

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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**PLAINTIFF’S COUNTER
56.1 STATEMENT**

DONALD ZARDA,

Plaintiff,

10 Civ 4334 (JFB)

**ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

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Plaintiff responds to defendants’ Local Rule 56.1(a) statement and makes such affirmative statements under Local Rule 56.1(b) as to place many misrepresentations and omissions in context:

1. Altitude Express, Inc. d/b/a Skydive Long Island (hereinafter “SDLI”) is a domestic business corporation operating under the laws of the State of New York. (New York State Department of State Entity Information for Altitude Express, Inc., Defendants Exhibit 1).

Admitted.

2. Ray Maynard (hereinafter “Maynard”) is the owner and chief executive officer of SDLI. (Maynard Dep. pg. 10:7-9; Def. Ex. 1).

Admitted upon information and belief.

3. Maynard has been skydiving for over forty (40) years. (Maynard Dep. pg. 11:9).

Admitted however pursuant to local rule 56(b), plaintiff avers that Maynard admits that he has less experience diving than Zarda. Maynard Dep. 249:10-11.

4. Skydiving is a seasonal sport, as such, the skydiving season runs from approximately March to November each year. (Zarda Dep. pg. 286:4-14, 316:13-16). Skydiving can only be performed in good weather: “the sky must be clear, you must have visibility of

three statute miles, you must be 500 feet below clouds, there must be 1,000 feet above the clouds, and 2,000 feet separation from the clouds to be able to jump.” (Zarda Dep. pg. 288:9-14). Additionally, skydivers cannot “jump from planes while it's raining.” (Zarda Dep. pg. 288:2-4).

Admitted.

5. In 2009, SDLI's average gross receipts for the slowest six months are less than 33 1/3 % of the average gross receipts for the busiest six months. (SDLI's Gross Receipts for 2009 (Defendants Exhibit 2)).

This immaterial allegation is admitted upon information and belief.

6. In 2010, SDLI's average gross receipts for the slowest six months are less than 33 1/3 % of the average gross receipts for the busiest six months. (SDLI's Gross Receipts for 2010 (Defendants Exhibit 3)).

This immaterial allegation is admitted upon information and belief.

7. A typical skydive takes between ten (10) and twenty (20) minutes to complete. (Zarda Dep. pg. 317:20-25). However, a tandem skydive generally takes anywhere from 15 to 20 minutes. (Zarda Dep. pg. 318:20-22).

Admitted.

8. The first priority for the instructor on a tandem jump is safety, the next is making the jump enjoyable for the customer. (Zarda Dep. pg. 140-141:18-6; Winstock Dep. pg. 91 :20-22).

Admitted.

9. While the airplane is loud, the instructors “can hear each other speak, it's not deafening.” (Winstock Dep. pg. 50:22-24).

Admitted but averred that once people are in free fall in the air, “You can't even speak,” the only way to communicate is through “hand signals.” Id. at 50-51.

10. Often jokes are made during the skydive to loosen the tension. (Maynard Dep. pg. 35:2-14, 38:13-18; Winstock Dep. pg. 30:9-12, 31:3-15).

Admitted, and averred that the jokes are sometimes obscene, bawdy and sexual in nature. Maynard dep. 34:21-35:14.

11. These jokes are made to make the situation less tense, “the calmer a passenger is to exiting, generally the safer the skydive will be.” (Winstock Dep. pg. 30: 16-22).

Admitted, but it is averred that the sexual jokes permitted at SDLI can cause embarrassment and discomfort. Zarda Dec. at ¶¶ 12, 22.

12. Plaintiff Donald Zarda (hereinafter “Zarda” or “Plaintiff”) resides in Richmond, Missouri. (Zarda Dep. pg. 129:11-12).

Admitted that at the time the lawsuit was filed and at his deposition he lived in Richmond, Missouri but now lives in Texas. See Zarda Dec. at p.6, n.1.

13. In 2001, Zarda was an openly gay man, who “came out” sometime between 1999 and 2000. (Zarda Dep. pg. 54:7-12).

Admitted.

14. However, prior to “coming out”, Zarda had relationships with women. (Zarda Dep. pg. 54:18).

Denied: “relationship” is undefined on page 54 and defendant is attempting to characterize these “relationships” with women as romantic when Zarda specifically denied that they were. Zarda Dep. 54:21 – 55:8

15. Zarda was first hired by SDLI in the summer of 2001. (Zarda Dep. pg. 56:2-3).

Admitted, though it might have been spring when the season starts.

16. Mr. Maynard, the ultimate decision maker, was the person who made the decision to hire Zarda. (Zarda Dep. pg. 56:19-20).

Admitted.

17. During his employment with SDLI, Zarda's sexuality "was known" by everyone who worked at SDLI, including Mr. Maynard. (Zarda Dep. pg. 62-63:8-14; Winstock Dep. pg. 18:5-7). Mr. Maynard was aware of Zarda's sexual orientation prior to his hire in 2001, as Zarda disclosed it to Mr. Maynard the first time they met. (Zarda Dep. pg. 78:11-17; Maynard Dep. pg. 135:17-20; Winstock Dep. pg. 18:5-7).

Denied except admitted that at some point during 2001, many, though perhaps not all, employees at SDLI figured out that plaintiff is gay, even though plaintiff did not tell them. Zarda dep. 63:3-14. There is no way of knowing whether "everyone" knew and, indeed, people usually mistake plaintiff as straight. Zarda Dep. at 126-27. Plaintiff denies that he told Maynard that he is gay prior to his having been hired in 2001. Zarda Dec. at ¶ 6.

18. After working most of the skydiving season in 2001, Zarda was then terminated from SDLI in September, because of a customer complaint. (Zarda Dep. pg. 57:10-19, 216-217:20-6, 285:11-16).

Admitted that plaintiff was fired because a customer complained that Don would not do an unsafe maneuver, Zarda Dec. at ¶ 7, which Maynard admitted would not be a legitimate basis for termination, Maynard Dep. 144-45, as well as a violation of state law. See Labor Law § 740.

19. After not working at SDLI for several years, at the end of the skydive season in 2008, Zarda stopped by the drop zone at SDLI to discuss the possibility of his returning to work at SDLI in 2009. (Zarda Dep. pg. 60-61:12-13; Maynard Dep. pg. 148:24).

Admitted.

20. As a result of these discussions, Maynard decided to re-hire Zarda to work at SDLI

for the 2009 summer season (Zarda Dep. pg. 58-59:22-6), as Zarda was a good instructor, a safe instructor, and “a good guy.” (Maynard Dep. pg. 149:9-12).

Characterization denied. Maynard knew that Zarda was a good instructor, a safe instructor, and a good guy; it had nothing to do with the “discussions.”

Maynard Dep. pg. 149:9-12.

21. Like in 2001, Maynard was fully aware of Zarda's sexual orientation when he made the decision to re-hire Zarda. (Zarda Dep. pg. 78:18-22; Winstock Dep. pg. 101:10-12).

Denied in part. Plaintiff was known to be gay during the season in 2001, but Maynard did not know he was gay when he hired Zarda, because Zarda did not tell him. Zarda Dec. at ¶ 6.

22. During the 2009 season at SDLI, Zarda enjoyed working with his coworkers and had a “great relationship” with everyone at SDLI. (Zarda Dep. pg. 72-73 :24-6).

Admitted.

23. However, on July 2, 2009, Zarda fractured his ankle during a landing with a tandem passenger, bringing his jumping season to an early close. (Zarda Dep. pg. 73:7-18, 75:6-22; Maynard Dep. pg. 150:12; Callanan Dep. pg. 44:17-20). 24. After fracturing his ankle, Zarda was put into a cast. (Zarda Dep. pg. 73:19-21). Zarda then showed up at SDLI in a cast. (Winstock Dep. pg. 35:16-20; Callanan Dep. pg. 46:23-24, 47:10-13).

