

**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 OPPOSITION OF PLAINTIFFS' MOTION FOR
RECONSIDERATION OF THE DISMISSAL OF THE TITLE VII CLAIM**

Saul D. Zabell, Esq.
ZABELL & ASSOCIATES, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716
Tel.: (631) 589-7242
Fax: (631) 563-7475
szabell@laborlawsny.com

I. INTRODUCTION

Defendants, Altitude Express, Inc. d/b/a Skydive Long Island (“SDLI”) and Ray Maynard (collectively “Defendants”), respectfully submit this memorandum of law in opposition to Plaintiff’s Motion for Reconsideration of the Dismissal of his Title VII claim. [ECF Doc. No. 211]

On March 28, 2014, this Court granted Defendants’ motion for summary judgment with respect to Plaintiff’s gender stereotype discrimination, hostile work environment and overtime claims. [ECF Doc. No. 145] Plaintiff’s pending motion now requests the Court reconsider its decision and reinstate the Title VII claim. [ECF Doc. No. 211] In doing so, Plaintiff relies upon the U.S. Equal Employment Opportunity Commission’s (“EEOC”) advisory decision in *Anonymous v. Foxx*, EEOC Appeal 0210133080. However, in reaching its original decision this Court properly relied upon the binding authority within this Circuit and dismissed Plaintiff’s defective Title VII claim. *See Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). Contrary to Plaintiff’s erroneous assertions, the EEOC’s decision in *Foxx* is merely an advisory opinion and this Court has no affirmative obligation to adopt the EEOC’s findings. Particularly since the precedent within this Circuit is squarely at odds with the EEOC’s decision. Therefore, absent an intervening decision from either the Supreme Court or the Second Circuit the holding in *Simonton* continues to be binding upon this Court.

However, even if the foregoing was not true, Plaintiff’s pending motion still fails because the EEOC’s advisory decision in *Foxx* is factually distinctive from the instant case. Plaintiff’s deposition testimony provides no articulable basis to prove he was, in any way, subject to impermissible gender stereotyping. Instead, Plaintiff’s own testimony unequivocally proves that: (1) Defendants were aware of his sexual orientation each successive time he sought and was awarded seasonal employment with Defendants; (2) Plaintiff was masculine both in appearance

and behavior; and (3) Defendants terminated Plaintiff in direct response to a workplace complaint lodged by a customer. Plaintiff affirmed the validity of the customer complaint. Accordingly, Plaintiff's motion for reconsideration of this Court's dismissal of his Title VII claims must be denied in its entirety.

II. ARGUMENT

Point I

The Second Circuit Precludes claims under Title VII for Harassment on the basis of Sexual Orientation

"Title VII does not, by its express terms, prohibit all arbitrary employment practices. Rather, it is directed only at specific impermissible bases of discrimination such as race, color, religion, sex, or national origin." *Dollinger v. State Ins. Fund.*, F.Supp.2d 467, 475 (N.D.N.Y. 1999). "Sexual orientation is not included in the statutory protected class." *Kiley v. American Soc. for Prevention of Cruelty to Animals*, 296 Fed. Appx. 107, 109 (2d Cir. 2008); *See also Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (noting that "[t]he law is well-settled in this circuit . . . that [the Plaintiff] has no cause of action . . . because Title VII does not prohibit harassment or discrimination because of sexual orientation"). Thus, this Court properly dismissed Plaintiff's Title VII claims. [ECF Doc. No. 145]

Under the gender stereotyping theory of Title VII liability, "individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class." *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). The gender stereotyping theory is grounded in the premise that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The Second Circuit has drawn a strict distinction between discrimination based on sexual orientation and discrimination based on failure to comply with traditional gender roles. Because

the stereotypical notions regarding how men and women should behave necessarily blur into sexual orientation, the Second Circuit has made it clear that a plaintiff may not utilize a gender stereotyping claim in an effort to “bootstrap protection for sexual orientation into 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). Therefore, it is well settled in this Circuit that harassment on the basis of sexual orientation is not actionable under Title VII. *Simonton v. Runyon*, 232 F.3d 33, 35–36 (2d Cir. 2000).

Point II

The Second Circuit’s Preclusion of Sexual Orientation Claims Constitutes Binding Authority

Plaintiff’s pending motion must be denied in its entirety because Plaintiff fails to recognize Second Circuit decisions are binding precedent in this court. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982); *F.D.I.C. v. Bear Stearns Asset Backed Sec. I LLC*, No. 12CV4000-LTS-MHD, 2015 WL 1311300, at *7 (S.D.N.Y. Mar. 24, 2015). A decision of the Second Circuit is binding on lower courts in the Second Circuit, unless it has been called into question by an intervening Supreme Court decision or by a decision of the Second Circuit sitting in banc or unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court, or the Second Circuit court in banc. *F.D.I.C.*, 2015 WL 1311300, at *7. There has been no Supreme Court ruling or intervening change of law that would permit the Court to stray from the binding precedent of *Simonton*. Therefore, the Court must conclusively defer to the court of appeals’ interpretation of the law as stated within *Simonton*. *See Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (stating that “district courts and other inferior courts are bound by decisions of the Court of Appeals in the appropriate circuit unless overruled by an intervening Supreme Court decision or other change in law.”); *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 4634541, at *130

(S.D.N.Y. Aug. 4, 2015) (noting that it treats Second Circuit cases as binding precedent); *Cartica Mgmt., LLC v. Corpbanca, S.A.*, 50 F. Supp. 3d 477 (S.D.N.Y. 2014) (noting that district courts and other inferior courts are bound by decisions of the court of appeals in the appropriate circuit unless overruled by an intervening Supreme Court decision or other change in law); *Adelphia Recovery Trust v. Bank of Am., N.A.*, 624 F. Supp. 2d 292 (S.D.N.Y. 2009). As discussed above, Second Circuit precedent confirms harassment on the basis of sexual orientation is not actionable under Title VII. Accordingly, this Court properly dismissed Plaintiff's Title VII claim, and as a corollary Plaintiff's motion must be denied in its entirety.

Further, this Court cannot credit Plaintiff's argument that it may disregard binding precedent and follow various decisions issued by the appellate courts of other circuits, other district courts or the EEOC. (See Pl. Memo of Law pp. 4-12) See *Volin v. Civil Court of City of New York*, No. 91 CIV. 339 (KMW), 1992 WL 295968, at *2 (S.D.N.Y. Oct. 2, 1992) (noting that decisions of other district courts, or other circuit courts may provide guidance on a case of first impression, but they are not binding on this court). Here, this is not a case of first impression. Plaintiff's argument is almost singularly based upon the EEOC advisory decision in *Complainant v. Foxx*, Appeal 0210133080 (noting that for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination). Although deference may be accorded to an agency's interpretation, there is no affirmative obligation for this Court to adhere to a decision issued by the EEOC. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (noting that deference should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer). This Court is bound to the precedent emanating within this Circuit, which, as noted above, precludes claims for harassment on the basis of sexual orientation is not actionable under Title VII. *Simonton*, 232 F.3d

at 35–36. Thus, despite Plaintiff’s suggestion, this Court cannot simply ignore the precedent. Therefore, this Court’s dismissal of Plaintiff’s Title VII claims must stand, and Plaintiff’s pending motion must be denied in its entirety.

Point III

Plaintiff’s Testimony does not support a claim for Recovery under Title VII

In the unlikely event this Court determines it is not bound by the holding in *Simonton*, the reasoning behind this Court’s dismissal of Plaintiff’s Title VII claim still stands. Plaintiff fails to consider that the factual record, including Plaintiff’s own testimony, proves Plaintiff was not subject to discrimination under Title VII.

Plaintiff’s non-conforming stereotyping claim fails

The record is devoid of evidence that Plaintiff was subjected to discrimination based upon gender stereotyping. Although Plaintiff asserted that “several” unidentified employees made comments about his pink baseball cap, he conceded he was not offended by his co-workers comments. (Zarda Dep. pp. 120-22, 125-26) There exists no evidence indicating that the alleged comments were anything more than occasional, thus, their possible existence does not constitute a change in the terms and conditions of Plaintiff’s employment. *See Tomassi v. Insignia Fin. Group, Inc.*, 478 F.3d 111, 115 (2d Cir. 2007) (noting that the more remote and oblique the remarks are in relation to the employer’s adverse action, the less they prove that the action was motivated by discrimination, whereas conversely); *Trigg v. New York City Transit Auth.*, No. 99-CV-4730 (ILG), 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001) (holding that occasional comments and teasing were insufficient to change the terms and conditions of Plaintiff’s employment); *Chanval Pellier v. British Airways, Plc.*, 02-CV-4195 (JT), 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).

Further, Plaintiff failed to identify Mr. Maynard as having made any inappropriate comments regarding his pink hat. (Zarda Dep. pp. 120-128) As the principal decision maker at SDLI, Mr. Maynard never issued comments which implicated an orientation based discrimination. Therefore, any alleged comment was made by a co-worker, none of which held a management position and/or a position of authority. As such, Plaintiff, he cannot demonstrate he was subjected to an adverse employment action. *See Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010) (stating that the district judge acted within his discretion when he excluded comments made by an employee who was senior to Plaintiff because the comments were not related to the decision-making process); *see contra Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (stating that “the stray remarks of a colleague” with “comments made directly to” the plaintiff by someone with “enormous influence in the decision-making process” may constitute an adverse employment action).

Moreover, even if the alleged comments bothered Plaintiff, he failed to lodge any complaints. The primary purpose of Title VII “is not to provide redress but to avoid harm.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998). Accordingly, based upon Plaintiff’s failure to notify Defendants of any discriminatory behavior, Defendants were not made aware of the comments and did not have an opportunity to correct the alleged behavior. As a result, Plaintiff cannot now argue that the stray complaints form the basis for an adverse employment action. *See Garone v. United Parcel Serv., Inc.*, 436 F. Supp. 2d 448, 465-66 (E.D.N.Y. 2006) *aff’d sub nom. Sardina v. United Parcel Serv., Inc.*, 254 F. App’x 108 (2d Cir. 2007) (noting that to defend a claim defense to discrimination the Defendant must show it “exercised reasonable care to prevent and correct” behavior and Plaintiff unreasonably failed to take advantage of any preventive or

corrective opportunities”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). As such, Plaintiff cannot have experienced an adverse employment action when the comments were, at best, sporadic, made by non-managerial co-workers and Plaintiff admittedly did not find them offensive in nature.

