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)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

Defendants, Altitude Express, Inc. d/b/a Skydive Long Island ("SDLI") and Ray Maynard, respectfully submit this memorandum of law in support to their Fed. R. Civ. P. 56 motion for summary judgment seeking dismissal of Plaintiff's Amended Complaint in its entirety.

As set forth in detail below, Plaintiff was formerly employed by Defendant SDLI as a skydive instructor. Plaintiff seeks to recover damages for discrimination and wage and hour infractions he alleges occurred from May 2009 to June 2010. However, whether by direct admission or documentary evidence, Plaintiff fails to meet his evidentiary burden for all such claims. Consequently, Defendants' motion for summary judgment should be granted in its entirety as no material issues of fact exist sufficient to warrant the resolution of this dispute at trial.

II. FACTS

The material facts in this case are undisputed and are contained within Defendants' 56.1 statement and, for purposes of avoiding redundancy, will not be repeated herein.[1]

III. LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c); Wernick v. Federal Reserve Bank of New York, 91 F.3d 379, 383 (2d Cir. 1996). Where the moving party has met the threshold burden of supporting the

[1] The facts in this case are derived from deposition testimony of all named parties, Rosanna Orellana, David Kengle, Lauren Callanan, and Richard Winstock. True and accurate copies of which are annexed to the Declaration of Saul D. Zabell dated February 11, 2013 as Exhibits 11-16. Additional documentary evidence is annexed thereto as Exhibits 1 through 10.

motion, the opposing party must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Local Rule 56.1 requires the party opposing a motion for summary judgment to identify specific and material factual disputes.

The non-movant will not defeat summary judgment merely by pointing to self-serving conclusory allegations without evidentiary support. See Niagara Mohawk Power Corp. v. Jones Chem. Inc., 315 F.3d 171, 175 (2d Cir. 2003); Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 498 (2d Cir. 2001). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only factual disputes that might affect the outcome of the litigation, in light of the substantive law, will preclude summary judgment. Id. When the moving party has met the standard of Rule 56, summary judgment is mandatory. See Celotex v. Catrett, 477 U.S. 317, 322-23 (1986).

IV. ARGUMENT

A. Plaintiff's Gender Stereotype Discrimination Claims Under Title VII and the NYSHRL Fail as a Matter of Law

Plaintiff's claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law (NYSHRL) each fail as matter of law.[2] In order to survive summary judgment for a claim of discrimination, Plaintiff must meet the burden shifting test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), by demonstrating that "(1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." Id.

[2] The analysis for Plaintiff's Title VII claims also applies to Plaintiff's claim for gender stereotyping under the New York State Human Rights Law, as claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII. Rojas v. Roman Catholic Diocese of Rochester, 660 F.3d 98, 107 n. 10 (2d Cir. 2011); Zambrano-Lamhaouhi v. New York City Bd. of Educ., 866 F. Supp. 2d 147, 159 (E.D.N.Y. 2011).

Plaintiff attempts to bring Title VII and NYSHRL claims under three separate theories of gender stereotyping; none of which are valid.[3] First and foremost, Plaintiff's claims should be dismissed based on Plaintiff's belief that he was terminated because of his sexual orientation. Plaintiff testifies repeatedly that he believes the reason he was terminated is because of his sexual orientation. (Zarda Dep. pg. 116:9-12, 134:12-15, 215:8, 278-279:11-2, 281:21-24). Such testimony is at odds with Plaintiff's claim he was discriminated pursuant to a gender stereotype, as, under Title VII, a gender stereotype cannot be predicated on sexual orientation. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000). On that basis alone, Plaintiff's claims for gender stereotyping should be dismissed. Nevertheless, each of Plaintiff's three theories of gender stereotyping, as discussed further below, is either contradictory or inherently flawed, and therefore cannot survive summary judgment as a matter of law.

1. Plaintiff was not subjected to gender stereotyping because he is male

The United States Supreme Court has held that evidence of gender stereotyping may establish a violation of Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). An employer subjects an employee to gender stereotyping by assuming an employee will conform to a stereotype of their gender. See Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 119 (2d Cir. 2004) (holding stereotyping applies "to the supposition that a woman will conform to a gender stereotype"). Stereotype remarks can be "evidence that gender played a part in an adverse employment decision." Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 119 (2d Cir. 2004) (internal quotations omitted).

[3] To the extent Plaintiff attempts to hold Mr. Maynard individually liable for claims of discrimination under Title VII, those claims are impermissible as a matter of law and must be dismissed. "[I]ndividuals are not subject to liability under Title VII." Patterson v. County of Oneida, N.Y., 375 F.3d 206, 221 (2d Cir. 2004); Wrighten v. Glowski, 232 F.3d 119, 120 (2d Cir. 2000) (*per curiam*).

Plaintiff alleges he was terminated based on a male gender stereotype. In so arguing, Plaintiff contends that Defendants assumed Plaintiff sexually harassed a woman because he is male. (See Amended Complaint ¶ 44, 48). However, the record is devoid of evidence supporting Plaintiff's theory. The factual record establishes that a customer complained about Plaintiff's behavior during a tandem skydive which resulted in Plaintiff's immediate suspension and subsequent termination. Specifically, on June 18, 2010, Plaintiff took Rosanna Orellana ("Orellana") on a tandem skydive. (Zarda Dep. pg. 201-202:24-4). Orellana believed Plaintiff behaved inappropriately during the skydive, touching her hips, resting his head on her shoulder, and discussing the intimate details of his personal life. (Orellana Dep. pg. 47:5-13; 48:15-18, 89:10-20, 50:14-18). Plaintiff's behavior and inappropriate contact made Orellana and her boyfriend, David Kengle ("Kengle"), uncomfortable, so much so, that they lodged a complaint with SDLI. (Orellana Dep. pg. 100-101:25-2, 60:4-8, 49:3-5; Kengle Dep. pg. 23-24:22-5, 27:2-9, 62-63:20-3, 66:15-18, 31:13-15). As a result of this complaint, Plaintiff was immediately suspended and ultimately terminated by Defendants. (Zarda Dep. pg. 40:6, 43:10-13, 44:3, 218:20-21; Maynard Dep. pg. 196:10-18, 282:3).