Admitted that plaintiff, non-negligently suffered an accident, Maynard dep. at 150, 152, and showed up at the drop zone because of a “mandatory staff meeting” that Maynard asked him to show up to. Maynard Dep. at 156-57, 159 and Zarda Dec., Exhibit B.

25. Upon noticing the cast, Maynard requested Zarda put a sock over his foot. (Zarda

Dep. pg. 347:12-18).

Denied but admitted that Maynard saw pink toenails while the two were near a coke machine after plaintiff had his cast removed, and Maynard said, “That’s gay,” in a derisive, nasty tone. Zarda dep. at 347, dec. at 18. Earlier in the season, he ask Zarda to paint his cast or leave a staff meeting. Id. at ¶ 17. If you see the cast attached as Exhibit A to the Zarda Dec., you see that there are few socks available that could cover it.

26. Maynard requested the cast be covered up as he did not “appreciate anyone being at the drop zone in a cast and on crutches. The students are nervous enough and if they see someone on crutches with a cast on, it's not going to be very good for the customers.” (Maynard Dep. pg. 160-161:24-9; Winstock Dep. pg. 96-97:15-14). This request was not specific to Zarda, as Maynard did not “want anybody, if possible, to be there on crutches in a cast.” (Maynard Dep. pg. 162:17-18).

Denied. There were many times that workers showed up at the dropzone in crutches and casts; and, further, why would Maynard not make Zarda go home if he were to be at the drop zone on crutches, even if he were wearing a cast, which would not be hidden as a result of a sock covering it. The request had nothing to do with as if his being on crutches with a black cast would have fooled anyone. Zarda Dec. at ¶ 17. Additionally, a woman named Tara, girlfriend of a dropzone employee, broke her back on a tandem jump and was allowed on the drop zone on crutches. Id.

27. As a result of his injury, Zarda could not work the remainder of the 2009 season. However, Maynard allowed Zarda to return for the 2010 season, after getting healthy. (Zarda

Dep. pg. 76:22-25, 77:17-22; Maynard Dep. pg. 155-156:23-6, 165:15-18).

Admitted that Maynard is “always looking for workers,” Maynard dep. at 301 and rehired Don for the following season.

28. Like in 2001 and 2009, Maynard was fully aware of Zarda's sexual orientation when he allowed him to return to work at SDLI for the 2010 season. (Zarda Dep. pg. 79:2-6).

Admitted that Maynard probably had not forgotten about Zarda’s sexual orientation in the proceeding year, and at least was reminded of it when he fired him for telling as customer he is gay.

29. After taking the remainder of the 2009 season off, Zarda returned to work at SDLI on May 15, 2010. (Zarda Dep. pg. 78:4-6).

Admitted.

30. During his time at SDLI, Zarda behaved like every other employee in his daily mannerisms, he could not be distinguished from his co-workers based on his actions. Zarda admits that he acted normally, was “just like everybody else,” and didn't do anything special that would distinguish him from his co-workers. (Zarda Dep. pg. 79-80:16-17).

Admitted.

31. Zarda is admittedly masculine in both appearance and actions. (Zarda Dep. pg 121-122:16-6, 365:3-10, 116:21-25, 364:21-23). As an individual who works out frequently and stays in shape (Zarda Dep. pg 87:20-21, 89:10), Zarda has an “athletic” appearance, which he admits often leads others to believe he is heterosexual. (Zarda Dep. pg. 121-122:16-6, 365:3-10). Zarda admits that he does not “look like a lot of gay people might look.” (Zarda Dep. pg. 121:7-8). Zarda also acts masculine, not feminine. (Zarda Dep. pg. 116:21-25, 364:21-23).

Admitted.

32. While masculine in appearance, Zarda would occasionally wear a pink baseball cap during work at SDLI to protect his head from the sun. (Zarda Dep. pg. 120:4-14, 125-126:22-7).

Denied insofar as plaintiff almost always wore his pink cap in the sun and he testified it was viewed as feminine. Zarda dep. at 120.

33. While Zarda claims that his pink cap was viewed as a “feminine thing”, he admits that heterosexual men also occasionally wear pink articles of clothing. (Zarda Dep. pg. 120:15-17, 126-127:13-4).

Admitted that the pink cap was seen as feminine, but denied that the second part of the allegation is often true. In fact, it is rare to see a heterosexual man wear pink. Zarda Dec. at ¶ 15. The portion quoted, Zarda dep. 126-27, refers to plaintiff’s statement, “as long as I don’t have any accessories on, that might lead people ... to ask me if I am gay.” This does not support the proposition stated.

34. Zarda asserts that some employees of SDLI would comment on his pink cap, however when asked, he could not identify any individuals who allegedly made comments, or what comments were made about the cap. (Zarda Dep. pg. 120-121:4-9).

Denied. Plaintiff said “everyone commented on it.” Zarda Dep. pg. 120-121:4.

35. Additionally, Zarda failed to identify Maynard, his boss and the decision maker at SDLI, as one of the individuals who allegedly made comments about his pink cap. (Zarda Dep. pg. 120-128). Nor was Maynard ever heard making comments about Zarda's pink clothing. (Winstock Dep. pg. 36:9-11).

Denied, “everyone commented on it at one point,” Zarda Dep. at 120-121:4,

ipso facto Maynard commented. Plaintiff denies information as to what Winstock heard Maynard saying, but plaintiff did hear Maynard making derogatory comments about his pink clothing and toenails. Zarda Dec. at ¶¶ 17-18.

36. Despite the fact that Zarda claims comments were made about his pink cap, Zarda admits that he “wasn’t offended” by any comments made about his cap. (Zarda Dep. pg. 122:15-19).

Denied. Plaintiff wasn’t offended when “people at work . . . would say, hey nice pink hat,” but when Maynard derisively referred to his pink cast as “gay” and made him cover it up, he was offended. Zarda Dec. ¶¶ 17, 18.

37. Zarda admits that his sexual orientation came up “all the time” at SDLI; it was “routine and so ordinary” for it to come up at work. (Zarda Dep. pg. 48:2-23). However, Zarda was not offended when his sexual orientation was brought up. (Zarda Dep. pg. 51:21-25, 239-240:24-15).

Denied. Defendants continually misquote the depositions. Plaintiff testified that he was not offended when *Winstock* referred to him as “Gay Don” at his *[i.e. Winstock’s]* deposition, Zarda Dep. at 51:21-25. Furthermore, Zarda said the following about people speaking about his sexuality at work in an attempt to hurt his feelings:

“In an attempt to hurt my feelings, I can’t remember specifics. I don’t think so. Like we just talked about, some borderline stuff. I think that an attempt to hurt my feelings would imply malice and so that the person was wanting to be malicious, and so I don’t think anybody there was wanting to be malicious to me so they might have done it in error or ignorance, possibly, not knowing what to one was being malicious about it. say or how to say something; *yeah, in that regard possibly but not* – I don’t think anybody was being malicious about it.” Zarda Dep. at 240 (emphasis added).

38. Zarda was open and notorious about his sexual orientation; he even had the nickname

“gay Don” at SDLI. (Zarda Dep. pg. 49:6-15). Zarda “referred to himself as Gay Don” and made jokes about being “gay Don.” (Maynard Dep. pg. 137:14-20). In fact, Winstock was introduced to Zarda as “gay Don.” (Winstock Dep. pg. 25:9-12).

