

**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.

JOINT PRE-TRIAL ORDER

Case No.: 10-cv-4334 (JFB)(ARL)

The Honorable JOSEPH F. BIANCO, Senior U.S. District Court Judge:

The following matters have been agreed to by counsel, and are hereby Ordered:

I. THE NAMES OF COUNSEL¹

Plaintiff's Counsel

Defendants' Counsel

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II. PLAINTIFF'S ASSERTION OF SUBJECT MATTER JURISDICTION

A. Plaintiff's Statement

Subject matter jurisdiction is based on diversity. The parties are citizens of different states (New York, Texas and Missouri) and the amount in controversy easily exceeds \$75,000.

¹ This document incorporates submissions from Plaintiff and Defendants. Each party was responsible for their own sections.

B. Defendants' Statement

1. Subject Matter Jurisdiction is lacking. Plaintiff does not maintain claims under Federal Law. Defendants maintain that Plaintiff cannot meet the jurisdictional threshold required by 28 U.S.C. § 1332 and therefore fails to meet the requirements for diversity jurisdiction.

III. SUMMARY OF CLAIMS AND DEFENSES TO BE TRIED

A. Plaintiff's Statement

Plaintiff originally brought claims under the Title VII, the New York State Human Rights Law, the New York Labor Law and the Fair Labor Standards Act. He abandoned his claim under FLSA, but not the New York Labor Law. The Court dismissed, over plaintiff's objection, the Title VII claim and only the sexual orientation discrimination and minimum wage claims are to be tried.

Plaintiff is gay. He was considered by defendant Maynard and his chief instructor, Richard Winstock, to be an excellent tandem skydive instructor who worked for defendants in 2001, 2009 and 2010. In or about June 2010, customers (known to the defendant as "passengers") Rosana and David went on a skydive and signed a waiver stating they were going to be touched because of the nature of the skydive and the skydive gear. Later, on the aircraft, plaintiff was insinuated by a third party to be encroaching upon a romantic relationship between two customers (passengers Rosana and David) as a result of the tandem gear that zips the instructor to the customer. Plaintiff disclaimed the insinuation and said words to the effect that, "You don't have to worry about me, I'm gay."

Videos were taken of both jumps, as is common. Plaintiff contends that Rosana shows no distress in the video, and did not complain about anything that day – nor did she want to. She later told David, however, that she was offended by the remark that plaintiff was gay, and added that she felt uncomfortable on the skydive. David called Maynard a few days later, and conveyed Rosana's alleged complaints because she did not want to. Maynard never spoke to Rosana or allow plaintiff to see the video in which he could recognize the complainant. Maynard immediately suspended plaintiff without pay and docked his pay by some \$600. After ruminating it over for a week, during which time Winstock encouraged Ray not to terminate Don, Maynard did just that, causing plaintiff emotional and monetary damages; he had come all the way from Missouri to work at the drop zone and in the middle of the season it was nearly impossible to find replacement work. Since then he has been too frightened to touch another person on a tandem jump for fear of not being protected by a waiver meant to allow the instructor to use his best judgment in handling a passenger safety during the tandem jump, an inherently dangerous activity that could result in death.

Plaintiff applied for unemployment. When asked by the Department of Labor to provide an explanation for his termination, defendants stated that he committed misconduct in providing "personal information" to a customer, but did not allege misconduct in the discomfort at the hips. The Labor Department awarded benefits without a hearing, though plaintiff is terrified of going on a tandem jump for being accused of improperly touching someone and not being given the benefit of the waiver all passengers sign that they should expect to be touched. In sum, plaintiff sues for termination and denial of other rights and privileges of employment (including termination, suspension, docking pay, and denial of the enforcement of the waiver) in violation of the New York Human Rights Law.

Plaintiff also sues for the failure to pay wages within the minimum wage because on any day in which he did one or no skydive, he received less than the New York Minimum Wage. The minimum wage deficiency adds up to approximately \$1,750 for the summers of 2009 and 2010.

B. Defendants' Statement

1. Defendants properly paid Plaintiff under the New York Minimum Wage Law.
2. Defendants did not violate The New York State Human Rights Law at any time during Plaintiff's employment, up to and including his termination.

IV. STATEMENT BY PARTIES REGARDING A TRIAL BY JURY

The parties respectfully request this case be tried by a jury. Defendants estimates the trial to last approximately seven (7) days. Plaintiff believes the trial will last for 5 or 6 days.

V. STATEMENT BY PARTIES REGARDING TRIAL BY MAGISTRATE JUDGE

The parties do not consent to a trial before the Magistrate Judge.

VI. STIPULATED FACTS

Plaintiff was fired by defendant in 2010.

VII. STIPULATIONS BETWEEN PARTIES

The parties agree to exchange pre-marked exhibits thirty (30) days prior to the commencement of trial.

