
2 Mr. Zarda: Okay. You said in
3 here, I know you were upset, that that
4 came up and that they were offended and
5 then you said something about this girl,
6 I took the girl, being inappropriately
7 touched. You said that.
8 Mr. Maynard: Well, she felt
9 that -- that you were holding her hips in
10 a way that she was very uncomfortable.
11 Mr. Zarda: Ray, does that make any
12 sense to you?
13 Mr. Maynard: Don --
14 Mr. Zarda: I mean, really.
15 Mr. Maynard: Don, listen, I'm not
16 going to explain anything else to you.
17 That's -- this is what is happening, this
18 is what's going to happen and I'm sorry,
19 but that's -- that's what I'm saying.
20 Mr. Zarda: Okay. What about -- I
21 mean, when you say 'personal escapades,'
22 these guys -- I mean -- I mean, Marco
23 runs around saying everything is gay.
24 Petretti still is in the 2001 mode --
25 Mr. Maynard: But this is not --

1 MAYNARD
2 Mr. Zarda: -- he jokes about it.
3 Mr. Maynard: They're not talking
4 to the customers. They're not saying
5 things to the customers that you're
6 saying to the customers.
7 Mr. Zarda: What was I -- what did
8 I say to the customer?
9 Mr. Maynard: Listen, I'm done.
10 You know, this is what -- I mean, I
11 thought about this for a very long time.
12 I went to my lawyer. I got legal advice
13 of what I should do here and I'm doing
14 what I feel I have to do. This is not
15 working anymore for me or for my company
16 to have you work here.
17 Mr. Zarda: But based on -- okay,
18 what are you letting me go for?
19 Mr. Maynard: I'm -- because it's
20 not working.
21 Mr. Zarda: Okay, you suspended me
22 for a week, okay. So, I mean, did you
23 decide a week ago that something wasn't
24 working? You made a decision a week ago.
25 So what did I get suspended for? I mean,

1 MAYNARD
2 I've been sitting in the dark at home.
3 Mr. Maynard: You were suspended
4 for completely ruining somebody's
5 birthday because of you talking about
6 your personal life to them. That is it
7 in a nutshell.
8 Mr. Zarda: I ruined somebody's
9 birthday because I got -- okay, that's
10 fine. That's not --
11 Mr. Maynard: They were very
12 sincere on the phone. There was nothing
13 about -- they weren't demanding their
14 money back or nothing like that. They
15 were just saying there's no way can I
16 ever give my fiancée her birthday back
17 because it was taken away because of you
18 putting your head on her shoulder,
19 whispering in her ear and talking about,
20 'Don't worry about me, I'm gay,' under
21 canopy and everything else.
22 Mr. Zarda: Ray, did you think at
23 all to -- that maybe these people just
24 were looking for a free jump and that
25 they --

1 MAYNARD
2 Mr. Maynard: No, because I offered
3 them a free jump. I offered them
4 everything and they didn't want it.
5 Mr. Zarda: No, no, no, I mean --
6 Mr. Maynard: They didn't want it.
7 They didn't want it.
8 Mr. Zarda: I mean, that that's
9 what they thought about that they could
10 just use this --
11 Mr. Maynard: Absolutely not.
12 Absolutely not. It doesn't even matter.
13 It doesn't matter. The decision is that
14 this is not working anymore for me for
15 you to be working here.
16 Mr. Zarda: Ray, did you
17 investigate at all? When did they call?
18 When did they call, on Friday or Monday?
19 Because you let me work all through the
20 weekend.
21 Mr. Maynard: They called on
22 Monday.
23 Mr. Zarda: Okay, on Monday.
24 Mr. Maynard: And if they had
25 called on Friday, that would have been

1 MAYNARD
2 done then.
3 Mr. Zarda: So you made this
4 decision really fast on Monday. Did you
5 investigate -- did you ask any of the
6 other people on the plane? There was a
7 bunch of people on the plane. Did
8 Don say to them --
9 Mr. Maynard: Things happened under
10 canopy, Don. Things were said under
11 canopy. There was nobody there. There's
12 nobody there to see you do what you're
13 doing.
14 Mr. Zarda: Okay.
15 Mr. Maynard: It doesn't even
16 matter. It's over.
17 Mr. Zarda: What did she say
18 happened under canopy?
19 Mr. Maynard: It's over. I -- just
20 about -- about -- about, you know, don't
21 be worried, I'm gay. Don't worry about
22 me being so close. I have to go. I have
23 to go do work. You can take care of what
24 you have to care of, get your stuff out.
25 Mr. Zarda: Ray, I came up here

1 MAYNARD
2 from a long way.
3 Mr. Maynard: It's not working
4 anymore. It's over."
5 MR. ZABELL: Counselor, I'm
6 advising you that this transcript of the
7 audio termination is inaccurate. There
8 were many things that I've noticed that
9 are missing or analysis transcribed so we
10 will not be accepting this as an accurate
11 transaction although I believe now madam
12 reporter that is taken down what has been
13 said.
14 Q. All right. Do you believe that
15 this is -- there are any mistakes in that
16 transcript, Mr. --
17 MR. ANTOLLINO: And I appreciate
18 your speaking objection, but I'm going to
19 ask the witness --
20 Q. But do you believe that there are
21 any mistakes in that transcript?
22 A. I don't know if every word is
23 tracked. I wasn't watching it that closely.
24 Q. Do you think that it's
25 substantially accurate?

1 MAYNARD
2 A. Yes.
3 MR. ZABELL: Objection. Okay.
4 Q. Do you want to listen to it again
5 and read it a little bit more closely? And I
6 see your counsel is making a speaking -- is
7 coaching you to say yes. Would you like to
8 read it again and look at it more closely?
9 MR. ZABELL: I have said nothing at
10 all on the record.
11 MR. ANTOLLINO: You've nodded your
12 head.
13 MR. ZABELL: It's not different
14 than what you're doing right now,
15 Counselor.
16 Q. Would you like to?
17 A. Sure, why not.
18 (Whereupon video is played.)
19 MR. ZABELL: The videographer
20 should be taking it down.
21 MR. ANTOLLINO: Okay, that's fine.
22 And we'll say tape being played in the
23 record and get.
24 (Whereupon, tape is played.)
25 Q. Okay. You've had an opportunity to

1 MAYNARD
2 listen again. It's not a perfect transcript
3 but would you agree that it's substantially
4 accurate?
5 A. Yes, there are a few things that I
6 couldn't understand. I marked in between where
7 I couldn't understand things.
8 Q. All right. Why don't you tell me
9 where you couldn't understand. You've marked a
10 few things.
11 A. It was in between --
12 Q. Two people speaking at once.
13 A. I guess. I don't know.
14 Q. So you put a question mark on line
15 five, and then --
16 A. Because things were being said and
17 you couldn't understand them on the tape and
18 that's what every one of these were the same
19 thing.
20 Q. Okay. So that's where two people
21 were talking?
22 A. I would guess.
23 Q. All right. And so you put a little
24 mark on 15, on line 15 and line 19 and -- so
25 you put a lot of -- we'll make another copy of

1 MAYNARD
2 this and we'll call this Exhibit 22 -- 23-A
3 because these are your corrections, all right.
4 Do you want to do that?
5 MR. ZABELL: As long as you give me
6 copies.
7 MR. ANTOLLINO: We'll make copies.
8 MR. ZABELL: Make a copy.
9 THE VIDEOGRAPHER: We are now off
10 the record at 3:13 p.m.
11 (Recess taken.)
12 THE VIDEOGRAPHER: This is tape
13 five of the deposition of Raymond
14 Maynard. We are now on the record at
15 3:20 p.m.
16 (Exhibit R-23-A, marked-up
17 transcription, marked for
18 identification.)
19 Q. Mr. Maynard, I've marked as 23-A
20 your marked-up exhibit of my attempt at
21 transcripts and you've noted that on various
22 points that there were two people speaking at
23 once and so you weren't exactly sure there
24 were -- it was a completely accurate
25 transcript. Is that a fair statement?

1 MAYNARD
2 MR. ZABELL: Objection.
3 A. Yeah.
4 Q. But would you agree that it's
5 substantially accurate?
6 MR. ZABELL: Objection, asked and
7 answered.
8 A. Yes.
9 Q. Did you feel like I left anything
10 out, other than the discussions with Lauren
11 that I didn't transcribe, did you feel like
12 anything was left out that was important?
13 A. I don't think so.
14 Q. All right. All right, so -- at the
15 end. We didn't play the part about Lauren, but
16 you heard the tape before when Don is talking
17 to Lauren; correct?
18 MR. ZABELL: Objection to the form
19 of the question. You may answer.
20 A. Yes, I did hear the tape.
21 Q. All right. And I believe at the
22 end of the tape he asked Lauren if these people
23 got video; correct?
24 A. I don't remember if that was a
25 question to her.

1 MAYNARD
2 Q. All right. Let me just play that
3 part of the tape. That's not on the
4 transcript. That's just a yes or no. So just
5 a second:
6 TRANSCRIPTION OF AUDIO:
7 "Mr. Zarda: Okay, could you --
8 Lauren, could you print me just the rest
9 of my jumps.
10 Lauren: Sure, not a problem.
11 Mr. Zarda: And, you know what,
12 the -- the one that always gets -- it's
13 got --
14 Lauren: I'll bring it. You
15 know --
16 Mr. Zarda: -- jumper one.
17 Lauren: That's okay. I'll bring
18 it right out to you. Not a problem. If
19 you want to grab your stuff, I'll bring
20 it right out to you.
21 Mr. Zarda: It's going to take a
22 little bit for that.
23 Lauren: That's okay.
24 Mr. Zarda: And --
25 Lauren: I'll bring it right out to

1 MAYNARD
2 you, Don.
3 Mr. Zarda: Did these people get
4 video?
5 Lauren: Don, I don't know what
6 information --
7 Mr. Zarda: Would you just please
8 look and see if they got video?
9 Lauren: Don, Ray's made a
10 decision. I have to go with what Ray
11 says.
12 Q. Now after having listened to the
13 portion where Don, in talking to Lauren, it
14 appears he asked her repeatedly whether these
15 people got video; is that right?
16 A. It sounds like.
17 Q. So that would lead you to the
18 conclusion that he didn't know one way or the
19 other; correct?
20 MR. ZABELL: Objection. Didn't
21 know one way or the other with what?
22 Q. Whether or not they got video;
23 correct?
24 A. Possibly.
25 Q. Okay. And it would also lead you

1 MAYNARD
2 to the conclusion that he had never seen the
3 video; correct?
4 A. It could.
5 Q. And he wanted to see the video;
6 correct?
7 A. I think so.
8 Q. Did you know that we didn't get the
9 video until we subpoenaed it or demanded it in
10 this case?
11 MR. ZABELL: Objection to the
12 form --
13 A. I didn't know it.
14 MR. ZABELL: -- and to the
15 representations contained therein you may
16 answer.
17 Q. I was just asking if you knew that.
18 A. Excuse me?
19 Q. I was just asking if you knew that.
20 A. No, I didn't know that.
21 Q. When you say you looked at the
22 video, did you also look at the out takes?
23 A. I'm trying to think which one I
24 saw. I'm not sure if I saw the raw footage or
25 the edited version.

1 MAYNARD
2 MR. ANTOLLINO: All right. So I'm
3 going to call for production of the raw
4 footage. I think that's responsive and
5 I'll put it in a letter to you.
6 MR. ZABELL: You've already been
7 given the raw footage.
8 MR. ANTOLLINO: I have?
9 MR. ZABELL: Even your client is
10 shaking his head yeah. Off the record.
11 (Discussion off the record.)
12 Q. Let's take a look at line eight
13 from 23-A where you say, "That's all I have to
14 say. I spoke to my attorney. I explained
15 everything to him exactly the history and
16 that" -- I'm sorry, withdrawn.
17 You said, "That's all I have to
18 say. I spoke to my attorney, I explained
19 everything to him exactly the history of
20 everything and that and he said that, 'You
21 know, I have to let you go.'" Do you see that?
22 A. Yes.
23 Q. And is that what your attorney, in
24 fact, told you?
25 MR. ZABELL: Objection. You do not

1 MAYNARD
2 have to disclose communications that were
3 given to you by your attorney.
4 Q. All right. So --
5 MR. ZABELL: To the extent you can
6 answer that without revealing what your
7 attorney told you, you may, but he's
8 asking you specifically what your
9 attorney told you.
10 A. I'm not sure how to answer that.
11 + MR. ANTOLLINO: I think let's
12 mark that for a ruling because I think
13 the attorney/client privilege has been
14 waived. We don't have to call the judge
15 on this, but it will come up eventually.
16 Q. And on page two, line -- or
17 paragraph 16, do you see there where it says at
18 the last sentence, "that's all on my attorney's
19 advice." Do you see that?
20 A. Yes.
21 Q. And is that a true sentence,
22 "That's all on my attorney's advice"?
23 A. That's correct.
24 Q. And what did your attorney advise
25 you?

1 MAYNARD
2 MR. ZABELL: Objection. Same
3 objection based upon privilege.
4 MR. ANTOLLINO: So you're going
5 to -- let's just make the record clear.
6 You're not going to allow me to inquire
7 into the substance of the discussion
8 between Harry Arnoff and Ray Maynard in
9 any respect whatsoever; so no matter how
10 many times he's referred to legal advice
11 and attorneys advice in this transcript,
12 that's going to be the same direction to
13 the witness. Is that a fair statement?
14 MR. ZABELL: Correct. That is a
15 fair statement.
16 MR. ANTOLLINO: All right. We'll
17 take this up -- we'll mark those all for
18 a ruling at a later time.
19 MR. ZABELL: You can certainly
20 attempt to do it at a later time, but
21 you're allowed one shot at a deposition
22 and nothing else.
23 MR. ANTOLLINO: All right. So then
24 I think that we have to call the court
25 then. If you're saying that you're not

1 MAYNARD
2 going to reproduce your client or you're
3 going to fight reproducing your client
4 for not answering questions, I mean then
5 that -- listen -- off the record -- on
6 the record. All right.
7 Do you believe that you have --
8 you've mentioned at your deposition that
9 you had the right to recall my client if
10 the judge overrules my objections to
11 certain privileges; is that right?
12 MR. ZABELL: That's correct.
13 MR. ANTOLLINO: All right. So are
14 you saying that you believe that you can
15 recall my client if the judge overrules
16 the objections, but you can't -- I can't
17 recall Mr. Maynard if the judge overrules
18 your objections?
19 MR. ZABELL: The difference is my
20 objections were sub juris.
21 MR. ANTOLLINO: All right. Well,
22 let's call the court and I'm going to ask
23 the judge if we can brief this and you
24 can object. Let's call the court.
25 I don't think we have to reach this

1 MAYNARD
2 now, but I want to avoid a future fight
3 with Saul Zabell. So I'm going to look
4 up the court's number and call and see if
5 we can deal this because I think this
6 needs a letter brief at least.
7 THE VIDEOGRAPHER: We are now off
8 the record at 3:29 p.m.
9 (Recess taken.)
10 THE VIDEOGRAPHER: We are now on
11 the record at 3:43 p.m.
12 MR. ANTOLLINO: I'd just like to
13 state for the record that we called the
14 court. The judge was not available to
15 rule and the clerk is going to call us
16 back to let us know if the judge wants to
17 rule now or have argument, or have
18 briefing on this.
19 Q. Okay. So what was the last
20 question and answer?
21 (Record read.)
22 Q. Let's look at paragraph 18. In the
23 third -- one, two, third, fourth sentence, you
24 stated, "Because if it was a heterosexual, if
25 Rich Winstock was telling some chick about his

1 MAYNARD
2 escapades, he would be in the same situation."
3 Do you see that?
4 A. Yes.
5 Q. And what is a chick?
6 A. Excuse me?
7 Q. What is a chick? What do you mean
8 by chick?
9 A. A woman.
10 Q. Is it a -- do women like to be
11 called chicks?
12 A. Some do, some don't.
13 Q. Okay. What -- if Rich Winstock was
14 telling some chick about his escapades, what
15 did you mean by that?
16 A. If he's out with somebody.
17 Q. What do you mean by that?
18 A. If he's out and he's talking about,
19 I guess, intense matters.
20 Q. What intense matters?
21 A. Whatever could be going on, if he
22 was bragging about things.
23 Q. If he was what?
24 A. If he was bragging about things.
25 Q. Bragging about what?

1 MAYNARD
2 A. Whatever.
3 Q. Can you give me an example of what
4 escapade Rich Winstock would tell to a woman
5 that would be grounds for termination?
6 MR. ZABELL: Objection to the form.
7 You can answer.
8 A. If any of my instructors, including
9 Richie Winstock, was telling the customers of
10 any kind of sexual activities, that would fall
11 under that.
12 Q. Well, Don wasn't talking about
13 sexual activity. He was talking about his
14 sexual identity, wasn't he?
15 A. No. I was told that he was talking
16 specifically about things he did after work.
17 Q. What things that he did after work?
18 A. The men he was with.
19 Q. The men he was with. What men was
20 he with?
21 A. I have no idea.
22 Q. What did David Kengle say that
23 Rosana told him about the men he was with?
24 MR. ZABELL: Objection to the form
25 of the question, mischaracterizes

1 MAYNARD
2 testimony.
3 A. That he was talking about him being
4 gay and going out and doing this and doing
5 that.
6 Q. Being gay and going out and doing
7 this and doing that, what was he going out --
8 what does that mean? Going out and doing what?
9 MR. ZABELL: Objection to the form
10 of the question. Objection to the
11 multiple questions. You may pick a
12 question and provide an answer, if you
13 can.
14 A. He told me that besides in the
15 airplane the way he was touching her thighs and
16 having his head on her shoulder it made her
17 feel very uncomfortable. She was very upset
18 about that and he made remarks under canopy
19 that, "Don't worry, I'm gay," and went on about
20 that.
21 Q. So he didn't say anything about
22 going out and doing this and going out and
23 doing that; correct?
24 MR. ZABELL: Objection.
25 Q. It's just what you just testified

1 MAYNARD
2 to right now; correct?
3 A. Right.
4 MR. ZABELL: Objection.
5 Q. And it wasn't her thighs that she
6 felt were uncomfortable, it was hips; correct?
7 MR. ZABELL: Objection.
8 A. Hips, thighs, you know, the same
9 thing.
10 Q. Okay. The hips, there are two
11 attachments at the hips; correct?
12 A. Uh-huh.
13 Q. If Don had to choose between safety
14 in adjusting the hips and comfort, which -- in
15 adjusting the straps of the hips, which would
16 you prefer that he choose?
17 MR. ZABELL: Objection to the form.
18 A. He would choose to do the right
19 thing for safety, but not make the customer
20 feel uncomfortable.
21 Q. Do you feel that Don ever made any
22 other employees -- I'm sorry, withdrawn.
23 Do you feel that Don made any other
24 passengers physically uncomfortable in your
25 aircrafts?