Plaintiff's termination was not due to his gender or Mr. Maynard's purported stereotype of the male gender. Rather, Mr. Maynard merely reacted to a customer complaint regarding the inappropriate conduct of one of his instructors. (Zarda Dep. pg. 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24; Maynard Dep. pg. 247:14-15, 229:3-21). Furthermore, the complaint from Orellana was the second time a customer had complained about Plaintiff's behavior during a skydive. (Zarda Dep. pg. 57:10-19, 216-217:20-6, 285:11-16). In his more than twenty years of running SDLI, Plaintiff is the only skydiving instructor Mr. Maynard has ever received complaints about. (Maynard Dep. pg. 66:8-21, 69:9-14, 297:11-21; Winstock Dep.

pg. 19:10-13). In terminating Plaintiff, Maynard eliminated an instructor who failed to provide SDLI's customers with an enjoyable experience. Plaintiff's termination was not a function of a gender stereotype, but a reaction to Plaintiff's inability to provide a satisfactory customer experience at SDLI. (See Zarda Dep. pg. 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24, 57:10-19, 216-217:20-6, 285:11-16; Maynard Dep. pg. 247:14-15, 229:3-21). Indeed, Plaintiff was suspended, and subsequently terminated, in the immediate wake of the customer complaint - Maynard suspended him the very same day the complaint was received. (Zarda Dep. pg. 36:10-12, 37:7-14, 39:15-17, 40:6; Maynard Dep. pg. 183:15-21). The close proximity between the customer complaint and Plaintiff's suspension indicates Maynard was reacting to a complaint regarding Plaintiff's performance, not his gender or any corresponding stereotype.

It is nonsensical for Mr. Maynard to have terminated Plaintiff based on a stereotype of the male gender, as Maynard was at all relevant times well aware of Plaintiff's sexual orientation. (Zarda Dep. pg. 78:11-17, 78:18-22, 79:2-6). Each time Plaintiff sought seasonal employment at SDLI (in 2001, 2009, and 2010) Mr. Maynard knew Plaintiff was homosexual. (Zarda Dep. pg. 78:11-17, 78:18-22, 79:2-6; Maynard Dep. pg. 135:17-20; Winstock Dep. pg. 18:5-7, 101:10-12). It is incongruous that Maynard, knowing Plaintiff is homosexual, would assume he touched a woman inappropriately solely based upon his gender. It is therefore contrary to all facts in evidence that Mr. Maynard based his decision to terminate Plaintiff on a male stereotype.

Finally, even if, in the unlikely event, this court finds Maynard's investigation of Orellana's complaint to be insufficient, the facts surrounding Plaintiff's termination still fail to raise an inference of discrimination. Assuming, *arguendo*, Orellana's complaint could be

considered a complaint of sexual harassment, an arguably insufficient investigation of a complaint of sexual harassment leading to an adverse employment action is not, by itself, sufficient to raise an inference of discriminatory intent. Sassaman v. Gamache, 566 F.3d 307, 315 (2d Cir. 2008). "[O]nly where a plaintiff can point to evidence closely tied to the adverse employment action that could reasonably be interpreted as indicating that discrimination drove the decision, an arguably insufficient investigation may support an inference of discriminatory intent." Id. Here, even if Mr. Maynard did not conduct a sufficient investigation (which Defendants do not admit and the evidence does not support), Plaintiff cannot point to any evidence indicating discrimination drove Defendants' decision to terminate his employment. Plaintiff was terminated because a customer complained about his performance; a significant event as Defendants operate a customer service business. There were no comments made implicating a gender stereotype during Plaintiff's termination, or for that matter, during the entirety of his employment, sufficient to raise an inference of impermissible discrimination. (See Zarda Dep. pg. 218:20-21, 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24; Maynard Dep. pg. 282:3). Plaintiff's claim is rooted in supposition, without corresponding evidence of any kind.

In Plaintiff's December 4, 2012 letter addressed to Your Honor, Plaintiff relies on the decision in Sassman v. Gamache, 566 F.3d 307 (2d Cir. 2009) to support his theory of gender stereotyping. (See ECF Doc. No.: 106 (Def. Ex. 10)). However, this case is factually distinguishable from Sassman. In Sassman, the plaintiff was terminated for allegedly sexually harassing a fellow employee. Id. During his termination, the plaintiff's supervisor told the plaintiff: "you probably did what she said you did because you're male." Id. at 312. The Court held this gender stereotyping comment was sufficient to raise an inference of discriminatory

intent. Id. Here, however, no such comments were made during Plaintiff's termination. Maynard terminated Plaintiff in response to Kengle and Orellana's complaint. (See Zarda Dep. pg. 172:13-18, 218:20-21, 235:17-22, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24; Maynard Dep. pg. 282:3). This case is further distinguishable because Plaintiff was not accused of sexual harassment by a fellow employee. Instead, a customer complained about Plaintiff's behavior, which is a legitimate basis for terminating an employee. See Iverson v. Verizon Communications, 2009 WL 3334796, at *5 (S.D.N.Y. Oct. 13, 2009) (holding termination was for legitimate business reasons because plaintiff received multiple customer complaints). In terminating Plaintiff, Maynard did not assume he committed sexual harassment because of his gender. Rather, Maynard reacted to a complaint from a customer; an act objectively unrelated to Plaintiff's gender and to any gender stereotypes.