Admitted that plaintiff was open about his sexuality. “Notorious” means infamous, disreputable and dishonorable and is a pejorative, derogatory, bigoted word and demonstrates the defendants’ position. Plaintiff admits that at least Maynard considered Zarda notorious about his sexuality. Denied that plaintiff referred to himself as “Gay Don.” The passage cited, 137-14-20 says nothing whatsoever about the nickname that was foisted upon him. See Zarda dep. 137:14-20. Further, plaintiff does not recall whether someone other than himself introduced him to Winstock as “Gay Don,” but whether or not it happened, it was not to plaintiff’s liking or choice. Zarda Dec. at ¶ 8.

39. Zarda's co-workers would sometimes engage in what he referred to as “gay banter” or “gay fun”, saying things like “easy with gay Don.” (Zarda Dep. pg. 270-271:5-4).

Admitted that all of the employees were culpable of engaging in “gay banter or “gay fun.” Denied that the fun was plaintiff’s, and averred that it was at his expense. Again, he did not choose the name “Gay Don.” Zarda Dec. at ¶ 12-14.

40. However, Zarda concedes he “wasn't offended” when his co-workers referred to him as “gay Don” or engaged in “gay banter”, because they did not intend it to be malicious or derogatory. (Zarda Dep. pg. 51 :21-25). Zarda concedes that no one at SDLI made “gay jokes” to Zarda out of malice. Zarda doesn't believe anyone at SDLI was being malicious toward him when bringing up his sexuality. (Zarda Dep. pg. 239-240:24-15).

Denied that plaintiff wasn’t offended by it; to an extent he was, Zarda dep. at 240, but has a thick skin and wanted not to create tension in the workplace. He did, however, in 2009 have a talk with his employees to tone down the gay jokes. Zarda Dec.

at ¶ 13. **Admitted that the employees were not being malicious.**

41. Zarda is admittedly not offended by jokes about his sexual orientation, as long as the intention is good. (Zarda Dep. pg. 239:17-23).

Admitted.

42. Furthermore, it is common for Skydivers to pick on each other; all of the instructors at SDLI got picked on. (Zarda Dep. pg. 342:6-16).

Admitted.

43. Zarda concedes he was treated just like everyone else at SDLI; he was not treated differently, or picked on more, because of his sexual orientation. (Zarda Dep. pg. 341:10-15, 343:8-16; Winstock Dep. pg. 87:6-9, 97:22-25).

Denied. Plaintiff admits as he testified to, i.e., that “for the most part,” 342-43, he was treated as others. “Most part” means at least more than half of the time. Zabell tried again and again at the deposition to get plaintiff to commit to a yes or no that he “was treated like everyone else,” but failed to obtain that admission. Id. Now, having failed to get his admission, he dishonestly foists it upon the court here, as in countless other examples.

44. Rather, Zarda enjoyed positive working relationships with all his coworkers during his employment at SDLI in 2009 and 2010. (Zarda Dep. pg. 81:12-16, 82:6-9).

Plaintiff does not understand the use of the word “rather,” in this context, but admitted only as plaintiff testified, that “for the most part” he had positive working relationships at the dropzone.

45. If any problems arose at SDLI, Zarda could have brought them to the attention of Rich Winstock, the Chief Instructor (hereinafter “Winstock”), or Mr. Maynard. (Zarda Dep. pg. 101:7-16; Winstock Dep. pg. 89:20-23).

Admitted, and insofar as plaintiff was suspended, had his pay docked, he did; though it did no good, because despite Winstock's interventions, he was unable to prevent Don's termination. (Winstock's Dep., pg. 84.)

46. Zarda felt comfortable speaking to Winstock about his problems, enough so that he disclosed a personal problem to Winstock in 2009. (Zarda Dep. pg. 102:18-23, 103 :9-17).

Denied insofar as the testimony cited does not stand for the proposition stated, Zarda Dep. pg. 102:18-23, 103:9-17, and that the personal problem referred to, the death of a cat, plaintiff testified *he did not recall* speaking to Winstock about. Zarda dep. 104:2-8. This is another example of Zabell's blatant misconstruction of the evidence. Despite this, plaintiff avers that plaintiff gets along with Winstock, and vice versa, and they both think Ray is unethical and that plaintiff's termination was wrong. Zarda Dec. at p12., n2, Exhibit E; Winstock dep. at 24 (Winstock strongly recommends a written reprimand) and 83 (Winstock doesn't know what the reprimand would be for, but at least it would have saved Zarda's job).

47. However, Zarda admittedly "didn't make any complaints to the owner, [Maynard], or [Winstock] about" about any gender or sexual orientation discrimination. (Zarda Dep. pg. 335:7-11, 101-102:22-9.

Denied. See ¶ 48, infra.

48. The only complaint Zarda made about SDLI was an oral complaint to Winstock, informing him that he had been suspended. (Winstock Dep. pg. 90:9- 18).

Admitted.

The Jump in Question:

49. On June 18, 2010, David Kengle (hereinafter "Kengle") brought his girlfriend,

Rosana Orellana (hereinafter “Orellana”), to SDLI for a tandem skydive for her birthday. (Zarda Dep. pg. 201-202:24-4).

Plaintiff is not the source of that information, but he has no basis to deny it.

50. Zarda was the assigned instructor on the tandem jump with Orellana. (Zarda Dep. pg. 201-202:24-7).

Admitted.

51. During the skydive, Kengle and Orellana were in close proximity to their respective instructors. (Kengle Dep. pg. 18:13-18; Orellana Dep. pg. 43:13-18, 8; 100:17-22).

Orellana sat in front and Zarda sat directly behind her. (Orellana Dep. pg. 43:13-18).

Kengle was also sitting in front of his instructor. (Kengle Dep. pg.17:17, 23-25). Zarda then attached Orellana's harness to his harness. (Orellana Dep. pg. 41:12-20).

Admitted.

52. Orellana was not bothered by the close proximity to Zarda. (Orellana Dep. pg. 100:17-22).

Plaintiff denies knowledge or information and belief as to how Orellana felt or what she wanted or didn't want. She wanted to go on a skydive, but didn't read the waiver pertaining to what would happen on the skydive. Orellana Dep. at 36-37,

72. All of the visual evidence taken at the time of the jump, including immediately after the jump, shows she had a fantastic time on the jump. Afterwards, she said it was “awesome” and put her face close to Don's and posed for a picture with him.

Antollino Dec at Exhibit B (videographic and photographic evidence) and Kengle's jump, id. (hereinafter “contemporary evidence” or CE). She still shows the video to Kengle's family members. Orellana dep. at 97. She shows no discomfort in the CE,

but testified she was claustrophobic and backed away from me as I approached her with the video. Orellana dep. 93. She believes in gay marriage, id. at 65, yet testified offended by something much less controversial, a person telling her he is gay, suggesting she is making up the whole thing to support her *boyfriend's* complaint. She knows nothing about skydiving, did not read the waiver, id. at 36-37, 72, and thus has no idea what Don was doing in regards to the attachments with regards to her safety. Id. at 41. Therefore, she would have preferred that Don protect her safety even at the expense of her comfort. Id. at 80, 98. She didn't want to make a complaint. Id. She merely made some comments on the way home after the jump, and her boyfriend mulled it over for a day and then called in a complaint. Id. at 69. Ray waited two more to discuss the allegations. Zarda Dec. at 28.

53. During the plane ride up, a joke was made to Kengle by another instructor on the plane, stating: "how do you feel about your girlfriend being strapped to another man." (Zarda Dep. pg. 201-202:7-12; Orellana Dep. pg. 44:10-17; Kengle Dep. pg. 19:18-23).

Admitted that an instructor, not plaintiff, made this "joke."