1 MAYNARD
2 A. I think it's possible, but people
3 didn't come and make a complaint.
4 Q. So you're not aware of anything;
5 correct?
6 A. Correct.
7 Q. Your opinion of Don was that he was
8 a good instructor; correct?
9 A. Correct.
10 Q. And he's had more jumps than you;
11 correct?
12 A. Correct.
13 Q. And you knew Don was gay; correct?
14 A. Correct.
15 Q. And you trusted his judgment in
16 adjusting the straps to give as much safety and
17 balance that with comfort?
18 MR. ZABELL: Objection to the form.
19 You may answer.
20 A. Correct.
21 Q. And you didn't call Ms. Orelana and
22 say what was it about the hips that made you
23 feel uncomfortable; correct?
24 A. Correct.
25 Q. And it could have been something

1 MAYNARD
2 like he was adjusting the straps down there;
3 correct?
4 MR. ZABELL: Objection to the form.
5 You may answer.
6 A. It could.
7 Q. And if it was he was adjusting the
8 straps down there, that would not be a
9 legitimate complaint; correct?
10 MR. ZABELL: Objection to the form.
11 You may answer.
12 A. Correct.
13 Q. And a tandem instructor, in fact,
14 has to not only adjust the straps, but check
15 them and make sure that they're in place
16 throughout the tandem experience; correct?
17 A. Most of it should be done before
18 they get on the airplane. The final
19 adjustments are normally taking the side straps
20 and making them tighter. The harness -- the
21 tandem passenger harness, there is -- there is
22 very little time or there's very little things
23 that I even know about anybody doing
24 adjustments in the plan about the passenger
25 harness after you get on the airplane.

1 MAYNARD
2 Q. But you want to check the
3 attachments to make sure they're in place;
4 correct?
5 A. Correct.
6 Q. And that would require him to touch
7 the attachments and see that they were in
8 place; correct?
9 A. Correct.
10 Q. What if Don -- well, do you have a
11 uniform at work?
12 MR. ZABELL: Objection to the form
13 of the --
14 MR. ANTOLLINO: Okay, withdrawn.
15 Q. Is there a uniform that skydivers
16 wear at work?
17 A. No.
18 Q. Okay. So you can show up wearing a
19 T-shirt and shorts; correct?
20 A. Correct.
21 Q. And that's a typical attire for
22 someone doing a skydive; correct?
23 MR. ZABELL: Objection to the form.
24 You may answer.
25 A. In the summer.

1 MAYNARD
2 Q. What about -- what if Don came to
3 work with a T-shirt that says "I'm gay," would
4 you allow him to wear that?
5 A. It never happened.
6 Q. Well, I'm just asking if that would
7 be allowable.
8 A. I think that would make some people
9 uncomfortable.
10 Q. And so you would ask him to change
11 the shirt?
12 A. If I had somebody come to work that
13 said "I'm heterosexual" it would be the same
14 thing.
15 Q. So the answer to the question is
16 that if he came to work way a shirt that says
17 "I'm gay," you would tell him to change the
18 shirt; correct?
19 A. Most likely.
20 Q. All right. There's a shirt that
21 I've seen, it's kind of a joke on the street
22 that says, "I'm not gay, but my boyfriend is,"
23 and it's worn by many gay men. If Don showed
24 up at work with that T-shirt that said, "I'm
25 not gay but my boyfriend is," would you ask him

1 MAYNARD
 2 change the shirt?
 3 MR. ZABELL: Objection to the form
 4 of the question, speculation and
 5 everything else.
 6 You can answer.
 7 A. Probably.
 8 Q. Okay. There's a T-shirt out there
 9 that I've seen that says "Legalize Gay." It
 10 just says "Legalize Gay." If he showed up with
 11 that T-shirt, would you allow him to wear it?
 12 A. My company is not a forum for any
 13 kind of statements. My workplace is not a
 14 forum for these things that you're asking me.
 15 Q. My question is, to you, --
 16 MR. ZABELL: Counselor, if you want
 17 a different answer, ask a different
 18 question. Asked and answered, move on,
 19 because now you're harassing the
 20 deponent.
 21 MR. ANTOLLINO: No I'm not
 22 harassing him.
 23 Q. Would you ask him to change a shirt
 24 that says "Legalize Gay"?
 25 MR. ZABELL: Objection, asked and

1 MAYNARD
 2 answered. Move on, Counselor.
 3 Q. Can you answer the question?
 4 MR. ZABELL: You've already
 5 answered it. You don't need to answer it
 6 again.
 7 Q. All right. What about a T-shirt
 8 that says "I'm proud to be an Iraq vet"?
 9 A. To be a what?
 10 Q. An Iraq vet.
 11 MR. ZABELL: Iraq? What's the word
 12 you're saying because I think you're
 13 mispronouncing it. I don't understand
 14 it.
 15 MR. ANTOLLINO: All right. Well,
 16 maybe out in Long Island they pronounce
 17 it Iraq. In the city we pronounce it
 18 Iraq.
 19 Q. What if somebody wore a T-shirt
 20 that says "I'm an Iraq vet," would you ask
 21 somebody to change that T-shirt?
 22 A. No.
 23 Q. What about someone wearing a
 24 T-shirt that says "I love my grandchildren,"
 25 would you ask them to change that T-shirt?

1 MAYNARD
 2 A. No.
 3 Q. What if Don wore a T-shirt that
 4 said "I love my husband," would you ask him to
 5 change that T-shirt?
 6 A. No.
 7 Q. But that's personal information.
 8 MR. ZABELL: That's not a question.
 9 Q. Isn't it personal information? If
 10 Don has a T-shirt that says "I love my
 11 husband," that's personal information; correct?
 12 A. Correct.
 13 Q. Would that make some people
 14 uncomfortable?
 15 A. It would depend on the other
 16 person.
 17 Q. Right. And do you think that would
 18 make some people uncomfortable?
 19 A. Just a T-shirt?
 20 Q. Yeah, a man wearing a T-shirt that
 21 says "I love my husband."
 22 A. Some maybe.
 23 Q. Okay. But you wouldn't ask Don to
 24 change that T-shirt?
 25 A. No.

1 MAYNARD
 2 Q. What about a T-shirt that says,
 3 "I'm proud to be Cuban," would you ask someone
 4 to change that T-shirt?
 5 A. No.
 6 Q. All right, but it's personal
 7 information, correct, that he's Cuban?
 8 A. Yes.
 9 Q. All right. What if someone was
 10 talking to a passenger and said something like,
 11 "I'm Irish and the Irish are fighters," is that
 12 something that's inappropriate to tell a
 13 customer?
 14 MR. ZABELL: Objection to the form
 15 of the question.
 16 You can answer it. As absurd as it
 17 is, you can answer it.
 18 A. No.
 19 Q. That's personal information though;
 20 correct?
 21 A. Yes.
 22 Q. All right. Were you aware that --
 23 sir, do you have a jumper from New Zealand?
 24 MR. ZABELL: Objection to the form
 25 of the multiple questions.

1 MAYNARD
2 MR. ANTOLLINO: Not a jumper,
3 withdrawn.
4 Q. Do you have an instructor -- I need
5 some more coffee. We'll take a break after
6 this question.
7 Do you have an instructor from New
8 Zealand?
9 A. Well, yes.
10 Q. Is he still working for you?
11 A. Yes.
12 Q. Were you aware that he told
13 Mr. Kengle that he was from New Zealand?
14 A. No.
15 Q. Is there anything inappropriate
16 about that?
17 A. No.
18 Q. That's personal information, isn't
19 it, that he's from New Zealand?
20 A. Yeah.
21 MR. ANTOLLINO: Let me just get a
22 coffee. We are now off the record at
23 3:58 p.m.
24 (Recess taken.)
25 THE VIDEOGRAPHER: We are now back

1 MAYNARD
2 on the record at 4:11 p.m.
3 Q. All right. Under canopy you have
4 to loosen the straps as you land; is that
5 correct?
6 A. Correct.
7 Q. Okay. And you have to loosen the
8 straps at the hips as you land; correct?
9 A. Before you land.
10 Q. Before you land?
11 A. Correct.
12 Q. Otherwise an injury could occur?
13 A. It makes it better to have them
14 loosened up, yeah.
15 Q. Now, earlier we -- you mention also
16 in the audio tape that Don was alleged to have
17 whispered in the passenger's ear; correct?
18 A. Correct.
19 Q. Would you have preferred that he
20 shouted?
21 MR. ZABELL: Objection.
22 A. I don't know what was said.
23 Q. Well, I'm just talking about the
24 tone of voice in terms of the decibel level of
25 the voice, would you have preferred that he

1 MAYNARD
2 shouted in speaking to a customer?
3 MR. ZABELL: Objection.
4 You can answer, if you can.
5 A. Maybe.
6 Q. Isn't it true that when an
7 instructor is strapped to a passenger, the
8 instructor has to position his chin on either
9 the right or the left side of the passenger to
10 avoid hitting the passenger's head with his
11 mouth?
12 A. Sitting in the airplane?
13 Q. Either sitting in the airplane or
14 up in the air.
15 A. Yes.
16 Q. And so, therefore, would it be a
17 fair statement that the mouth is very close to
18 the ear on a tandem jump with a passenger and
19 an instructor?
20 A. Not for the entire jump.
21 Q. Okay. But --
22 A. At times.
23 Q. At times, okay. Do you think that
24 it might have been reasonable that the
25 girlfriend and the boyfriend, Mr. Kengle and

1 MAYNARD
2 Mr. and Ms. -- withdrawn.
3 Do you think it might have been
4 reasonable for Mr. Kengle or Ms. Orelana to
5 have felt uncomfortable by a comment that
6 Mr. Kengle's girlfriend was getting strapped to
7 another guy?
8 MR. ZABELL: Objection, asked and
9 answered no less than three times.
10 Q. You can answer.
11 A. No.
12 Q. Do you think that it was reasonable
13 that Don might have felt uncomfortable about
14 that?
15 A. No.
16 Q. Do you believe that Don, as a gay
17 man, has to accept such a statement and play
18 along with the suggestion that he's a
19 heterosexual?
20 MR. ZABELL: Objection to the form
21 of the question, the innuendo contained
22 in that question and the
23 mischaracterization of the intent --
24 Q. You can answer.
25 MR. ZABELL: -- of that question.

1 MAYNARD
2 If you can.
3 A. I don't know.
4 Q. Do you believe it was unreasonable
5 for Don to take him out -- take himself out of
6 the suggestion that someone else made that he's
7 being strapped to someone else's girlfriend?
8 A. Take himself out?
9 Q. Take himself out of the equation.
10 Do you think that's reasonable?
11 MR. ZABELL: Objection to the form.
12 I don't think it's a question that can be
13 answered in the manner in which it's
14 phrased, but to the extent that you
15 understand it, you may answer.
16 A. I don't know.
17 Q. But you think it was unreasonable
18 for him to mention that he was gay in order to
19 take himself out of the equation; correct?
20 MR. ZABELL: No -- objection to the
21 form.
22 Q. You can answer.
23 A. No, no.
24 Q. So it was reasonable for him to
25 tell the customer that he was gay to take

1 MAYNARD
2 himself out of the equation that he was being
3 put in as someone who was being strapped to
4 someone else's girlfriend; correct?
5 MR. ZABELL: Objection to the form.
6 A. Maybe.
7 Q. Why do you say maybe?
8 MR. ZABELL: Objection to the form.
9 You may answer.
10 Q. Why would you say "maybe"; why not
11 yes or no?
12 A. Because taking yourself out of the
13 equation, you know, that's a choice.
14 Q. Someone in the airplane, the
15 witnesses testified, made the suggestion that
16 Don was being strapped to a someone else's
17 girlfriend --
18 MR. ZABELL: Correct.
19 Q. -- in a way that was sexual --
20 MR. ZABELL: That's incorrect.
21 Q. -- correct?
22 MR. ZABELL: Objection to the form
23 of the question. Objection to the
24 mischaracterization of the prior
25 testimony.

1 MAYNARD
2 You can answer it this last time.
3 I will not allow him to harass you any
4 more after this.
5 A. I don't believe that this was being
6 in a sexual position or whatever you just said.
7 Q. You don't believe that there was
8 any sexual innuendo being made when an
9 instructor other than Don said to Mr. Kengle
10 and Ms. Orelana, I bet you didn't know that
11 your girlfriend was going to get strapped to
12 another guy?
13 A. No.
14 MR. ZABELL: Don't answer it any
15 more. You've been asked the question
16 multiple times. I told him before I
17 would not allow him to continue to harass
18 you on this issue in the manner in which
19 he has. Therefore, I will not permit any
20 additional questions repeating that same
21 question.
22 Q. If a customer came on to Don -- if
23 a woman came on to Don at the drop zone, would
24 it be appropriate for him to say, yeah, thanks
25 but I'm not interested because I'm gay?

1 MAYNARD
2 MR. ZABELL: Objection to the form
3 and the hypothetical.
4 You can answer.
5 A. I don't know.
6 Q. Why don't you know?
7 MR. ZABELL: Objection to the form.
8 A. I don't know.
9 Q. If someone tried to come on to
10 Don -- well, let me ask you this; did you ever
11 see any women express any interest in Don?
12 A. No.
13 Q. Do you believe any women ever have?
14 A. I don't know.
15 Q. All right. We've looked at
16 pictures and now we're going to watch some
17 videos. We will start with what I have
18 previously marked as the Rich folder which you
19 already have. We're starting with a folder
20 called "Rich" that I have on my computer which
21 I also have given to counsel and was also
22 viewed at the deposition of Rich Winstock and
23 there are five little movies here and I'm going
24 to play movie 1334 now and I'm going to ask you
25 to watch it and I'm going to ask if you see

1 MAYNARD
2 anything in this video that is improper,
3 inappropriate or unsafe.
4 Would you agree to answer those
5 questions after you watch the video?
6 A. Yes.
7 Q. All right.
8 MR. ZABELL: Before the play the
9 videotape -- are you all right?
10 MR. ANTOLLINO: I'm fine.
11 MR. ZABELL: Why don't you discuss
12 with me on the record how you'd like the
13 court reporter to handle --
14 MR. ANTOLLINO: There's no way
15 she's going to be able to -- there's no
16 way. It's just shouting and music.
17 MR. ZABELL: That's fine. So we
18 should discuss it so we both have a clear
19 understanding and she has clear direction
20 as to what is going to proceed and how
21 we're going to proceed.
22 MR. ANTOLLINO: Fair enough.
23 There's no way to transcribe it, but
24 we're now playing 1334.
25 (Whereupon video is played.)

1 MAYNARD
2 Q. Okay, so the question is, did you
3 see anything in that video that was
4 inappropriate, improper or unsafe?
5 A. Well, the exit -- the jump itself
6 they're experienced jumpers. It's called
7 rolling a tube out the door. People are
8 saying -- I believe they were saying, "Make
9 shit happen." They're adults in the plane. I
10 don't know what's so bad about that.
11 Q. Well, let me ask you this, do you
12 know that they were experienced jumpers?
13 A. Yes.
14 Q. Do you know all of those people?
15 A. I don't know -- do I know all of
16 those people? I didn't see all of them.
17 You're talking about everybody that's in the
18 airplane.
19 Q. The woman in the green, were you
20 aware that that was her first tandem or not?
21 MR. ZABELL: Objection to the form.
22 A. That's not a tandem that went out
23 the door.
24 Q. The woman in the green was in a
25 tandem; correct?

1 MAYNARD
2 A. Okay.
3 MR. ZABELL: Are you agreeing or
4 are you just accepting what he said as
5 accurate, Mr. Maynard?
6 THE WITNESS: To what?
7 MR. ZABELL: Are you agreeing to
8 his statement --
9 THE WITNESS: That she was a
10 first-time jumper?
11 MR. ZABELL: No, that the lady in
12 green was a tandem.
13 A. Yes, the woman in green was a
14 tandem.
15 Q. And she's not the one that did the
16 role?
17 A. Correct.
18 Q. What did you call it?
19 A. It's called a tube.
20 Q. A tube, okay. And it was just a
21 single jumper that did that?
22 A. No, there's two people.
23 Q. There's two people. So you don't
24 know the level of experience of those two
25 people, do you?

1 MAYNARD
2 A. I knew who the people were, but I
3 also know that they are very experienced
4 jumpers because only experienced jumpers would
5 do that maneuver.
6 Q. But they were tandem passengers?
7 A. They were not.
8 Q. Oh, okay. That's all I wanted to
9 know. There's a little bit of comradery with
10 the expression in the plane "Make shit happen";
11 correct?
12 MR. ZABELL: Objection to the form.
13 You may answer.
14 A. Yes.
15 Q. And the entire staff responds in
16 kind, including Rich Winstock, "Make shit
17 happen"; correct?
18 A. Correct.
19 Q. And that's basically the atmosphere
20 when you're up in the air; correct?
21 MR. ZABELL: Objection to the form.
22 A. Sometimes.
23 Q. Okay. You want to have it be
24 relaxed and loose so that people aren't
25 uncomfortable when they're about to be falling

1 MAYNARD
 2 out of an airplane; correct?
 3 A. Correct.
 4 Q. All right. I'm finished with this
 5 movie and we're going to go on to the next
 6 movie, 1335, and the same question applies
 7 inappropriate, improper or unsafe?
 8 MR. ZABELL: Objection to the form.
 9 (Whereupon video is played.)
 10 Q. Okay, you've watched the entire
 11 video?
 12 A. Yeah.
 13 Q. And that's the video of the time
 14 when someone gave someone else the finger;
 15 correct?
 16 A. Correct.
 17 Q. And there was a -- and one part of
 18 that video someone feigned vomiting, would you
 19 agree with that characterization?
 20 A. They what?
 21 Q. They faked a vomit.
 22 MR. ZABELL: Objection to the form
 23 of the question.
 24 Q. Do you remember at one point --
 25 MR. ZABELL: Are you withdrawing

1 MAYNARD
 2 the question before allowing the --
 3 MR. ANTOLLINO: The witness does
 4 not seem to understand what I'm getting
 5 at.
 6 Q. But I'm going to describe that
 7 there was someone who went "Blah" and stuck his
 8 tongue out in the camera; correct?
 9 MR. ZABELL: Let the record
 10 reflect --
 11 MR. ANTOLLINO: Let the record
 12 reflect --
 13 MR. ZABELL: Does the videotape
 14 picture Mr. Zarda -- Mr. Antollino?
 15 MR. ANTOLLINO: No.
 16 MR. ZABELL: Well, let the record
 17 reflect that Mr. Antollino stuck his
 18 tongue out of his mouth and made a
 19 gagging sound.
 20 MR. ANTOLLINO: Yes.
 21 Q. All right. Did you see that on the
 22 video?
 23 A. Yes.
 24 Q. And did you think that was
 25 inappropriate in any way?