Based on the deposition testimony and the evidence produced in this case, there exists no issue of material fact regarding the alleged gender stereotyping of Plaintiff. The record verifies Mr. Maynard did not assume Plaintiff sexually harassed Orellana because he is a man. Quite the contrary, Mr. Maynard was at all times aware of Plaintiff's sexual orientation and his actions were undertaken in direct response to a complaint regarding Plaintiff's conduct on a jump. As such, Plaintiff's claims must be dismissed with prejudice.

We would be remiss if we failed to note that Plaintiff's argument in support of this theory is at odds with his concurrent claim for discrimination predicated upon his sexual orientation. These two claims are inherently contradictory; Plaintiff cannot in one instance be terminated because he is gay and another because he is a man who "besmirched" a woman's honor. (See ECF Doc. No.: 106, pg. 2 (Def. Ex. 10)).

2. Plaintiff was not subject to gender stereotyping because he disclosed his sexual orientation

It is well settled that "Title VII does not prohibit harassment or discrimination because of sexual orientation." Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005). Because the stereotypical notions regarding how men and women should behave necessarily blur into sexual orientation, the Second Circuit has recognized that claims for gender stereotyping should not be used to "bootstrap protection for sexual orientation in to Title VII." Simonton, 232 F.3d at 38; Dawson, 398 F.3d at 218; Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011). This Circuit has "repeatedly rejected attempts by homosexual plaintiffs to assert employment discrimination claims based upon allegations involving sexual orientation by crafting the claim as arising from discrimination based upon gender stereotypes." Dawson, 398 F.3d at 219; see Trigg v. New York City Transit Auth., 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001) (rejecting gender stereotyping claim because plaintiff's "Amended Complaint is rife with references to sexual orientation, homophobia, and accusations of discrimination based on homosexuality"); Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 623 (E.D.N.Y. 2011) (rejecting Plaintiff's gender stereotyping claims because it was based upon "students calling her such names as 'lesbian' and 'carpet-muncher,' which are directly related to her sexual orientation, not her gender); Martin v. New York State Dep't of Corr. Servs., 224 F.Supp.2d 434, 447 (N.D.N.Y. 2002) (holding the harassment experienced by the plaintiff – "[t]he name-calling, the lewd conduct and the posting of profane pictures and graffiti are all of a sexual, not gender, nature.").

Under this alternate theory of gender discrimination, Plaintiff alleges he was terminated because he failed to comply with male gender stereotypes. However, this theory amounts to nothing more than a re-packaged claim for Plaintiff's discrimination based upon sexual

orientation. Plaintiff's alleged non-conformance with the male gender stereotype is directly related to his sexual orientation. In this particular instance, Plaintiff's claim for gender stereotyping is premised on the disclosure of his sexual orientation to Orellana, an act which he concedes was designed to ease her noticeable discomfort with his prior actions. (Zarda Dep. pg. 139-140:22-8, 173:15-19; 228-229:2-10). Plaintiff's argument, at its essence, is that he was terminated for disclosing to Orellana that he is homosexual, because it is contrary to the male gender stereotype to do so. However, this argument relies of the fact that Plaintiff is homosexual, not that he failed to comply with male gender norms. Thus, Plaintiff's merely attempts to bring a defective sexual orientation claim under Title VII, which is legally invalid. See Dawson, 398 F.3d at 221. As such, Plaintiff fails to state a legally cognizable basis for his Title VII claim and summary judgment is appropriate on this theory of gender stereotyping.

3. Plaintiff was not subjected to discrimination based on non-conforming gender stereotypes

i. Non-Conforming Gender Stereotype

Under Title VII, "[s]ex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination." Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (internal quotations omitted). An employee can fail to conform to gender stereotypes through either (1) behavior or (2) appearance. Id. at 221. However, to state such a claim under Title VII, the employee must demonstrate that he faced an adverse employment action as a result of the employer's animus toward the employee's "exhibition of behavior considered to be stereotypically inappropriate for their gender." Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005). The "sporadic use of abusive language, gender-related jokes and occasional teasing" is too isolated to amount to a change in the terms and conditions of employment under Title VII. Trigg v. New York City Transit Auth., 99-CV-4730 (ILG), 2001

WL 868336 (E.D.N.Y. July 26, 2001) aff'd, 50 F. App'x 458 (2d Cir. 2002) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

Factual evidence confirms Plaintiff was not subjected to discrimination based on his self-described failure to conform his behavior to male gender stereotypes. There is no evidence that Plaintiff behaved in stereotypically feminine manner. Rather, the record is rife with evidence indicating that Plaintiff's conduct was in no way different from that of any other male employee at SDLI. Indeed, Plaintiff behaved just like the other instructors at SDLI, so much so, his behavior could not be distinguished from that of his comparators. (Zarda Dep. pg. 79-80:16-17). Plaintiff admits he did not conduct himself in any manner that would set him apart from the other instructors. (Zarda Dep. pg. 79-80:16-17). Additionally, Plaintiff concedes he acts in a masculine, not feminine, manner. (Zarda Dep. pg. 116:21-25, 364:21-23). This evidence confirms that Plaintiff's behavior was no different from his fellow male employees and that he in fact had a masculine affect. These admitted facts contradict Plaintiff's claim that his behavior did not conform to prevailing male gender stereotypes because he behaved in a feminine manner. (See Amended Complaint ¶ 26-28). Given the undisputed fact that Plaintiff behaved in a masculine manner, just as every other male employee at SDLI, Plaintiff cannot sustain a claim for discrimination based on his purported failure to conform his behavior to the male gender stereotype.