54. Both Orellana and Kengle laughed at the joke made by the instructor (Orellana Dep. pg. 45:5-6), as it was funny and they can both "take a joke." (Orellana Dep. pg. 58:21-23; Kengle Dep. pg. 43:10).

Denied that it is funny, but admitted that the other instructor stated it as a misplaced form of trying to loosen up a tense atmosphere. Maynard dep. at 39-40. Maynard denies that it is a joke but rather a "statement." Maynard dep. 39-40. Denied that Orellana and Kengle were able to take a joke. Kengle is extremely jealous of other men pursuing her—as he characterized her -- "beautiful" girlfriend.

Kengle Dep. at 24. Further, plaintiff sensed discomfort when this joke or statement was made, and wanted to remove himself from the insinuation that he was sexually attracted to Rosanna. Zarda Dec. at ¶ 23.

55. This type of joke is made often by the skydiving instructors during a tandem jump. (Zarda Dep. pg. 202:13-18). Customers are not usually bothered when this joke is made. (Zarda Dep. pg. 206-207:21-4).

Denied, insofar as plaintiff specifically testified that Kengle was bothered by the joke, Zarda dep. at 202, but admitted that other customers usually do not get upset.

56. During the plane ride, sometime prior to the jump, Orellana believed Zarda was touching her inappropriately. She noticed that “[h]e had his hand on [her] hip” and was “resting his chin on [her] shoulder.” (Orellana Dep. pg. 47:5- 13; 48:15-18, 89:10-20). This contact made her uncomfortable during the jump.(Orellana Dep. pg. 100-101:25-2). During this time, Zarda also “leaned forward to give [Orellana] instructions ... in her ear.” (Zarda Dep. pg. 230-231 :21-7).

Denied. First, Orellana was on notice close that she would be in close contact with the instructor, signed a release wherein she agreed to be in such close contact. Orellana Dep. at 36-37, 72. That she did not read that waiver is not something to hold Zarda liable for, but Orellana. See Maynard dep. at 31 (customer complaint concerning something happening that is in the waiver is not a valid complaint). Second, an instructor is so close to the passenger that he is invading her space. Winstock Dep. at 82-83. Again, plaintiff does not know what Orellana believes – it is likely she is lying to protect her boyfriend’s integrity - but she signed a statement

that she agreed to be touched. *Id.* at 36-37, 72 Third, as a homosexual, he would have no reason or motive to put his hand on her hip in a sexual or inappropriate manner. Zarda Dec. at ¶ 23; yet as Maynard admitted (dep. at 149) he was an good and safe instructor and would have every reason or motive to make sure her safety was protected, and that the hip straps were adjusted appropriately. Maynard dep. at CITE. Fourth, it is a normal place to rest one’s hand while waiting to jump out of a cramped plane. Zarda Dec. at ¶ 24. Fifth, it is loud in the airplane, and the ear is the most natural place to give an instruction, because the instructor is *strapped* to the passenger. See Maynard dep. at 27-28. Sixth, the instructor must put his face on either shoulder or else the instructor’s teeth or perhaps nose will hit the back of the passenger’s head. Winstock dep. at 50, 55, 81; Maynard dep. at 259. Finally – it is unclear what significance “whisper” has in this lawsuit (whispering “sweet nothings,” perhaps?) but insofar as the instructor is so close, and the noise level high, a statement made at a natural octave might be interpreted as a whisper. Zarda Dec. at ¶ 25.

57. Kengle also noticed Zarda touching Orellana inappropriately in the plane. He observed Zarda putting his “hands on her hips” for practically the entire plane ride.

(Kengle Dep. pg. 19-20:24-7,22:2-4,23:4-12, 23:16-24, 27:14-23).

Plaintiff has no idea what Kengle saw, but Kengle said nothing at the time. Kengle Dep. at 24, and did not report the alleged touching for a day. *Id.* at 31. The documentary evidence shows Kengle had a fantastic time, and after his drop was over he said that was “fucking awesome,” and admitted that he did not look upset. Kengle Dep. at 49. His lay opinion testimony as to whether plaintiff the homosexual

was trying to make a move on his girlfriend is inadmissible.

58. Kengle observed that no other instructor, including his own instructor, was touching their customer in the same manner Zarda was touching Orellana. (Kengle Dep. pg. 23-24:22-5, 62-63:20-3, 66: 15-18). Kengle felt uncomfortable with the behavior he observed from Zarda based on his observations of the other instructors. (Kengle Dep. pg. 23-24:22-5, 27:2-9, 62-63:20-3, 66:15-18).

Denied. An instructor must constantly make adjustments to straps at the hips inside the plane and out. Maynard dep. at 27-28. The visual evidence as to what happened in the plane, taken by a constant flashing camera shows simply that the complainants were having an excellent time. Maynard dep. at 323-25. Kengle is very jealous of other men because he believes that Orellana is “beautiful” and they are men are always hitting on her. Kengle dep. at 24; Maynard dep. at 198. Kengle is “very vocal,” but he didn’t say anything at the time, Kengle dep. at 24, and didn’t express any disappointment after the jump when he posed with Don. See final moment of video. He only complained when, coming home from the jump, he learned that Don had told Orellana that he was gay, and a day later made a complaint and got his money back. Maynard Dep. 186-87. If the issue had been so pressing, Maynard might have addressed the issue on the spot, but he didn’t speak to Zarda about it *until three days later*. Zarda Dec. at ¶ 28.

59. While touching the customer's hips is required at some point during the tandem jump, it does not require the instructor to touch the customer inappropriately. (Zarda Dep. pg. 173:3-6).

Admitted and plaintiff homosexual did not touch Orellana inappropriately,

and defendants have no evidence that Zarda, the homosexual did anything but “put [his] hands in the location around the hips that's necessary to be able to perform the functions that I am required to do as a tandem instructor.” Zarda dep. at 173.

60. Then, “[a]t some point during the jump, [Zarda] sensed that [Orellana] was uncomfortable.” (Zarda Dep. pg. 174-175:22-6, 173:12-14).

Admitted, and plaintiff believes it was after the tired, “notorious” “joke.” Zarda Dec. at ¶ 21-23.

61. After pulling the parachute (Orellana Dep. pg. 50:11-18), in an attempt to allay Orellana's discomfort, Zarda disclosed his sexual orientation to Orellana. (Zarda Dep. pg. 139-140:22-8, 173:15-19; 228-229:2-10). He told her: “I hope I didn't make you feel uncomfortable on the plane, I'm gay,” that he “had recently broken up with his boyfriend.” (Orellana Dep. pg. 50:14-18).

Admitted, though plaintiff does not recall the statement about breaking up with his boyfriend, and it seems unlikely because it would have been untrue. Zarda Dec. at 23. Plaintiff did this because, in his judgment, it would make the passenger more comfortable, given the “joke” in the plane, *id.*, and Rich Winstock, SDLI's chief instructor does the same thing, when appropriate, to allay the discomfort of passengers – he tells them that he is married with children. Winstock dep. at 94,109-110.

62. It was only after Zarda noticed Orellana's discomfort with the jump that he disclosed this information to Orellana. (Zarda Dep. pg. 176:6-9, 177:14-16).

See response to ¶ 60 incorporated herein.

63. Orellana felt uncomfortable after Zarda disclosed this information to her. (Orellana

Dep. pg. 52:2-7, 54:11-19, 55:6-9). It made her uncomfortable because she “wanted to learn about the scenery,” and “wanted him to speak about what was going on around” them during the jump. She did not “want to hear about his personal life” during the jump. (Orellana Dep. pg. 52:2-7, 54:11-19, 55:6-9). She wanted information about her tandem jump instead. (Orellana Dep. pg. 52:2-7, 100:4-10).