Further, Plaintiff presents no evidence indicating he was terminated because his behavior failed to conform to the male stereotype. As admitted by the Plaintiff, he was terminated because of a customer complaint. (Zarda Dep. pp. 172, 227-28, 235, 243, 281) During Plaintiff’s termination meeting, no comments were made indicating he was terminated because of his orientation. The testimony reflects that the termination was based solely on the customer complaint. (Maynard Dep. pp. 226-27, 247) The factual record establishes that a customer complained about Plaintiff’s behavior during a tandem skydive. The customer 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. pp. 47-48, 50, 89) Plaintiff’s behavior and inappropriate contact made the customer and her boyfriend uncomfortable, so much so, that they lodged a complaint with SDLI. (Orellana Dep. pg. 49, 60, 100-01) (Kengle Dep. pp. 23-24, 27, 31, 62-63, 66) As a function of this complaint, and no other reason, Plaintiff was immediately suspended and ultimately terminated by Defendants. (Zarda Dep. pp. 40, 43-44, 218) (Maynard Dep. pp. 196, 282) Therefore, Plaintiff’s termination was not a function of a gender stereotype or discrimination, but a reaction to Plaintiff’s inability to conduct himself in an appropriate manner in the workplace. (Zarda Dep. pp. 172, 227-28, 235, 243, 281) (Maynard Dep. pp. 229, 247) Plaintiff cannot maintain a claim for discrimination.

Plaintiff’s Sexual Orientation claim fails

Much like his non-conforming gender stereotype claim, it is beyond cavil that a discrimination case under Title VII is evaluated under the burden-shifting framework promulgated by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. Under which, a Plaintiff must show that he: (1) belonged to a protected class; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) endured an adverse employment action occurring in the context of circumstances giving rise to an inference of discriminatory intent. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993); *Tolbert v. Smith*, 14-cv-012, 2015 WL 3875237, at *5 (2d Cir. June 24, 2015); *Robinson v. Concentra Health Services, Inc.*, 781 F.3d 42, 45 (2d Cir. 2015); *Placide-Eugene v. Visiting Nurse Serv. of New York*, 12-cv-2785 (ADS) (ARL), 2015 WL 58609, at *11 (E.D.N.Y. Jan. 2, 2015); *Pardo v Securitas*, 13-cv-3796 (JG), 2013 WL 5423798, at *2 (E.D.N.Y. 2013).

For purposes of Plaintiff's pending application only, the second and third elements of the *McDonnell-Douglas* analysis are conceded. Further, even if, in the unlikely event Your Honor would see fit to hold that Plaintiff's sexual orientation satisfies the first element of the required standard, Plaintiff's motion still fails because even in the most favorable light, the following facts preclude the possibility of an inference of impermissible discrimination under *McDonnell-Douglas*:

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

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).

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).

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).

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).

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).

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).

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).

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

[ECF Doc. No. 110]

Plaintiff’s testimonial admissions prove that he did not believe that he was subjected to any form of discrimination or disparate treatment based upon purported non-conforming gender stereotype or his sexual orientation. Much like his original claim under Title VII, Plaintiff’s latest theory of his case is fatally flawed. Importantly, due to the untimely passing of Plaintiff, the deposition testimony cannot be expanded upon or otherwise qualified. Faced with a factual record which is so constrained, we respectfully posit, there exists no set of circumstances under which Plaintiff could recover under any Title VII theory. In fact, based upon Plaintiff’s unadorned deposition testimony and the indisputable fact that Plaintiff’s New York State Human Rights Law

Claim for sexual orientation discrimination is analyzed under the McDonnell-Douglas standard, we maintain that claim too is similarly defective.

III. CONCLUSION

For the reasons set forth above, Plaintiff's motion for reconsideration of the dismissal of the Title VII claim must be denied in its entirety, with prejudice.

Dated: August 21, 2015
Bohemia, New York

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

Saul D. Zabell, Esq.
Zabell & Associates, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716
Tel: (631) 589-7242
Fax: (631) 563-7475
szabell@laborlawsny.com

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

DONALD ZARDA,

Plaintiff,

– against –

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

Defendants.

Case No.:

CV-10-4334 (JFB) (ARL)

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

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

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

EXHIBITS

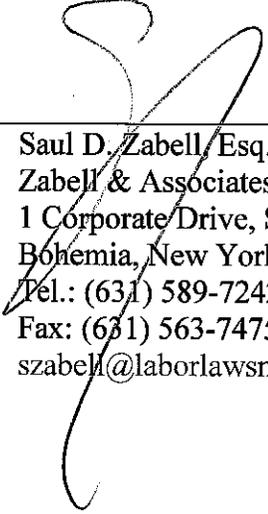
2. Attached hereto as "Exhibit A" is a true and correct copy of excerpts from Donald Zarda's Deposition Transcript dated December 9, 2011.
3. Attached hereto as "Exhibit B" is a true and correct copy of excerpts from Raymond Maynard's Deposition Transcript dated December 14, 2011.
4. Attached hereto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

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

Dated: August 21, 2015
Bohemia, New York

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____



Saul D. Zabell Esq.
Zabell & Associates, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716
Tel.: (631) 589-7242
Fax: (631) 563-7475
szabell@laborlawsny.com

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
DONALD ZARDA,

Plaintiff,

-against-

Index No.
10-CV-04334

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

Defendants.
-----X

December 9, 2011
10:15 a.m.

4875 Sunrise Highway
Bohemia, New York

EXAMINATION BEFORE TRIAL OF DONALD ZARDA,
the Plaintiff herein, taken by the
Defendants, pursuant to Article 31 of the
Civil Practice Law and Rules of Testimony,
and Notice and order, held at the
above-mentioned time and place, before Karen
LaMendola, a Professional Court Reporter and
Notary Public of the State of New York.

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2 A P P E A R A N C E S:

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GREGORY ANTOLLINO, ESQ.
Attorney for Plaintiff
18-20 West 21 Street, Suite 802
New York, New York 10010

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ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants
4875 Sunrise Highway
Bohemia, New York 11716

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BY: SAUL ZABELL, ESQ.

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ALSO PRESENT:
William L. Murphy

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1 D. Zarda

2 A He said the subject of my sexual
3 orientation had come up in front of the
4 customers and that they were offended by it,
5 and he was forced to give them all their
6 money back, and I was off for a week, and he
7 was going to take it out of my paycheck, the
8 full price for two tandem jumps with two
9 video, which he later did take that out of my
10 check, and he was very angry.

11 Q Did he say anything else?

12 A I'm sure he did, if you just
13 give me minute to recall that. I was in a
14 bit of -- I was shocked at the time, so --

15 MR. ANTOLLINO: Just answer the
16 question.

17 A I said that you can't be
18 serious. I might have said something like
19 that. I do remember mentioning to him
20 something about my sexual orientation coming
21 up on the drop zone so frequently, and I
22 can't say whether I brought it up or not. I
23 said, you know, Ray, people bring that up
24 around here all the time, and if you don't
25 want that to come up, I think you should have

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D. Zarda

back to the manifest records since it was just on Friday and look at the records and see who the cameramen were and then go to them and see if we could just look at their footage? And he, again, denied me being able to look at the video. That was the end of the discussion about the video. He wouldn't let me see it, so I said, is that it? And he said, no, there's something else. And I said, what, and he said, she said that you touched her in a way that made her feel uncomfortable. So I said, really, and I said, Ray, did you just tell me that I took the girl or the guy in this, and he said, you took the girl.

I said, okay, I said, so what you're telling me is that me, the gay guy that they complained about and they're offended by, touched the girl inappropriately; that's what you're going with? And he said, that's right, and then he was headed towards the door, and he was mad, and I said, where, Ray, where, as in I was wanting him to define to me where on the girl

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D. Zarda

that I had touched her inappropriately, and he said, flustered, like, it was at the hips. I said, ah, okay, and then Ray stormed out of the office, and I was left sitting in there for a minute stunned, and then I sat there for just -- I don't know exactly how long I sat there, but Ray had left, it was dark, he went out of the room, and he went out of the building.

I got my composure. It took me a few moments. Then I went out of the room, and when I went out of the room and out of the building, it was dark outside. That was when Rich Winstock was having a conversation with another instructor over to the left, and that's when I said, Rich, I got to see you for a second right now, and he said, okay, just a minute, and I said, it's important; now.

I started to get really upset because this was just all hitting me at that moment, what had just happened, it was pretty amazing, if I have to say, and I was in disbelief at what all had just transpired,

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D. Zarda

recollection, I think he just didn't remember everything, so that would be another thing.

Let me just think for a minute what else was said.

The issue or the matter of the nickname, Gay Don and what he said about that. I don't know where exactly the nickname came from, so I don't know if he recalled where it came from exactly or if that was something that was discussed, but that was a name that I heard a lot. I heard it from everybody, and I think I've heard it from him, and I didn't think that he meant it in any kind of derogatory way.

I think it just became -- if you were to look at the manifest computer at the drop zone, you would actually see a list of nicknames on the screen when they assign you who your passengers are going to be. Rich Winstock's nickname is Winnie. There's another gentleman that's from Texas, his name was Texas, so I mean, a bunch of people had nicknames that they would go by at the drop zone.

1 D. Zarda

2 make sure we're clear about what I was
3 shaking my head about.

4 Q Do you recall Rich testifying
5 yesterday that, yes, he knew you as Gay Don,
6 and he may have referred to you as Gay Don,
7 and he didn't know if you were offended by
8 it, and at that point, I believe you were
9 shaking your head side to side indicating
10 that you were not offended by him referring
11 to you as Gay Don?

12 Is that a fair characterization
13 of what occurred yesterday?

14 A That's pretty close. That's
15 acceptable. What I was shaking my head about
16 was to Rich because Rich is a friend that
17 I've known for a long time. I didn't want
18 him to feel like I felt that he, as a friend
19 of mine, was offending me. That's what I
20 meant.

21 Q When Rich referred to you as Gay
22 Don, you weren't offended by that?

23 A I wasn't offended by that. I
24 know he meant no malice. I know he meant no
25 derogatory meaning towards me. I know that

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D. Zarda

about it because he was doing it on Ray's orders, and again, I'm thinking back on something a decade ago that I thought was old business when Ray rehired me in 2009, so I haven't really thought much about that, so --

MR. ANTOLLINO: Just answer the question.

Q I think you are. You're doing fine.

A Repeat that part of the question, please.

Q My question was: On or about September of 2001, did you think you were being discriminated against by your termination?

A I'm going to have to say that I don't recall what I thought at that time, 2001, about that matter, about being discriminated against or whether I was being discriminated against at that time.

Q In your response, you mentioned that you were rehired in 2009; is that correct?

A That is correct.

1 D. Zarda

2 Q You were rehired by Skydive Long
3 Island; correct?

4 A That is correct.

5 Q Who rehired you?

6 A Ray Maynard.

7 Q Can you tell me how you came to
8 be rehired in 2009?

9 A Can you be a little more
10 specific about -- are you asking who I talked
11 to about it?

12 Q What I'm really asking you for
13 is a narrative. At what point did you say,
14 you know what, I'd like to start working
15 there? And explain to me how that all came
16 about.

17 A Okay.

18 MR. ANTOLLINO: Objection. It
19 calls for a narrative.

20 Q And you may go ahead and
21 disregard that objection and provide a
22 narrative.

23 A It wasn't just a one, pick up
24 the phone, call Ray, and ask if I could work
25 there kind of thing. It was something that

1 D. Zarda

2 everybody, so there were just some people
3 that required a little bit more work than
4 others to be able to get along with, and he
5 was one of those people.