Additionally, even if Plaintiff failed to conform his behavior to prevailing male stereotypes, he cannot demonstrate he suffered an adverse employment action as a result. See Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (holding Plaintiff could not state a claim for discrimination because she could not demonstrate she suffered an adverse employment action as a result of her behavior non-conformance: "she was not told by anyone at

Bumble & Bumble that her continued employment depended upon her acting and speaking in a more "feminine" manner" or that her "work assignments were restricted in any way to those considered "appropriate" for a woman to perform."). Plaintiff presents no evidence indicating that he was terminated because his behavior failed to conform to the male stereotype. To the contrary, Plaintiff was terminated because of a customer complaint. (Zarda Dep. pg. 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24). During his termination, no comments were made indicating that Plaintiff was being terminated because he behaved femininely. As such, Plaintiff cannot maintain a claim for discrimination based on his purported failure to conform his behavior to the male stereotype.

Furthermore, there exists no evidence that Plaintiff was subjected to discrimination because his appearance failed to conform to the male gender stereotype. Plaintiff concedes he was not effeminate, but masculine in appearance. (Zarda Dep. pg. 121-122:16-6, 365:3-10, 116:21-25, 364:21-23). Indeed, Plaintiff acknowledges he is a physically fit man, who bears an outwardly masculine appearance. (Zarda Dep. pg. 121-122:16-6, 365:3-10, 116:21-25, 364:21-23). Plaintiff admits that his "athletic" appearance often leads others to believe he is heterosexual, and is contrary to what "a lot of gay people look like." (Zarda Dep. pg. 121:7-8, 121-122:16-6, 365:3-10). Plaintiff's testimony confirms he did not fail to conform to male gender stereotypes by appearing effeminate. To the contrary, Plaintiff concedes he conformed to the male stereotype, appearing both physically fit and masculine. (Zarda Dep. pg 121-122:16-6, 365:3-10, 116:21-25, 364:21-23). To state a claim for gender stereotyping, Plaintiff must fail to conform in appearance to the male stereotype. Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005). This is simply not the case here. As such, Plaintiff cannot state a claim for gender stereotyping based on his appearance alone.

While bearing a masculine appearance, Plaintiff would occasionally wear a pink baseball cap during work at SDLI. (Zarda Dep. pg. 120:4-14, 125-126:22-7). However, sporadic instances of supposed non-conforming gender behavior are insufficient to infer that Plaintiff did not conform to male gender stereotypes. This is especially true because wearing pink articles of clothing is not specifically feminine; heterosexual men also wear pink on occasion. (Zarda Dep. pg. 120:15-17, 126-127:13-4). However, even if in the unlikely event Plaintiff's article of pink clothing is somehow sufficient to demonstrate he failed to conform to the stereotypical appearance of a male, Plaintiff's claim still fails because he cannot present sufficient evidence to demonstrate that he was subjected to discrimination as a result of his appearance.

Plaintiff asserts that several employees would make comments about his pink baseball cap, indicating that it was feminine. (Zarda Dep. pg. 120:15-17, 125-126:22-7). However, when questioned, Plaintiff could not identify any alleged individuals who made comments or any of the alleged comments. (Zarda Dep. pg. 120-121:4-9). Importantly, because Plaintiff could not identify any comments or those who made them, there is no evidence indicating that the alleged comments were anything more than occasional, thus their existence does not constitute a change in the terms and conditions of Plaintiff's employment. See Trigg v. New York City Transit Auth., 2001 WL 868336 (E.D.N.Y. July 26, 2001) (holding occasional comments and teasing were insufficient to change the terms and conditions of plaintiff's employment). Additionally, when given the opportunity, Plaintiff failed to identify Mr. Maynard as having made any inappropriate comments regarding his pink hat. (Zarda Dep. pg. 120-128). In fact, Mr. Maynard was never heard making such comments about Plaintiff. (Winstock Dep. pg. 36:9-11). As the principal decision maker at SDLI, Mr. Maynard never issued comments which implicated a gender stereotype. As such, Plaintiff cannot demonstrate he was subjected to an adverse

employment action because of the alleged comments regarding his pink clothing. See id. Furthermore, Plaintiff concedes that he was not offended by any of the comments made by his co-workers. (Zarda Dep. pg. 122:15-19). Plaintiff cannot have experienced a material change in the terms and conditions of his employment when the comments were, at best, sporadic and Plaintiff admittedly did not find them offensive in nature. See Chanval Pellier v. British Airways, Plc., 2006 WL 132073, at *6 (E.D.N.Y. Jan. 17, 2006) (holding that comments must be subjectively offensive to alter the terms and conditions of employment).

Finally, Plaintiff cannot show he suffered an adverse employment action resulting from his alleged non-conformance to the male stereotype. See Dawson, 398 F.3d at 221 (holding Plaintiff must demonstrate an adverse employment action as a result of Plaintiff's non-conforming appearance); Kiley v. Am. Soc. for Prevention of Cruelty to Animals, 296 F. App'x 107, 110 (2d Cir. 2008) (holding plaintiff could not maintain a claim for gender stereotyping based on her supervisor's gender stereotype comments regarding women when she does not state how these assumptions resulted in an adverse employment decision). Admittedly, Plaintiff's termination was a direct response to a customer complaint, not because Mr. Maynard believed he did not conform to the male stereotype. (Zarda Dep. pg. 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24). Again, no comments were made during Plaintiff's termination meeting indicating he was terminated because of his alleged feminine behavior or appearance. The testimony reflects that the termination was based solely on the customer complaint, not because Plaintiff did not behave or appear masculine enough. (Maynard Dep. pg. 226:3-16, 227:8-10, 247:14-15). In fact, the evidence indicates that Plaintiff was invited to return to SDLI multiple times, despite any alleged femininity or other purported non-compliance with prevailing gender stereotypes. (Zarda Dep. pg. 58-59:22-6, 76:22-25, 77:17-22; Maynard Dep.

pg. 149:9-12, 155-156:23-6, 165:15-18). Consequently, Plaintiff could not have been terminated based his alleged non-conformance to the male gender stereotype.