1 MAYNARD
 2 A. What you're asking me about this is
 3 with experienced jumpers having fun with each
 4 other and not a customer making a complaint
 5 about something that was not right.
 6 Q. I'm just asking you if you think
 7 that that was improper in any way?
 8 A. No.
 9 Q. Did you see anything that was
 10 inappropriate or unsafe in that video?
 11 A. I don't think so.
 12 Q. Wasn't there, in fact, a tandem in
 13 that plane?
 14 A. I'd have to see it again.
 15 Q. All right. Let's watch it again.
 16 (Whereupon video is played.)
 17 A. It was a tandem?
 18 Q. Were you able to see a tandem in
 19 there?
 20 A. No.
 21 Q. What about that young lady in the
 22 back?
 23 A. Like I said, I didn't see it.
 24 Q. You didn't see a tandem in there?
 25 Well, let me ask you this, if there had been a

1 MAYNARD
 2 tandem in there, would any of that comradery of
 3 experienced divers in front of the tandem
 4 passengers have been inappropriate?
 5 MR. ZABELL: Objection to the form
 6 of the question.
 7 You may answer.
 8 A. I didn't see that tandem person
 9 near these other guys. They were pretty far a
 10 about in the airplane and these were
 11 experienced jumpers again just goofing with
 12 each other.
 13 Q. It was pretty goofy, wasn't it?
 14 A. Yeah.
 15 Q. And if there were a tandem
 16 passenger in there, is anything improper about
 17 that goofiness?
 18 A. No.
 19 Q. Okay. So let's move on to 1337.
 20 (Whereupon video is played.)
 21 Q. All right, did you see anything
 22 that was inappropriate, unsafe or improper?
 23 A. No.
 24 Q. There were portions in there where
 25 people were touching each other on the

1 MAYNARD
2 posterior; is that correct?
3 A. Yes.
4 Q. What is the reason for that?
5 A. They were getting their balance
6 because they're standing outside the aircraft
7 that has no step.
8 Q. It was necessary for them to do
9 that?
10 A. Yes.
11 Q. It was necessary for them to touch
12 each other's posterior; correct?
13 A. Yes.
14 Q. Okay. Now we're looking at 1339.
15 (Whereupon video is played.)
16 Q. Did you see anything in there that
17 was inappropriate or unsafe?
18 A. No.
19 Q. Now we're going to look at 1340.
20 (Whereupon video is played.)
21 Q. Did you see anything in there that
22 was inappropriate or unsafe?
23 A. No.
24 Q. There was some point -- did you
25 recognize the instructor in that video?

1 MAYNARD
2 A. I think it was Super John.
3 Q. Super John. What's Super John's
4 last name? Well, I'll tell you what, since you
5 have asked to review a copy of the record, I'll
6 leave a blank space in there. Would you look
7 it up and write it into the space?
8 + TO BE FURNISHED: _____
9 A. Yeah.
10 Q. There was a point in there where
11 the instructor was sticking his finger into the
12 tandem passenger's ears and making what I
13 believe was moose ears?
14 MR. ZABELL: Objection to the form
15 of the question --
16 A. I didn't see it.
17 MR. ZABELL: -- and the
18 representations made therein.
19 MR. ANTOLLINO: Counsel, you were
20 the one last week who said that that was
21 moose ears. All right, let's look at it
22 again.
23 (Whereupon video is played.)
24 Q. Did you just see that?
25 A. He was tapping her on the head.

1 MAYNARD
2 Q. He was tapping her on the head?
3 Didn't it really look like he was sticking his
4 fingers in her ears and going like this
5 (indicating)?
6 A. No.
7 Q. Okay. Was there anything
8 inappropriate about his tapping her head?
9 A. I don't think so.
10 Q. Was it just a joke, a harmless
11 trope for a skydiver?
12 MR. ZABELL: Objection to the form
13 of the question.
14 Q. You can answer.
15 MR. ZABELL: And the words you
16 used.
17 If you can. If you know what he's
18 saying.
19 THE WITNESS: I don't know what
20 he's saying. They were doing something
21 for the video.
22 Q. They were being goofy for the
23 video; correct?
24 A. They were having fun.
25 Q. And by -- and in having fun, they

1 MAYNARD
2 were being goofy; correct?
3 A. Yes.
4 Q. Okay. And if someone -- if an
5 instructor did put his fingers in a passenger's
6 ear and make a little moose ear for the video,
7 would that have been improper?
8 A. I don't know, but that's not what I
9 saw.
10 Q. Okay. But, you know, you're an
11 experienced skydiver and I just want to know
12 what your opinion is if that happened and
13 someone did make moose ears, would that have
14 been inappropriate or is that just typical?
15 A. If I saw a video of somebody
16 sticking their fingers in someone's ear that
17 would be inappropriate. That is not what I
18 saw.
19 Q. Okay. We're looking at 1341 now.
20 (Whereupon video is played.)
21 Q. Did you see anything in there that
22 was inappropriate, unsafe or improper?
23 A. No. Could I watch it one more
24 time?
25 Q. Sure.

1 MAYNARD
2 (Whereupon video is played.)
3 A. No, I believe that they did either
4 a front flip or a back flip and then they came
5 out of it.
6 Q. The instructor has his arms around
7 the passenger until the drove went up; is that
8 true?
9 A. No.
10 Q. You see the instructor having his
11 arms around the passenger at any time?
12 A. Yeah.
13 Q. Why?
14 A. Because they would have to do the
15 flip one way or the other, that's the position
16 you have to get into.
17 Q. That something if they wanted to do
18 the flip he had to put his arms around her;
19 correct?
20 A. Yes.
21 Q. And he was basically hugging her;
22 correct?
23 A. He had his arms around her. I
24 wouldn't characterize it as hugging her.
25 Q. All right. So if she complained

1 MAYNARD
2 afterwards that he put his arms around me,
3 would you fire that instructor?
4 A. No.
5 Q. How many seconds was it before he
6 drops the drogue in that, were you able to
7 catch it?
8 A. No.
9 Q. Was it an inappropriate amount of
10 time?
11 A. No. When they go out of the
12 airplane, they do a flip with the people, a
13 front flip or back flip. They go out a little
14 bit longer than the normal with the drogue.
15 Q. What are some other reasons why he
16 might -- what is the recommended amount of time
17 to pull the drogue when you leave the airplane?
18 A. It's probably between five and
19 seven seconds.
20 Q. Okay. And is it better to have a
21 light passenger to wait a little closer to
22 seven so you don't collide with the
23 photographer if there is photography?
24 A. No.
25 Q. Is it possible if you have a light

1 MAYNARD
2 passenger and you're jumping out of the plane
3 if -- are there any dangers to pulling the
4 drogue too quickly?
5 A. No.
6 Q. We're going to look now at the main
7 event, the video of Mr. Zarda and Ms. Kengle
8 and this is the video that you've provided to
9 me which has the screen name skydiveavi.avi;
10 correct?
11 (Whereupon video is played.)
12 Q. For some reason the video is
13 stopping so we're going to have to go back to a
14 point where before it stopped and play more.
15 (Whereupon video is played.)
16 MR. ANTOLLINO: Something is wrong
17 with this video.
18 MR. ZABELL: Counselor, I have a
19 copy a my computer.
20 MR. ANTOLLINO: Would you mind?
21 Thanks a lot.
22 (Whereupon video is played.)
23 Q. Okay. You've now watched the
24 entire video. You can take that counselor.
25 Okay. So you've watched that video

1 MAYNARD
2 and you've seen it before; correct?
3 A. Correct.
4 Q. About how many times have you
5 watched it?
6 A. Not much.
7 Q. More than five?
8 A. No.
9 Q. If you were to grade Don's
10 performance in that zero, what would you give
11 it?
12 A. The skydive part of it?
13 Q. Yeah.
14 A. An eight or nine except I didn't
15 see any handle checks where you touch the
16 handle which is supposed to be done at every
17 jump. I didn't see that. It wasn't apparent
18 on that jump.
19 Q. In other words it just might not
20 have been filmed when he did it; correct?
21 A. No. He was filmed -- the handle
22 checks are done under drogue.
23 Q. Right.
24 A. So he was filmed the entire time
25 under the drogue. The handle checks are before

1 MAYNARD
2 you come in and put the parachute up.
3 Q. But you'd give it an eight or nine
4 out of ten?
5 A. Yes, I would.
6 Q. Okay. And how would you rate the
7 landing?
8 A. The landing was good.
9 Q. Would you characterize it as good
10 or great?
11 A. Yes.
12 Q. Okay. Did you see at the end that
13 the passenger seemed happy?
14 A. No.
15 Q. You didn't see that she seemed
16 happy?
17 A. No.
18 Q. What did you see?
19 A. And in the beginning the looks that
20 Don had on his face looking at her and the
21 expressions were kind of creepy too.
22 Q. So you think that Don made some
23 creepy expressions on there?
24 A. Yeah.
25 Q. Do you think that those expressions

1 MAYNARD
2 are why you fired Don?
3 A. No, not at all. I got a complaint.
4 Q. Okay. So you had to fire an
5 employee because of any complaint?
6 A. Do I have to fire them?
7 Q. Yeah.
8 A. No, I do not have to fire every
9 employee because of a complaint. If it's a
10 serious complaint, yes, I do.
11 Q. You're saying that she didn't look
12 happy in that video?
13 A. I what?
14 Q. You don't believe she looked happy
15 in that video?
16 A. I don't think she did.
17 Q. At the end she said it was awesome?
18 A. I'm just looking at her facial
19 expression when she first landed.
20 Q. Well, when people land they can
21 have any number of expressions, they're just
22 coming from their teen thousand feet; correct?
23 A. You asked me -- go ahead.
24 Q. Is that right?
25 A. Yes.

1 MAYNARD
2 Q. Some people throw up; correct.
3 A. Correct.
4 Q. But they still might have had a
5 good time; correct?
6 A. Correct.
7 Q. She said "That was awesome"; is
8 that correct?
9 A. I don't know.
10 Q. All right. Let's watch the video
11 again then.
12 (Whereupon video is played.)
13 Q. Now that you've seen it again she
14 said "Yeah, that was awesome"; isn't that
15 right?
16 A. Yeah, she said it.
17 Q. And she smiled; correct?
18 A. She smiled when she kissed her
19 boyfriend.
20 Q. She smiled next to Don. She posed
21 with Don after she kissed her boyfriend;
22 correct?
23 MR. ZABELL: Objection to the
24 multiple questions.
25 Q. You may answer.

1 MAYNARD
2 MR. ZABELL: You may pick one and
3 answer.
4 A. What's your question?
5 Q. She posed with Don after she kissed
6 her boyfriend; correct?
7 A. Correct.
8 Q. She voluntarily put her face next
9 to Don's face and smiled for the camera;
10 correct?
11 A. It might have been that way.
12 Q. Okay. Do you have any reason to
13 believe that she did not think the jump was
14 awesome if it was not awesome?
15 MR. ZABELL: Objection to the form
16 of the question.
17 You may answer.
18 A. Yes, I do.
19 Q. And what's that, what Mr. Jkengle
20 told you?
21 A. Correct.
22 Q. Anything else?
23 A. No.
24 Q. As is evident from that video there
25 is nothing in there that indicates that she did

1 MAYNARD
2 not have an awesome time on that jump; correct?
3 MR. ZABELL: Objection to the form
4 of the question and he's already told you
5 what he believes is on the video that
6 does not indicate that she had an awesome
7 jump.
8 Q. You can answer the question.
9 A. I don't believe that videotape
10 backs up that she had a great jump, no, I do
11 not.
12 Q. Why? Let's list all the reasons.
13 A. When she landed?
14 Q. Uh-huh.
15 A. She didn't look happy. She might
16 have said "Awesome," but that wasn't like "Oh,
17 that was awesome." It was like, "It was
18 awesome."
19 Q. Anything else? So she wasn't
20 evocative enough?
21 MR. ZABELL: Objection to the form
22 of the question. If you understand the
23 words that he's using, you may answer.
24 If you don't understand them, you can
25 tell him you don't understand them.

1 MAYNARD
2 A. I don't understand them.
3 Q. She wasn't expressive enough?
4 MR. ZABELL: The same objection.
5 A. No.
6 Q. And any other evidences that she
7 didn't have an awesome time?
8 A. No.
9 Q. So it's simply when she landed that
10 she wasn't smiling immediately and her -- and
11 when her statement of awesomeness was not
12 expressive enough; correct?
13 MR. ZABELL: Objection.
14 Q. Just those two things are the
15 evidences that she didn't have an awesome time;
16 correct?
17 MR. ZABELL: Objection to the
18 multiple questions posed before you. You
19 may choose any one of them and provide an
20 answer to it.
21 A. No.
22 Q. Now, what were the creepy looks
23 that Don gave?
24 A. You can see it on the tape.
25 Q. So it's -- when he's being filmed

1 MAYNARD
2 on the tape. When he was being filmed when the
3 camera is directly on him?
4 A. Correct.
5 Q. You thought that those expressions
6 were creepy?
7 A. The way that he was looking at her,
8 looking at her and then looking back and doing
9 whatever else he was, at some point like that,
10 I thought that was a little creepy and that's
11 my opinion.
12 Q. You didn't fire him for that, did
13 you?
14 A. No.
15 Q. Do you instruct your instructors
16 how to act when they're on camera?
17 A. Excuse me?
18 Q. Do you instruct your instructors
19 how to act when they're on camera when someone
20 is buying video?
21 A. Professionally.
22 Q. Isn't it true that you don't want
23 hem to sit there with a poker face?
24 A. No.
25 Q. Okay. You want them to contribute

1 MAYNARD
2 to the fun of the jump; correct?
3 A. Correct.
4 Q. And, so, when this particular
5 vision of Mr. Zarda was shown, only his face
6 and his hands were available; correct?
7 A. Correct.
8 Q. So he was making expressive
9 gestures with his face and his hands; correct?
10 A. Correct.
11 Q. And those gestures were very
12 similar to many of the gestures we've seen in
13 the other videos and in the screen shots I
14 showed you; correct?
15 MR. ZABELL: Objection to the form
16 of the question.
17 You may answer.
18 A. No.
19 Q. Okay. Were his extra creepy?
20 MR. ZABELL: Objection to the form
21 of the question.
22 You may answer.
23 A. They were different.
24 Q. They were different. And what made
25 them different?

1 MAYNARD

2 A. The way he was looking at her and
3 the motions that he made were different than
4 any other thing you showed me today.

5 Q. When Mr. Kengle called, he didn't
6 mention anything about looking at her or making
7 any -- looking at her in an improper way, did
8 he?

9 MR. ZABELL: Objection to the form
10 of the question. You may answer.

11 A. He called to make a complaint about
12 how his girlfriend was unhappy the way she felt
13 on the jump; that she felt totally
14 uncomfortable. That is what the phone call was
15 about. It was a complaint.

16 Q. And she felt uncomfortable in part
17 because Don told her that he is gay?

18 A. Correct.

19 Q. All right. We're going to -- now
20 Mr. Kengle was on the same plane. You saw him
21 in the video we just saw; correct?

22 A. I don't know if I saw him.

23 Q. Well, he had his own video; is that
24 correct?

25 A. That's correct.

1 MAYNARD

2 The guy's last name is Sherman.
3 John Sherman. It just came to me.

4 Q. All right. I'm going to show you
5 my computer and ask you if you recognize
6 this -- well, you never met with Mr. Kengle
7 with -- in respect to this complaint did you?

8 MR. ZABELL: Wait, wait. Objection
9 to the form of the multiple questions.

10 MR. ANTOLLINO: Okay, withdrawn,
11 and I'll ask it again.

12 Q. You never met with Mr. Kengle after
13 his complaint, did you?

14 A. No, I did not.

15 Q. So you wouldn't necessarily be able
16 to pick him out of a lineup, would you?

17 A. No.

18 Q. All right. Well, let's just play
19 the video.

20 (Whereupon video is played.)

21 Q. Did you see anything in there that
22 was inappropriate or unsafe?

23 A. No.

24 Q. All right. And I believe that
25 Mr. Kengle said twice after he landed that it

1 MAYNARD

2 was fucking awesome; is that right?

3 A. I didn't hear it. Maybe he did.

4 Q. You didn't hear him say it once or
5 at all?

6 A. No.

7 Q. He looked happy at the end of the
8 jump; correct? Did you see -- withdrawn.

9 Have you ever seen that video
10 before?

11 A. No, I don't think so.

12 Q. There was one point in there where,
13 you know, Ms. Orelana gave a little kiss to the
14 camera. Did you see that?

15 A. Yes.

16 Q. Did you think that was
17 inappropriate?

18 A. No.

19 Q. She was flirting with the camera;
20 correct?

21 MR. ZABELL: Objection to the form.

22 A. I don't know.

23 Q. How did they exit the -- how did
24 they exit the airplane? Was that the
25 appropriate way to exit the airplane in that

1 MAYNARD

2 video?

3 A. Yes.

4 Q. Hold on a second.

5 Do you believe that homosexuality
6 is wrong?

7 A. I don't have an opinion on it. If
8 people want to do it, people can do as long as
9 it doesn't affect me or affect my customers
10 it's a free world.

11 Q. So, therefore, you would say it's
12 not wrong?

13 A. No.

14 Q. It's not wrong?

15 A. No.

16 MR. ZABELL: No, it's not wrong or,
17 no, it is wrong.

18 A. No, it's not wrong.

19 Q. It took you a while to get there,
20 though, you didn't --

21 MR. ZABELL: Objection.

22 Q. You paused. I mean, we've got it
23 on tape. You paused a while before you gave an
24 answer on that. Why did you have to think
25 about that?