6 Q I think I understand that
7 concept.

8 A Yes.

9 Q Ben Lowe required more work to
10 get along with.

11 Were you able to get along with
12 him?

13 A Yes, I was.

14 Q Who else?

15 A At the very beginning, Willie.
16 That's one of those nicknames. For the life
17 of me, I can't remember his full name right
18 now, but I'm sure we have a record of it
19 somewhere. I remember him very well, but
20 this is one of those situations where people
21 go by their nickname. He required a little
22 bit of extra work, as well, and by the end of
23 the season, it was good.

24 Q So your relationship, by the end
25 of the season, was great with everyone; is

1 D. Zarda

2 that correct?

3 A I think so.

4 Q So much so that would you
5 characterize you enjoyed working in 2009 at
6 Skydive Long Island?

7 A I enjoyed working in 2009 up
8 until I broke my ankle, so I didn't enjoy
9 that.

10 Q How did you break your ankle?

11 A It was at work, and it was on a
12 landing.

13 Q Do you recall when that was?

14 A The specific date?

15 Q Yes.

16 A Yeah, you don't forget that. It
17 was July 2, 2009 at, approximately, 2 o'clock
18 in the afternoon.

19 Q When you broke your ankle, you
20 were casted; correct?

21 A Eventually.

22 Q How soon after July 2 were you
23 casted?

24 A In a splint, in a cast, or in a
25 boot because there's -- be more specific,

1 D. Zarda

2 MR. ANTOLLINO: Objection to
3 form.

4 A No.

5 Q You came back in 2010 looking
6 forward to jump again; correct?

7 A I did. I came back with a
8 positive, high-spirited attitude ready to go
9 to work.

10 Q When were you cleared to begin
11 jumping in 2010?

12 A By my doctor, I was cleared to
13 begin work jumping on -- now, this may be off
14 a couple of days -- on or around January 22
15 or 24. It was in that range right there.

16 That was -- let me continue so
17 that I make sure I get this straight.

18 Q Please, go ahead.

19 A That was on my doctor's initial
20 orders that I begin work jumping six months
21 following my surgery. That was six months.
22 We had been in contact on the phone, but when
23 I returned to Long Island, because I knew I
24 was coming back to work for Ray because we
25 had already established that, he still wanted

1 D. Zarda

2 to have an office visit with me for a final
3 check-up to clear me out, and that was in
4 June.

5 Q The "he" is your doctor, or the
6 "he" is Ray that you just referred to?

7 A My surgeon.

8 Q Your surgeon?

9 A Yeah, that did the work.

10 Q Did you have the surgery done
11 here on Long Island?

12 A It was.

13 Q Good surgeon?

14 A Thank goodness, yes, he was.

15 Q When were you rehired by Skydive
16 Long Island 2010?

17 A Well, Ray and I discussed me
18 coming back before I went back home in 2009
19 just after I started walking again. I asked
20 him about coming back to work in 2010, and he
21 said that would be fine; just get healthy,
22 and I said okay.

23 Q You found that response to be
24 appropriate; correct?

25 A Sure.

1 D. Zarda

2 Q When did you start working again
3 at Skydive Long Island in 2010?

4 A It was on or about May 15, 2010.
5 That was my report date, and I do believe
6 that was the first day I reported.

7 Q Now, when you started working at
8 Skydive Long Island in 2001, do you know if
9 Ray Maynard was familiar with your sexual
10 orientation when he hired you?

11 A I don't know. I can't remember
12 back that far directly if we discussed it or
13 if he knew about it via Curt or Rich or if he
14 knew about it at all. I think he knew about
15 it possibly from one of them and then if he
16 didn't know about it when he hired me, he
17 certainly didn't take long to figure it out.

18 Q And you were rehired in 2009
19 with full knowledge of your sexuality; is
20 that correct?

21 A Unless he forgot about it, then
22 I would say he would have know.

23 Q Is it possible that he may have
24 forgotten about it?

25 A It's possible.

1 D. Zarda

2 Q Then, in 2010 when you began
3 working again, was he aware of your
4 sexuality?

5 A I would say certainly he would
6 have to have been still aware.

7 Q Let's talk about how you acted
8 at work in 2009.

9 A Okay.

10 Q How did you act?

11 MR. ANTOLLINO: Objection to
12 form.

13 A Could you actually be a little
14 more specific? How did I act in -- just
15 break that down, please.

16 Q In your daily mannerisms, did
17 you act just like every other employee?

18 A I think I did.

19 Q If we were watching a video of
20 you, just a video with no volume and we saw
21 your daily interactions, would we be able to
22 distinguish your interactions from any of
23 your coworkers?

24 A I doubt it.

25 Q Was that the same in 2010?

1 D. Zarda

2 A It was.

3 Q Your work activities throughout
4 your employment at Skydive Long Island were
5 indistinguishable from any of your coworkers;
6 is that correct?

7 A I would say -- there's no way I
8 could say whether indistinguishable or not,
9 because I am the one that is performing the
10 work actions, and I would be viewed by a
11 third person, so it would be strictly up to
12 whoever was watching me and what they
13 thought, but I would say that I acted
14 normally just like everybody else. I didn't
15 do anything special that I can think of.

16 Q In your perception, you acted
17 just like everybody else?

18 A As far as I can tell.

19 Q In 2009, you testified that you
20 got along with everybody; is that correct?

21 A I believe, unless we were to
22 read back what I said, I think I said
23 something to that effect.

24 Q I think what you said is that
25 Ben Lowe and maybe Willie required a little

1 D. Zarda

2 bit of extra attention, but you won them over
3 by the end of the season; is that correct?

4 A I didn't say I won them over;
5 you just said that.

6 Q I did just say that. That was
7 my characterization.

8 A Well, I think the relationship
9 developed positively by the end of the
10 season. It required a little extra work, but
11 it got to a good place.

12 Q Would you say that in 2009, you
13 had positive working relationships with all
14 of your colleagues?

15 A I would say so, for the most
16 part.

17 Q What about 2010, did you have
18 positive working relationships with your
19 colleagues?

20 A There were some new characters
21 in 2010, so there's a high turnover rate for
22 seasonal employees at Skydive Long Island, so
23 there were some new people that were brought
24 into the mix, different attitudes and
25 different personalities, and most of the same

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people were there, but I would say that yes, I did have a good experience. There were a couple of personalities that needed a little extra work.

Q In 2010, you had a good experience, but some of the personalities needed extra work; is that correct?

A I'd say so.

Q Who were those personalities?

A First, a guy named Monkey John.

Q Did his mom give him that name?

A I have no idea.

Q I'm making a joke.

A Oh, all right. He required a little extra work.

Q What was Monkey John's problem?

A You know, it was kind of funny. His problem was when I returned to my same digs in the staff room, which is already crowded, and I was going to take the same spot that I had the previous year, he didn't like it, so he made a little to-do about it, and that was my first meeting with John, with Monkey. His girlfriend Carmen, at the time,

1 D. Zarda

2 A I don't recall exactly the
3 reason that I told them. I would have told
4 them -- I most likely told them what I told
5 you about what Ray said, so you're asking me
6 to recall exactly what my conversation was
7 with five different individuals during a week
8 that I had, so I can't recall that.

9 Q Do you believe you were
10 suspended because you're gay?

11 A I believe that was the primary
12 reason.

13 Q Do you know what the secondary
14 reasons were?

15 A Well, I think there were some
16 gender issues in there, as well.

17 Q What gender issues were those?

18 A How I would conform to sex
19 stereotypes, how I act as a man. I think
20 that was a problem.

21 Q Did you act like a man?

22 A I think so.

23 Q Did you act like a woman?

24 A I don't think so, but other
25 people may think that. I don't know what

1 D. Zarda

2 context of differently than other men at
3 work.

4 A Maybe some people enjoyed,
5 noted, commented on my pink hat, pink cap. I
6 had a pink ball cap. I don't know if it was
7 a ball cap or just a regular hat, but it was
8 pink, and it said rebel on it, and it was
9 bright pink, and I wore it. I wore it on
10 occasion at work. I have no hair. I would
11 wear it sometimes until about 1:00 or
12 2:00 p.m. when the sun would go behind the
13 building and I didn't need it anymore. It
14 was viewed as a feminine thing.

15 Q Your pink hat was viewed as a
16 feminine thing?

17 A It was.

18 Q Who commented on it?

19 A Everybody commented on it at
20 some point that they saw me wearing that hat.

21 Q I'd like for you to identify for
22 me the names of the people who commented on
23 it and what they specifically said, if you
24 remember.

25 A Rich put it best yesterday.

1 D. Zarda

2 It's so many jokes that it's almost
3 impossible to come up with one right now
4 because it was just a regular, routine thing.
5 A hat, a nice pink hat. There were various
6 comments on it. I mean, I look the way I do.
7 I don't look like a lot of gay people might
8 look. The condition that I'm in, I look more
9 athletic looking.

10 Q Are you saying that all gay men
11 don't look athletic?

12 A Not all gay men do, so I get
13 mistaken for being straight sometimes, and
14 here I was in a pink hat, so it kind of
15 didn't make sense to some people, or they
16 didn't know what to do with it.

17 Q Are you saying that outwardly,
18 you believe your appearance leads people to
19 believe that you're straight?

20 A It does oftentimes, as long as I
21 don't have any accessories on that might lead
22 people to think otherwise. People do.
23 Sometimes even when I'm out at a gay club,
24 people come up to me to ask me if I'm gay.
25 Yeah, sometimes I get mistaken for being

1 D. Zarda

2 straight just on my appearance.

3 Q Are you saying that you are of
4 the belief that your outward appearance
5 indicates to people that you are straight?

6 A I get told that a lot.

7 Q Is that offensive?

8 A I don't say that it's offensive,
9 because I can't hold somebody accountable
10 just because I might look a certain way and
11 they are mistaken about it. It surprises me
12 sometimes, and it doesn't offend me. I
13 wouldn't be offended for looking straight.
14 It's just kind of funny sometimes.

15 Q When people at work, who you
16 can't really identify by name, would say,
17 hey, nice pink hat, were you offended by
18 that?

19 A No, I wasn't offended.

20 Q Did Rich --

21 MR. ANTOLLINO: Wait, wait. He
22 hadn't finished answering yet.

23 Q -- Winstock say to you, nice
24 pink hat?

25 MR. ANTOLLINO: He had not yet

1 D. Zarda

2 MR. ANTOLLINO: I have.

3 MR. ZABELL: That's why I'm
4 going to request that you take me up on
5 my offer to review the Federal Rules of
6 Civil Procedure.

7 MR. ANTOLLINO: You've, once
8 again, made a derisive comment,
9 Mr. Zabell. I have made an appropriate
10 objection. I have made very few
11 objections in this deposition, and I
12 will make what I feel are appropriate
13 objections.