The facts of this case are analogous to those found in Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2004). In Dawson, the plaintiff, a lesbian with a "manly" appearance, claimed to have been terminated for failing to conform to gender stereotypes. Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2004). However, the court held she could not assert a claim under Title VII because she had (1) presented no facts indicating her continued employment was conditioned on her acting more feminine or that her work was affected because she was not feminine; and (2) presented no facts that she was subjected to any adverse employment action as a result of her more "manly" appearance. Id. Similarly, here, Plaintiff presents no facts sufficient to demonstrate his employment was, in any way, affected because he did not act or appear "manly" enough. To the contrary, the record demonstrates that Plaintiff was masculine in both his physical appearance and in his demeanor. Here, as in Dawson, Plaintiff was not subjected to an adverse employment action as a result of his appearance and/or behavior. See id. at 222-23.

To the extent Plaintiff may rely on Miller v. City of New York, this case is factually distinct. In Miller, the plaintiff was told he was not a "manly man" and not a "real man" because of his size and disability. Miller v. City of New York, 177 Fed.Appx. 195 (2d Cir. 2006). The plaintiff was verbally harassed by his boss for not being "manly" and was forced to perform heaving lifting "to toughen him up." Id. The court held that these facts demonstrate that the terms and conditions of the plaintiff's employment were affected by his inability to conform to a male stereotype. Id. No such facts exist here. Primarily, the evidence demonstrates that Plaintiff did conform to the male stereotype – Plaintiff is masculine, physically fit, and is often mistaken for heterosexual based on his masculine appearance. (Zarda Dep. pg. 121-122:16-6, 365:3-10,

116:21-25, 364:21-23). Additionally, no evidence exists demonstrating that the terms and conditions of Plaintiff's employment were affected because of his alleged non-conformance to a male stereotype. Unlike Miller, the material terms and conditions of Plaintiff's position were not changed because of his self-described failure to conform to the male stereotype.

ii. Hostile Work Environment

To state a claim for hostile work environment predicated on Plaintiff's alleged failure to conform to the male gender stereotype, Plaintiff must demonstrate that the comments regarding Plaintiff's gender "were so severe or pervasive to create a hostile or abusive work environment." Dawson v. Bumble & Bumble, 398 F.3d 211, 223 (2d Cir. 2005). In determining whether such a claim exists, the "court should consider the offensiveness of the defendant's conduct, its pervasiveness, and its continuous nature." Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62-63 (2d Cir. 1992) (citing Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2d Cir.1989)). The harassment must be "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Id. (quoting Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 67 (1986)). This requires the conduct to be "repeated and continuous; isolated acts or occasional episodes are insufficient." Id. (internal citations omitted). Additionally, the conduct must be unwelcome and offensive, and the plaintiff must subjectively perceive it to be hostile. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62-63 (2d Cir. 1992); Chanval Pellier v. British Airways, Plc., 2006 WL 132073, at *6 (E.D.N.Y. Jan. 17, 2006) (quoting Gallagher v. Delaney, 139 F.3d 338, 346-47 (2d Cir. 1998)).

To the extent Plaintiff claims he was subjected to a hostile work environment based on his purported non-conformance to typical male stereotypes, Plaintiff was not subjected to pervasive offensive comments creating an abusive working environment at SDLI. Plaintiff

waived any and all such putative claims as he admits that he was not offended by comments made regarding his pink clothing. (Zarda Dep. pg. 122:15-19); Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62-63 (2d Cir. 1992); Pellier, 2006 WL 132073, at *6; Gallagher, 139 F.3d at 346-47. As Plaintiff was admittedly not offended by his co-workers' comments, his claim for discrimination fails as a matter of law. Pellier, 2006 WL 132073, at *6.

Plaintiff fails to meet his evidentiary burden under the familiar McDonnell Douglas burden shifting analysis for a claim of non-conforming gender stereotypes, as Plaintiff admits he conformed to his gender stereotype and did not experience a change in the terms and conditions of his employment resulting from any alleged non-conformance. As such, Plaintiff's claim fails, and must be dismissed.

It is notable that Plaintiff's theory of discrimination based on non-conforming gender stereotypes contradicts Plaintiff's claim that he was discriminated because Defendants believed he acted consistent with male stereotypes. Plaintiff attempts, at the same time, to argue that he was terminated because Mr. Maynard believed he was a stereotypical male and that he was not stereotypical. Plaintiff cannot have it both ways.

B. Plaintiff's Claim for Sexual Orientation Discrimination Under the NYSHRL Fails as a Matter of Law

1. Disparate Treatment

While not actionable under Title VII, claims of sexual orientation discrimination are actionable under the New York State Human Rights Law. Stephenson v. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO, 6 N.Y.3d 265, 271 (2006); Dawson v. Bumble & Bumble, 398 F.3d 211, 224 (2d Cir. 2005). However, the question of whether such claims can survive summary judgment is determined by the McDonnell Douglas burden shifting analysis used for Title VII claims. Id.; Dawson v. Bumble & Bumble, 398 F.3d 211, 224 (2d Cir.