Admitted this is what she testified to, but denied that, in a ten or fifteen minute jump that she described as “awesome” CE, Antollino Dec. at Exhibit B, and later cozied up to plaintiff, id. at the end, that she did not see any scenery or that she was not told what was going on. Zarda Dec. at ¶ 23. In fact, plaintiff’s talking about the jump and the closeness of their contact was “information about the jump itself.” Id. A one-sentence discussion – even if it took place in the air, which plaintiff remembers differently – could hardly distract from the scenery, Zarda Dec. at ¶ 26, and notwithstanding Orellana’s after-the-fact complaint, Maynard rated the jump at 8 or 9 out of 10, dep. at 280, and Winstock, dep. at 75, rated the jump at 97% and said the landing was outstanding. Id. at 73

64. Orellana felt that Zarda's conduct, putting his hands on her hips and his chin on her shoulder during the jump, had crossed the line. Orellana Dep. pg. 60:4-8. She felt that “he should have been more professional” in his interactions with her. (Orellana Dep. pg. 49:3-5).

Denied, though admitted that she testified to this. As set forth in ¶ 63, Winstock (75) and Maynard (281) gave plaintiff very high grades in the manner in which plaintiff performed in the jump based on the video. Maynard saw not a single unprofessional thing in the pictures the jumpers ordered. Maynard dep. at. 323-25.

Furthermore, Orellana’s opinion is inadmissible because not only does she not know anything about skydiving, but she didn’t even read the waiver before she went on the jump. Orellana dep. at 29, 36-37, 72. She has no basis whatsoever to evaluate what is or is not professional.

65. In her opinion, Zarda's actions ruined the jump for Orellana. (Orellana Dep. pg. 54:20-21, 60:6-8).

Denied. She said it was “awesome” as soon as she got off and cozied up to plaintiff for a picture. See Orellana dep. at 83; see Orellana video at very end.

66. Kengle also felt the overall experience had been tainted because of Zarda's actions. (Kengle Dep. pg. 31:11-12).

Denied. Just as with Orellana, the CE shows that Kengle was having a great time, and he did not complain for a day, at which time he, an unemployed waiter, dep. at 7, was happy to cash his refund money. So he got an experience that he described as “fucking awesome” completely free. Kengle at 49. Orellana didn’t want to complain. Dep. at 69.

67. After leaving SDLI, Orellana told Kengle that she would have liked the experience better if she had a different instructor. (Kengle Dep. pg. 30:8-9).

Denied. The contemporaneous evidence shows that both of them had a fantastic time, Kengle Dep. at 48, Orellana Dep. at 83, and both Winstock and Maynard evaluated plaintiff’s performance on the jump in superlative terms. Kengle’s statement is hearsay and even if not, Orellana’s opinion is sheer speculation.

68. After thinking over the aforementioned events, on about Monday, June 21, 2010, Kengle called the SDLI office to lodge a complaint about Zarda' s behavior on the jump with Orellana. (Maynard Dep. pg. 179:14-22, 180:2-14; Kengle Dep. pg. 31:13-15).

Admitted that after stewing over it , Kengle, an unemployed waiter, dep. at 7, devised a way to get a refund.

69. Kengle believed a complaint was warranted because Zarda's actions were “inappropriate.” (Kengle Dep. pg. 35:13-15).

Denied, and it is unclear what “actions” Kengle is talking about. Kengle wanted his money back. He is a thirty-something unemployed waiting who as recently as 2006 was driving a 1988 car on installment plan. Antollino dec. at Exhibit Q (TLO report). This is not to denigrate the unemployed, but let’s be real: Kengle wanted to impress his girlfriend with an expensive gift that he couldn’t afford, because men were always hitting on her; then he devised a way to get his money back by making a nonsensical complaint – that a homosexual was hitting on his girlfriend. Further, he has no qualifications for evaluating plaintiff’s performance, thus they are inadmissible; (2) the contemporaneous evidence shows he was having a wonderful time; and (3) it is as legal and proper to state one is gay in the workplace as it is to say one is Cuban, something that Maynard himself believes. Dep. at 256. Forcing an employee to pretend he is heterosexual is akin to forcing a black person to show up to work in white face. See generally, Kenji Yoshino, Covering.

70. When he called SDLI, Kengle spoke to Lauren Callanan (hereinafter “Callanan”), who “took [his] story and let [him] know she would pass the information along.” (Kengle Dep. pg. 31 :15-17; Callanan Dep. pg. 33:21-22).

This immaterial statement is admitted.

71. Callanan relayed to Maynard that a customer complained, and provided him

with Kengle's name and phone number. (Maynard Dep. pg. 181:2-3).

Denied, and this demonstrates how loose the defendant plays with the facts. Maynard was not sure which of his employees told him, Maynard dep. at 180, but surely one of them had to.

72. Maynard then contacted Kengle later that day, telling Kengle “that he was very unhappy” with what Kengle and Orellana experienced during their skydive. (Kengle Dep. pg. 31:9-16).

Admitted.

73. During their phone conversation, Kengle complained to Maynard about what he and Orellana believed to be inappropriate touching by Zarda during the skydive. (Zarda Dep. pg. 156:16-23; Orellana Dep. pg. 69:11-13; Maynard Dep. pg. 181-182:16-12).

Denied. Kengle has no qualifications for evaluating plaintiff’s performance, and his opinion is inadmissible; the contemporaneous evidence, Antollino Dec., Exhibit B, Maynard Dep. 325, shows he was having a wonderful time, and Maynard and Winstock believed the jump to show superlative. Maynard rated it 8 or 9 and Winstock 97/100.

74. Kengle expressed to Maynard “his disappointment” in the company and with what the tandem master, Zarda, did during their jump. (Maynard Dep. pg. 181:16). Kengle explained that the skydive “was a present for [Orellana's] birthday and that her birthday was completely ruined” because of Zarda's behavior, and that he would never recommend SDLI in the future because of it. (Maynard Dep. pg. 181:21-23; Callanan Dep. pg. 33-34:24-4).

Denied. While he might have stated this days later, the contemporaneous

evidence shows that they were having a wonderful time during the jump.

75. Kengle explained to Maynard that, during the jump, Zarda had his hands on Orellana's hips, put his head on her shoulder, and whispered in her ear, which made her feel very uncomfortable during the jump. (Maynard Dep. pg. 182:6-17; Callanan Dep. pg. 34:7-12). He also explained that Zarda tried to justify his behavior by telling her that he was gay. (Maynard Dep. pg. 182:6-17; Callanan Dep. pg. 34:7-12) He told Maynard that Orellana was upset that Zarda discussed his personal life with her. (Maynard Dep. pg. 182-183:22-8, 289:11-15; Callanan Dep. pg. 34:7-12).

Denied. Kengle wanted his money back. Further, he has no qualifications for evaluating plaintiff's performance, which is inadmissible; (2) the contemporaneous evidence shows he was having a wonderful time; and (3) it is legal and proper to state one is gay in the workplace. See Executive Law CITE; Herek, Bauer and Yoshino, supra; Winstock at 109 (discussing personal life where appropriate); Maynard dep. at 254-57 (discussing ethnicity, military status, and familial status at the workplace perfectly ok). Additionally, Maynard's discussing his marital woes and girlfriend is perfectly appropriate for his Facebook page. Antollino Dec. ¶¶ 7-9.

76. In response to Kengle's complaint, Maynard offered to refund the money Kengle paid for the skydives and accompanying video. (Kengle Dep. pg. 32:9-16). Kengle did not request the refund, Mr. Maynard insisted on it. (Kengle Dep. pg. 33:19-22).