14 Q When in 2010, did you wear your
15 pink hat?

16 A Be more specific, if you would,
17 please. When as in, what; days of the week,
18 time of the day?

19 Q What days in 2010, while you
20 worked at Skydive Long Island, did you wear
21 your pink hat?

22 A Can't remember every specific
23 time that I took a pink cap out of my bag or
24 out of my cubbyhole in the video room and put
25 it on my head, but in general, I would wear

1 D. Zarda

2 my pink hat when the sun was shining.
3 Particularly, in the morning hours from when
4 we began work until about 1:00 or 2:00 p.m.
5 when the sun would go behind the building
6 where the gear area is and I no longer needed
7 protection from the sun.

8 I would wear it while I was
9 gearing up passengers on the ground. Any
10 time I was running around on the ground and
11 the sun was shining, I would wear the hat to
12 protect my head.

13 Q Have you ever seen a straight
14 man wear a pink hat?

15 A I can't say that I recall a
16 specific time I've seen a straight man wear a
17 pink cap, but I don't see it often.

18 Q But you have seen it; is that
19 what you're saying?

20 A I can't recall. I mean, you're
21 asking me to think back over the course of --
22 I'm forty-one years old -- to the time that I
23 could remember if I've ever seen a straight
24 man wear a pink hat. I will tell you that I
25 probably have seen a straight person wear a

1 D. Zarda

2 pink hat at some point in my life. When,
3 during this forty-one-year-old process, I
4 can't say right now at this seating.

5 Q When people would say to you the
6 one comment you were able to relay to me,
7 hey, nice pink hat, do you recall who those
8 people were that said that to you?

9 A It's a close-quarters
10 environment. The key players that I worked
11 with, the full-timers, have all said
12 something. Probably most at the beginning of
13 the season when they seen the hat and they
14 seen me we wearing it.

15 I mean, either a sleeveless
16 shirt on because it's hot, or whatever, or
17 there was this guy wearing a pink hat, you
18 know. I can't remember exactly who said
19 what/when about the pink hat.

20 Q Would Rich say anything to you?

21 A It would be in that same
22 category of questioning of me not being able
23 to say specifically if Rich said something,
24 what he said, and when. I just know that it
25 was talked about a lot.

1 D. Zarda

2 can only attest to his motivations being
3 associated with what he said, so I can't
4 superimpose anything on Mr. Maynard's thought
5 processes, because they're rather abstract at
6 times, and they don't always make sense.

7 Q So you think he terminated you
8 for the reasons he told you he terminated
9 you; is that correct?

10 A Sounds like that's what I'm
11 saying.

12 Q What were those reasons again?

13 A Well, because I'm gay and that I
14 brought that up, or it was mentioned before
15 the customers and they were offended by it,
16 and that that was inappropriate and for
17 touching my female passenger in a way that
18 made her feel uncomfortable at the hips.

19 Q Both of those things actually
20 occurred on the jump; is that correct?

21 MR. ANTOLLINO: Objection.

22 A No. Let's be more specific when
23 you say this occurred.

24 Q As part of the jump, you had to
25 touch the customer in the hip area; is that

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D. Zarda

now he's going to take money out of my paycheck for a tandem that I didn't even do, and that was Mr. Kengle's tandem. I wasn't his instructor, and for work performed by two other of his employees, which were the video guys, that I had nothing to do with. It didn't make any sense to me that he was doing that.

Q And he immediately refunded you that money; did he not?

MR. ANTOLLINO: Objection.

A Not immediately.

Q Did he refund that money before the lawsuit was filed?

A He did before the lawsuit was filed.

Q When did he refund that money to you?

A One week later when he terminated me after he spoke to his lawyer, which I think is kind of the key thing about that, after he spoke to his attorney, which he admitted when he terminated me, that he did.

1 D. Zarda

2 Q Do you think you were terminated
3 because his Workers' Comp premiums went up?

4 A No. He terminated me for the
5 reasons that we discussed.

6 Q Which you were accused of
7 inappropriately touching a woman and then
8 sharing the fact that you don't like women
9 with her?

10 MR. ANTOLLINO: Objection.

11 A I didn't say I didn't like
12 women. You said it.

13 Q Sharing with her your sexual
14 orientation --

15 A Yes.

16 Q -- which indicated that you
17 didn't like women in that respect.

18 A I don't like that wording being
19 on the record because I didn't say that. I
20 never said I didn't like women. Women in
21 that manner, I need you to break that down.
22 What do you mean by that manner?

23 Q You were accused by Ms. Orelana
24 of touching her inappropriately --

25 A Right.

1 D. Zarda

2 Q -- and then disclosing to her
3 your sexual orientation, which indicated that
4 you are not sexually attracted to women?

5 A I would say that that would
6 indicate that. By me saying, don't worry I'm
7 gay, would convey that idea.

8 Q It's somehow saying, don't
9 worry, if I'm touching you in a manner that
10 makes you feel uncomfortable, I'm not acting
11 on it; correct?

12 A No, not correct.

13 Q Can a gay man ever touch a woman
14 inappropriately?

15 A They can. They could. So no,
16 it's not to convey that idea. It's to
17 resolve the situation about the joke that was
18 made in front of the boyfriend about the
19 girlfriend being strapped to another man,
20 which was me, and to quell that situation and
21 to calm that situation down.

22 Q And you felt that that needed to
23 be calmed down?

24 A Say that once more, please.

25 Q You felt that that situation

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D. Zarda

MR. ZABELL: Let's get this man
a drink.

(Whereupon, a recess was taken
from 3:35 p.m. to 3:59 p.m.)

Q Before the break, I was asking
you questions about the possible likelihood
that you were terminated because Ray Maynard
was upset that his Workers' Comp policy went
up because you had filed a claim; do you
recall that?

A I recall that.

Q Do you recall testifying that it
was, in fact, possible that that was one of
his motives?

A I said that it was possible.

Q And another one of his motives
could have been that Mr. Kengle and
Ms. Orelana complained about their jump; is
that correct?

A Sounds like it, yeah. I mean,
that's what he told me.

Q During the break there was, what
I would characterize as, innocent banter
between your attorney and myself, and I think

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D. Zarda

homosexual.

Q But if I had never met you before and I called you a homo, even though it may be correct, it wouldn't be considered appropriate; would it?

A That's probably on the boundary. It would probably just depend on the by-language, the interaction that we were having, the rapport that we were having.

If you were walking down the street and you said, hey, homo, and you yelled at me and were a stranger, that would probably sound derogatory. If we were just hanging out with some friends, it would be all right.

Q You're comfortable enough in your sexuality that if somebody was going to make jokes with you about it, it was clear that their intention was just to invoke a smile or some laughter, that it would be fine; correct?

A Correct.

Q Did anybody at Skydive Long Island bring up your sexuality in an attempt

1 D. Zarda

2 to hurt your feelings?

3 A In an attempt to hurt my
4 feelings, I can't remember specifics. I
5 don't think so. Like we just talked about,
6 some borderline stuff. I think that an
7 attempt to hurt my feelings would imply
8 malice and so that the person was wanting to
9 be malicious, and so I don't think anybody
10 there was wanting to be malicious to me, so
11 they might have done it in error or
12 ignorance, possibly, not knowing what to say
13 or how to say something; yeah, in that regard
14 possibly, but not -- I don't think anybody
15 was being malicious about it.

16 Q And if somebody had brought
17 something up to you in error, did you feel
18 comfortable addressing it with them?

19 A Again, specifics over this whole
20 time period is difficult for me to come to.
21 I'm just thinking back. There were some
22 social cues, you know, moments where somebody
23 like Willie, possibly, or Ben might have said
24 something that was a little off just because
25 they didn't know any better. I didn't feel a

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D. Zarda

spoke negatively about me often during their marriage, so I thought that was intriguing. Not completely surprised to hear that. Don't know what Ray was thinking.

Q So Ray's issue with you is just because you're gay; is that what you're saying?

A Which time; when he fired me?

Q When he fired you in 2010.

A Well, when he fired me in 2010, he said it was because the issue of my sexuality came up in front of the customers. He was firing me for that. It was inappropriate, and the issue about touching this girl inappropriately came up, and that's what he said.

Q But you think it also may be because you caused his Workers' Compensation premiums to go up, as well; correct?

MR. ANTOLLINO: Objection.

A No. I'm not going to go down that road. I didn't cause anything. I'm not the Workers' Comp Board. I'm not the New York State Insurance Fund. I didn't cause

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D. Zarda

2 Ray, and like many of the people that work
3 there, they're under Ray's thumb, so they all
4 work for him, and so I feel that -- and
5 they're all participants, they all
6 participated in this joking, this gay banter,
7 this gay fun. They all participated, so
8 they're all culpable to some extent in this,
9 and yet we're in a situation where they all
10 still work for Ray and they're under Ray's
11 thumb, and Ray can hang their jobs over them.

12 Q Right. But I asked you to
13 identify this gay banter, and you were unable
14 to identify it.

15 A When was I unable -- I don't
16 remember being unable --

17 Q I asked you to tell me about any
18 of the gay banter that was made, and you were
19 unable to state what was said and when it was
20 said. If you've thought of something, please
21 enlighten me now.

22 What was this gay banter?

23 A Well, I think Rich just nailed
24 it right on the head; easy with Gay Don. I
25 mean, that's my name, Gay Don. Everybody

1 D. Zarda

2 said it all the time. I mean, it's pretty
3 clear. You start there with that and that
4 just leads into other things.

5 Q What other things?

6 A Well, even Rich couldn't
7 remember all the jokes. It's just so much.

8 Q I know. I'm not asking Rich.
9 I'm asking you. What were the jokes?

10 A I can't remember all the jokes
11 at this seating.

12 Q Can you remember some of them?

13 A Well, let me just sit here and
14 think about it for a moment.

15 Without remembering specifically
16 who said things like this, there were times
17 when there might be guys that were muscular
18 or attractive or gay looking that were
19 customers that were around, and some of the
20 other employees would say, how about him,
21 Don? He looks like your type. What do you
22 think about him? Stuff like that.

23 Q Do you recall who said that to
24 you?

25 A It happened frequently. I do

1 D. Zarda

2 little part of it, but I think the bigger
3 piece, the much bigger piece, the
4 dramatically larger piece of it had to do
5 with me being gay.

6 MR. ANTOLLINO: Off the record
7 for one moment, if you don't mind.

8 MR. ZABELL: Are we talking
9 about scheduling?

10 MR. ANTOLLINO: Yes.

11 MR. ZABELL: Sure.

12 (Whereupon, a discussion was
13 held off the record.)

14 Q The dramatically large piece of
15 your termination had to do with your being
16 gay.

17 What, if any, do you believe
18 could have been the other factors?

19 MR. ANTOLLINO: Objection.

20 Asked and answered.

21 A Well, we've been down this path,
22 but to go briefly again, the accusation of
23 the inappropriate touching was in the mix and
24 the issue of me being gay.

25 Q And?

1 D. Zarda

2 Q What is --

3 A That's using one of those
4 definitions that was mentioned yesterday, and
5 it can be number of jumps, number of years,
6 or number of years at a drop zone.