2005); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To meet his burden Plaintiff must demonstrate that "(1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." Id. If the Plaintiff does so, "a presumption of discrimination arises and the burden shifts to the defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action." Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005). If the defendant does so, "the presumption of discrimination created by the prima facie case drops out of the analysis, and the defendant will be entitled to summary judgment unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." Id. (internal quotations and citations omitted). In analyzing the defendant's business decision, courts must refrain from second-guessing a business's decision making process. Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985) see, e.g., Sweeney v. Research Foundation of the State Univ. of N.Y., 711 F.2d 1179, 1187 n. 11 (2d Cir. 1983).

Plaintiff fails to meet his burden under the McDonnell Douglas analysis, because he cannot establish that he was terminated under circumstances which give rise to an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Certain factors "strongly suggest that invidious discrimination [is] unlikely. For example, where the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [that person] an invidious motivation that would be inconsistent with the decision to hire." Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir.1997); Chin v. ABN-AMRO N. Am., Inc., 463 F. Supp. 2d 294, 304 (E.D.N.Y. 2006); Zuffante v. Elderplan, Inc., 2004 WL

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

Here, Mr. Maynard hired Plaintiff on three (3) separate occasions: 2001, 2009 and 2010. (Zarda Dep. pg. 56:19-20, 58-59:22-6, 76:22-25, 77:17-22; Maynard Dep. pg. 155-156:23-6, 165:15-18). Each time Maynard invited Plaintiff to work at SDLI, Maynard had full knowledge of Plaintiff's sexual orientation, as Plaintiff is openly gay. (Zarda Dep. pg. 54:7-12, 62-63:8-14, 78:11-22, 79:2-6; Maynard Dep. pg. 135:17-20; Winstock Dep. pg. 18:5-7, 101:10-12). Mr. Maynard was aware of Plaintiff's sexual orientation yet continued to bring Plaintiff back to SDLI to work. Additionally, Maynard was the person who decided to fire Plaintiff. (Zarda Dep. pg. 56:19-20, 58-59:22-6,76:22-25, 77:17-22, 218:20-21; Maynard Dep. pg. 155-156:23-6, 165:15-18, 282:3). Given that Maynard decided to hire Plaintiff, with full knowledge of his sexual orientation, and subsequently decided to fire him, there can be no inference of discrimination. Grady, 130 F.3d at 560. It is illogical to suggest that Maynard would re- hire Plaintiff, knowing his sexual orientation, if he had any aversion to homosexuals. See Cooper, 2001 WL 868003, at *6. Additionally, Plaintiff was terminated within two (2) years of his hire date - he was hired late in 2008 and terminated in June 2010. (Zarda Dep. pg. 60-61:12-13, 218:20-21, Maynard Dep. pg. 282:3, 148:24). The short period between his hire date and his termination bears a strong inference that Plaintiff was not subjected to invidious discrimination. Grady, 130 F.3d at 560; see Cooper v. Morgenthau, 2001 WL 868003, at *6 (S.D.N.Y. July 31, 2001) (holding the inference of no discriminatory animus due when plaintiff was hired and fired by the same person "should

be accorded substantial weight where the time period between the hiring and firing is less than two years."). Moreover, Plaintiff was suspended and terminated in the immediate wake of a customer complaint. (Zarda Dep. pg. 36:10-12, 37:7-14, 39:15-17, 40:6; Maynard Dep. pg. 183:15-21). Again, the close proximity between the complaint about Plaintiff's conduct and his termination indicate that he was terminated based solely on his inability to satisfy a customer. The undisputed facts confirm that Plaintiff was not fired under circumstances giving rise to an inference of discrimination. Grady, 130 F.3d at 560; Cooper, 2001 WL 868003, at *6.

Assuming, *arguendo*, that Plaintiff can somehow demonstrate that he was terminated under circumstances which give rise to an inference of discrimination, Defendants have a legitimate, non-discriminatory reason for Plaintiff's termination. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Plaintiff's termination was a result of a customer complaint regarding Plaintiff's behavior. (Zarda Dep. pg. 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24).

A customer complaint is a legitimate business reason for terminating Plaintiff. See Iverson v. Verizon Communications, 2009 WL 3334796, at *5 (S.D.N.Y. Oct. 13, 2009) (holding plaintiff was terminated for legitimate business reasons because plaintiff had poor performance and received multiple customer complaints); Hayes v. Cablevision Sys. New York City Corp., 2012 WL 1106850, at *15 (E.D.N.Y. Mar. 31, 2012) (holding customer complaints and written reprimands were sufficient to show a legitimate business reason for plaintiff's termination). Defendant SDLI is first and foremost a customer service business, in which the highest priority is customer safety and the second is ensuring an enjoyable experience. (Zarda Dep. pg. 140-141:18-6; Winstock Dep. pg. 91:20-22). On June 18, 2010, Plaintiff was unable to provide Defendants' customer with an enjoyable experience. (Zarda Dep. pg. 201-202:24-4;