1 MAYNARD
2 MR. ZABELL: Objection to the form.
3 You can answer.
4 A. Because I did, that's all.
5 Q. Do you think it's a disorder being
6 gay?
7 MR. ZABELL: Objection.
8 A. No.
9 Q. Do you think that gay people can
10 become heterosexual if they want to?
11 A. I'm not a doctor or a psychologist
12 or anybody to make any kind of opinion on that.
13 Q. Do you think gay marriage is wrong?
14 A. No.
15 MR. ANTOLLINO: All right. Do you
16 want to change the tape?
17 THE VIDEOGRAPHER: We are now off
18 the record at 5 p.m.
19 (Recess taken.)
20 THE VIDEOGRAPHER: This is tape six
21 of the deposition of Raymond Maynard.
22 We're now on the record at 5:06 p.m.
23 Q. Do you know anyone by the name of
24 Doug Smith?
25 A. Doug Smith?

1 MAYNARD
2 Q. Yes.
3 A. It doesn't ring a bell.
4 Q. Did anyone ever contact you about
5 Don after you fired him in relation to Don's
6 applying for another job?
7 A. No.
8 Q. Now, after the lawsuit was filed,
9 there was a little bit of press attention in
10 October of 2010. Do you recall that?
11 A. Yes, I do.
12 Q. Are you under the impression that
13 either Don or I sent out a press release
14 announcing the lawsuit?
15 A. I don't know who contacted the
16 press, but somebody had to.
17 Q. Well, are you aware that the court
18 docket is a public docket?
19 A. No.
20 Q. Are you aware that reporters often
21 look in the docket for juicy and interesting
22 cases?
23 A. No.
24 Q. Were you aware that a reporter from
25 the New York Post called me the day after I

1 MAYNARD
2 filed this case? Are you aware of that?
3 A. No.
4 Q. So it could be true?
5 A. It could be.
6 Q. You don't have any press release
7 that was sent out to the press; correct?
8 A. No.
9 Q. Was there anything wrong -- do you
10 think there was anything wrong with Don
11 cooperating and speaking to the reporter who
12 was interested in the case?
13 A. No.
14 Q. Now after Don was fired he applied
15 for unemployment insurance; correct?
16 A. I believe he did.
17 Q. How did you find out about it?
18 A. Because I get a notice from
19 Unemployment.
20 Q. All right. And one of the
21 grounds -- well, you contested his claim for
22 unemployment; correct?
23 A. Yes, we did.
24 Q. And one of the grounds you can
25 contest unemployment is that the employee was

1 MAYNARD
2 fired for misconduct; correct?
3 A. I believe -- I don't remember
4 exactly, I thought that it was about that he
5 was working, had another job somewhere.
6 Q. Well, I'll show you what I've
7 premarked as 26.
8 (Exhibit R-26, letter, marked for
9 Identification.)
10 Q. And I'll ask you if you recognize
11 this.
12 A. (Reviewing.)
13 Yes.
14 Q. You recognize it?
15 A. Yeah.
16 Q. That's a letter that Lauren
17 Callanan wrote on your behalf to the
18 unemployment insurance division; correct?
19 A. Correct.
20 Q. And, so, one of the points that she
21 makes is that "Mr. Zarda resumed working for
22 Altitude Express on May 15, 2010 through June
23 21, 2010 and was terminated for believed
24 misconduct as we received complaints from
25 customers stating Mr. Zarda shared

1 MAYNARD
2 inappropriate information with them regarding
3 his personal life"; correct?
4 A. Correct.
5 Q. It doesn't mention anything there
6 about improper touching; correct?
7 A. With what?
8 Q. It doesn't mention anything there
9 about improper touching; correct?
10 A. No.
11 Q. And the complaints from customers,
12 that was just from one customer; correct?
13 A. Correct.
14 Q. And Mr. Kengle; correct?
15 A. Correct.
16 Q. And Lauren said, "This is not the
17 first time we had received complaints from
18 paying customers regarding Mr. Zarda," and when
19 you say that, you're referring to the
20 complaints from 2001; correct?
21 A. Correct.
22 Q. All right. And those complaints
23 were also about Don sharing personal
24 information at the workplace; correct?
25 A. Yes.

1 MAYNARD
2 Q. You also speculated that Don was
3 working at Advance in Fitness; correct?
4 MR. ZABELL: Objection. This
5 document does not indicate that Mr.
6 Maynard speculated about anything.
7 MR. ANTOLLINO: All right.
8 Q. The document does say, and you can
9 refer to it since I have taken it from you, "It
10 is speculated that during this time through
11 present day, Mr. Zarda has also owned, co-owned
12 and maintained his own business."
13 MR. ZABELL: Correct, but
14 Mr. Maynard didn't write this letter,
15 Counsel.
16 Q. It says that "It is speculated,"
17 correct? Do you want to look at the letter?
18 A. (Reviewing.)
19 Okay.
20 Q. Do you know who -- you know, Lauren
21 uses what we call in the law the passive voice.
22 It is speculated, but it doesn't say who did
23 the speculation. Do you know who did the
24 speculation?
25 A. That he owned a company?

1 MAYNARD
2 Q. Yeah.
3 A. He told us he owned a company. He
4 gave us that information, Don gave us that
5 information.
6 Q. But why did she used the word
7 "speculated"?
8 A. I don't know.
9 Q. You don't know how much money that
10 company makes?
11 A. No.
12 Q. Do you know why -- withdrawn. Do
13 you know why you would want to see any e-mails
14 between Don and Bill Moore?
15 A. Why would I want to see e-mails?
16 Q. Yeah, why would you -- could you
17 think of any reason you would want to see
18 e-mails between Don and Bill Moore?
19 A. I don't know who Bill Moore is.
20 Q. Did Don have a cat that died?
21 A. Did he have a cat that died?
22 Q. Yes.
23 A. I believe he did.
24 Q. Did you see him crying at the drop
25 zone at any time?

1 MAYNARD
2 A. Did I personally see him crying?
3 Q. Yeah.
4 A. I don't believe so.
5 Q. Did anyone tell you that he cried?
6 A. I don't remember anybody telling me
7 that he cried. I know he was upset that his
8 cat died.
9 Q. Was he unable to do jumps for any
10 period of time because of the death of the cat?
11 A. I don't remember that.
12 Q. All right. This request for a
13 finding of misconduct was denied by
14 Unemployment; correct?
15 MR. ZABELL: Objection to the
16 mischaracterization of the document.
17 Q. I'm just asking if you know.
18 A. I don't know.
19 Q. Okay. Well, did Don get
20 unemployment?
21 A. I don't remember. I think he did.
22 Q. You're looking for people; is that
23 right?
24 MR. ZABELL: Objection to the form.
25 Q. You're looking for workers, aren't

1 MAYNARD
2 you?
3 A. We're always looking for workers.
4 Q. You're always looking for workers.
5 In fact, you put out two ads for workers, one
6 on Facebook and one on dropzone.com; is that
7 correct?
8 A. Correct.
9 Q. I'll show you what I've marked as
10 24?
11 MR. ZABELL: Thank you, Counselor.
12 (Exhibit R-24, posted ads, marked
13 for identification.)
14 Q. How many -- are those ads that your
15 company has posted?
16 A. Yes.
17 Q. Seeking experienced skydivers?
18 A. Yes.
19 Q. Okay. How many do you need?
20 A. I like to get probably four to six
21 more tandem masters and a few more video guys,
22 a few ground guys.
23 Q. Okay. So Don -- how many video
24 guys?
25 A. I haven't crunched all the numbers,

1 MAYNARD
2 probably two or three more.
3 Q. All right. So you're looking for
4 between five and nine people who are
5 experienced jumpers; correct?
6 A. About that.
7 Q. Because the video guys also have to
8 go out in the parachute; correct?
9 A. Correct.
10 Q. Don is qualified for all of those
11 jobs; correct?
12 A. Correct.
13 Q. All right. Is Don eligible for
14 rehire this summer?
15 MR. ZABELL: Objection to the form
16 of the question.
17 Q. You can answer.
18 MR. ZABELL: Just yes or no.
19 THE WITNESS: Excuse me?
20 MR. ZABELL: Just answer yes or no.
21 A. No.
22 Q. Why not?
23 MR. ZABELL: Let's take a break.
24 MR. ANTOLLINO: No, no, no, hold
25 on. We are going to --

1 MAYNARD
2 MR. ZABELL: Step outside.
3 MR. ANTOLLINO: You have
4 interrupted the questioning. You're
5 coaching the witness and that's unfair.
6 THE VIDEOGRAPHER: Do you want me
7 to go off the record now?
8 MR. ANTOLLINO: Well, I have no
9 choice.
10 THE VIDEOGRAPHER: We are now off
11 the record at 5:16 p.m.
12 (Recess taken.)
13 THE VIDEOGRAPHER: We are now on
14 the record at 5:17 p.m.
15 MR. ANTOLLINO: Counsel, that was
16 completely inappropriate and I'm going to
17 ask for evidentiary sanctions because of
18 that.
19 MR. ZABELL: Counselor, look at me
20 when you speak to me, please. I am
21 telling you you are absolutely incorrect.
22 I started to get up to take a quick break
23 before you started asking your question.
24 MR. ANTOLLINO: Nonsense.
25 MR. ZABELL: You saw that I stood

1 MAYNARD
2 up and then you jammed out a question
3 while I had already was attempting to
4 take a break.
5 MR. ANTOLLINO: Nonsense. You went
6 out and coached your witness.
7 Q. Why is Don not eligible for rehire?
8 MR. ZABELL: Objection to the form.
9 You may answer.
10 A. He was let go for a customer
11 complaint and this was the second time it
12 happened. I believe in giving people a second
13 chance and he's had a second chance.
14 Q. Are there any other reasons?
15 A. No.
16 Q. All right. And would it be fair to
17 say you will never hire Don again?
18 MR. ZABELL: Objection to the form.
19 You can answer.
20 A. I never say never. Right now, two
21 strikes and -- I never say never though.
22 Q. Did you have a conversation with
23 your attorney outside?
24 MR. ZABELL: Objection.
25 Don't answer that question.

1 MAYNARD
 2 MR. ZABELL: Objection to the form.
 3 You may answer.
 4 A. We like you to be within 20 to 30
 5 minutes max.
 6 MR. ZABELL: Counsel, you should
 7 know that you are five minutes away from
 8 your seven hours.
 9 MR. ANTOLLINO: No, I'm not.
 10 MR. ZABELL: No, you are. We're
 11 leaving at 5:30.
 12 MR. ANTOLLINO: Counsel, I'm not
 13 done and I'm entitled to seven hours
 14 without colloquy, okay, and without
 15 breaks. So if you're going to leave then
 16 we're going to have to make a motion to
 17 continue the deposition and he's going to
 18 have to come back.
 19 MR. ZABELL: It seems like you're
 20 wasting your time anyway, Counselor. Go
 21 ahead, you have five minutes.
 22 Q. Do you have a staff manual?
 23 MR. ZABELL: Objection to the form.
 24 You may answer.
 25 A. You mean an employee handbook?

1 MAYNARD
 2 Q. Yes.
 3 A. Yes, we do.
 4 Q. And how old is it?
 5 A. A year and a half, a year. Fairly
 6 new.
 7 Q. Why did you write it?
 8 A. My girlfriend, who is very business
 9 minded, said I should have one.
 10 + MR. ANTOLLINO: All right. I
 11 call for the production of that. I'll
 12 send you a follow-up letter.
 13 MR. ZABELL: No.
 14 Q. But you didn't have one when Don
 15 was working at the drop zone; correct?
 16 A. No, we did not.
 17 Q. Does the employee manual instruct
 18 employees not to provide any personal
 19 information to the passengers?
 20 A. I'm not sure.
 21 Q. Does the employee manual say don't
 22 mention to any employees if you're gay?
 23 A. I'm not sure.
 24 Q. Do you remember an occasion where
 25 Don and some other staff members from Skydive

1 MAYNARD
 2 Long Island went to Neptune's Bar and you were
 3 there?
 4 A. We have jumped in there, yes.
 5 Q. Do you recall a time when Don
 6 jumped in there with you?
 7 A. Yes.
 8 Q. Okay. And that was in 2010?
 9 A. I'm not sure of the date, when it
 10 was.
 11 Q. Okay. Do you recall there being a
 12 transgender person present?
 13 A. A what?
 14 Q. At Neptune's. Do you know what
 15 transgender means?
 16 A. I'm not too sure.
 17 Q. Okay. A transgender person is a
 18 person that has -- that either is biologically
 19 a man and who either dresses, acts or performs
 20 as another gender?
 21 MR. ZABELL: I'm going to A, advise
 22 you that that's incorrect, and, B, tell
 23 you that you're under no obligation to
 24 believe any representations he makes
 25 because he is not under oath.

1 MAYNARD
 2 Q. Okay. That's one way to describe
 3 it a transgender person. Have you ever seen
 4 anyone like at Neptune's?
 5 A. I don't recall if I have.
 6 Q. Okay.
 7 MR. ZABELL: Counsel, it is now
 8 5:30. If you represent that you can
 9 finish within the next ten minutes, I
 10 will gladly allow my client to sit for
 11 another ten minutes. If you cannot, then
 12 we are done for the day.
 13 MR. ANTOLLINO: All right. If
 14 you're leaving, and I'm not going to
 15 represent that I'm done. I get seven
 16 hours. If you insist on leaving then
 17 we'll just have to continue the
 18 deposition another time.
 19 MR. ZABELL: Okay. I believe
 20 you've used your seven hours. I say good
 21 day, sir.
 22 MR. ANTOLLINO: I haven't, but
 23 that's okay. What time do you have for
 24 the video?
 25 THE VIDEOGRAPHER: We've gone on

1 MAYNARD
2 the record testimony five hours, 30
3 minutes and 16 seconds.
4 MR. ANTOLLINO: Does that sound
5 like seven hours to you, Counsel?
6 MR. ZABELL: You've used your seven
7 hours. We were invited to be here at 10
8 o'clock. You did not start on time. We
9 were here at 10 o'clock. This
10 deposition, from our position, started at
11 10 o'clock.
12 MR. ANTOLLINO: Well, even if you
13 count that 15 minutes of lateness, I'm
14 still well within my seven hours and I
15 get another hour, but we'll just have to
16 take it up to the judge like everything
17 else.
18 He has said that he's taking his
19 client, so I have no legal authority to
20 compel him and I have to go to the judge.
21 THE VIDEOGRAPHER: We are now off
22 the record at 5:28 p.m.
23 (Time noted: 5:28 p.m.)
24
25

1 A C K N O W L E D G M E N T
2
3 STATE OF NEW YORK)
4 :
5 COUNTY OF)
6
7 I, RAYMOND MAYNARD, hereby certify
8 that I have read the transcript of my testimony
9 taken under oath in my deposition of December
10 14, 2011; that the transcript is a true,
11 complete and correct record of my testimony,
12 and that the answers on the record as given by
13 me are true and correct.
14
15 _____
16 RAYMOND MAYNARD
17
18 Signed and Subscribed to
19 before me, this day
20 of , 2011.
21 _____
22 Notary Public, State of New York
23
24
25

1 C E R T I F I C A T E
2
3 STATE OF NEW YORK)
4)
5 COUNTY OF NEW YORK)
6
7 I, SOPHIE NOLAN, a Notary Public within
8 and for the State of New York, do hereby
9 certify:
10 That RAYMOND MAYNARD, the witness whose
11 examination is hereinbefore set forth, was duly
12 sworn by me and that this transcript of such
13 examination is a true record of the testimony
14 given by such witness.
15 I further certify that I am not related to
16 any of the parties to this action by blood or
17 marriage and that I am in no way interested in
18 the outcome of this matter.
19 IN WITNESS WHEREOF, I have hereunto set my
20 hand this 27th day of December, 2011.
21
22
23
24 _____
25 SOPHIE NOLAN

1 ***ERRATA***
2 ELLEN GRAUER COURT REPORTING CO. LLC
3 126 East 56th Street, Fifth Floor
4 New York, New York 10022
5 212-750-6434
6 NAME OF CASE: Zarda vs. Altitude Express
7 DATE OF DEPOSITION: December 14, 2011
8 NAME OF WITNESS: RAYMOND MAYNARD
9
10 PAGE LINE FROM TO REASON
11 _____|_____|_____|_____|_____
12 _____|_____|_____|_____|_____
13 _____|_____|_____|_____|_____
14 _____|_____|_____|_____|_____
15 _____|_____|_____|_____|_____
16 _____|_____|_____|_____|_____
17 _____|_____|_____|_____|_____
18 _____|_____|_____|_____|_____
19 _____|_____|_____|_____|_____
20 _____|_____|_____|_____|_____
21 _____|_____|_____|_____|_____
22 Subscribed and sworn before me
23 this ____ day of _____, 20__.
24 _____
25 (Notary Public) My Commission Expires:

ERRATA

ELLEN GRAUER COURT REPORTING CO. LLC
126 East 56th Street, Fifth Floor
New York, New York 10022
212-750-6434

NAME OF CASE: Zarda vs. Altitude Express
DATE OF DEPOSITION: December 14, 2011
NAME OF WITNESS: RAYMOND MAYNARD

PAGE	LINE	FROM	TO	REASON
201	125	No	MAYBE	No ONE COMPLAINED
202	7	No	MAYBE	No ONE COMPLAINED
220	19	I won't thank so.		No ONE COMPLAINED
253	7	PROBABLY	MAYBE	IF ANOTHER CUSTOMER COMPLAINED!
256	8	YES	?	No ONE COMPLAINED
256	21	YES	?	No ONE COMPLAINED!
257	20	YEAH	?	No CUSTOMER COMPLAINED
271	7	No.	STILL NO	THESE ARE FRIENDS - No COMPLAINTS-
272	18	No	?	IT WAS AMONG EXP. THINGS - NOT S "NO COMPLAINTS"
273	3	YES	IT APPEARS THAT	- ONLY ONE POINT OF VIEW!
273	10	YES	MAYBE	-
273	13	YES	MAYBE	No COMPLAINT-
276	3	YES	MAYBE	- No ONE COMPLAINED

Raymond F. Maynard

Subscribed and sworn before me

this 10 day of May 2012

Renee A. Godsell

(Notary Public)

My Commission Expires:

Renee A. Godsell
Notary Public, State of New York
No. 01606103602
Qualified in Suffolk County
Commission Expires Dec. 29 2015

1 UNITED STATES DISTRICT COURT 317
2 EASTERN DISTRICT OF NEW YORK
3 -----X
4 DONALD ZARDA,
5 Plaintiff,
6 -against-
7 ALTITUDE EXPRESS, ET ANO.,
8 Defendant,
9 Civil Action No.: 10-9334
10 -----X
11 One Corporate Drive
12 Bohemia, New York
13 November 16, 2012
14 1:21 p.m.
15 Continued Videotaped Deposition
16 of RAYMOND MAYNARD, pursuant to Notice, before
17 Jennifer Fuchs, a Notary Public of the State
18 of New York.
19
20
21
22
23 ELLEN GRAUER COURT REPORTING CO. LLC
24 126 East 56th Street, Fifth Floor
25 New York, New York 10022
212-750-6434
REF: 102023