7 Q Were you treated better or worse
8 than those people that you were more senior
9 to?

10 A I don't think seniority has made
11 any difference.

12 Q You were all treated the same?

13 A Mostly. A newbie gets treated a
14 little differently than someone that's senior
15 in years.

16 Q You guys picked on the newbies a
17 little bit?

18 A What's that?

19 Q You guys picked on the newbies a
20 little bit?

21 A I don't.

22 Q The others do?

23 A It's just a pecking order.

24 Q Were you picked on when you were
25 a newbie?

1 D. Zarda

2 A Everybody gets picked on a
3 little bit; yeah.

4 Q But it kind of stopped after you
5 were a newbie?

6 A No. It's skydivers.

7 Q Skydivers, they just pick on
8 everybody?

9 A They do.

10 Q So all your coworkers got picked
11 on at one point or another?

12 A Skydivers -- yeah, they had...

13 Q Sometimes the bottle would point
14 to you, and sometimes the bottle would point
15 to somebody else?

16 A That's a good way to put it.

17 Q Right?

18 A That's a good way to put it, so
19 yes.

20 Q You were treated just like
21 everybody else there; right?

22 A For the most part.

23 Q So if you swore under oath that
24 you weren't, would you be lying; correct?

25 A No. I said for the most part.

1 D. Zarda

2 Q Yes. For the most part, you
3 were treated just like everybody else,
4 correct; yes or no? That's a yes-or-no
5 question, and I get to ask yes-or-no
6 questions.

7 A You do, but that's --

8 Q You said that for the most part,
9 you were treated like everybody else;
10 correct?

11 A For the most part.

12 Q So that's a yes; correct?

13 A Yes, for the most part --

14 Q Thank you.

15 A -- I was treated like everyone
16 else.

17 Q Now, could you tell me what
18 comments John made?

19 A What comments he made?

20 Q Yes.

21 A I don't know that I specified
22 John's comments in here (indicating).

23 Are you talking about when he
24 got upset with me where my stuff was located?

25 Q Any comments that he made to you

1 D. Zarda

2 Q Do you consider yourself to be
3 wussy?

4 A I don't.

5 Q Do you think you ever act like a
6 wussy?

7 A Nope, I don't.

8 Q What do you understand a wussy
9 to be?

10 A Depends on the connotation and
11 in the context that that word is being used
12 in saying it. Sometimes it might not mean
13 anything. It just depends on who is saying
14 it. If it's an adversary and they're calling
15 you a wussy, most guys can agree that is
16 derogatory to possibly your manliness, so I
17 think it could take on that connotation. It
18 depends on the context, the connotation, and
19 the circumstance in which someone is calling
20 you that.

21 Q Do you think you act less than
22 manly?

23 A I don't; no.

24 Q I mean, I look at you and I see
25 someone who looks particularly manly.

1 D. Zarda

2 A Okay, that's good.

3 Q Do you agree that that's the
4 vibe you give off?

5 A I hear that.

6 Q So if someone looks at you, you
7 believe you appear manly; is that correct?

8 A For the most part.

9 Q And that you act manly?

10 A For the most part. I have, you
11 know, moments. If they see me in different
12 social settings, they might think a different
13 thing.

14 Q Well, did people you worked with
15 at Skydive Long Island see you in different
16 social settings?

17 A Yes.

18 Q What were those different social
19 settings?

20 A Well, they didn't go to Fire
21 Island with me and they didn't go to gay
22 events with me, but they knew about some of
23 those. They knew I went to Fire Island.
24 They know I'm gay. They don't understand how
25 we enjoy ourself socially and so forth.

EXHIBIT B

ORIGINAL

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----x
DONALD ZARDA,

Plaintiff,

-against-

ALTITUDE EXPRESS, ET ANO.,

Defendant,

Civil Action No.: 10-9334
-----x

90 John Street
New York, New York

December 14, 2011
10:15 a.m.

Videotaped Deposition of RAYMOND
MAYNARD, pursuant to Notice, before Sophie
Nolan, a Notary Public of the State of New
York.

ELLEN GRAUER COURT REPORTING CO. LLC
126 East 56th Street, Fifth Floor
New York, New York 10022
212-750-6434
REF: 99061

1 **A P P E A R A N C E S:**

2

3 **GREGORY ANTOLLINO, ATTORNEY AT LAW**

4 **Attorney for Plaintiff**

5 18-20 West 21st Street, Suite 802

6 New York, New York 10010

7 **BY: GREGORY ANTOLLINO, ESQ.**

8 **PHONE 212-334-7397**

9 **FAX 212-334-7399**

10 **E-MAIL greg@antollino.com**

11

12

13 **ZABELL & ASSOCIATES, P.C.**

14 **Attorneys for Defendant**

15 4875 Sunrise Highway, Suite 300

16 Bohemia, New York 11716

17 **BY: SAUL D. ZABELL, ESQ.**

18 **PHONE 631-589-7242**

19 **FAX 631-563-7475**

20 **E-MAIL szabell@laborlaw.com**

21

22

23 **ALSO PRESENT:**

24 **VINCENZO PETULA, Legal Videographer**

25

MAYNARD

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A. It was several months, I believe.

Q. And was it discussed during those several months that Don was gay among the students at -- among the instructors at Skydive Long Island?

A. Did you say was it discussed?

Q. Yeah.

A. It might have been.

Q. You don't remember one way or the other?

A. It probably was.

Q. Was Don referred to as gay Don?

A. He referred to himself as gay Don.

Q. When you say "he referred to himself as gay Don," when was that? When did he refer to himself as gay Don?

A. In 2001.

Q. He said, I'm gay Don?

A. He would make jokes about it. He was not always called gay Don. He was not referred to as gay Don.

Q. Rich Winstock testified that, and you don't have to accept this as true, that he was introduced to Don by another person as gay

MAYNARD

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Q. And that was in 2008?

A. I believe so.

Q. Who brought it up?

A. Don did.

Q. And what did you say?

A. What did I say?

Q. Yeah.

A. I said that I believed that he was a good instructor, he was a safe instructor.

He was a good guy and I would give him a chance.

Q. Earlier you testified that you initially said no. When was it that you said no?

A. In one of the earlier phone calls.

Q. Why did you say no?

A. Because I just said no.

Q. But there must have been a reason for it.

A. No reason.

Q. Did you need people at the time?

A. Excuse me?

Q. Did you need people at the time?

MR. ZABELL: Objection. During

1 MAYNARD

2 is that correct?

3 A. I don't remember.

4 Q. He wasn't certain if he would be
5 returning that summer or not, correct, when he
6 went out on injury; correct?

7 A. Correct.

8 Q. In fact, you received an e-mail
9 from Don --

10 (Exhibit R-19, e-mail, marked for
11 Identification.)

12 Q. -- I hand you what I premarked as
13 Exhibit 19 -- shortly after the injury;
14 correct?

15 A. You want me to read it?

16 Q. That appears to be an e-mail that
17 Don sent to you after the injury?

18 A. Yes.

19 Q. And it indicates that he wants to
20 continue could have his job, he wants to get
21 better and get back to work; correct?

22 A. Yes.

23 Q. And there was no reason why he
24 could not return to work if his doctors cleared
25 him to work that summer; correct?

MAYNARD

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A. Correct.

Q. And if his doctors had cleared him to work that summer, you would have allowed him to continue to do jumps; correct?

A. Correct.

Q. All right. Now, you have mandatory staff meetings at the drop zone; is that correct?

A. Not really.

Q. I'll hand you what I've marked collectively as Exhibit 25 -- I'm sorry, Exhibit 20 and ask you if you recognize these.

(Exhibit R-20, three e-mails, marked for Identification.)

Q. There's three e-mails here.

A. Okay.

Q. These are all e-mails about staff meetings; correct?

A. Okay. Yes, they are.

Q. Okay. And it's sent from Skydive Long Island with the e-mail address funjumps@skydivelongisland.com; correct?

A. Correct.

Q. And that is your e-mail address;

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MAYNARD

MR. ZABELL: Objection to the form.

How long did what take?

MR. ANTOLLINO: The suspension meeting.

A. Twenty minutes, a half an hour.

I'm not sure.

Q. And what did you discuss in this 20 minutes or 30 minutes?

A. We discussed the complaint from the gentleman about his girlfriend and that he made his girlfriend feel very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder and just the girl was very, very uncomfortable for the entire jump and she even thought that maybe he was hitting on her and he was covering up this stuff by telling her that he was gay.

Q. Did you think that Don was hitting on her?

A. It doesn't matter what I think.

Q. I'm asking you if you think that Don was hitting on her?

A. I couldn't say if I thought he was or not.

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MAYNARD

people.

Mr. Maynard: It wasn't a gay issue. It was a personal issue. When I told you the other day -- that's -- I'm not going to get into it. Because if it was a heterosexual thing -- if Richie 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. Not -- I don't care -- 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.

Mr. Zarda: Okay, well --

Mr. Maynard: Okay? So don't take this as a gay thing. It's not a gay thing. It's about your personal escapades and what you're telling people, what you're saying. So --

Mr. Zarda: Okay, well, can I before -- can I say something?

Mr. Maynard: Sure.

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MAYNARD

Mr. Zarda: Okay. You said in here, I know you were upset, that that came up and that they were offended and then you said something about this girl, I took the girl, being inappropriately touched. You said that.

Mr. Maynard: Well, she felt that -- that you were holding her hips in a way that she was very uncomfortable.

Mr. Zarda: Ray, does that make any sense to you?

Mr. Maynard: Don --

Mr. Zarda: I mean, really.

Mr. Maynard: Don, listen, I'm not going to explain anything else to you. That's -- this is what is happening, this is what's going to happen and I'm sorry, but that's -- that's what I'm saying.

Mr. Zarda: Okay. What about -- I mean, when you say 'personal escapades,' these guys -- I mean -- I mean, Marco runs around saying everything is gay. Petretti still is in the 2001 mode --

Mr. Maynard: But this is not --

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MAYNARD

I've been sitting in the dark at home.

Mr. Maynard: You were suspended for completely ruining somebody's birthday because of you talking about your personal life to them. That is it in a nutshell.

Mr. Zarda: I ruined somebody's birthday because I got -- okay, that's fine. That's not --

Mr. Maynard: They were very sincere on the phone. There was nothing about -- they weren't demanding their money back or nothing like that. They were just saying there's no way can I ever give my fiancée her birthday back because it was taken away because of you putting your head on her shoulder, whispering in her ear and talking about, 'Don't worry about me, I'm gay,' under canopy and everything else.

Mr. Zarda: Ray, did you think at all to -- that maybe these people just were looking for a free jump and that they --

EXHIBIT C

Page 17

1 Richard Winstock 17

2 Q When was that?

3 A Three years ago. Approximately, three

4 years ago.

5 Q Anyone else?

6 A There were others. I don't recall

7 names.

8 Q What was Alex Allen fired for?

9 A I don't know.

10 Q Did you ask Ray or --

11 A No.

12 Q How did you find out that Alex was

13 fired?

14 A Word of mouth.

15 Q Not from Ray, but from someone else?

16 A I don't recall.

17 Q Did you have any opportunity during the

18 summers that Don worked under your tutelage, let's

19 say, to observe his performance as an instructor?