Orellana Dep. pg. 49:3-5, 100-101:25-2). Instead, Kengle and Orellana were placed in an uncomfortable position because Plaintiff put his hands on Orellana's hips, rested his chin on her shoulder, and disclosed intimate details of his personal life. (Orellana Dep. pg. 47:5-13; 48:15-18, 49:3-5, 89:10-20, 100-101:25-2; Kengle Dep. pg. 23-24:22-5, 62-63:20-3, 66:15-18). As a result, Orellana and Kengle had a dissatisfactory experience and called SDLI to lodge a complaint. (Maynard Dep. pg. 179:14-22, 180:2-14; Kengle Dep. pg. 31:13-15, 35:13-15). This alone is the reason Plaintiff was terminated. (Zarda Dep. pg. 40:6; 218:20-21, 235:17-22, 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24; Maynard Dep. pg. 282:3). In terminating Plaintiff, Defendant made a business decision to eliminate an employee who failed to provide the customer with one of the core goals of skydiving – an enjoyable experience. This decision was based on SDLI's desire to please its customer base, not Plaintiff's sexual orientation. Even Plaintiff admits that the customer's complaint regarding his behavior is unrelated to his sexual orientation. (Zarda Dep. pg. 360:14-17). As Plaintiff is the only instructor which Maynard has received complaints about in his twenty years at SDLI, Maynard properly responded to the complaint with immediate and unbiased corrective action. (Maynard Dep. pg. 66:8-21, 69:9-14, 297:11-21). Parenthetically, this was not the first incidence in which a customer complained about Plaintiff during a jump; Plaintiff received a prior customer complaint in 2001. (Zarda Dep. pg. 57:10-19, 216-217:20-6, 285:11-16). In terminating Plaintiff, Maynard simply eliminated an employee who, on at least two (2) occasions, failed to provide satisfactory customer service. Therefore, Plaintiff was terminated for a legitimate, non-discriminatory reason and his claim for sexual orientation discrimination must be dismissed.

2. Hostile Work Environment

To the extent Plaintiff claims sexual orientation discrimination predicated upon the existence of a hostile work environment, any such claim is legally deficient and must be dismissed as a matter of law. Again, to establish a viable hostile work environment claim, Plaintiff must allege conduct that is "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." Gallagher v. Delaney, 139 F.3d 338, 346-47 (2d Cir. 1998) (internal citations omitted). Plaintiff must demonstrate that the conduct was intimidating, hostile, or offensive. Id. "[A] reasonable person would have to find the environment hostile or abusive, and the victim must have subjectively so perceived it." Id. "Isolated incidents of discriminatory comments or conduct is not sufficient to establish a hostile work environment." Viruet v. Citizen Advice Bureau, 2002 WL 1880731 (S.D.N.Y. Aug. 15, 2002); see Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (" 'simple teasing,' ... offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment." ').

Plaintiff cannot produce evidence sufficient to state a claim of hostile work environment based on his sexual orientation. Plaintiff's sexual orientation came up frequently when he worked at SDLI, as Plaintiff freely discussed it with his peers. (Zarda Dep. pg. 48:2-23). The other skydive instructors would occasionally engage in what Plaintiff referred to as "gay banter," including calling Plaintiff by the nickname "gay Don." (Zarda Dep. pg. 49:6-15, 270-271:5-4). While these comments regarding Plaintiff's sexual orientation were made around the work place, there is no evidence indicating these comments were sufficiently severe or pervasive to alter the conditions of his work environment or were unwelcome. Rather, testimony indicates that the other skydivers would occasionally comment on Plaintiff's sexual orientation in a fun, joking

manner. (Zarda Dep. pg. 51:21-25, 239-240:24-15, 270-271:5-4). Importantly, Plaintiff also partook in the "gay banter," referring to himself as "gay Don" and making jokes about being "gay Don." (Maynard Dep. pg. 137:14-20). This "banter" was no different from what the other skydivers experienced at SDLI, as skydivers enjoy teasing each other. (Zarda Dep. pg. 342:6-16). The light-hearted joking, which Plaintiff participated in, regarding Plaintiff's sexual orientation is not hostile or abusive, and did not alter his work environment. See Gallagher, 139 F.3d at 346-47; Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (holding teasing, offhand comments, and isolated incidents do not amount to discriminatory changes in the terms and conditions of employment). Moreover, Plaintiff concedes he did not find the comments made by his peers regarding his sexual orientation to be offensive. (Zarda Dep. pg. 51:21-25, 239:17-23, 239-240:24-15). A hostile work environment cannot exist if Plaintiff does not find the alleged comments to be subjectively offensive. Gallagher, 139 F. 3d at 346-347. Consequently, as Plaintiff admitted he was not offended by the comments of his peers, he cannot maintain a claim for sexual orientation discrimination based on hostile work environment.

C. Plaintiff has Withdrawn his Minimum Wage and Overtime Claim Under the FLSA

Consistent with Plaintiff's letter to the Court of December 4, 2012 (ECF Doc. No.: 106 (Def. Ex. 10)), Plaintiff has withdrawn all claims under the FLSA. To the extent Plaintiff has not withdrawn these claims, Defendants expressly reserve the right to brief this matter before Your Honor.

D. Plaintiff's Minimum Wage Claim Under NYLL Fails as a Matter of Law

New York Labor Law requires employers to pay their employees the minimum wage for all hours worked. See N.Y. Lab. Law § 652 (McKinney 2012). An employer may fulfill their obligation to pay the employee minimum wage by paying them on a piece rate basis. N.Y. Lab.

Law § 190; 12 N.Y.C.R.R. § 142-2.16. Pursuant to New York Codes Rules and Regulations § 142-2.16, when an employee is paid on piece-work basis, his regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's earnings.

Plaintiff was, at all times, paid at least the minimum wage during his employment with Defendants. Plaintiff was compensated on a "piece-work" basis, being paid on a per-jump basis rather than by the hour. (Zarda Dep. pg. 301-302:23-8, 309:11-16; Winstock Dep. pg. 61:2-7). Plaintiff's regular hourly wage can be calculated based his allegation that he worked approximately twelve (12) hours per day, the number of days he completed jumps per week, and his weekly earnings. (See Def. Ex. 5, 6, and 7). Due to weather, there are some days in which Plaintiff did not work at SDLI. (Winstock Dep. pg. 61:11-17; Callanan Dep. pg. 57:10-12, Zarda Dep. pg. 293:4-22). Those days are reflected on his jump log as days in which he performed no jumps. (Def. Ex. 5 and 6). Additionally, when there was downtime, such as when the weather was poor or there were no scheduled customers, Plaintiff was permitted to leave SDLI. (Zarda Dep. pg. 293:4-22; Maynard Dep. pg. 306-307:22-2; Callanan Dep. pg. 59:17-20). Plaintiff is not entitled to be paid minimum wage for days in which he did not work and time where he was not required to be on the premises. See N.Y. Lab. Law § 652 (McKinney 2012).