Admitted that Maynard gave them a refund and Kengle greedily took it because, despite that the contemporaneous evidence shows he had a wonderful time. Kengle did not testify that Maynard insisted on anything. (Kengle Dep. pg. 33:19-22).

77. In the course of investigating this complaint from Kengle, Maynard did not speak to Orellana, (Maynard Dep. pg. 185:11-13) nor did he speak to the other individuals present on the plane. (Maynard Dep. pg. 199:7-16). However, Maynard did review the video of Zarda's jump with Orellana. (Maynard Dep. pg. 199: 17 -22).

Denied that Maynard did any investigation because if all he did was watch the video, that was evidence in plaintiff's favor to show that Kengle was lying because it shows nothing inappropriate. See Orellana video and photographs.

78. In his twenty plus years at the helm of SDLI and the successful completion of thousands of tandem jumps, no one has complained to Maynard about any instructor, other than the complaints made against Zarda by Kengle and the customer complaint in 2001. (Maynard Dep. pg. 66:8-21, 69:9-14, 297:11-21). The only complaints Maynard received about his skydiving instructors were about Zarda. (Maynard Dep. pg. 69:9-14; Winstock Dep. pg. 19:10-13).

Denied. There have been numerous complaints about SDLI and its employees. Maynard dep. at 55. See also Antollino Dec. at ¶¶ 6, 11. One of them was similar to the one made by Kengle – Exhibit K the Ripoff Report -- involving improper touching wherein a complainant alleged that the instructors were groping their girlfriends. Maynard in response asked why they didn't say anything, or call the police. Antollino Dec. ¶ 12, Exhibit K, Maynard's rebuttal, p 2-3.

The Suspension and Termination

79. On the Monday following the July 18, 2010 jump with Orellana, Maynard had a conversation with Zarda regarding the jump, in the course of his investigation of the complaint. (Zarda Dep. pg. 36:10-12, 37:7-14, 39:15-17; Maynard Dep. pg. 183:15-21).

Denied. Maynard did not investigate the complaint. See response to ¶ 77.

Watching a video that exculpates plaintiff from an allegation is not an investigation.

80. During the conversation, Maynard questioned Zarda as to whether he remembered the jump with Rosanna Orellana on June 18, 2010. (Zarda Dep. pg. 36: 19-25). Zarda responded that he did not remember the specific jump. (Zarda Dep. pg. 37:2-5, 362:18-19, 37:8-11). Maynard then told Zarda that he “took a girl named Rosanna” on a tandem jump that day. (Zarda Dep. pg.). “At that time, [Zarda] didn't remember anything specific about that jump.” (Zarda Dep. pg. 37:15-16).

Admitted. Plaintiff asked to see the video to refresh his recollection after thirty customers, but Maynard refused to let him. Maynard dep. at 185; Zarda Dep. at 4.

81. Maynard then informed Zarda “there were some customers that came out and jumped, and it was a boyfriend and a girlfriend, and that [he] had taken the girl, and they had called and made a complaint.” (Zarda Dep. pg. 37:15-22; Maynard Dep. pg. 187:8-22, 196:10-18). Zarda again did not remember anything about the jump. (Zarda Dep. pg. 38: 3-6).

Admitted and in between this meeting and the Rosanna jump, plaintiff had taken up some thirty passengers and would have no reason to remember – especially since the jump was so uneventful and enjoyable for the passengers. Zarda Dec. at ¶ 26-27; Maynard dep. at 323, 325; Orellana video; Kengle video; photographs of the jump.

82. Maynard informed Zarda that the customer complained about how Zarda touched her, that he “touched her in a way that made her feel uncomfortable”, and that he touched her inappropriately “at the hips.” (Zarda Dep. pg. 43:10-13, 44:3). Maynard explained that

Zarda made Orellana feel “very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder” and that she was “very uncomfortable for the entire jump” and his actions even led her to believe Zarda “was hitting on her”. (Maynard Dep. pg. 196:10-18).

Denied that the issue of the touching came up first – the sexuality issue came up first, and the touching issue second. Zarda Dec. at ¶ 29, 39, Exhibit D. This is similar to the termination interview, Maynard dep. at 224-32, where the touching is barely mentioned until plaintiff brings it up. Of course the unemployment document does not mention touching at all. Antollino Dec. at ¶ 15, Exh. O. Other than that, it is admitted that this is what was said, in sum and substance, but denied that what was said actually happened. Orellana video; Kengle video; photographs of the jump; Zarda Dec. at ¶¶ 26-27.

83. Admittedly, this is not a complaint about Zarda's sexual orientation. (Zarda Dep. pg. 360:14-17).

Don admits that Kengle’s fear that his girlfriend was being hit on is not a complaint about his sexual orientation. However, Maynard’s invoking this ridiculous complaint without any investigation is reliance on sex stereotyping, and the other complaint – that plaintiff told Orelana that he is gay – demonstrates homosexual bias. Gregory M. Herek, “Why Tell if You are Not Asked?” Self Disclosure, Intergroup Contract, and Heterosexuals' Attitudes Toward Lesbians and Gay Men, in Out in Force: Sexual Orientation and the Military (Gregory M. Herek, Jared B. Jobe, Ralph M. Carney eds. 1996). Bruce Bawer similarly notes: “most heterosexuals are constantly alluding to their personal relationships without

even realizing it, let alone considering it inappropriate; they only notice it, and consider it inappropriate, when a homosexual does the same thing.” Bruce Bawer, Place at the Table: The Gay Individual in American Society (1994). Kengle’s complaint about homosexual Don’s attempt to hit on his girlfriend is a not in itself a complaint about Zarda’s sexual orientation but it is the pretext that allows Maynard to get rid of plaintiff on the basis of stating his sexual orientation to another customer and offending that customer’s biases. Maynard knew that the touching complaint was a lie. Plaintiff is gay. The video shows no improper touching. Touching is required on the job, and Maynard did not speak to Orellana as to how she was touched and where insofar as to gauge whether it was a form of touching required of the activity. Nowhere in her deposition does she describe how the touch was “inappropriate,” a conclusory term. Maynard knows Zarda is an excellent instructor. Finally, Maynard had the opportunity to invoke the touching allegation to oppose Zarda’s unemployment benefits, something which could increase his premiums. Maynard dep. at 344-45; Antollino Dec Exh. O. In its misconduct opposition to Zarda’s unemployment application, Maynard says nothing about touching, only the very weak complaint about revealing “personal information.” Antollino Dec. Exhibit O. The fact that Maynard did not use the touching allegation to oppose unemployment benefits – when he had the financial motive to invoke such an inflammatory charge – shows he knew it not to be true. Id.

84. Maynard also questioned Zarda whether “anything about [his] sexual orientation came up” during the jump, and Zarda responded that he did not know. (Zarda Dep. pg. 38:8-10). He then told Maynard “that that comes up all the time around here,” as it is often joked about at the drop zone by the SDLI staff. (Zarda Dep. pg. 38:12-15).

Admitted.

85. Maynard then informed Zarda that the customers also complained that Mr. Zarda discussed his sexual orientation with the customer during the jump. (Zarda Dep. pg. 40:2-4). Which, Zarda only did after realizing Orellana was uncomfortable with what occurred during the jump. (Zarda Dep. pg. 176:6-9,177:14-16).

Admitted.

86. Due to the nature of a tandem jump, discussing the instructor's sexual orientation is not recommended during a jump. (Winstock Dep. pg. 95:5-9). As "that pre-jump phase is one of building trust, ... there's better ways to build trust." (Winstock Dep. pg. 95:11-15).