1 ----- I N D E X ----- 319
2 WITNESS EXAMINATION BY PAGE
3 RAYMOND MAYNARD MR. ANTOLLINO 320
4
5
6 ----- E X H I B I T S -----
7 EXHIBIT DESCRIPTION FOR I.D.
8 Exhibit 30 Photograph 324
9 Exhibit 31 Errata Sheet 331
10 Exhibit 32 Document entitled Ripoff
11 Report 336
12 Exhibit 33 Skydive Long Island Get
13 Laid Luau document 340
14 Exhibit 34 E-mail 349
15 Exhibit 35 Affidavit of Ray Maynard 350
16 Exhibit 36 E-mail 353
17
18
19 (Exhibits retained by counsel)
20
21
22
23
24
25

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2
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17 BY: SAUL D. ZABELL, ESQ.
18 PHONE 631-589-7242
19 FAX 631-563-7475
20 E-MAIL szabell@laborlaw.com
21
22 ALSO PRESENT:
23 DONALD ZARDA
24 JOSE RIVERA, Legal Videographer
25

1 THE VIDEOGRAPHER: The time is 1:21 320
2 p.m., November 16, 2012, and this is tape
3 number one, volume two in the continued
4 videotaped deposition of Raymond Maynard.
5 MR. ANTOLLINO: Swear in the
6 witness.
7 MR. ZABELL: It is 1:21. Please
8 proceed.
9 R A Y M O N D M A Y N A R D, resumed as a
10 witness, having been duly resworn by a
11 Notary Public, was examined and testified
12 further as follows:
13
14 EXAMINATION BY
15 MR. ANTOLLINO (Cont'd):
16 Q. Mr. Maynard, we've met before.
17 Still photos can be made in a tandem
18 jump; is that correct?
19 A. That's correct.
20 Q. And Mr. Kengle and Ms. Orelana had
21 still photos in addition to video, correct?
22 A. I guess. I'm not sure.
23 Q. Well, let me just --
24 A. That's normal.
25 Q. It's normal, so it comes

1 MAYNARD 321
2 automatically or...
3 Well, anyway, let me just show you
4 what I got from Mr. Kengle. There's a package of
5 a hundred or so photos.
6 These photos are taken automatically
7 from the photographer's camera; is that correct
8 (handing)? How are they taken?
9 MR. ZABELL: I will object to the
10 multiple questions you've asked of him.
11 MR. ANTOLLINO: Withdrawn.
12 Q. How are the pictures taken?
13 A. A separate camera from the video
14 camera is attached to the helmet, and it's a
15 digital camera, and the videographer has a device
16 that's either triggered by his hand, or there's
17 other ones now that they actually have in their
18 mouth, they're called bite switches, and there's
19 also tongue switches, so they're able to control
20 their free fall and everything with their hands.
21 And when the time is right for a photo, they can
22 then chomp down on the bite switch and make the
23 camera take a picture.
24 Q. Is there any capacity for the camera
25 to keep going on automatically as time goes on

1 MAYNARD 323
2 A. I don't know if I could pick her out
3 of a lineup, but.
4 Q. You don't know if you could pick her
5 out of a lineup?
6 A. No.
7 Q. You met her on the day of the jump,
8 but you can't recognize her.
9 A. Yeah.
10 Q. I am just going to ask you to
11 scroll -- withdrawn.
12 Could you scroll down these pictures
13 and pick out any pictures that you believe that
14 Mrs. Orelana is not having a good time on this
15 jump?
16 MR. ZABELL: I am going to object to
17 the form of the question.
18 You may answer, if you can.
19 (Witness perusing photographs.)
20 Q. I think Mr. Kengle's pictures start
21 with this one, 7927 (indicating).
22 Did you see any pictures where you
23 saw evidence Ms. Orelana was not having a good
24 time?
25 A. No.

1 MAYNARD 322
2 without the switch?
3 MR. ZABELL: Objection to the form.
4 You may answer.
5 A. I've never jumped with one of those
6 cameras, so I'm not sure if that could just
7 automatically go on.
8 Q. Do these pictures appear to be
9 pictures from the -- if you look through them,
10 you can go through them by pressing the down
11 button, do these pictures appear to be the
12 pictures of Mr. Kengle and Ms. Orelana?
13 A. Looking from here, I don't know who
14 is jumping here.
15 MR. ZABELL: I would suggest you
16 look through all of them before answering.
17 THE WITNESS: Okay.
18 Q. Well, let me ask you this.
19 Do you recognize Ms. Orelana; have
20 you ever met her?
21 A. Yes.
22 Q. When did you meet her?
23 A. On the day of the jump.
24 Q. So you recognize her in these
25 photos?

1 MAYNARD 324
2 Q. Do you want to go through the rest
3 of Mr. Kengle's pictures to see any evidence of
4 him not having a good time or Ms. Orelana, where
5 she's pictured in there too?
6 MR. ZABELL: Objection to the form.
7 You may answer.
8 (Witness perusing photographs.)
9 A. I don't know normal facial
10 expressions and that.
11 Q. Wait. So you think that's evidence
12 he's not having a good time?
13 A. No. I don't know.
14 MR. ZABELL: Objection to the form.
15 You may answer.
16 A. I don't know.
17 MR. ZABELL: Counsel, I will advise
18 you to allow the deponent to finish
19 answering the question before asking your
20 next question.
21 MR. ANTOLLINO: I did, okay.
22 Q. Continue.
23 (Witness perusing photographs.)
24 Q. When you can't go down any further,
25 let me know.

325
MAYNARD
That's the last one. Didn't it look like he was having a good time?
MR. ZABELL: Objection to the form.
A. I don't understand what you mean. Does it look like he was having a good time?
Q. Doesn't it seem like he was having a fantastic time?
MR. ZABELL: Objection to the form.
A. I saw a normal skydive. Normally people have a good time when they skydive.
Q. And it looked like he was having a good time when he was skydiving, correct?
MR. ZABELL: Objection; asked and answered.
A. You could say that.
MR. ANTOLLINO: We have been marking these exhibits as R and a number. We left off at R-20 something, so I will mark this as R-30, and I will give you a copy to share with your counsel.
(Exhibit R-30, Photograph, marked for identification.)
Q. Do you recognize that picture?
A. Well, it's a tandem that's being

327
MAYNARD
multiple tandem instructors do that on film.
Q. For a laugh, correct?
MR. ZABELL: Objection to the form. You may answer.
A. I didn't ask them why they did it.
Q. Do you encourage your tandem instructors to take naps on your customers?
A. I didn't say that.
Q. Well, do you discourage it?
A. They're doing something for a photo op.
Q. Okay. Why are they doing that for a photo op; why is he taking a nap on her for a photo op?
A. He's --
MR. ANTOLLINO: Wait for me to finish asking the question.
MR. ZABELL: You asked two.
MR. ANTOLLINO: I asked one.
MR. ZABELL: I object to the form of the question.
MR. ANTOLLINO: Withdrawn. I'll ask it again.
Q. Why is he taking a nap on her for

326
MAYNARD
done over eastern Long Island.
Q. Do you recognize any of the people in the picture?
A. I don't recognize the customer.
Q. Who is the tandem instructor?
A. Well, I couldn't say for certain, but I believe it might be Bobby Swain.
Q. What is he doing?
A. He's acting like he's asleep.
Q. Why?
A. For the photo shoot.
Q. Why would he do that for the photo shoot?
A. Almost every single tandem instructor does that exact photo.
Q. That exact one?
A. Um-hum.
Q. It's a goofy type of atmosphere where you try and have fun.
MR. ZABELL: I am going to object to the form.
MR. ANTOLLINO: Question mark.
MR. ZABELL: You may answer.
A. No. I'm saying that I've seen

328
MAYNARD
the photo op?
A. He's not taking a nap.
Q. He's awake?
A. Of course he's awake.
Q. Is he pretending to take a nap?
A. It looks like that way.
Q. Okay. Why is he pretending to take a nap for the photo op?
A. That's something that has started to be done, and other people liked it.
Q. Who liked it?
A. There are other customers that see the videotapes after the jump.
Q. And they like it when their instructor pretends to take a nap on top of them?
A. Yeah.
Q. Have they told you that?
A. It's obvious when they're watching the videotape that they think it's pretty funny.
Q. Okay. Do you know that that's on your Facebook page.
A. I'm not aware.
Q. All right. Thank you. I'm done with that.

1 MAYNARD
2 All right. Did you read the first
3 portion of your deposition?
4 A. Not recently.
5 Q. Well, did you read it?
6 A. Yes.
7 Q. And were you aware that you had 30
8 days to review and make corrections in your
9 deposition transcript?
10 A. Yes.
11 Q. Were you aware that after 30 days
12 there were many changes that were made?
13 A. I guess.
14 Q. Why did you make those changes?
15 A. I thought that's what it was given
16 to me for.
17 Q. How did you decide to make these
18 changes?
19 A. Because I read what the deposition
20 said, and then I thought that I had clear mind
21 after the time to make my changes.
22 Q. You had a clear mind, so are you
23 saying you weren't having a clear mind at the day
24 of your first deposition?
25 A. Sometimes probably not.

1 MAYNARD
2 this as R-31.
3 (Exhibit R-31, Errata Sheet, marked
4 for identification.)
5 Q. Are those the changes you made about
6 80 days after the deposition was tendered to your
7 attorney?
8 MR. ZABELL: Take the opportunity to
9 review the document.
10 A. I need my glasses.
11 MR. ANTOLLINO: Mr. Zabell, all
12 right. The judge did warn you not to make
13 this prolonged, and already you've done
14 that on a couple of occasions.
15 You didn't tell me the videographer
16 was here. You brought your client in late,
17 all right, and you're making sure that your
18 client takes as much time as possible to
19 review the documents. I only have an hour,
20 as you know.
21 MR. ZABELL: Are you finished,
22 Counselor?
23 MR. ANTOLLINO: Yes.
24 MR. ZABELL: Review the document,
25 Ray.

1 MAYNARD
2 Q. Why not; were you on any
3 medications?
4 A. No.
5 Q. Are you on any medications today
6 that prevent you from having a clear mind?
7 A. No.
8 Q. Do you have a clear mind today?
9 A. Yes.
10 Q. At what point in the deposition on
11 the first date did you have a clear mind?
12 A. I don't know. I don't remember.
13 Q. What was it about your testimony;
14 can you recall what changes you made and why?
15 MR. ZABELL: Objection to the form.
16 You may answer.
17 A. No.
18 Q. Did someone -- go ahead. Are you
19 finished? You said "No," and then I thought you
20 were done, but you said something else. All
21 right.
22 Did anyone tell you to make any
23 changes?
24 A. No.
25 MR. ANTOLLINO: I am going to mark

1 MAYNARD
2 THE WITNESS: So I can't have my
3 glasses?
4 Q. All right. We are going to put that
5 aside if you can't read without your glasses. Do
6 you have them with you?
7 A. Yeah.
8 Q. Okay. How long will it take you to
9 get them?
10 A. A minute.
11 MR. ANTOLLINO: Okay.
12 THE VIDEOGRAPHER: Off the record?
13 MR. ZABELL: No.
14 (Whereupon, the witness leaves the
15 deposition room.)
16 MR. ANTOLLINO: We're not stopping
17 the clock?
18 MR. ZABELL: No.
19 MR. ANTOLLINO: All right. We're
20 going to call the judge then. We'll
21 eventually call the judge. The judge
22 warned you.
23 (Whereupon, the witness enters the
24 deposition room.)
25 THE WITNESS: Okay.

333
MAYNARD
Q. Okay. Are these the changes you made about 80 days after your deposition was tendered?
A. Yes.
Q. Okay. It seems to be a lot of -- you put -- you changed nos to maybes and probablys to maybes, yeses to question marks, and the reason for your changes is that no one complained, complain and complain is mentioned on this document; would you say that to be true?
MR. ZABELL: I will object to the form of the question.
MR. ANTOLLINO: You can answer.
MR. ZABELL: You may answer.
A. After reading the deposition, this is what I wrote in.
Q. Yeah, I know. I'm just asking you if it appears that the word "complain" appears about 10 times?
A. Yes.
Q. What is it about a complaint that made you want to change portions of the deposition?
MR. ZABELL: Objection to the form.

335
MAYNARD
MR. ANTOLLINO: Withdrawn, withdrawn.
Q. Is any complaint by a customer grounds for termination?
A. What kind of complaint?
Q. Any.
A. Any. Broad scope of any kind of complaint about anything for the day?
Q. Yes, exactly.
A. No.
MR. ZABELL: Counselor, could I have that copy of the exhibit, please?
MR. ANTOLLINO: Yes. We have copies. Don't worry.
Q. We talked at your first deposition about a complaint that was on the internet and that was responded to, and that you believed that it was written by an owner of a competing drop zone. Do you remember that?
A. There was something out on the internet years ago I remember.
Q. Yes. And you responded to that; is that correct?
A. I believe I did.

334
MAYNARD
You may answer.
A. I don't understand your question.
Q. Well, I'm trying to understand why "complain" is such a major part of this errata sheet, this exhibit.
MR. ZABELL: That's not a question.
A. Without seeing that statement from me, I don't know how I could answer that.
Q. Okay, fair enough.
If someone complained -- is any complaint grounds for termination?
MR. ZABELL: Objection to the form. You may answer.
MR. ANTOLLINO: You can put that away. We're done with that now.
THE WITNESS: Okay.
A. Is any complaint grounds?
Q. Yes.
A. Could you specify something?
Q. The question is is any complaint a ground for termination, any complaint by a customer ground for termination?
MR. ZABELL: Objection to the form of the multiple question.

336
MAYNARD
MR. ANTOLLINO: Okay. I want to show you what we will mark as R-32. (Exhibit R-32, Document entitled Ripoff Report, marked for identification.)
Q. I want you to look through that. I'm not asking you to read the whole thing, but to look at it and see if that appears to be the complaint that you talked about at your deposition.
MR. ZABELL: Counselor, do you have a copy for me?
MR. ANTOLLINO: I have a copy to give you later, but while I question him, I'd like to have it in front of me.
A. Even this may seem like it's a complaint. To me this was somebody trying to damage my reputation, so I don't believe -- no one would even come forward and say who they were. So anybody that wants to stand there anonymously and say things, my feeling is, as I said in here, if these things actually happened and somebody was doing these things to their friends at the time, if it really happened, they would have said something at the time.

1 MAYNARD 337
2 Q. Okay. And that's what you wrote in
3 the updates and rebuttals.
4 When you found out about this, the
5 update and rebuttal number one says, "Owner of
6 company," quote, "Nothing but lies from a
7 skydiver with an agenda. Author, Ray, drop zone
8 owner." Do you see that?
9 MR. ZABELL: Objection to the form.
10 A. No. Where is that?
11 Q. In the middle of page 2, updates and
12 rebuttals.
13 A. Okay.
14 Q. You see that there? It say number
15 one, company, quote, "Nothing but lies from a
16 skydiver with an agenda." You wrote that,
17 correct?
18 A. Yes, I did.
19 Q. Okay. It continues on to the next
20 page, correct, and in the middle of the page it
21 says, "Thank you truthfully RM." Those are your
22 initials, correct?
23 A. Yes.
24 Q. And DZO means what?
25 A. Drop zone owner.

1 MAYNARD 339
2 were taking a different path.
3 Q. Okay. So you just -- okay. Was
4 there any particular reason, or there was no
5 reason?
6 MR. ZABELL: Objection to the form.
7 Q. I know it's an at-will business. I
8 understand that.
9 MR. ZABELL: Counselor, are you
10 withdrawing your previous question?
11 MR. ANTOLLINO: No, I'm not.
12 Q. I'm just asking was there any
13 particular reason you let her go; did you believe
14 her performance was not up to standards, for
15 example?
16 MR. ZABELL: I am objecting to the
17 form of the multiple questions.
18 You may pick one and provide an
19 answer.
20 A. There was a change in direction, and
21 it wasn't going to work anymore.
22 Q. Why?
23 A. Because there was a change in
24 direction.
25 Q. What was the change in direction?

1 MAYNARD 338
2 Q. And you're the drop zone owner,
3 correct?
4 A. Yes, I am.
5 Q. Okay. Do you know who wrote the
6 other responses? The next one is the skydiver
7 chick from Williston Park. Do you know who wrote
8 that?
9 A. No, I do not.
10 Q. Did Lauren Callanan write any of
11 these responses, or did you direct her to?
12 A. I did not direct anybody to write
13 anything.
14 MR. ANTOLLINO: Here is your copy,
15 Counsel (handing).
16 Q. What happened to Lauren; why isn't
17 she working for you anymore?
18 A. Things change.
19 Q. Did she resign, or did you fire her?
20 A. It's an at-will business, and I told
21 her that things just weren't working out.
22 Q. So you fired her?
23 A. I let her go.
24 Q. Was there a reason why?
25 A. We're an at-will business, and we

1 MAYNARD 340
2 A. We were going more corporate, things
3 were changing, other people were coming in, and
4 it was time that -- we weren't seeing -- things
5 were not going to be the way -- just it was time
6 for her to go.
7 Q. Why did Lauren not fit into the new
8 corporate culture?
9 MR. ZABELL: Object to the form.
10 You may answer.
11 A. Because it was going to be
12 different.
13 Q. Okay. Do you remember we talked
14 about at the first part of the deposition Skydive
15 Long Island Get Laid Luau?
16 A. Yep.
17 MR. ANTOLLINO: All right. Let's
18 just mark this as R-33.
19 (Exhibit R-33, Skydive Long Island
20 Get Laid Luau document, marked for
21 identification.)
22 Q. You recognize Jordan Miles, correct?
23 A. Yes, I know Jordan Miles.
24 Q. Does he still work for you?
25 A. Actually, he's moving on to another

1 MAYNARD 341
2 job in Denver, and he's going active, actually.
3 I believe this week he's being deployed.
4 Q. Did you fire him last summer; did
5 he -- withdrawn. Did he work for you last
6 summer?
7 A. Yes.
8 Q. Did you look into whether or not
9 this was grounds for termination, this "pulling
10 your pork" reference and the "getting laid luau"?
11 A. Well, they're talking about pulled
12 pork sandwich, and they're referring to getting
13 leis for the luau.
14 Q. How is "getting laid" spelled?
15 "Getting laid" is spelled L-A-I-D, correct, in
16 that post?
17 A. Yes.
18 Q. And "getting laid" means having
19 intercourse in the way that it is spelled that
20 way, correct?
21 A. That's your interpretation.
22 Q. What's your interpretation?
23 A. My interpretation is we were having
24 a luau. Everybody was going to get a lei.
25 Q. And do you know how lei is spelled?