VIII. LIST OF WITNESSES/POTENTIAL WITNESSES

A. Plaintiff (not including rebuttal or impeachment witnesses)

1. Richard Winstock

2. Donald Zarda (deposition)
3. Raymond Maynard
4. Rosana Orelana
5. David Kengle
6. Lauren Callanan (deposition)
7. Ira Helfand

Plaintiff reserves the right to supplement this list if he should learn that any of the defendants' unexamined witnesses 8-57 should happen to have relevant, material information.

Plaintiff also objects to several witnesses whose names were never exchanged in discovery – let alone the initial disclosures – and whose addresses defendants have refused to provide.

B. Defendants

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

1. Ray Maynard, Defendant
c/o Defendants' Counsel
2. Donald Zarda, Plaintiff
c/o Gregory Antollino, Esq.
3. Rosana Orellana, Witness
4. David Kengle, Witness
5. Richard M. Winstock, Witness
6. Lauren Callanan, Witness
7. Michael C. Gamble, Witness
8. Michael Gocke, Witness

9. Shaun Tierney, Witness
10. Tim Fayan, Witness
11. Ed Reiter, Witness
12. Robert Kozakiewicz, Witness
13. Kris Zito, Witness
14. John Campbell, Witness
15. Carmen Villamil, Witness
16. Duncan Shaw, Witness
17. Marko Markovich, Witness
18. Brandon Spadero, Witness
19. Orin Perry, Witness
20. Curt Kellinger, Witness
21. Ben Lowe, Witness
22. Aristotelo Dorizas, Witness
23. Wayne Burrell, Witness
24. Jason Lucas, Witness
25. John Sherman, Witness
26. Erik Tops, Witness
27. Jason Berger, Witness
28. Timothy Fagan, Witness
29. Joseph Fortune, Witness
30. James McQueen, Witness

31. Jordan Miles, Witness
32. Patrick Newman, Witness
33. Brett Nock, Witness
34. Brian Petretti, Witness
35. Daniel Santiago, Witness
36. Robert Swaine, Witness
37. Janeen Tierney, Witness
38. Douglas Alm, Witness
39. Meghan Ayers, Witness
40. Jared Fox, Witness
41. Gerard Hannon, Witness
42. Brian Kullmann, Witness
43. Dean Langen, Witness
44. Doug Licciardi, Witness
45. Paul Lichtarski, Witness
46. Allison Rodriguez, Witness
47. Christopher Spencer, Witness
48. Michael Thamarus, Witness
49. Casey Lacour, Witness
50. Miguel Arias, Witness
51. Matthew Kaufman, Witness
52. Graham Kozakiewicz, Witness
53. Jon Eric Lohwasser, Witness

54. Christina McCormick, Witness
55. Andrew Medina, Witness
56. Ryan Sargent, Witness
57. Jonathan Villa, Witness

Defendants reserve the right to call some or all of the individuals listed in Plaintiff's list of trial witnesses. Defendants reserve the right to call additional witnesses to testify as to the lack of merit to Plaintiff's allegations. Defendants object to the following witnesses presented by Plaintiff as they will not provide relevant testimony and/or were not offered/noticed for deposition:

1. Ira Helfand

Defendant further objects to Plaintiff's use of deposition testimony (other than for impeachment purposes) for the following witnesses expected to be available at trial:

1. Donald Zarda (deposition)
2. Raymond Maynard
3. Lauren Callanan

IX. DEPOSITION TESTIMONY TO BE OFFERED IN CASE IN CHIEF

A. Plaintiff:

Raymond Maynard, party opponent

7:20-25, 8:9-21, 11:6-13, 11:24-12:8,, 15:11-25, 16:1-7, 18:12-21, 19:2-21 , 20:2-19, 24-25, 22:2-10, 24 3-14, 26: 19-25, 27:1-25, 28:2-16, 30:9-25, 31:2-12 , 34:14-25, 35:2-25, 36:2-3, 39:17-25, 40:2-41:3, 41:21-42:2, 42:13-16, 43:24-44:18, 51:15-25, 52:10-18, 53:13-54:13, 61:12-22, 62:21-24, 64:23-65:16, 66:17-21, 68:23-69:14, 72:20-73:7, 73:22-74:9, 74:21-75:3, 76:9-16, 76:25-77:1, 77:5-77:11, 77:17-23, 79, 7-80:2, 80:8-17, 81:3-22, 15-16, 81:24-82-2, 87:21-89:7, 89:17-21, 90:14-91:12, 91:20-25,92:20-93:9, 95:4-16, 98:7-11, 19-24, 108:12-109:7, 109:19-110:3, 110:19-25, 112:3-20, 114:20-115:5, 115:22-23, 116:2-23, 117:3-17, 125:12-126-13, 126:17-19, 128:9-129:3, 129:15-17, 130:9-131:2, 131:5-14, 133:2-134:17, 135:12-136:4, 137:15-18, 138:14-140:21, 143:25-144:10, 144:15-24, 145:3-4, 145:20-24, 150:17-22, 155:18-156:6, 158:14-17, 159:9-14, 162:14-22, 164:9-165:14, 176:13-177:8 (and exhibit R-25), 178-8-23, 181:7-182:19, 184:5-10. 185:2-13, 185:22-186:8, 188:14-20, 189:2-19, 190:13-15, 190:19-22, 193:13-21, 195:7-17, 196:8-18, 198:2-17, 199:2-5, 199:7-16, 200:2-21, 201-2-5, 201:19-25, 203:8-15, 203:19-204:3, 205:11-18, 209:4-11, 210:19-211:2, 211:25-212:25, 220:3-23, 246:2-251:9, 254:19-256:23, 257:9-20, 258:3-14, 259:6-22, 260:3-19, 261:4-10, 261:16-25, 262:2-6, 263:7-13, 268:15-269:3, 271:25-273:13, 275:22-276:3, 280:9-18, 281:3-282:10, 282:20-283:22,