20 A Yes.

21 Q Did you have an opinion about it?

22 A Yes.

23 Q What was it?

24 A I had no objections with his ability to

25 perform tandem instructor duties.

Page 18

1 Richard Winstock 18

2 Q Did you believe that Don was a good

3 instructor?

4 A Yes.

5 Q Was it known at S.D.L.I. that Don was

6 gay?

7 A Yes.

8 Q Issued say Don is gay.

9 Q How was that something that was known?

10 A I would say from Don.

11 Q Was it something that was ever

12 discussed among other people?

13 A Not specifically. It was known.

14 Q Did you ever hear anyone say to Don

15 anything like referring to his homosexuality in

16 any way?

17 A I didn't.

18 Q Over the years that you have worked at

19 Skydive Long Island, has there ever been a

20 customer complaint?

21 A While I was there about Don?

22 Q Well, has --

23 A Can you just clarify for me?

24 Q So you are aware that there was a

25 customer complaint about Don that is the basis of

Page 19

1 Richard Winstock 19

2 this lawsuit, correct?

3 A I am --

4 MR. ZABELL: Object to the form. You

5 can answer.

6 A I am now.

7 Q Have there been any other complaints

8 about Don that you're aware of?

9 A Not that I'm aware of.

10 Q Have there been any other complaints by

11 any other customers about anything over the years

12 that you've worked there?

13 A Not that I'm aware.

14 Q The five people other than Alex Allen

15 whose names you didn't remember, do you know what

16 any of them were fired for?

17 A I don't.

18 Q Are you also a cameraman at Skydive

19 Long Island?

20 A Yes.

21 Q What are your duties as a camera man?

22 A Primary responsibility is to video the

23 entire tandem experience for the passenger and

24 then produce a product for them to take home.

25 Q When you say, produce a product, do you

Page 20

1 Richard Winstock 20

2 mean edit the raw material that you've filmed?

3 A Correct.

4 Q So are there frequently out takes from

5 the video?

6 A Correct.

7 Q What is done with those, that you know

8 of?

9 A The raw footage?

10 Q Yes.

11 A I can only speak with my footage, but

12 we record over it, or destroy it. We're using

13 digital media now. It used to be, actually,

14 cassette like media where we would just record

15 over it. Some people do save it. I'm talking

16 about myself. I record over them.

17 Q When you say you use digital now, how

18 long have you been using digital?

19 A This summer, one year.

20 Q So in 2010 you were still, or the

21 company was still using the cassette?

22 A The compact cassette, yes.

23 Q Did you ever hear any staff members

24 make jokes about Don's sexuality in front of Don?

25 A No.

Page 25

1 Richard Winstock 25

2 had nothing to do with sexual orientation, why did

3 you suggest that?

4 A Because it's a sensitive -- it's a

5 sensitive situation.

6 Q But why mention sexual orientation in

7 the letter, or in this proposed letter I should

8 say?

9 A It was outwardly known that Don is gay,

10 and when I say outwardly, in a positive way. It

11 was Don -- in fact, I was introduced to him as gay

12 Don. So this wasn't something that was hidden.

13 When it comes to sexual orientation and

14 being politically correct, I feel that it was --

15 the advice I gave Ray was to be very sensitive to

16 that situation and be very politically correct and

17 do -- document it accordingly.

18 Q Did the complaint have anything to do

19 with sexual orientation that you can recall?

20 A Yes.

21 Q How so?

22 A It was brought up, the fact that Don

23 was gay was brought up. I believe Don brought it

24 up to the passenger, so it was definitely

25 mentioned in the complaint to Ray.

Page 26

1 Richard Winstock 26

2 Q How did Ray react to that?

3 A I don't know.

4 Q Well, did Ray express any opinion about

5 whether or not that was appropriate?

6 A To bring that up?

7 Q Yes.

8 A Ray's the drop zone owner, and anything

9 tandem instructor wise would usually -- he would

10 defer to me to make the decision.

11 I wasn't -- if you can clarify one

12 thing, when you say that wasn't appropriate, what

13 wasn't appropriate?

14 Q Don mentioning to the passenger that he

15 was gay.

16 A The answer to that is I don't know that

17 Ray said that was okay or not.

18 Q What is your opinion?

19 A I would instruct, or I would probably

20 give a tandem instructor advice that doing a

21 tandem is inherently an awkward situation, and if

22 you feel that can lighten the mood or possibly

23 make that person more comfortable and that would

24 make it a safer skydive, if the instructor felt

25 that it would make the skydive safer or put a

Page 27

1 Richard Winstock 27

2 person at ease, I personally would not have a

3 problem with it, and, of course, you can go

4 overboard with it as well.

5 So I would tread lightly on how much

6 information you gave or didn't give a passenger.

7 Sometimes no information is better than too much.

8 Q So there came to be a point when you

9 had a discussion with Don -- or rather Ray, about

10 the complaint after Don was terminated?

11 MR. ZABELL: I'll object to the form.

12 You can answer.

13 A Yes.

14 Q When was that, about how long after Don

15 was terminated?

16 A Within the week.

17 Q What did you say to Ray or what did he

18 say to you?

19 A Ray had advised me that he had

20 terminated Don under the advice of his attorney.

21 Q Do you know who his attorney was?

22 A I don't.

23 Q Do you know if it was not Saul Zabell?

24 A I don't know.

25 Q So you definitely don't know who the

Page 28

1 Richard Winstock 28

2 attorney was, and just to clarify this, you would

3 not be able to have say, oh, no, I know it wasn't

4 Saul Zabell because I know Don got Saul Zabell at

5 a different time?

6 A I'm sorry, Saul Zabell?

7 Q This is Saul Zabell.

8 A I don't know if it was or it wasn't.

9 It was his attorney.

10 Q That's all he said, was on the advice

11 of his attorney?

12 A I heard the name Harvey as the

13 attorney. I have no idea who gave him the advice.

14 Q Was there any further discussion?

15 A There wasn't.

16 Q Did there come a time that you learned

17 about this lawsuit?

18 A Was there a time what?

19 Q Oh, and by the way, I offer to

20 represent you as well if you feel like taking me

21 up on that, but I don't think you're going to need

22 any representation.

23 MR. ANTOLLINO: We'll have the question

24 read back.

25 (Whereupon, the requested section was

Page 85

1 Richard Winstock 85
 2 Don was gay, is that correct?
 3 A Yes.
 4 Q How did you know that everybody was
 5 aware that Don was gay?
 6 A Don was flamboyant. He was very
 7 outwardly -- he's a friendly guy, and in his
 8 friendliness he doesn't hide the fact that he's
 9 gay. In fact, it's very out in the open. The
 10 pink hats, the pink toenail polish, he's called
 11 gay Don. I never knew that that bothered him. If
 12 it did, I'm sorry.
 13 MR. ZABELL: I hate to interrupt, but I
 14 think the record should reflect when the
 15 deponent was testifying he was called gay
 16 Don, I didn't know if it bothered him, that
 17 Mr. Zarda shook his head no, it didn't.
 18 MR. ANTOLLINO: There's been no
 19 testimony here. I didn't see --
 20 MR. ZABELL: You have to let me finish
 21 speaking, because I give you the courtesy of
 22 that.
 23 I'm saying that the record should
 24 reflect that Mr. Zarda was physically shaking
 25 his head from left to right while the

Page 86

1 Richard Winstock 86
 2 deponent was saying, I didn't know that it
 3 bothered him, indicating that, no, it did
 4 not.
 5 MR. ANTOLLINO: I didn't see that.
 6 MR. ZABELL: You can feel free to ask
 7 Mr. Zarda.
 8 MR. ANTOLLINO: He's not under oath.
 9 You can ask him tomorrow, and he's gonna tell
 10 you the truth.
 11 Q You can go ahead. I just needed to
 12 verbally clarify that.
 13 A I think I finished answering.
 14 Just that Don himself was very open
 15 about it. This was not something hidden or
 16 something that was quiet. It wasn't clandestine.
 17 Q Did you ever hear Don refer to
 18 himself or introduce himself as gay Don?
 19 A I may have.
 20 Q Did you ever treat Mr. Zarda
 21 differently because of his sexuality?
 22 A No.
 23 Q Did you have occasion to work with Mr.
 24 Zarda?
 25 A Yes.

Page 87

1 Richard Winstock 87
 2 Q How frequently?
 3 A If not every weekend, almost every
 4 weekend for two summers, minus possible injuries,
 5 or he might have missed a few days here and there.
 6 Q Did you ever observe any of your
 7 co-workers treating Mr. Zarda differently than any
 8 other co-worker?
 9 A I didn't.
 10 Q Did you ever observe Mr. Zarda being
 11 treated differently because of his sexual
 12 orientation?
 13 A I didn't.
 14 Q Did you ever hear any jokes in the
 15 workplace about Mr. Zarda's sexuality?
 16 A No.
 17 Q Did Mr. Maynard ever make disparaging
 18 comments about Don Zarda?
 19 A Not in front of me.
 20 Q Are you aware if he had made any
 21 disparaging comments?
 22 A No.
 23 Q So when you say, not in front of me,
 24 does that mean you're not aware of comments that
 25 were made?

Page 88

1 Richard Winstock 88
 2 A No, I am not.
 3 Q Are you aware of any of the co-workers
 4 at Skydive Long Island making disparaging comments
 5 about Mr. Zarda?
 6 A No.
 7 Q Now, you hold a special title at
 8 Skydive Long Island, do you not?
 9 A Yes.
 10 Q What is your title?
 11 A Safety and training advisor. Chief
 12 instructor and instructor examiner in a few
 13 different disciplines.
 14 Q What does an instructor examiner do?
 15 A Certifies instructors. It's the person
 16 if you want to become a tandem instructor or a
 17 free fall instructor, or a coach, you have to go
 18 to an instructor examiner. That's the person who
 19 actually gives -- signs off on the rating for a
 20 tandem instructor. So it's called -- commonly
 21 referred to as an I.E., and I'm the only one at
 22 Skydive Long Island.
 23 Q Who was the most senior skydiver at
 24 Skydive Long Island?
 25 A Seniority -- That's a good question.

22 (Pages 85 to 88)

Page 97

1 Richard Winstock 97
 2 you see someone with a cast at a skydiving
 3 operation, I think it's probably not the best for
 4 business.
 5 If I was Ray, or if I was the owner and
 6 I had to make that decision, I probably wouldn't
 7 want someone, especially an instructor, walking
 8 around with a cast on or possibly in a wheelchair
 9 or something that would bring up -- we're trying
 10 to be positive and build trust and get a good
 11 feeling going.
 12 So, no, I wouldn't think there would be
 13 any reason for an instructor with a cast on -- It
 14 wouldn't help the business, let's put it that way.
 15 Q Did you ever hear Ray Maynard comment
 16 about any of the colors that Don Zarda was
 17 wearing?
 18 A I didn't hear, no.
 19 Q Did you ever hear any of the co-workers
 20 comment on the colors that Don Zarda wore?
 21 A I didn't.
 22 Q Do you think Don Zarda was treated any
 23 differently at Skydive Long Island because he's
 24 gay?
 25 A No.