1 MAYNARD 343
2 sandwich, does someone actually pull the pork, or
3 is that the job of the cook?
4 MR. ZABELL: Objection.
5 You can answer.
6 A. I don't know.
7 Q. How do you make pulled pork?
8 A. I've never made pulled pork.
9 Q. All right. When you have an
10 unemployment claim filed against you, are there
11 any economic consequences that result from that
12 to you?
13 A. I believe how the unemployment
14 insurance works, that I pay a premium for that
15 insurance, and I'm not sure -- I believe that if
16 there are multiple claims, that possibly my
17 premium goes up.
18 Q. I see. So there's a chance that if
19 someone has multiple claims or, rather, an
20 employer has multiple claims like you, that you
21 might have to pay more money?
22 A. I believe that's how it works.
23 Q. Okay. And is there a way for you to
24 prevent a unemployment claim from being approved?
25 MR. ZABELL: Objection to the form.

1 MAYNARD 342
2 MR. ZABELL: Objection; asked and
3 answered.
4 You can answer it again.
5 A. I don't know, L-E-Y.
6 Q. It's a double entendre that he's
7 making there, getting a lei on his body, but he's
8 spelling it like having intercourse, correct?
9 MR. ZABELL: Objection to the form.
10 You may answer.
11 A. I don't know for a fact that that
12 means intercourse, and that is not my
13 interpretation of that.
14 Q. What about "pulling your pork"?
15 A. They had pulled pork sandwiches.
16 Q. All right. And is "pulling your
17 pork" a double entendre, or he was just stating
18 exactly; he was referring to pulled pork
19 sandwiches?
20 A. This was being referred to pulled
21 pork sandwiches.
22 Q. All right. Can I see it for a
23 second?
24 (Witness handing.)
25 Q. When someone eats a pulled pork

1 MAYNARD 344
2 You may answer.
3 A. When an unemployment claim is put
4 in, we have a -- a letter is sent to us, which I
5 read. And if we don't have anything to dispute
6 it, it's not answered. If we believe that that
7 person is working somewhere else, then we -- it's
8 our responsibility to send that information to
9 them.
10 Q. Are there any other grounds upon
11 which an unemployment claim can be denied?
12 A. Not that I know of.
13 Q. Did you know that if an employee is
14 fired for misconduct, he or she is not entitled
15 to unemployment benefits?
16 MR. ZABELL: Objection to the form.
17 A. That's probably part of the rules.
18 Q. Is that what your understanding of
19 the rules are?
20 A. I have not read them lately, but I
21 would believe they might be.
22 Q. Okay. Well, you actually accused
23 Don Zarda of misconduct when he put in his
24 unemployment claim, correct?
25 A. Well, Lauren wrote that letter.

1 MAYNARD 345
2 Q. She wrote it at your direction,
3 correct?
4 A. Yes.
5 Q. So let's mark this -- we've already
6 marked this as R-26. It's already been marked.
7 Lauren wrote this at your direction,
8 and you approved it, correct?
9 A. Yes.
10 Q. And you accused Don of misconduct,
11 correct?
12 A. I'd like to see the letter.
13 Q. Sure (handing).
14 If you look down to the fourth
15 paragraph, I think you will find it there.
16 (Witness perusing document.)
17 Q. The question is there's an
18 accusation of misconduct in that letter, correct?
19 A. For believed misconduct.
20 Q. And the misconduct was sharing
21 personal information, correct?
22 A. Received complaints from a customer,
23 yes.
24 Q. Okay. Thank you.
25 You have insurance to pay for this

1 MAYNARD 347
2 You may answer.
3 A. The season is over this weekend.
4 Q. Well, okay. I guess I'm thinking
5 into next summer.
6 A. Oh.
7 Q. Do you have any openings for this
8 summer?
9 A. There probably will be. I haven't
10 even explored that. I put some things out.
11 There most likely will be.
12 Q. What were the circumstances of Rich
13 Winstock's leaving the Skydive Long Island?
14 A. I wish I had that answer.
15 Q. He quit.
16 A. He did.
17 Q. You wish he still worked for you?
18 A. Yes.
19 Q. He was a good chief instructor.
20 A. Yes, he was.
21 Q. Did he say anything about why he was
22 leaving?
23 A. My last conversation with Winstock
24 when we stood eye to eye and talked about a lot
25 of the changes that were going on at the drop

1 MAYNARD 346
2 case?
3 A. No.
4 Q. So you're paying it all out of
5 pocket, your defense?
6 A. That's correct.
7 Q. And how much have you paid so far?
8 A. I don't know the exact amount.
9 Q. Is it over \$200,000?
10 A. I hope not.
11 MR. ZABELL: Objection.
12 Q. What?
13 MR. ZABELL: You can answer.
14 A. I hope not.
15 Q. Is it over a hundred thousand
16 dollars?
17 A. I'm not really sure.
18 Q. Is it over \$50,000?
19 A. Most likely.
20 Q. Do you have any openings for work at
21 the new drop zone?
22 A. Not right now.
23 Q. So you've hired everyone for the
24 summer?
25 MR. ZABELL: Objection to the form.

1 MAYNARD 348
2 zone, and my last conversation with him was Rich,
3 you know, I want you to stay on, I need your help
4 here, and I really don't want you to leave, and
5 he said, I'm not going to leave. He says, I'm
6 leaving today to go to my daughter's softball
7 game, we'll talk during the week, and I will see
8 you next weekend, and I never saw him again.
9 Q. So he didn't even send in a letter
10 of --
11 A. Yeah. He sent me an e-mail stating
12 that he decided not to come back, and I asked him
13 to come back, and I never heard back from him
14 again.
15 Q. When he said I decided not to come
16 back, did he say anything else as to why?
17 A. He had some complaints about my
18 girlfriend.
19 Q. Is she working at the drop zone now?
20 A. She was never an employee there.
21 Q. Is she working there now?
22 A. She never was an employee there.
23 Q. Is she at the drop zone a lot?
24 A. Yes. She helped me out.
25 Q. Does she boss people around, maybe

1 MAYNARD 349
2 get in the way?
3 A. No.
4 MR. ZABELL: Objection to the
5 multiple question.
6 Q. So you think he quit because of your
7 girlfriend?
8 A. I don't know why he quit.
9 Q. Were you aware that he e-mailed Don
10 and said that he just couldn't take you anymore?
11 MR. ZABELL: I'm going to advise you
12 that if your answer to that question
13 requires you to reveal the content of
14 conversations between yourself and your
15 attorney, you need not answer that
16 question.
17 MR. ANTOLLINO: All right. I'll
18 hand you this. I'll hand you this.
19 Let's mark this as R-34.
20 (Exhibit R-34, E-mail, marked for
21 identification.)
22 MR. ZABELL: Have you withdrawn the
23 previous question?
24 MR. ANTOLLINO: Yes.
25 Q. Have you seen that before?

1 MAYNARD 351
2 Q. All right. Where did you sign this?
3 A. Excuse me?
4 Q. Where did you sign this?
5 A. Where did I sign it?
6 Q. What location, yeah.
7 A. I signed it here.
8 Q. All right. So you came to
9 Mr. Zabell's office?
10 A. Yes, I did.
11 Q. Did you write this affidavit
12 yourself?
13 A. Did I write this myself
14 (indicating)?
15 Q. Yeah.
16 A. No.
17 Q. Was it presented to you for
18 signature?
19 A. Yes.
20 Q. All right. And number 1 says,
21 quote, "An electronic search for electronic
22 information regarding Donald Zarda was performed
23 at my direction by Lauren Callanan at Altitude
24 Express, Inc. d/b/a Skydive Long Island." Do you
25 see that?

1 MAYNARD 350
2 A. No.
3 Q. What's your reaction to that?
4 A. My reaction to this is that -- I
5 would say two months before he left he was not
6 the same person that I knew. He hardly ever
7 talked to me. He walked around like he was very
8 unhappy all the time, and it was very noticeable,
9 even not just to myself but the other staff
10 members, and I never found out what was going on.
11 I had my thoughts, because there was a lot of
12 changes made at the drop zone, and a lot of
13 people didn't like it.
14 Q. But yet you wanted him --
15 A. I did. I wanted him to stay.
16 MR. ANTOLLINO: All right. Let's
17 mark this next as R-35.
18 (Exhibit R-35, Affidavit of Ray
19 Maynard, marked for identification.)
20 THE WITNESS: Could I have a copy of
21 this?
22 MR. ANTOLLINO: I gave one to your
23 lawyer. This is the original.
24 Q. Okay. Do you recognize this?
25 A. Yes.

1 MAYNARD 352
2 A. Yes.
3 Q. Do you know what she did?
4 MR. ZABELL: Objection to the form.
5 You may answer.
6 A. Okay. I asked her to go through any
7 e-mails, any contacts, any kind of information
8 that possibly would be in the computers and print
9 it out and give it to me.
10 Q. Okay. But you don't know what she
11 did exactly, do you?
12 A. Well, I asked her to go through
13 e-mails and anything pertaining to Don at all
14 that was in the computers.
15 Q. Okay. You asked her to do that, but
16 do you know what she did?
17 MR. ZABELL: Objection; asked and
18 answered.
19 A. I asked her to do that.
20 Q. But do you --
21 A. I was not -- I -- no.
22 Q. You don't know what she did?
23 A. No, I don't.
24 MR. ZABELL: Objection; asked and
25 answered.

1 MAYNARD 353
2 MR. ANTOLLINO: All right. We've
3 obtained, or, I should say, Don produced
4 this to me. We will mark this as R number
5 next.
6 (Exhibit R-36, E-mail, marked for
7 identification.)
8 MR. ZABELL: Do you have a copy for
9 me?
10 MR. ANTOLLINO: Yes (handing).
11 Q. Don produced this to me, and we
12 produced it to Mr. Zabell.
13 Do you know why Lauren didn't find
14 this?
15 A. I've never seen this.
16 Q. All right. This was something that
17 was e-mailed to your drop zone; is that correct?
18 A. Well, it has our e-mail address on
19 it.
20 Q. Okay. And the word "Don" does
21 appear in there, correct?
22 A. Yes, it does.
23 Q. And you don't know why Lauren didn't
24 produce that to us, correct?
25 A. No, I do not.

1 MAYNARD 355
2 transcription from a video.)
3 MR. MAYNARD: "My name is Ray
4 Maynard. I am the owner of Skydive Long
5 Island. Thank you for choosing our drop
6 zone to make your first skydive.
7 That release you just signed is a
8 very important legal document, and I am
9 going to explain why.
10 Skydiving is a dangerous sport. You
11 can be injured skydiving or even be killed.
12 When you sign that release, you agree to
13 various things. I am going to hit some of
14 the highlights of what you agree to.
15 You agree to release Skydive Long
16 Island and anyone remotely connected with
17 your skydive from liability if something
18 happens to you. You agree to release them
19 even if it happens as a result of their
20 negligence. You entered into that
21 agreement not only on behalf of yourself,
22 but on behalf of your family and your
23 estate.
24 You further agree to reimburse us
25 for any expenses in the event anyone does

1 MAYNARD 354
2 Q. All right. I want to show you -- I
3 am going to play your video. Do you have the
4 numbers? Your safety video. You know the safety
5 video, right?
6 A. Yes, I do.
7 Q. All right.
8 That's you, correct?
9 A. Yes.
10 MR. ZABELL: All right.
11 (Playing video.)
12 (Discussion off the record.)
13 MR. ZABELL: I would object. Any
14 transcription that gets done is what is
15 done here. There's no transcription that's
16 added at the conclusion of this deposition.
17 MR. ANTOLLINO: Try your best, and
18 I'll give it to you later.
19 Q. I want you to listen to this, okay.
20 You want to start over back at the beginning, or
21 should we just continue?
22 A. Sure.
23 Q. We start at 10 seconds. There we
24 go.
25 (The following portion is a

1 MAYNARD 356
2 file a lawsuit on your behalf. You agree
3 to reimburse us for any judgment that
4 someone may get. That release also
5 contains an assumption of risk. You have
6 assumed the entire risk of the skydive.
7 Another aspect of the release is the
8 limitation of warranty. Equipment that you
9 use is warrantied only to the extent it has
10 been used before. There is no warranty of
11 merchantability or fitness for a particular
12 purpose.
13 That document you signed is a very
14 important legal document. It is essential
15 that you understand it. If you want to
16 discuss it with your attorney, feel free to
17 do that. You can come back at a later time
18 and make your skydive. I want to make sure
19 you understand, you don't have to make the
20 skydive. You don't have to sign the
21 release. The bottom line on the release is
22 that you agree not to sue us, and if you do
23 sue us, you can't win.
24 Now having gotten that out of the
25 way, let's get on with the training so we

1 MAYNARD 357
2 can go out and make the skydive."
3 Q. Okay. So is that -- that was a
4 video that you showed customers?
5 A. Correct.
6 Q. All right. And you believe that
7 everything in there is true, correct?
8 A. I don't understand.
9 Q. That someone should not -- has to
10 sign the release before they go on; everything in
11 there applies to your drop zone, correct?
12 MR. ZABELL: I object to the form.
13 MR. ANTOLLINO: Withdrawn, and I
14 will just ask it again.
15 Q. Everything that you said in there
16 applies to a person who is about to go on to a
17 tandem jump, correct?
18 A. Correct.
19 Q. All right. There's another guy in
20 another video with kind of a long beard. You're
21 aware of him, right?
22 MR. ZABELL: Objection to the form.
23 Q. Do you recognize this guy
24 (indicating)?
25 A. That's Bill Booth.

1 MAYNARD 359
2 people might think he's an expert.
3 Q. Do you?
4 A. Based on what he's done and the
5 things that he's manufactured, I guess.
6 Q. Okay. I am going to play a portion
7 of his safety video to you.
8 (The following portion is a
9 transcription from a video.)
10 MR. BOOTH: "Inherent risk you will
11 be taking by making a tandem parachute
12 jump. There is not now, nor will there
13 ever be a perfect parachute, a perfect
14 airplane, a perfect pilot, a perfect
15 parachute instructor or, for that matter, a
16 perfect student. Each of these systems and
17 people, all necessary for you to make a
18 tandem parachute jump, is subject to
19 malfunction or to human error."
20 Q. Do you believe that to be true?
21 A. It's not a perfect world.
22 Q. Do you believe that to be true is
23 the question, what he just said?
24 MR. ZABELL: Objection to the form.
25 A. I guess so.

1 MAYNARD 358
2 Q. All right. So he's a big guy,
3 hotshot in the tandem jumping world; is that a
4 fair characterization?
5 MR. ZABELL: Objection to the form
6 of the question.
7 You may answer.
8 A. Bill Booth is the founder of the
9 Relative Workshop.
10 Q. Do you believe he's an expert?
11 MR. ZABELL: Objection to the form.
12 Q. Do you believe he's an expert in
13 this field?
14 MR. ZABELL: Are you withdrawing the
15 previous question?
16 MR. ANTOLLINO: Yes.
17 MR. ZABELL: I'm going to object to
18 the form of this question.
19 You may answer.
20 A. Do I believe he's an expert?
21 Q. Yes.
22 A. With what?
23 Q. In the field of skydiving.
24 A. He's a well -- he's a well-admired
25 skydiver. He has a couple of patents. Some

1 MAYNARD 360
2 MR. ANTOLLINO: All right. Let me
3 just go over my notes. I think we're
4 almost done.
5 THE VIDEOGRAPHER: Off the record?
6 MR. ANTOLLINO: Off the record.
7 MR. ZABELL: There is no off the
8 record.
9 MR. ANTOLLINO: All right, fine.
10 Q. Oh, yes. Since you do not believe
11 what is contained in R-32, the Ripoff Report, is
12 a legitimate complaint, you didn't investigate
13 this particular allegation; would that be fair to
14 say?
15 A. I responded to it. How could I
16 possibly investigate it?
17 Q. Well, I mean, could you ask around
18 at the drop zone if anyone had complained about
19 these allegations?
20 A. That particular propaganda, for lack
21 of a better word, was discussed in length by most
22 of the staff and all agreed that someone is just
23 trying to discredit Skydive Long Island.
24 Q. Why do you think they wanted to do
25 that?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, . Civil No. 10-CV-04334-JFB-GRB
Vs. .
. 824 Federal Plaza
. Central Islip, NY
ALTITUDE EXPRESS, INC., ET AL, .
d/b/a Skydive Long Island . March 28, 2014

**FILED
CLERK**

4/1/2014

Ray Maynard
.

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Decision

1 THE CLERK: Calling Case 10-CV-4334, Zarda versus
2 Altitude Express. Please state your appearance for the record.

3 MR. ANTOLLINO: Gregory Antollino for plaintiff, good
4 afternoon, Your Honor.

5 THE COURT: Good afternoon, Mr. Antollino.

6 MR. ZABELL: And Saul Zabell for the defendants.
7 Good afternoon, Judge.

8 THE COURT: Good afternoon. As you know, I scheduled
9 this conference because I wanted to rule on the pending
10 motions. I decided, given that they have been now pending for
11 some time to place an oral ruling on the record. It's possible
12 I may also do a written opinion on this, I haven't decided
13 whether to or not yet, but I didn't want the case to be delayed
14 further. So I'm going to place the ruling on the record. I
15 just ask you to bear with me, it should take about 10 or 15
16 minutes, and then we'll discuss the next steps going forward.

17 So first just let me for the record state that the
18 standard I'm applying for summary judgment is set forth in an
19 opinion that I wrote several years ago, Zhao versus State
20 University of New York, 472 F Sup 2nd. 289 Eastern District of
21 New York (2007). I adopt that standard in its entirety, I
22 won't repeat it here. In short with respect to summary
23 judgment obviously the facts are accepted as true and all
24 reasonable inferences are drawn in favor of the nonmoving
25 party.

1 Here, we have cross motions for summary judgment so
2 when considering each motion I'm applying that standard for the
3 benefit of the nonmoving party. I also adopt as contained in
4 that opinion the framework for analyzing a gender
5 discrimination claim, which is similar both in the Federal law
6 and State law in terms of the McDonnell Douglas burden-shifting
7 analysis which I am applying here. And that case also dealt
8 with gender stereotyping. It has some case law with respect to
9 that as well, which is obviously part of the subject of this
10 suit.