Denied. Winstock dep. at 109 ("I personally find that women, female passengers, usually older, when they're extremely nervous, and their mothers, I have to calm down my passenger, especially when they're extremely nervous I have to, otherwise it's a safety issue, and like I said earlier, our job is to land safely, and I want to go home to my three kids. Every passenger is different. . . .[D]o I recommend not bringing [one's sexuality] up[?] Yes, of course I recommend you don't bring it up, but there are situations where it could benefit you." Plaintiff did no differently, though the circumstances were different only in that plaintiff said he is gay whereas Winstock made clear he is straight. Zarda Dec. at ¶ 40.

87. Following this conversation, Maynard suspended Zarda for a week without pay. (Zarda Dep. pg. 40:6).

Admitted.

88. Zarda's suspension had "nothing to do with him being gay." (Maynard Dep. pg. 189:4-5) Rather, it was a function of the customer's complaint regarding Zarda's behavior. (Maynard Dep. pg. 187:18-22, 196:10-18).

Denied. Maynard's testimony on this point pertained to whether plaintiff was gay at work or after work, and that talking about his activities and "escapades" after work was inappropriate. Plaintiff is gay all day and the statement merely reflects Maynard's ignorance that being gay is an "escapade" rather than an immutable condition. Zarda Dec. ¶ 10.

89. After this discussion with Maynard, Zarda "sought Winstock's counsel" to discuss the events that had just occurred. (Zarda Dep. pg. 35:11-22, 207-208:16-6). In response, Winstock notified Zarda he would discuss the matter with Maynard. (Zarda Dep. pg. 208:6-1 0).

Admitted, and during that time, Winstock strongly advocated for plaintiff not to be terminated. Winstock dep. at 84.

90. After his one-week suspension, Maynard terminated Zarda, based on the complaint from Kengle. (Zarda Dep. pg. 218:20-21, Maynard Dep. pg. 282:3).

Denied. Maynard fired plaintiff for telling a customer he is gay. All of the contemporaneous evidence as well as the evidence to unemployment, as well as common sense, shows that Maynard did not believe the touching allegation, but was enraged that he told a customer that he is gay. See ¶¶ 82, 83, supra.

91. The termination conversation between Maynard and Zarda was tape recorded by Zarda. (Maynard Dep. pg. 221:2-25).

Admitted.

92. During the termination conversation, in response to Zarda's inquiry regarding his sexual orientation, Maynard informed him "[i]t wasn't a gay issue. It was a personal issue ... Because if it was a heterosexual thing -- if Ritchie Winstock was telling some chick of his escapades, he would be in the same situation. It's not about gay. It's about your personal life, talking to people about it ... I don't care what you do and I don't care what

those guys do, but what I do care about is that it's not shared with my customers.”

(Maynard Dep. pg. 226:3-16). “It's not a gay thing. It's about your personal escapades and what you're telling people.” (Maynard Dep. pg. 226:19-22).

Admitted, but denied Maynard's bigoted belief that being gay is an “escapade.” See Herek and Bauer, ¶ 83. Webster's defines escapade as “a usually adventurous action that runs counter to approved or conventional conduct.” To believe that being gay is an escapade is evidence of bigotry.

93. During the termination meeting, Maynard and Zarda discussed Kengle's complaint. They discussed the fact that Orellana felt Zarda touched her inappropriately, which made her uncomfortable. (Maynard Dep. pg. 227:8-10). Maynard explained that Kengle was upset because Orellana's birthday was ruined because Zarda touched her inappropriately on the hips (Maynard Dep. pg. 247:14-15), put his head on her shoulder, was whispering in her ear, and telling her “Don't worry about me, I'm gay.” (Maynard Dep. pg. 229:3-21).

Admitted except that the tape says nothing about Orellana's birthday being ruined “because Zarda touched her inappropriately on the hips.” Maynard dep. at 229 (“you were suspended for ruining somebody's birthday because of you talking about your personal life to them.”) In fact, Maynard only brings up the touching allegation when Zarda reminded him about it. Id. at 227.

94. Despite his contention that he could not have touched Orellana inappropriately because of his sexual orientation (Zarda Dep. pg. 43:17-22), Zarda admits that a homosexual man can touch a woman inappropriately. (Zarda Dep. pg. 228:13-15).

Defendants certainly have a weak case to allege in a 56.1 statement that a

homosexual could touch a woman in an inappropriate way and therefore the case should be dismissed. Plaintiffs do not deserve to win this motion solely on the utter unlikelihood that plaintiff, who is 100% gay and has never had a romantic relationship with a woman, would touch Orelana in a sexual nature. Zarda Dec. at ¶ 10. Nevertheless, though highly impossible, it is admitted that anything that does not violate the law of physics is possible.

95. Zarda testified that Maynard terminated him because Kengle and Orellana complained about the conduct that occurred on their jump. (Zarda Dep. pg. 235:17-22). Zarda explained that Maynard terminated him because the customers accused him of inappropriately touching a “female passenger in a way that made her feel uncomfortable” and “because the issue of [his] sexuality came up in front of the customers.” (Zarda Dep. pg. 172:13-18, 243:11-14, 227:4-15, 227-228:23-7, 281:21-24).

Denied. Again, defendants misconstrue testimony. Plaintiff testified that, “I can’t superimpose anything on Mr. Maynard’s thought processes, because they’re rather abstract at times, and they don’t always make sense,” 172:3-6, and clarified himself, “No. Let’s be more specific...” Id at 172:22, and testified that he put his “hands in the location around the hips that’s necessary to be able to perform the functions that I am required to do as a tandem instructor.” 174:15-18, and that Maynard knew it was a lie. See Zarda Dep. at 274, 277-78.

96. However, contradictorily, 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).

Denied it is plaintiff’s contradiction: It was Kengle’s and Maynard’s

contradiction. Kengle brought up both reasons as complaints against plaintiff to get his refund, and Maynard used both reasons – which essentially cancelled each other out – to terminate plaintiff, though at the termination interview, the touching was barely mentioned. Maynard dep. at 227 (transcription of termination interview wherein plaintiff brings up the touching allegation); see also unemployment misconduct documents, Antollino Dec. at Exhibit O. Inappropriate touching might be a slam-dunk that might disentitle plaintiff from benefits, and therefore Maynard had a financial motive to pursue that allegation. Maynard dep. at 343. But Maynard dropped the touching allegation in the unemployment papers and plaintiff got his benefits. Antollino Dec. at ¶ 16, Exh. P.

97. If an instructor does something to make a customer uncomfortable, the instructor is responsible for damaging the customer's skydive experience. (Winstock Dep. pg. 92-93:22-4). It is not inappropriate to discipline an employee because of a customer complaint. (Winstock Dep. pg. 93:5-8).

Denied. Not every complaint is legitimate. Maynard dep. at 20, 22, 31. SDLI even makes the customer sign a waiver that if they *die* during a jump, SDLI is not responsible, Antollino Dec., exh. A Rosana Waiver; Exhibit B, Maynard Safety video, so how can the skydiver be responsible? Rather, skydiving is an inherently dangerous activity, Maynard dep. at 165, and touching is one thing that the customer specifically signs off on in that waiver. ¶ 13. Furthermore, even insofar as an instructor is responsible for doing a good job in general, if there is a complaint, the complaint must be investigated – as this one was not with the mere exception of viewing exculpatory evidence. Furthermore, there are many levels of discipline, and Winstock – without even knowing what the complaint was about – strongly advocated that plaintiff not be

fired. Winstock dep. at 84, but Maynard ignored him. Perhaps that's one reason why Winstock quit SDLI, despite Maynard's wanting him to stay on, Maynard dep., at 347; Zarda Dec. at Exhibit E, Winstock writing plaintiff that what happened to Zarda was wrong.