Page 98

1 Richard Winstock 98
 2 Q Did you ever hear Ray Maynard complain
 3 about Don Zarda?
 4 A I didn't.
 5 Q Did you ever hear Don Zarda complain
 6 about Ray Maynard?
 7 A I did not -- Strike that.
 8 Minus the one time, the very last
 9 incident when he was upset that he was sent home,
 10 that he came to me with a complaint about Ray
 11 because I was his direct supervisor at the time,
 12 other than that, I never heard Don complain about
 13 Ray at any time.
 14 Q I believe you were shown an e-mail by
 15 counsel for Mr. Zarda, and in that e-mail Mr.
 16 Zarda had commented about whether or not Mr.
 17 Maynard came to his senses.
 18 Do you recall that?
 19 A Yes.
 20 Q Do you believe that's an appropriate
 21 question to ask, A, of your supervisor, and, B,
 22 about the owner of the company?
 23 A I believe -- I think I could classify
 24 Don and my personal relationship as friendly. I
 25 think it was a friendly e-mail. I know Don was

Page 99

1 Richard Winstock 99
 2 definitely upset about the situation and that I
 3 would put that in the category of that is how Don
 4 would speak to me. I didn't take it as
 5 disrespectful.
 6 Q Do you see how somebody could see that
 7 as being disrespectful?
 8 A Yes.
 9 Q Do you see how Mr. Maynard could see
 10 that as disrespectful?
 11 A Yes.
 12 Q Do you know on how many different
 13 occasions Mr. Zarda was terminated from Skydive
 14 Long Island?
 15 A To the best of my recollection, one
 16 time prior to this incident.
 17 Q So a total of two times?
 18 A To the best of my knowledge.
 19 Q Do you know how many times Mr. Zarda
 20 was hired by Skydive Long Island?
 21 A Two. I'm surmising here.
 22 Q Let's work this through.
 23 If he was hired once and terminated
 24 once --
 25 A Correct.

Page 100

1 Richard Winstock 100
 2 Q -- and hired again and then terminated
 3 again, then two would be correct, right?
 4 A Right.
 5 Q Was Mr. Zarda hired while you were
 6 employed at Skydive Long Island?
 7 A Yes.
 8 Q Were you responsible for the hiring?
 9 A No.
 10 Q Did you have any input in the hiring?
 11 A No.
 12 Q When he was hired, were you advised of
 13 anything regarding Mr. Zarda?
 14 A Yes.
 15 Q What were you advised of?
 16 A Curt Kellinger, who is the instructor
 17 who introduced me to Don up in Vermont, told me
 18 that he asked Don to come to Skydive Long Island.
 19 He told me that Don was gay and he told me that
 20 Don was an excellent tandem instructor, and that's
 21 all that was told to me prior to his being hired.
 22 Q In any of your experiences with Don,
 23 did you ever find any of that to be untrue?
 24 A No.
 25 Q I'm sorry, who was that that told you?

Page 101

1 Richard Winstock 101
 2 A Curt Kellinger.
 3 Q Does Curt Kellinger work at Skydive
 4 Long Island?
 5 A He does.
 6 Q The fact that Curt Kellinger told you
 7 that Don Zarda was gay, did that effect whether or
 8 not Don Zarda was hired by Skydive Long Island?
 9 A No.
 10 Q So, in fact, he was hired even though
 11 his sexuality was known?
 12 A Correct.
 13 Q Did it effect what he was paid?
 14 A No.
 15 Q To your knowledge, did it effect how he
 16 was treated?
 17 A No.
 18 Q Is there anything else you'd like to
 19 tell me?
 20 A No.
 21 MR. ZABELL: Thank you for your time.
 22 I appreciate it.
 23 Would you like to reserve the right to
 24 the see a copy of this deposition at the
 25 conclusion of the deposition?

Page 102

1 Richard Winstock 102
 2 THE WITNESS: At the conclusion?
 3 MR. ZABELL: Not immediately.
 4 THE WITNESS: Yes, I would.
 5 MR. ANTOLLINO: All right. There's a
 6 few things to follow-up on here.
 7 CONTINUED EXAMINATION BY MR. ANTOLLINO:
 8 Q You said that Don wasn't hired by you,
 9 but did you inform Ray that Don was gay before Ray
 10 made the decision to hire Don?
 11 A Ray knew Don prior -- I think -- I
 12 don't know who's confused here. Ray had already
 13 worked with Don; so Ray knew Don. All I was
 14 saying to the question was I didn't have much to
 15 do with the hiring. So when Ray hired Don, Ray
 16 knew Don was gay.
 17 Q The first termination of Don, do you
 18 know when that was?
 19 A I don't.
 20 Q Was that before you were working at
 21 S.D.L.I.?
 22 A I was working at Skydive Long Island,
 23 but I wasn't there for this incident, or I wasn't
 24 there while he was working.
 25 Q You testified that you believe it had

Page 103

1 Richard Winstock 103
 2 to do with a passenger and instructor interaction?
 3 A That's right.
 4 Q And Ray told you that?
 5 A Yes.
 6 Q When did Ray tell you that?
 7 A Sometime over the course of the last
 8 three to last four years.
 9 Q So it could have been after this
 10 lawsuit had been filed?
 11 A No, this is back when, approximately,
 12 around the time that he was hired. Ray explained
 13 to me that he hired Don and that he also explained
 14 to me that he was terminated once before.
 15 Q But you don't recall any of the
 16 specifics about what Ray said about this
 17 interaction?
 18 A It was passenger/instructor interaction
 19 was the reason he was terminated.
 20 Q If a passenger complains about an
 21 unwillingness to violate safety standards, is that
 22 a legitimate complaint?
 23 A If a passenger --
 24 Q If a passenger --
 25 A I'm trying to get -- If a passenger

Page 104

1 Richard Winstock 104
 2 complains about an unwillingness to violate a
 3 safety, can I -- My passenger is asking me and I
 4 don't want to violate safety standards?
 5 Q No. If the passenger says something
 6 like, can we do X, Y or Z, whatever it is, and you
 7 know that violates safety standards and you say no
 8 because that violates safety standards, is that a
 9 legitimate passenger complaint?
 10 A No.
 11 Q You said you've told some passengers
 12 that you're married?
 13 A Yes.
 14 Q So this happened over the course of say
 15 the last ten years?
 16 A Over the course of the last thirteen
 17 years, give or take.
 18 Q So certainly between 1998 and 2011?
 19 A Yes.
 20 Q Before last year, if you told someone
 21 that you were married, that person would
 22 understand that you were heterosexual, correct?
 23 A Correct.
 24 Q Did you show Ray Maynard that e-mail
 25 where Don said, has Ray come to his senses?

EXHIBIT D

EXHIBIT D ORELLANA DEP.

<p style="text-align: right;">Page 1</p> <p>1 UNITED STATES DISTRICT COURT 2 EASTERN DISTRICT 3 -----X 4 DONALD ZARDA, 5 Plaintiff, 6 - against - INDEX NO.: 7 ALTITUDE EXPRESS, INC., d/b/a CV-10-4334 8 SKYDIVE LONG ISLAND AND RAY MAYNARD, 9 Defendants, 10 -----X 11 Bee Reporting Agency, Inc. 12 800 Veterans Memorial Highway 13 Hauppauge, New York 14 November 9, 2011 15 1:30 P.M. 16 17 EXAMINATION BEFORE TRIAL OF ROSANA 18 ORELLANA, a non-party witness, taken by the 19 attorney for the Plaintiff, pursuant to Subpoena, 20 and held before Deborah Thier, a Notary Public of 21 the State of New York at the above-stated time and 22 place. 23 * * * * 24 25</p>	<p style="text-align: right;">Page 3</p> <p>1 2 FEDERAL STIPULATIONS 3 4 IT IS HEREBY STIPULATED AND AGREED, 5 by and between the parties hereto, through 6 their respective Counsel, that the certifi- 7 cation, sealing and filing of the within 8 examination will be and the same are hereby 9 waived; 10 11 IT IS FURTHER STIPULATED AND AGREED 12 that all objections, except as to the form 13 of the question, will be reserved to the 14 time of the trial; 15 16 IT IS FURTHER STIPULATED AND AGREED 17 that the within examination may be signed 18 before any Notary Public with the same 19 force and effect as if signed and sworn to 20 before this Court. 21 22 23 24 25</p>
<p style="text-align: right;">Page 2</p> <p>1 2 APPEARANCES: 2 3 4 GREGORY ANTOLLINO, ESQ. 5 Attorney for the Plaintiff 6 18-20 West 21st Street - Suite 802 7 New York, New York 10010 8 9 ZABELL & ASSOCIATES, P.C. 10 Attorneys for the Defendants 11 4875 Sunrise Highway - Suite 300 12 Bohemia, New York 11716 13 BY: SAUL D. ZABELL, ESQ. 14 15 ALSO PRESENT: 16 JOHN SANCHEZ, ESQ. 17 DONALD ZARDA 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 4 3 (At this time, a ruling was sought from 4 Judge Joseph Bianco via conference call.) 5 COURT CLERK: Please state your 6 appearances. 7 MR. ANTOLLINO: Gregory Antollino, 8 counsel for the plaintiff, Donald Zarda. 9 Good afternoon, Your Honor. 10 JUDGE BIANCO: Good afternoon. 11 MR. ZABELL: For the defendants, Saul 12 Zabell, from the law firm of Zabell and 13 Associates, attorneys for the defendants. 14 Good afternoon, Your Honor. 15 JUDGE BIANCO: Good afternoon. 16 My understanding is the issue is 17 regarding a deposition? 18 MR. ANTOLLINO: Yes, Judge. 19 JUDGE BIANCO: What's the issue? 20 MR. ANTOLLINO: The Issue is this. I 21 have two non-party witnesses who I have 22 subpoenaed. Both have information about the 23 same transaction and occurrence, and I don't 24 want the first witness listening to the 25 second witness' testimony or vice versa. Rule 615 specifically applies to this, the</p>

1 (Pages 1 to 4)

Page 45

1 Rosana Orellana 45

2 A It didn't loosen the tension, but we're

3 not -- but me and my boyfriend aren't -- we can

4 take a joke.

5 Q Did you both laugh at that?

6 A Yes.

7 Q Did you have a response or did you just

8 laugh?

9 A I probably just laughed, yes.

10 Q Did your boyfriend laugh?

11 A Yes, he laughed.

12 Q So who went out of the plane first, was

13 it your boyfriend and his instructor or was it you

14 and --

15 A My boyfriend and his instructor.

16 Q So you saw him descend from the plane,

17 and how soon after did you descend from the plane?

18 A I don't remember.

19 Q Was it more than a minute?

20 A Roughly a minute. You know, we have to

21 give them some time, you know, I guess to fall,

22 so....

23 Q Certainly no more than five minutes?

24 A I'd say no.

25 Q So at some point you descended from the

Page 46

1 Rosana Orellana 46

2 open plane, correct? ...