11 So I adopt that standard in its entirety and I move
12 now to each of the claims. First, well, actually I should say
13 the threshold matter. There was a motion to strike a portion
14 of the reply memorandum of plaintiff's partial summary judgment
15 motion because it raised the issue of sex discrimination
16 stereotyping, which was not the subject of the plaintiff's
17 motion.

18 I'm denying the motion to strike, there was no
19 prejudice even by raising that. And in fact it was pretty much
20 the same arguments that had been made previously. So the
21 motion to strike it is denied. I have considered it, but it
22 hasn't affected the ruling, again because it contained similar
23 arguments.

24 The Court will first address the gender
25 discrimination claim under Federal law for gender stereotyping.

1 Having reviewed the evidence under the applicable standard I'm
2 granting the motion for summary judgment on that claim because
3 I find that the plaintiff has failed to meet even the prima
4 facie burden, as minimal as it is, that the adverse action gave
5 rise to an inference of discrimination based up gender
6 stereotyping.

7 But evening assuming arguendo the prima facie burden
8 was met, the defendants here articulated a nondiscriminatory
9 reason, namely the customer complaint about how the plaintiff
10 was touching her and I believe there was insufficient evidence
11 that the articulated reason was a pretext for gender
12 discrimination based upon stereotyping. Although for reasons
13 I'll state in a moment when I get to the New York State claim,
14 I believe there is sufficient basis to have it go forward with
15 respect to a sexual orientation discrimination.

16 But sticking with the gender discrimination claim,
17 there were a number of theories that were, I guess three
18 theories that were asserted by plaintiff with respect to gender
19 discrimination based on stereotyping. I note that to some
20 extent I believe some of these theories are inconsistent with
21 each other and to some extent inconsistent with a sexual
22 orientation claim, and to some extent inconsistent with Mr.
23 Zardo's deposition at page 215 where he indicated it was, Ray
24 fired me for being gay.

25 But in any event I have analyzed them independently

1 of each other and I've even looked at them in conjunction to
2 the extent that that can be done. I'm just going to through
3 them.

4 The first theory I guess was that the plaintiff was
5 fired because of stereotyping that a male must be guilty of
6 sexual harassment if it is alleged. There's simply no evidence
7 to believe that that stereotype was motivating Mr. Maynard in
8 this situation. There's no, for example there's no evidence of
9 comments, there's no female comparators who were treated
10 differently. There is literally nothing to support that
11 theory.

12 The only thing that the plaintiff points to in the
13 papers, and this was discussed at oral argument, is what
14 plaintiff believes was a sloppy investigation in terms of the
15 interview of the plaintiff not allowing him a chance to see the
16 video and other issues with how the investigation was
17 conducted.

18 However, the law is clear that disputes about the
19 thoroughness of an investigation by itself cannot be enough to
20 create an inference of discriminatory intent. This case is no
21 exception to that. That's actually set forth in a case that
22 the plaintiff cites in support of its position, *Sassaman v.*
23 *Gamache*, 566 F.3rd, 307. It's a 2nd Circuit 2009 case where at
24 page 315 the 2nd Circuit states, "We emphasize that we do not
25 hold that an arguably insufficient investigation of a complaint

1 of sexual harassment leading to an adverse employment action
2 against the accused is, standing alone, sufficient to support
3 an inference of discriminatory intent. Rather, we hold only
4 that where plaintiff can point to evidence closely tied to the
5 adverse employment action that could reasonably interpret it as
6 indicating that discrimination drove the decision, and arguably
7 insufficient investigation may support an inference of
8 discriminatory intent.”

9 So here, where there is nothing other as it relates
10 to this claim, no other evidence other than a dispute about the
11 thoroughness of the investigation, I conclude that that is not
12 sufficient to give rise to an inference of discrimination, and
13 certainly, certainly not sufficient to overcome the articulated
14 nondiscriminatory reason for the termination.

15 Sassaman obviously is clearly distinguishable from
16 this case because it wasn't just a dispute about the adequacy
17 of the investigation, there was a direct comment by the
18 supervisor that you probably did what she said you did because
19 you're male.

20 So obviously a completely different situation where
21 in addition to the investigation there was direct proof of
22 discriminatory intent based upon that comment. So I don't
23 believe under that theory there's any possibility that this
24 could survive summary judgment. And secondly, to the extent
25 the sloppy investigation I think was a separate theory, for the

1 reasons I just stated I don't believe that the sloppy
2 investigation of itself can be sufficient to allow this claim
3 to, -- I should say the disputes about the sloppiness of the
4 investigation because the defendants have a different version
5 with respect to the investigation itself.

6 Moving to the other theory which is based on the, I
7 guess the plaintiff did not conform to male stereotyping, -- to
8 not conform to male stereotypes in terms of being teased about
9 wearing certain things, a pink hat and other similar types of
10 issues, the defendants noted as a threshold matter that Zarda
11 stated in his deposition that he was masculine in appearance.
12 But putting that issue aside, I don't think that's, the key
13 issue as it relates to this.

14 The key issue is that any teasing or comments with
15 respect to those types of items, there is no relationship, that
16 no rational Jury could draw any relationship to those, to the
17 termination decision. In terms of proximity to the adverse
18 action, there was no proximity. It's clear what the proximity
19 and the adverse action with this whole issue with the customer,
20 which included the disclosure of the customer's sexual
21 orientation, it had nothing to do with conforming to male
22 stereotypes in terms of what you may wear or how you may
23 behave, -- zero to do with that.

24 As Mr. Zabell noted in his papers also, Mr. Zardo was
25 rehired after these alleged incidents regarding what he was

1 wearing. There's simply no connection between those, no
2 possible connection that can be drawn by a rational Jury
3 between those events and the termination decision here.

4 So for all of those reasons I'm granting the motion
5 as it relates to the gender discrimination claim.

6 With respect to the State claims, first as a
7 jurisdictional matter the complaint does allege diversity of
8 jurisdiction. As was discussed at the oral argument, there was
9 no dollar amount in the amended complaint. Mr. Antollino did
10 put in a letter articulating why he believes the \$75,000
11 threshold had been surpassed. And I conclude based upon that
12 letter that there is a good faith basis for him to allege that
13 based upon the categories of damages that he outlined. And
14 therefore, I believe that the jurisdictional requirement for
15 diversity of citizenship is met.

16 I will ask him at the conclusion of this to amend the
17 complaint as a technical matter to put in the allegation of, in
18 excess of \$75,000. So I will move to the State law claims, the
19 sexual orientation claim, the defendant's motion for summary
20 judgment on that is denied for the following reasons.

21 The plaintiff's evidence, unlike the gender
22 discrimination claim, in addition to disputing the adequacy of
23 the investigation itself, the plaintiff has several other
24 pieces of evidence that they point to with respect to that that
25 I believe are more than sufficient to create a genuine issue of

1 fact that must be resolved at trial, including primarily, I
2 guess most significantly the timing of the disclosure of sexual
3 orientation to the customer and the termination was obviously
4 in very close proximity and was the subject of the interactions
5 between Mr. Zardo and Mr. Maynard.

6 So I think that is another, -- is one piece of
7 evidence that certainly can be relied on with respect to the
8 sexual orientation claim. There are some other pieces of
9 information or evidence that if credited and drawn most
10 favorably to the plaintiff could also be utilized to support
11 that claim. There's this issue regarding another employee, I
12 think it was Weinstock if my memory is correct, who disclosed
13 in some manner being heterosexual during a jump and there was
14 no adverse action taken with respect to that.

15 Obviously I know the defendants argue the
16 circumstances were different than alleged to an allegation of
17 improper touching. But in any event, again this has to be
18 construed most favorably to the plaintiff. With respect to the
19 defendant's motion it is something that they could as part of
20 their other evidence utilize for the purpose of creating a
21 genuine issue of fact.

22 There is some evidence that, in the unemployment form
23 that the reason for the termination was not completely
24 consistent with the reasons given at other times. And I
25 believe that all of these things, while each of these things in

1 isolation would not be sufficient, I believe together they are
2 certainly sufficient to create an issue of fact or whether the
3 termination was because of the articulated nondiscriminatory
4 reason given by the defendants of a customer complaint about
5 discomfort and being touched by the plaintiff during the jump
6 or whether he was terminated because of the sexual orientation,
7 or the disclosure of his sexual orientation by the plaintiff.

8 So the defendant's motion on the State law claim for
9 sexual orientation discrimination is denied. And similarly,
10 the plaintiff's cross motion for summary judgment on the sexual
11 orientation claim is denied. Looking, again, now looking at
12 the evidence from the defendant's standpoint most favorably for
13 purpose of the plaintiff's motion, it's undisputed that a
14 customer complaint was made.

15 While there's a dispute about whether it should have
16 been sufficient for the termination or not, -- certainly the
17 fact that a complaint was made does provide some support for
18 the defendant's position. There was some investigation done,
19 it wasn't an immediate termination, it was a suspension with
20 some discussion with the plaintiff. And again, while there's a
21 dispute about whether that was sufficient under the
22 circumstances of that, -- if that's construed most favorably to
23 the defendant it certainly creates enough of an issue of fact
24 with regard to his intent to preclude summary judgment in the
25 plaintiff's favor on this.

1 And there's also evidence that there was knowledge of
2 the plaintiff's sexual orientation far before this event
3 transpired. Obviously that doesn't address the issue of
4 whether or not the disclosure of the sexual orientation was the
5 basis for the discriminatory act that's alleged, -- but as the
6 issue of whether or not it was over the sexual orientation
7 itself, certainly that evidence would support the defendant's
8 position.

9 So the evidence in the record if construed most
10 favorably to the defendant is certainly sufficient to overcome
11 plaintiff's motion for summary judgment on the issue of whether
12 or not the articulated reason, the articulated
13 nondiscriminatory reason was the real reason for the
14 termination.

15 Turning briefly to the hostile work environment
16 claim, again, that standard is set forth in Zhao. I won't
17 repeat it here, but the isolated incidents related to the
18 comments about what the plaintiff was wearing or behavior, or
19 similar things of that nature are, it's not even close to being
20 sufficiently pervasive or severe to possibly have a Jury
21 rationally conclude that it was a hostile work environment.

22 This issue is about, -- this case is about the
23 termination, it's not about a hostile work environment. So the
24 motion is granted with respect to that.

25 Turning to the wage claim, I'm denying the cross

1 motions on the wage claim, because the record, the Court just
2 can't discern from the record, again construing it most
3 favorably to the nonmoving party in each situation, whether or
4 not this can be resolved as a matter of law, based upon the
5 facts that are in, that have been submitted in the summary
6 judgment motion. Certainly, the defendants have attached
7 records which accredited would allow them to prevail on this
8 claim. And so that's why the plaintiff's motion for this is
9 denied.

10 But I'm also denying the defendant's motion because
11 there's some disputes about the adequacy of the record keeping
12 about, there's a dispute about whether the plaintiff was
13 required to be there in the vicinity of the location for
14 certain periods of time. And I believe that the Zarda
15 affirmation that was submitted in opposition on April 8, 2013,
16 is sufficient to at least create an issue of fact that this
17 can't be resolved at summary judgment. Although it does not
18 seem to be a particularly strong claim, I believe it's
19 sufficient to survive summary judgment.

20 The overtime claim, plaintiff did not even separately
21 brief the overtime issue and I'm granting summary judgment on
22 the overtime issue because I don't see any evidence that would
23 support an overtime claim under New York law as opposed to a
24 minimum wage claim.

25 So the cases that survive, excuse me, the claims

1 that survive summary judgment are the sexual orientation claim
2 under New York law as well as the minimum wage claim under New
3 York law. And those are the claims that will proceed to trial.

4 Okay, so Mr. Antollino, I am just going to ask that
5 you formally just, I guess it would be the second amended
6 complaint.

7 MR. ANTOLLINO: Certainly.

8 THE COURT: I'm sorry, what did you say?

9 MR. ANTOLLINO: Certainly.

10 THE COURT: What did you say, Mr. Antollino?

11 MR. ANTOLLINO: I'm sorry? No, I just said
12 certainly.

13 THE COURT: Okay. So just put that in for a week
14 from today, and Mr. Zabell, you can just file another answer.

15 MR. ZABELL: Your Honor, if I may, we had discussed
16 at our last conference that if Your Honor's decision did in
17 fact come down the way it came down today that I would be given
18 an opportunity to brief the issue based upon the deposition
19 testimony and the discovery documents that Mr. Zarda turned
20 over that they do not meet the 75,000 jurisdictional
21 requirement.

22 THE COURT: Okay. Well, if, if, I'm not going to let
23 that the way everything else that we're going to do, because
24 the case has been around for too long. So I will let you put
25 something in. But what I'm going to do is I'm going to have

1 them put in the amended complaint, if you believe that there's
2 not a good faith basis based upon the letter that he submitted,
3 I think it was June 13 or something like that where he put in
4 the various categories of damages. I guess in lieu of an
5 answer you could file a motion to dismiss on jurisdictional
6 grounds, okay.

7 MR. ANTOLLINO: Judge, and just to be clear, the
8 standard is not whether or not the damages are provable, but
9 whether there is a good faith basis to allege them.

10 THE COURT: Yes. I know that standard, I've been
11 through it a few times.

12 MR. ANTOLLINO: I just wanted to make it clear as to
13 all parties that if there were any motion it would be that I do
14 not have a good faith basis --

15 THE COURT: Right.

16 MR. ANTOLLINO: -- to assert this. Not that it's not
17 going to be provable. It's not a summary judgment motion --

18 THE COURT: Right.

19 MR. ANTOLLINO: It would be I do not have a good
20 faith basis to pay it.

21 THE COURT: Right. That's why I thought your letter
22 was, you know, very detailed in terms of looking at other cases
23 in terms of emotional damages and things like that, of what a
24 good faith potential recovery would be. So I think Mr. Zabell,
25 as you probably gathered, you have a real uphill battle on

1 that, but I won't prevent you from, -- I said I would give you
2 a chance and I think you're entitled to a chance. So if you
3 want to put in, but I am going to ask that you put that in, you
4 know, quickly. And then I'll give Mr. Antollino a chance to
5 respond to that, okay.

6 MR. ANTOLLINO: Thank you, Judge.

7 THE COURT: So I mean, do you want to set a motion
8 schedule for that now, then, Mr. Zabell, since I have you? Do
9 you want to just do that?

10 MR. ZABELL: Yeah, that, I can get 15 days, Judge?

11 THE COURT: Yes. So then Mr. Antollino will put it
12 in by April 4. And then 15 days would be, that would be a
13 weekend --

14 MR. ZABELL: Wait, wait.

15 THE COURT: April 21?

16 MR. ZABELL: Wait, I'm sorry, Judge, 15 days is,
17 that's going to take me to, let's see. That's not going to
18 take me to April 4, that will take me --

19 MR. ANTOLLINO: I'm going to put in the amended
20 complaint toot sweet. So you know, it will be 15 days from the
21 day that I put in the amended complaint, not April 4. I mean,
22 I really feel that if Mr. Zabell is actually going to pursue
23 this motion it's not only a waste of his client's money, it's a
24 waste of the Court's time. And I'll look at it very carefully,
25 but I have, I've made a thorough letter on that point because I

1 knew I was correct on this and I think that if Mr. Zabell is
2 going to waste his client's money and the Court's time he'd
3 better have a good faith basis to make the argument that I
4 don't have a good faith basis to say that this could happen.

5 So I may make a, I may decide to make a cross motion
6 for sanctions if we have to waste our time on a point which is
7 really theoretical, not something that I have to prove.
8 Theoretically I can get more than \$75,000 on this case. It's
9 not going to the Jury now and it's not, it's not even summary
10 judgment. It's just me having a good faith basis. So what
11 he's arguing is that I am in fact, -- have a bad faith argument
12 by making his argument that I don't have a good faith basis.

13 THE COURT: Okay. Let's just get it scheduled, Mr.
14 Antollino, okay. You can make a cross motion, you can make
15 whatever motion you'd like to, but let's, so you said you're
16 going to put it in Monday then? The amended complaint?

17 MR. ANTOLLINO: Yeah, I'll put it in, I'll put it in
18 this weekend.

19 THE COURT: Okay. So if he puts it in this weekend,
20 Mr. Zabell, do you want 15 days then from Monday?

21 MR. ZABELL: Yes, please.

22 THE COURT: So we'll say, that would be, say April
23 15. How long do you want to respond? Mr. Antollino, if you,
24 if you believe that you've covered this in your letter you can
25 just submit a letter to me saying you're relying on your

1 previous submission, you don't have to write up something, you
2 know, you don't have to repeat what you said previously, okay?

3 MR. ANTOLLINO: Okay, all right.

4 THE COURT: So how long do you want?

5 MR. ZABELL: Well, give me ten days from his
6 response.

7 THE COURT: Okay. So April 25 will be the
8 opposition, and then a week for any reply, Mr. Zabell?

9 MR. ZABELL: That will be sufficient, thank you,
10 Judge.

11 THE COURT: Okay, so that's May 2. I won't have an
12 argument on this because I think it's a fairly straightforward
13 issue. Unless I have questions I'll just, I'll either do what
14 I did today where I'll have a phone conference and I'll rule on
15 it, or I'll issue a short order, okay.

16 But in terms of the, it's not, just to mention, Mr.
17 Antollino this is not going to affect obviously the trial date
18 in this case because we weren't going to have the trial that
19 soon anyway. So the, what I'll do is I'll make the pretrial
20 order due, it shouldn't be too complicated, maybe 30 days from
21 May 2 then?

22 MR. ZABELL: That's fine.

23 MR. ANTOLLINO: I can work with that, Your Honor.

24 THE COURT: So we'll say June 2, pretrial order. And
25 then within 10 days of that we'll have a call to set a trial

1 date, which I anticipate would be in the all, okay?

2 MR. ZABELL: Okay. Your Honor, there is one last
3 thing, and I bring it up as much for humor's sake as anything
4 else. But I can say in every conference that I've had with Mr.
5 Antollino, Mr. Antollino has brought up the issue of seeking
6 sanctions against me. I just, I bring it up for comedy's sake,
7 it's Friday afternoon. I just think it's, it's well worth
8 noting.

9 MR. ANTOLLINO: I'd like to bring up a little comedy.
10 One of the World Trade Center jumpers from this week was
11 actually one of the witnesses mentioned in the pretrial
12 although disclosures, although he never put in an affidavit or
13 was deposed. So that's some real comedy.