284:5-11, 284:4-11, 284:24-285:18, 286:3-8, 287:5-14, 287:22-288:10, 289:5-17, 290:24-291:18, 292:5-25, 293:9-14294:20-296:5, 296:16-297:25, 300:25-301:22, 302:3-303:9, 304:7-15, 304:22-305:7, 306:2-307:4, 308:12-22, 309:22-311:16,

Lauren Callanan, officer of party opponent who is believed to be more than 100 miles from Central Islip

11-15, 106:12-109:2 and Exhibit 1A.

B. Defendants

Defendants do not intend to offer deposition testimony in support of their case in chief, but reserve the right to do so, should a witness become unavailable or if needed to impeach a witness. Defendants reserve the right to object to any and all delineations of deposition testimony identified by Plaintiff to be used at trial.

X. LIST OF EXHIBITS

A. Plaintiff will be offering the following exhibits to which Defendants do not stipulate to the admissibility. Defendants object to each exhibit subject to proper foundation.

1. Tape of termination interview; (objection- authenticity)
2. Plaintiff's transcript of termination interview; (objection- authenticity) or
2a. Deposition transcript of termination interview; (objection- authenticity)
3. Orelana Jump Video
4. Kengle Jump Video
5. Kengle Jump Pictures(objection- incomplete record and authenticity)
6. Orelana Jump Pictures(objection- incomplete record and authenticity)
7. Job Availabilities at SDLI for Summer 2012; (objection- relevance and authenticity)
8. Yelp Complaint; (objection- relevance, authenticity and hearsay)
9. SDLI Facebook pictures marked at Maynard deposition; (objection- relevance and authenticity)
10. Emails between Winstock and Zarda during suspension; (objection- relevance and hearsay)
11. Ripoff Report Complaint (objection- relevance, authenticity and hearsay)
12. Picture of instructor taking a nap on passenger(objection- relevance, authenticity; failure to produce during discovery)
13. SDLI 2013 highlights video with woman complaining about her "Camel toe" (objection- relevance and authenticity)
14. SDLI advertisement for "pulling pork" and "getting Laid" (objection- relevance)
15. Letter from Callanan to Department of Labor alleging misconduct in the form of "providing personal information." (objection- relevance, failure to specifically identify exhibit)
16. Unemployment board rejection of misconduct allegation; (objection- relevance

and hearsay)

17. Tandem outfit manual (objection- relevance and authenticity)
18. Electronic data found by plaintiff but not provided by defendant; (objection- relevance, failure to specifically identify exhibit)
19. Plaintiff's Minimum Wage Affidavit dated April 1, 2013; (objection- hearsay)
20. Deposition of David Kengle
21. Affidavit of David Kengle dated May 11, 2012;
22. Deposition of Rosana Orelana
23. Affidavit of Rosana Orelana dated May 11, 2012;
24. Orelana Errata Sheet
25. Kengle Errata Sheet
26. Sky Dive Long Island Gross Receipts 2009; (objection- relevance)
27. Sky Dive Long Island Gross Receipts 2010; (objection- relevance)
28. Plaintiff's paycheck dated July 12, 2009;
29. Plaintiff's paycheck dated June 27, 2010;
30. Plaintiff's 2009 Jump Log; (objection- authenticity)
31. Plaintiff's 2010 Jump Log; (objection- authenticity)
32. Plaintiff's 2009 W-2;
33. Plaintiff's 2011 1040;
34. Plaintiff's School Records from Embry-Riddle Aeronautical University; (objection- authenticity)
35. Rosana Orelana's Agreement, Release of Liability and Assumption of Risk;
36. David Kengle's Agreement, Release of Liability and Assumption of Risk;
37. 2009 Earnings Report for Plaintiff;
38. 2010 Earnings Report for Plaintiff;
39. Defendants' Tandem Jump and Instructional Videos; (objection- relevance and authenticity)
40. Defendants' Safety Video; (objection- relevance and authenticity)
41. Don's Gay Cruise Pictures (objection- relevance, authenticity and failure to produce during discovery)
42. Screenshots of Website of Maynard's attorney (objection- relevance)
43. Picture of Plaintiff's pink toenails (objection- relevance, authenticity and failure to produce during discovery)
44. SDLI Employee Handbook 2011(objection- relevance)
45. Summary judgement decisions in Weber v. SDLI and Loudaros v. SDLI (objection- relevance)