Accordingly, for the years 2009 and 2010, Plaintiff's regular wage ranged from $12.50 to $30.83 per hour.[4] This amount exceeds the $7.25 (or $7.15 in 2009) per hour minimum wage mandated in New York. As such, Plaintiff was compensated at a rate exceeding the minimum

[4] Plaintiff's hourly rate was calculated by dividing his earning for each week by the number of hours worked that week. Plaintiff's weekly earnings are contained in Defendants' Exhibit 5. Plaintiff's hours per week were calculated based on Plaintiff's allegation he worked twelve (12) hours per day and multiplying that by the number of days in which he performed jumps each week. For example, for the week of May 18, 2009 to May 24, 2009, Plaintiff earned $1,510. Plaintiff jumped seven (7) days that week and thus worked 80 hours that week. This results in an hourly wage of $18.88 (1510/80 = $18.875). The full list of calculations is attached to the Declaration of Saul D. Zabell as Defendants' Exhibit 9.

wage for each week in which he worked at SDLI. Therefore, there exists no issue of fact and Plaintiff's claim for minimum wage under the New York Labor Law must be dismissed.

E. Overtime under NYLL

Primarily, Plaintiff's claim must be dismissed because he did not work more than forty (40) hours per week requiring the payment of overtime by Defendants. While Plaintiff claims that he often worked seven (7) days per week, the evidence confirms that Plaintiff rarely worked more than five (5) days per week. (Def. Ex. 5 and 6). Additionally, Plaintiff alleges he worked twelve (12) hour days, however, the evidence demonstrates that Plaintiff did not actually do so. On days when Plaintiff worked, there was often down time, either due to weather or a lack of customers. (Winstock Dep. pg. 61:11-17; Callanan Dep. pg. 57:10-12, Zarda Dep. pg. 293:4-22). During such occasions, Plaintiff was free to leave the premises to go home or run errands. (Maynard Dep. pg. 306-307:22-2; Callanan Dep. pg. 59:17-20). However, instead of utilizing this time off, Plaintiff chose to remain at SDLI's facility, as it was more "convenient" for him. (Zarda Dep. pg. 293:4-22, 293:9-22, 293-294:23-7, 319:11-20, 322:11-16). As Plaintiff did not work during this down time, Plaintiff is not entitled to be paid for these hours. Given that Plaintiff was not required to be on-premises at all times during the day, (Maynard Dep. pg. 306-307:22-2; Callanan Dep. pg. 59:17-20), Plaintiff could not have worked twelve (12) hour days at SDLI. As such, Plaintiff did not work overtime, and is not entitled to any overtime pay under the law.

Even if Plaintiff did work in excess of forty hours (40) per week, he received all overtime pay to which he was entitled under the law. Under the New York Labor Law ("NYLL"), employees who are subject to an exemption under the Fair Labor Standards Act ("FLSA") must only receive an overtime rate at one and one-half the basic minimum hourly rate. 12 NYCRR

§ 142-2.2. This is true even if their normal rate exceeds the statutory overtime rate. See Edwards v. Jet Blue Airways Corp., 21 Misc. 3d 1107(A) (Sup. Ct. 2008) (holding defendant complied with 12 NYCRR § 142–2.2 because, as an exempt employee, plaintiff was only entitled to reduced overtime rate and plaintiff was paid his regular rate, which was greater than one and one-half times the basic minimum hourly rate). Skydiving is a seasonal sport, operating from approximately March to November each year. (Zarda Dep. pg. 286:4-14, 316:13-16). As a seasonal recreational business, SDLI qualifies for the FLSA exemption afforded to seasonal amusement or recreational establishments.[5] Plaintiff is therefore exempt under the FLSA, and must only be paid overtime at a rate of one and one half the minimum wage under NYLL. See 29 U.S.C. § 213(a)(3); 12 NYCRR § 142-2.2. The minimum wage in 2009 was $7.15 per hour, requiring an overtime rate of $10.73. (Def. Ex. 8). The minimum wage rate in New York for 2010 was $7.25, which requires an overtime rate of $10.88. (Def. Ex. 8).

Pursuant to the calculations of Plaintiff's earnings each week in 2009 and 2010, Plaintiff received more than the required overtime rate every week in which he worked. Plaintiff consistently earned more than $10.73 per hour in 2009 and $10.88 in 2010. (Def. Exs. 5, 6, 7, and 8). Accordingly, Plaintiff was paid overtime for all hours worked and this claim cannot withstand Defendants' motion for summary judgment.

[5] To qualify for the seasonal exemption under the FLSA, the establishment must meet the 33 1/3 % test, wherein the monthly average based on total receipts for the six individual months in which the receipts were smallest should 33 1/3 % or less of the monthly average for six individual months when the receipts were largest. 29 U.S.C. § 213(a)(3)(b). In 2009, the gross receipts of the slowest six months was 12.14% of the gross receipts of the busiest six months. (See Def. Ex. 2). In 2010, the gross receipts of the slowest six months was 17.44% of the gross receipts of the busiest six months. (See Def. Ex. 3). Therefore, SDLI qualifies for the seasonal exemption under the FLSA.

V. CONCLUSION

For all the foregoing reasons, this Court should grant Defendants' Fed. R. Civ. P. 56 Motion for Summary Judgment and dismiss this action in its entirety with prejudice.

Dated: Bohemia, New York
February 11, 2013

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