14 THE COURT: All right. I don't think we need any
15 more comedy, okay.

16 MR. ANTOLLINO: Okay. Who's the reporter on this?

17 THE COURT: I'm sorry, what did you say?

18 MR. ANTOLLINO: The court reporter, the court
19 reporter?

20 THE COURT: Oh, there is no court reporter here. We
21 put this on the, this is being recorded digitally. So if you
22 want to order the transcript just contact my deputy and she'll
23 tell you who in the clerk's office, -- or it's in our rules I
24 guess, too, who in the clerk's office you can call to order it.
25 They send it out to an agency and they produce the transcript,

1 okay.

2 MR. ANTOLLINO: Okay.

3 THE COURT: Okay, thank you, counsel, have a good
4 weekend.

5 MR. ANTOLLINO: Thank you, bye.

6 MR. ZABELL: Everybody have a good weekend.

7 * * *

8 C E R T I F I C A T I O N

9

10 I, **TRACY GRIBBEN**, court approved transcriber,
11 certify that the foregoing is a correct transcript from the
12 official electronic sound recording of the proceedings in the
13 above-entitled matter.

14

15

16 /S/ TRACY GRIBBEN

17 TERRY GRIBBEN'S TRANSCRIPTION SERVICE DATE: April 1, 2014

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July 21, 2015

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)

Dear Judge Bianco:

As we know, I represent the plaintiffs in this matter and write a pre-motion conference for you to reconsider your dismissal of the Title VII claim on new authority, Anonymous v. Foxx, EEOC Appeal 0210133080, attached as "Exhibit A."

Being as though I had cut off this week to prepare for this trial, I'm just wasting time at work and surfing the net. I happened to click on NYT.com to find out what had happened in the last few hours, and found an article about the attached decision. Anonymous holds that Title VII protects against discrimination on the basis of sexual orientation as a matter of law because (1) it is grounded in sex stereotypes; and (2) it discriminates against people because of their association with other people based on sex. Therefore sexual orientation can be sex discrimination under prong 1, probably automatically; and is certainly automatically sex discrimination under prong 2 because it is associational. The substance of the discussion starts at page 5.

Of course as soon as I saw this, I thought I'd bring it to your attention and preserve my record. The dismissal of the Title VII claim disallows punitive damages and attorneys' fees, which may at this point exceed the compensatory damages available under the NY State Executive Law. Obviously, that's not insignificant. My motion for reconsideration would ask you to reinstate the Title VII claim *if only for the purposes of appellate review*. In other words, I could ask for your to reinstate the sex stereotype claim; or ask you to reinstate the Title VII claim merely for the purposes of appellate review on the grounds of prong 2 of the Anonymous decision; or both.

In May, we spoke on the phone about this case and I asked if you had heard Chief Justice Roberts' questioning in the gay marriage argument. Unfortunately, he didn't come on board, so to speak, with his line of reasoning at argument in the opinion, and he dissented. But now plaintiffs have something better: The agency that is charged with interpreting Title VII in the first instance has held that sexual-orientation discrimination is discrimination as a matter of law under Title VII, even if there is no sex stereotyping

involved. Agency interpretation is given deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). You noted in the spring conversation, when I referred to the gay marriage argument, that you were not sure how that outcome would affect Title VII, especially since I was speculating. There is no more speculation. The EEOC's interpretative guidance is not binding, but is entitled to deference. The law is moving, and the decision itself cites several decisions that have been handed down since we litigated these issues in the first instance. Eventually, the Courts of Appeals will weigh in, and, who knows, this case might make it to the Supreme Court. I've asked to be heard by it twice before, and it's fun; I had a Circuit split in one case and made the watch list. At a minimum, on the question of law that I make, there is no prejudice to the defendant: Were the jury to find sexual orientation discrimination, it could offer an advisory verdict on punitive damages, then we could let the Circuit decide whether a finding of sexual orientation discrimination, if there were to be one, constitutes sex discrimination, and save the attorneys' fees application until the end.

Thank you for your consideration.

Sincerely,



Gregory Antollino

Cc: Saul Zabell by ecf



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

David Baldwin,
Complainant
v.

Anthony Foxx,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120133080

Agency No. 2012-24738-FAA-03

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e-2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency's final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant's initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission's jurisdiction.¹

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency's Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

¹ This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant's claim of discrimination. That is for the Agency to determine upon remand.

On August 28, 2012, Complainant contacted an EEO Counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor, who was involved in the selection process for the permanent position, made several negative comments about Complainant's sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner had attended Mardi Gras in New Orleans, the supervisor said, "We don't need to hear about that gay stuff." He also alleged that the supervisor told him on a number of occasions that he was "a distraction in the radar room" when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant's claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO Counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted an EEO Counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found, Complainant's EEO Counselor contact in August 2012 was made well beyond the 45-day limitation period.

The FAD also notified Complainant that, pursuant to the “Secretary’s Policy on Sexual Orientation” and the “Departmental Office of Civil Rights’ March 7, 1998 Procedures for Complaints of Discrimination based on Sexual Orientation,” the “sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)].”

Complainant appealed the Agency’s decision to the Commission.

ANALYSIS AND FINDINGS

² Complainant did not submit an application for the vacant permanent FLM position. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be

EEOC Jurisdiction over Complainant's Sex Discrimination Claim

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that “[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.” 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”).

Title VII’s prohibition of sex discrimination means that employers may not “rel[y] upon sex-based considerations” or take gender into account when making employment decisions. See Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241–42 (1989); Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012) (quoting Price Waterhouse, 490 U.S. at 239).⁴ This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving

⁴ As used in Title VII, the term “sex” “encompasses both sex - that is, the biological differences between men and women - and gender.” See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping - failing to act and appear according to expectations defined by gender.” As such, the terms “gender” and “sex” are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) (“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”) (plurality opinion). We do the same in this decision.

allegations of sex discrimination — whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.⁵

In the case before us, we conclude that Complainant’s claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass’n, “Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation” (Feb. 2011), available at <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (“*Sexual orientation* refers to the *sex* of those to whom one is sexually and romantically attracted” (second emphasis added)). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

⁵ As we observed in Macy, 2012 WL 1435995 at *6:

“Title VII . . . identif[ies] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a ‘bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.’” Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, “the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”’ [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). “The only plausible inference to draw from this provision is that, in all other circumstances, a person’s gender may not be considered in making decisions that affect her.” Price Waterhouse, 490 U.S. at 242.

Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he "experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." Id. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee's sex. See also Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller's manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.") (internal citations omitted).⁶

⁶ Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., ___ F. Supp. 3d ___, No. 15-298, 2015 WL 1735191 (C.D. Cal., 2015) ("[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); Lawson v. Kelly, ___ F. Supp. 3d ___, No. 14-522, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification," and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of

Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship. *See, e.g., Floyd v. Amite County School Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) ("This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race."); *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) ("We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").⁷ This is because an employment action based on an employee's relationship with a person of another race necessarily involves considerations of the employee's race, and thus constitutes discrimination because of the employee's race.

This analysis is not limited to the context of race discrimination. Title VII "on its face treats each of the enumerated categories" — race, color, religion, sex, and national origin — "exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 ("[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin."); *see also Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."); *Williams v. Owens-Illinois, Inc.*,

her sex."), *aff'd sub nom., Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom., Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁷ *See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir.1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race"); *Hancock v. Dep't of Transp.*, EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), *req. for recon. den.*, EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) ("[A]n individual may be entitled to protection by virtue of association with a member of a protected class"); *Robertson v. U.S. Postal Serv.*, EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency's act or omission would not have occurred if the complainant and associate were of the same race).

665 F.2d 918, 929 (9th Cir. 1982) (“[T]he standard for proving sex discrimination and race discrimination is the same.”); Horace v. City of Pontiac, 624 F.2d 765, 768 (6th Cir. 1980) (“Both cases concern Title VII cases of race discrimination, but the same standards and order of proof are generally applicable to cases of sex discrimination.”).

Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, “by definition,” discrimination because of the employee or applicant’s sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race [in violation of Title VII].”); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) (“Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII’s prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.”).

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” 490 U.S. at 251 (quoting Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently “masculine” or “feminine.”⁸ But as the Commission⁹ and a number

⁸ See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) (“It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[] are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) (“[A] jury could view Wolfe’s behavior as an attempt to denigrate Woods because — at least in Wolfe’s view — Woods fell outside of Wolfe’s manly-man stereotype” and that would constitute sex discrimination in violation of Title VII).

⁹ See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-

of federal courts¹⁰ have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

conforming behavior); Dupras v. Dep't of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329 (EEOC March 15, 2013) (complainant's allegation that she was subjected to stereotyping on the basis of sex because of her sexual orientation is sufficient to state a claim of sex discrimination under Title VII); Culp v. Dep't of Homeland Security, EEOC Appeal No. 0720130012, 2013 WL 2146756 (EEOC May 7, 2013) (complainant's allegation of sexual orientation discrimination states a claim of sex discrimination because it was an allegation that her supervisor was motivated by stereotypes that women should only have relationships with men); Brooker v. U.S. Postal Service, EEOC Request No. 0520110680, 2013 WL 4041270 (EEOC May 20, 2013), (complainant's allegation that coworkers were spreading allegations about his sexual orientation was properly framed as a claim of sex discrimination); Complainant v. Dep't of Homeland Security, EEOC Appeal No. 0120110576, 2014 WL 4407457 (EEOC August 19, 2014) (reaffirming the analysis in the cases cited above).

¹⁰ See Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); Heller, 195 F. Supp. 2d at 1224 (D. Or. 2002) (“[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”); Koren v. Ohio Bell, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (“And here, Koren chose to take his spouse's surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name.”); Terveer v. Billington, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he “alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under Mech's supervision or at the LOC, and that his orientation as homosexual had removed him from Mech's preconceived definition of male.”) (internal citations and quotes omitted); Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn. 2014) (denying an employer's motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); Deneffe v. SkyWest, Inc., 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer's motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male “braggadocio” about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) Cf. Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014), *petition for cert. filed*, (U.S. Dec. 31, 2014) (No. 14-765) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant's theory.”; *Id.* at 495 (Berzon, J. concurring) (“[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”).

Sexual orientation discrimination and harassment “[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.” Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real” men should date women, and not other men.

Id.

Those deeper assumptions and stereotypes about “real” men and “real” women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government’s motion to dismiss:

Under Title VII, allegations that an employer is discriminating against an employee based on the employee’s non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”). Here, Plaintiff has alleged that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,” that his “status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under [his supervisor’s] supervision or at the LOC,” and that “his orientation as homosexual had removed him from [his supervisor’s] preconceived definition of male.” As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff’s nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”

Terveer v. Billington. 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (citations omitted) (first quoting Pl.’s Am. Compl.; then quoting Fed. R. Civ. P. 8(a)).

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above.¹¹ Indeed, many courts have gone to great lengths to distinguish adverse employment actions based on “sex” from adverse employment actions based on “sexual orientation.” The stated justification for such intricate parsing of language has been the bare conclusion that “Title VII does not prohibit . . . discrimination because of sexual orientation.” Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the “borders [between the two classes] are . . . imprecise.” Id. (alteration in original).¹²

Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII and those “traditional notions” did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).¹³

¹¹ A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example, in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh’g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, .Oct. 16, 2014).

¹² We do not view the borders between sex discrimination and sexual orientation as “imprecise.” As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

¹³ Indeed, the Equal Employment Opportunity Commission’s own understanding of Title VII’s application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991) (holding that Title VII’s prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep’t of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII’s discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., “statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.¹⁴ Nothing in the text of Title VII “suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone.” Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.”).¹⁵ But the Supreme Court has ruled that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex). Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections extended to LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

¹⁴ Title VII prohibits discrimination on the basis of “sex” without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, “[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress’s province.” EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ____ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, *4 (2015).

¹⁵ See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see *infra*) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) (“Title VII has not been amended to prohibit discrimination based on sexual orientation.”); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (“Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent.”).

The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of “people in interracial relationships.” See, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588–89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of “masculine women.” See Price Waterhouse, 490 U.S. at 239–40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of “non-believers.” See, e.g., EEOC v. Townley Eng’g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word “mothers” in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant’s allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.¹⁶ Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

¹⁶ There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.

CONCLUSION

Accordingly, we conclude that Complainant's allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII. Furthermore, we conclude that Complainant's initial EEO Counselor contact was timely. We remand the Complainant's claim of discrimination to the Agency for further processing for a determination on the merits.

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

DONALD ZARDA,

Plaintiff,

– against –

**ALTITUDE EXPRESS, INC. d/b/a SKYDIVE
LONG ISLAND and RAY MAYNARD,**

Defendants.

Case No.:

CV-10-4334 (JFB) (ARL)

**DECLARATION IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF THE
DISMISSAL OF THE TITLE VII CLAIM**

SAUL D. ZABELL, ESQ., attorney duly admitted to practice before this Court, hereby affirms the following under the penalty of perjury:

1. I am the managing principal of Zabell & Associates, P.C., and counsel for Defendants Altitude Express, Inc. d/b/a Skydive Long Island and Ray Maynard in the above-captioned action. I submit this Declaration in opposition to Plaintiff's Motion for Reconsideration of the Dismissal of his Title VII claim.

EXHIBITS

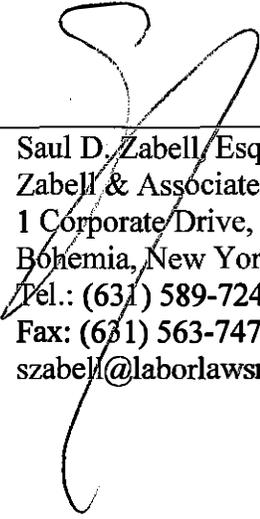
2. Attached hereto as "Exhibit A" is a true and correct copy of excerpts from Donald Zarda's Deposition Transcript dated December 9, 2011.
3. Attached hereto as "Exhibit B" is a true and correct copy of excerpts from Raymond Maynard's Deposition Transcript dated December 14, 2011.
4. Attached hereto as "Exhibit C" is a true and correct copy of excerpts from Richard M. Winstock's Deposition Transcript dated December 8, 2011.
5. Attached hereto as "Exhibit D" is a true and correct copy of excerpts from Rosana Orellana's Deposition Transcript dated November 9, 2011.

6. Attached hereto as "Exhibit E" is a true and correct copy of excerpts from David Kengle's Deposition Testimony dated November 9, 2011.

Dated: August 21, 2015
Bohemia, New York

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____



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ZABELL DEC EXHIBIT A

ZARDA DEPOSITION TRANSCRIPT, PAGES 43, 44, 49, 51,
58, 59, 572, 73, 76-82, 116, 120-22, 125-27, 172, 218, 227,
228, 235, 239, 240, 243, 270, 271, 281, 341-43, 364-35

PREVIOUSLY REPRODUCED

EXHIBIT A

ZABELL DEC. EXHIBIT B

MAYNARD DEP. AT PP. 137, 149, 155, 156, 165, 196, 226,
227, 229, 247, 282, PREVIOUSLY REPRODUCED

EXHIBIT B

ZABELL DEC., EXHIBIT C, DEPOSITION OF RICHARD
WINSTOCK, PP. 17-20, 25-28, 85-88, 97-100, 101-04
PREVIOUSLY REPRODUCED

EXHIBIT C

ZABELL DEC. EXHIBIT D

ORELLANA DEP. AT PP. 1-4, 45-52, 57-60, 89-92, 97-104,
PREVIOUSLY REPRODUCED .

EXHIBIT D

ZABELL DEC. EXHIBIT E
KENGLE DEP. AT PP. 1-4, 21-32, 61-68,
PREVIOUSLY REPRODUCED

EXHIBIT E

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**RULING ON RENEWAL OF TITLE VII CLAIM
BASED ON BALDWIN V. FOXX**

10/13/15

THE COURT:

Last week I said I didn't want to -- I had a jury trial going on, I didn't want to place the reason for my denial of the motion for reconsideration by plaintiff to either reinstate the Title VII claim or to what the jury decided in the event that the Second Circuit changes its precedent with respect to that issue. I want to place my reasoning on the record.

The Second Circuit has in a published decision, *Simonton v. Runyon*, 232 F.3d 33, Second Circuit 2000 case, concluded that Title VII does not prohibit discrimination

1 based on sexual orientation in a non-published summary
2 order. The Second Circuit affirmed a District Court
3 decision in 2008 reaching the same conclusion based upon
4 Runyon. That case is Kiley v. American Society for
5 Prevention of Cruelty to Animals, 296, Fed. Appx, 107 at
6 page 109, Second Circuit 2008. And I believe Runyon
7 continues to be binding precedent on this Court
8 notwithstanding the recent EEOC advisory opinion that
9 reaches a different conclusion.

10 Until the Second Circuit overrules the binding
11 precedent, I believe a District Court must follow Runyon
12 and, therefore, the motion for reconsideration is denied
13 to the extent the request was to put it before the jury so
14 potentially there wouldn't have to be a retrial if the
15 Second Circuit were to conclude differently and overrule
16 Runyon. I don't believe in this case I should be putting
17 a claim before a jury that as the law currently stands
18 does not exist in the Second Circuit at least. So I'm
19 denying -- in my discretion, I'm not going to do that.
20 I'm denying the motion.

21 Prior to jury selection, Mr. Antollino requested
22 the Court allow the lawyers to participate in the voir
23 dire by asking their own questions to the jurors. I know
24 that there are judges in Federal Court who do allow that
25 practice in whole or in part but I'm not one of them. I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiff)

vs.)

ALTITUDE EXPRESS AND RAYMOND)
MAYNARD)

Defendants

NOTICE OF APPEAL

10-4334 (JFB)

NOTICE IF 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/
GREGORY ANTOLLINO, ESQ.
275 Seventh Avenue, Ste 705
New York, NY 10001
(212) 334-7397
gantollino@nyc.rr.com

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

-----X

ESTATE OF DONALD ZARDA,
Plaintiff

JUDGMENT IN A CIVIL CASE

-against-

Case Number: CV-10-4334

ALTITUDE EXPRESS INC., ET AL.
Defendants.

-----X

 X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

 Decision by Court. This action came to trial/hearing before the Court. The issues have been tried/heard, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, estate of Donald Zarda, take nothing of the defendants, Altitude Express Inc. and Raymond Maynard, and that the action be dismissed on the merits.

Dated: Central Islip, New York
October 28, 2015

DOUGLAS C. PALMER
Clerk of Court

 /S/
By: Michele Savona
Deputy Clerk