- B. Defendants will be offering the following exhibits to which Plaintiff stipulates to the admissibility except where noted with an asterisk. While depositions may be offered in lieu of testimony, to denote deposition transcripts in toto as exhibits is, to plaintiff, unnecessary, and could contain immaterial and irrelevant information. Further, plaintiff objects to these documents in whole or in part because they are mostly legal, not factual documents, contain immaterial, irrelevant information – often involving claims no longer

part of the case - and would be cumulative, or whose prejudice would outweigh their probative value and lead to juror confusion.

1. Plaintiff's Amended Complaint dated February 22, 2011;*
2. Plaintiff's Amended Rule 26 Disclosure Statement dated October 29, 2012.*
3. Plaintiff's Response to Defendants' First Set of Interrogatories dated April 7, 2011;* in part
4. Plaintiff's Amended Response to Defendants' First Set of Interrogatories dated April 7, 2011;* in part
5. Plaintiff's Supplemental Response to Defendants' First Set of Interrogatories dated January 31, 2012; *in part
6. Plaintiff's Response to Defendants' First Request for Admissions dated January 21, 2011;
7. Plaintiff's Supplemental Response to Defendants' First Request for Admissions dated March 25, 2011.
8. Plaintiff's Response to Defendants' Second Request for Admissions dated January 18, 2012;
9. Plaintiff's EEOC Charge of Discrimination dated August 6, 2010;*
10. Plaintiff's EEOC Notice of Right to Sue dated August 20, 2010;*
11. Affidavit of Plaintiff dated July 12, 2010;
12. Affidavit of David Kengle dated May 11, 2012;
13. Affidavit of Rosana Orelana dated May 11, 2012;
14. Plaintiff's Declaration in Opposition to Motion dated April 7, 2013;*
15. Plaintiff's paycheck dated July 12, 2009;
16. Plaintiff's paycheck dated June 27, 2010;
17. Plaintiff's 2009 Jump Log;

18. Plaintiff's 2010 Jump Log;
19. Plaintiff's 2009 W-2;
20. Plaintiff's 2011 1040;
21. Plaintiff's School Records from Embry-Riddle Aeronautical University;
22. Plaintiff's Agreement, Release of Liability and Assumption of Risk dated May 14, 2010;*
23. Rosana Orelana's Agreement, Release of Liability and Assumption of Risk dated June 18, 2010;
24. David Kengle's Agreement, Release of Liability and Assumption of Risk dated June 18, 2010;
25. 2009 Earnings Report for Plaintiff;
26. 2010 Earnings Report for Plaintiff;
27. Rosana Orelana's Jump Video;
28. David Kengle's Jump Video;
29. December 21, 2011 deposition transcript of Lauren Callanan;*
30. November 9, 2011 deposition transcript of David Kengle;*
31. November 9, 2011 deposition transcript of Rosana Orelana;*
32. December 8, 2011 deposition transcript of Richard Winstock;*
33. December 14, 2011 deposition transcript of Raymond Maynard;*
34. November 16, 2012 deposition transcript of Raymond Maynard;* and
35. December 9, 2011 deposition transcript of Donald Zarda.*

Defendants reserve the right to use any demonstrative exhibits listed for its case-in-chief, or for potential impeachment, as possible rebuttal exhibits. Defendants reserve the right to use some or all of Plaintiff's demonstrative exhibits as possible rebuttal exhibits. Defendants reserve the right to add, as additional exhibits, charts pertaining to any exhibits used at trial. Plaintiff objects to this confusing reservation of rights.

XI. AMENDMENTS

For good cause shown and the Court's assent, the parties may amend this pre-trial order.

Respectfully submitted,

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Dated: June ___, 2014

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By: _____
Saul D. Zabell, Esq.
Attorneys for Defendants

Dated: June 4, 2014

Service of a copy of this Order shall be made by the Clerk of this Court by forwarding a copy hereof to all parties.

Dated: Central Islip, New York
June _____, 2014

JOSEPH F. BIANCO
Senior United States District Court Judge