Wage Facts

98. At SDLI, there was no schedule of hours, rather the instructors were "expected to show up at work at a specific time ... and were expected to stay until work was complete." (Zarda Dep. pg. 291:15-20).

Denied but admitted in part. Zarda Wage Aff. ¶ 4 (the day started at 9 on weekdays and 7:30 on weekends) and ended when the day was called or sun went down. Id. at ¶¶ 6-7.

99. On the weekends the employees are expected "to be there at 7:30 because we try to get wheels up by 8 o'clock." On the weekdays the employees are expected "to be there at 9:30 to have wheels up by 10 o'clock." (Maynard Dep. pg. 306:6-10; Callanan Dep. pg. 59:5-10).

Admitted.

100. During any one day, "Skydiving goes on typically all the way until one half hour before sunset." (Zarda Dep. pg. 301 :5-9).

Admitted.

101. However the workday can end at different times depending "on the day and how much business" SDLI has. (Maynard Dep. pg. 306:14-15).

Admitted.

102. There are days when there is bad weather and no one is required to show up to SDLI. (Winstock Dep. pg. 61:11-17; Callanan Dep. pg. 57:10-12).

Admitted, and it is the employer's legal obligation to record these events.

103. However, when there was downtime, such as when the weather was bad or there were no scheduled customers, the instructors were permitted to leave SDLI. (Zarda Dep. pg. 293:4-22).

Admitted in part and denied in part, and it is the employer's legal obligation to record these events. The plaintiff was "on call" for the entire day – not "on call" in the sense that he could be called in for the day. He could never be more than 20-30 minutes away, Maynard dep. at 309, and there was nothing nearby to do within twenty minutes. Plaintiff dep. at 292.

104. In such a situation, the skydivers "don't have to be at the drop zone. They can go home. They can go do what they have to do, but they need to be available if there is if work is in." (Maynard Dep. pg. 306-307:22-2; Callanan Dep. pg. 59:17-20).

Admitted, and it is the employer's legal obligation to record these events.

105. Typically, the instructors should "be within 20 to 30 minutes" from SDLI when there are weather delays. (Maynard Dep. pg. 309:4-5; Callanan Dep. pg. 61 :13-22).

Admitted, and it is the employer's legal obligation to record these events.

106. However, in those instances when the instructors could leave, Zarda chose not to leave SDLI because it was "more convenient." (Zarda Dep. pg. 293:4-22). Zarda testified that for him, "once [he] made the trip out there, [he] would stay from where [he] came from ... For some people that live out there ... they could kind of come and go ... but it didn't really work out for [him] that way." (Zarda Dep. pg. 293:9-22). Because Zarda lived "a little bit of a distance" away, it was less convenient for him to "drive all the way back to Coram and then come all the way back to" SDLI. (Zarda Dep. pg. 293-294:23-7, 319:11-20, 322:11-16).

Admitted.

107. While working at SDLI, Zarda agreed to be compensated on a piecemeal basis, receiving \$40.00 for each tandem jump performed. (Zarda Dep. pg. 301-302:23-8, 309:11-16; Winstock Dep. pg. 61 :2-7). Instructors can also earn \$50 per jump for training tandems, \$55 per jump for advanced free fall, and \$59 per jump for video jumps. (Winstock Dep. pg. 61 :2-7).

Admitted, but that doesn't mean it was a legal hourly wage when plaintiff stayed all day and got no pay. Zarda Wage Aff.

108. Zarda, and other employees, were paid on a W-2 basis, receiving a weekly paycheck from SDLI. (Winstock Dep. pg. 60:20-23). Paychecks at SDLI were issued the week after the wages were earned. (Zarda Paycheck 06/27/10 (Defendants Exhibit 4)).

This immaterial fact is admitted, and it is averred that – unless the employer can meet its burden in proving otherwise – the plaintiff worked 25 days for a total of about 250 hours and got no pay, and that the hourly wage laws require hourly wages, not weekly wages averaged over a period of time depending on the weather. Zarda Wage Aff, pp. 3-4.

109. For the week of May 11, 2009 to May 17, 2009, Zarda worked two days, jumping ten (10) times, and earning \$410.00. (SDLI Jump Log for 2009 (Defendants Exhibit 5); Employee Earnings Record from 11/1/09 to 12/31/10 for Donald Zarda (Defendants Exhibit 7)).

This immaterial fact is admitted.

110. For the week of May 18, 2009 to May 24, 2009, Zarda worked seven (7) days, jumping 37 times, and earning \$1510.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

111. For the week of May 25, 2009 to May 31, 2009, Zarda worked three (3) days, jumping 29 times, and earning \$1,215.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

112. For the week of June 1, 2009 to June 7, 2009, Zarda worked five (5) days, jumping 35 times, and earning \$1,400.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

113. For the week of June 8, 2009 to June 14, 2009, Zarda worked four (4) days, jumping 16 times, and earning \$640.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

114. For the week of June 15, 2009 to June 21, 2009, Zarda worked five (5) days, jumping 27 times, and earning \$1,112.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

115. For the week of June 22, 2009 to June 28, 2009, Zarda worked four (4) days, jumping 37 times, and earning \$1360.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

116. For the week of June 29, 2009 to July 5, 2009, Zarda worked two (2) days, jumping 9 times, and earning \$370.00. (Def. Ex. 5; Def. Ex. 7).

This immaterial fact is admitted.

117. For the week of May 10, 2010 to May 16~2010, Zarda worked two (2) days, jumping 19 times, and earning \$760.00. (SDLI Jump Log for 2010, (Defendants Exhibit 6); Def. Ex. 7).

This immaterial fact is admitted.

118. For the week of May 17,2010 to May 23,2010, Zarda worked four (4) days, jumping 20 times, and earning \$600.00. (Def. Ex. 6; Def. Ex. 7).

This immaterial fact is admitted.

119. For the week of May 24, 2010 to May 30, 2010, Zarda worked six (6) days, jumping 30 times, and earning \$992.00. (Def. Ex. 6; Def. Ex. 7).

This immaterial fact is admitted.

120. For the week of May 31, 2010 to June 6, 2010, Zarda worked five (5) days, jumping 34 times, and earning \$1,150,00. (Def. Ex. 6; Def. Ex. 7).

This immaterial fact is admitted.

121. For the week of June 7, 2010 to June 13, 2010, Zarda worked six (6) days, jumping 21 times, and earning \$811.00. (Def. Ex. 6; Def. Ex. 7).

This immaterial fact is admitted.

122. For the week of June 14, 2010 to June 20, 2010, Zarda worked three (3) days, jumping 35 times, and earning at least \$772.00. (Def. Ex. 6; Def. Ex. 7).

This immaterial fact is admitted.

123. For the week of June 21, 2010 to June 27, 2010, Zarda worked one (1) day, jumping 9 times, and earning \$370.00. (Def. Ex. 6; Def. Ex. 7).

This immaterial fact is admitted.

124. Zarda “liked being able to make good money” skydiving, as the skydiving “instructors make pretty good money in that short amount of time.” (Zarda Dep. pg. 209-210:24-5).

This immaterial fact is admitted.

125. For the period of January 1, 2007 to July 23, 2009, the minimum wage in the State

of New York was \$7.15 per hour. (New York State Department of Labor History of the Hourly Minimum Wage (Def. Ex. 8)).

Admitted.

126. For the period of July 24, 2009 to the present, the minimum wage in the State of New York was \$7.25 per hour. (Def. Ex. 8).

Admitted.

127. Plaintiff withdraws all claims for minimum wage and overtime under the FLSA. (ECF Doc. No. 106 (Defendants' Exhibit 10)).

Admitted.

Dated: New York, New York
April 7, 2013

_____/s/
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