3 A Yes.

4 Q How did that feel?

5 MR. ZABELL: Objection to the form.

6 You may answer.

7 A How did it feel?

8 Q Yes.

9 A As far as my feelings or on my body

10 or --

11 Q Let's start with physical feelings.

12 How did it feel physically?

13 A Physically, couldn't breathe. I mean,

14 there is a lot of air up there.

15 Q Was that something that you thought

16 that Don was doing wrong or you just thought

17 that it was the way that worked?

18 A It's probably the way that it worked.

19 Q Emotionally how did you feel?

20 A Emotionally -- well, at that point we

21 had -- I'd felt -- we had an incident on the

22 plane, so, I mean, I didn't really think about it,

23 you know, emotionally.

24 Q Wait a minute. You had an incident on

25 the plane?

Page 47

1 Rosana Orellana 47

2 A Yes.

3 Q What was the incident on the

4 plane?

5 A He had his hand on my hip, I remember

6 that, and I remember him resting his chin on my

7 shoulder, and he was being a little flirtatious.

8 Q Don was being flirtatious?

9 A Yes.

10 Q In what way?

11 A Like I said, he had his hand on my hip,

12 and I felt a little uncomfortable, and he was

13 resting his chin on my shoulder.

14 Q Anything else?

15 A That's all I remember.

16 Q Did you tell him that you felt

17 uncomfortable?

18 A No.

19 Q Why not?

20 A Because I'm about to throw myself out

21 of a plane, so I don't think it's the appropriate

22 time.

23 Q So he had his hand on your hip and his

24 chin on your shoulder?

25 A Yes.

Page 48

1 Rosana Orellana 48

2 Q And you didn't say anything, but you

3 felt uncomfortable?

4 A Yes.

5 Q Was there anything else that made you

6 feel uncomfortable?

7 A That was it that made me feel

8 uncomfortable.

9 Q When you said he was being flirtatious,

10 what do you mean by that?

11 A He was kind of putting his finger on

12 his lip, you know, just the way -- I'm sure you

13 know what flirtatious is. He was kind of like

14 being flirtatious.

15 What really bothered me was just really

16 the hand on my hip, which I felt he shouldn't put

17 -- rest put his hand on my hip, and resting his

18 chin on my shoulder.

19 Q So really it was the hand on the hip

20 and the chin on the shoulder?

21 A Yes.

22 Q And you said he was touching his lips?

23 A Yes.

24 Q And you felt that --

25 A He was -- you know, I feel like you

12 (Pages 45 to 48)

Page 49

1 Rosana Orellana 49
 2 should maintain some sort of professionalism when
 3 you're -- I didn't mind the jokes, I just felt
 4 like he should have been a little more
 5 professional.
 6 Q In what way was touching his lips
 7 unprofessional?
 8 A His face is very close to mine, so, I
 9 mean, if he's doing that, it just makes me feel a
 10 little awkward when I'm strapped to him.
 11 Q I thought you had some distance between
 12 you.
 13 A I was sitting in front of him, he was
 14 sitting right behind me. I wasn't sitting on him,
 15 but there was very little distance. But if he
 16 could reach and rest his chin on my shoulder, he
 17 must have been close enough.
 18 Q Out of the corner of your eye you
 19 remember seeing him touch his lips?
 20 A Yes. And he was resting his chin on my
 21 shoulder. If he was resting his chin on my
 22 shoulder, he was close.
 23 Q Did you mention anything to him about
 24 touching his lips and that you thought that was
 25 unprofessional?

Page 50

1 Rosana Orellana 50
 2 A No.
 3 Q Why not?
 4 A Because I am about to throw myself out
 5 of a plane. I don't think it's the appropriate
 6 time.
 7 Q Was there anything else that Don did
 8 that made you feel uncomfortable?
 9 A Yes, when we were free falling.
 10 Q Yes?
 11 A There's a point where when you let the
 12 chute go out, you have time to talk and, you know,
 13 he -- I remember him telling me two things.
 14 I remember him telling me, I hope I
 15 didn't make you uncomfortable on the plane, I'm
 16 gay, and I remember him telling me that he had
 17 recently broken up with his boyfriend, and that's
 18 all I remember from that conversation.
 19 Q Let me just get a picture of this in my
 20 mind.
 21 This is before he pulled the parachute
 22 to go up or after?
 23 A After.
 24 Q So he pulled the parachute, it went up,
 25 and you remember him saying, one, I hope I didn't

Page 51

1 Rosana Orellana 51
 2 make you feel uncomfortable on the plane, and I
 3 just broke up with my boyfriend, something like
 4 that?
 5 A Yes.
 6 Q Why is it you remember that?
 7 A Because I felt uncomfortable when he
 8 said it, so it just stuck to my -- you know, just
 9 stuck with me.
 10 Q There's basically three things he said.
 11 He said first, I hope I didn't make you feel
 12 uncomfortable, second, I'm gay, and third, I
 13 recently broke up with my boyfriend.
 14 Would you agree with that?
 15 A Yes.
 16 Q The first thing he said, I hope I
 17 didn't --
 18 A That was one line, I hope I didn't make
 19 you feel uncomfortable, because I'm gay. It was
 20 all in one sentence.
 21 Q So it was kind of pushed together?
 22 A Yes.
 23 Q Did that make you feel uncomfortable, I
 24 hope I didn't make you feel uncomfortable, I'm
 25 gay?

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1 Rosana Orellana 52
 2 A It made me uncomfortable because -- the
 3 statement itself didn't -- it made me feel
 4 uncomfortable because I wanted to learn about the
 5 scenery, I wanted him to speak about what was
 6 going on around us. I didn't want to hear about
 7 his personal life.
 8 Q How long were you up for when the
 9 parachute went up?
 10 A How long?
 11 Q Yes.
 12 A I mean, it's a couple of minutes -- I
 13 mean, we we're falling for a long time. I don't
 14 remember how long it was.
 15 Q And you expected him to point out
 16 certain sceneries to you?
 17 A Absolutely.
 18 Q Did he point anything out at all?
 19 A No.
 20 Q So you felt uncomfortable because --
 21 not because -- So are --
 22 MR. ZABELL: Are you going to finish
 23 that question or are you abandoning it?
 24 MR. ANTOLLINO: Don't interrupt.
 25 MR. ZABELL: I'm going to object to the

Page 57

1 Rosana Orellana 57

2 Q So when you got up, when you say --

3 when you fell out of the plane, that was about how

4 long?

5 A When I'm falling?

6 Q Yes, falling.

7 A Very short.

8 Q When you went up after he pulled the

9 cord, how long was that?

10 A It was a short moment too, and then you

11 just fall. I just remember falling for a long

12 time.

13 Q Did he make you feel uncomfortable in

14 any way other than when he said these things about

15 how I hope you didn't feel uncomfortable on the

16 plane, I'm gay?

17 A Did he do anything?

18 Q Yes.

19 A The touching on the plane, and then the

20 phrases that I let you know.

21 Q What did you think he was referring to

22 when he said, I hope I didn't make you feel

23 uncomfortable?

24 A What did I think?

25 Q Yes.

Page 58

1 Rosana Orellana 58

2 A Probably the jokes and probably the way

3 he was acting.

4 Q So the joke was something, according to

5 what you believe -- Withdrawn.

6 You believed that --

7 MR. ZABELL: Are you taking down --

8 MR. ANTOLLINO: Withdrawn.

9 Counsel, stop interrupting.

10 MR. ZABELL: You don't have a right to

11 withdraw things that are in the deposition.

12 You can say, I would like to withdraw that

13 question, but it still gets written in the

14 record that you're withdrawing that. But I'm

15 just confirming that in the record.

16 Q You said the jokes were something you

17 might be --

18 A I wasn't personally upset about the

19 jokes, I was upset about the touching and my free

20 fall.

21 Q Why didn't you get upset about the

22 jokes?

23 A Because I can take a joke.

24 Q But wasn't that about your personal

25 life?

Page 59

1 Rosana Orellana 59

2 A No, not really. It was -- all of them

3 were joking, and we can take jokes. You know,

4 we're young people too, I can take a joke.

5 Q Well then, why, can't you take

6 information about his personal life when you're

7 free falling?

8 A Because that doesn't concern me.

9 Q Well, does your relationship with your

10 boyfriend concern him?

11 A Probably not.

12 Q So what's the difference between the

13 two?

14 A I wasn't -- he is on the job, he is

15 working, he is customer service. He has to make

16 people happy, and I'm sure people don't want to

17 hear about his personal life.

18 Q But they were joking about your

19 personal life. Isn't there a chance that that

20 made you unhappy?

21 A I'm not working, they are working.

22 Q But it was them joking about your

23 personal life up in the plane, isn't that correct?

24 A Everyone was joking, it was funny, and

25 then they crossed the line.

Page 60

1 Rosana Orellana 60

2 Q And the crossing of the line was

3 mentioning that he was gay?

4 A The crossing of the line was when he

5 put his hand on my hip and his chin on my

6 shoulder, and then talking about his personal

7 life. Not necessarily that he was gay, it was

8 just talking about his life.

9 Q Talking about his life was not okay,

10 but talking about your life was okay?

11 A I wasn't talking about my life, they

12 were talking about my life.

13 Q But that was okay?

14 A It wasn't that it was okay, it's just

15 that I can take a joke.

16 Q I don't understand what's the

17 difference between it not being okay and being

18 able to take a joke.

19 A Because I am not working there.

20 Q But they are the ones who are making

21 the jokes, right?

22 A What could I do?

23 Q So was it okay or not okay for them

24 making jokes about your personal life?

25 A It was --

Page 89

1 Rosana Orellana 89

2 Q Using that definition, did Don tell you

3 anything about his personal escapades that you can

4 recall? Did Don tell you about any action that

5 runs counter to approved conduct?

6 A No. The only thing he told me was that

7 he had recently broken up with his boyfriend and

8 he said he hoped he didn't offend me on the plane.

9 Q When you said that Don was flirting

10 with you, did you think he was trying to come on

11 to you?

12 A No.

13 Q Was he sexually harassing you?

14 A It's a form of sexual harassing. Yes.

15 Q In what way?

16 A He has his hip on my -- his chin on my

17 shoulder and his hand on my hip.

18 Q That was sexual harassment in what way?

19 A I didn't give him permission to do

20 that.

21 Q Well, you signed this agreement, didn't

22 you? You signed this agreement, correct?

23 A That says we are going to be in close

24 proximity, but it doesn't mean that somebody is

25 going to rest their chin on my shoulder.

Page 90

1 Rosana Orellana 90

2 Q Were you aware that close proximity of

3 the harness has a hip attachment point that

4 required him to attach his harness to yours at the

5 hip?

6 A At the hip?

7 Q Yes.

8 A Yes.

9 Q In fact, the briefing video that you

10 saw before you went on the jump showed you that

11 you would be attached at the hip, correct?

12 A Yes.

13 MR. ZARDA: Can I ask you a question?

14 MR. ANTOLLINO: No. Shut up.

15 MR. ZABELL: You can excuse yourself if

16 you like.

17 MR. ANTOLLINO: We will in a second.

18 MR. ZABELL: You don't have to tell

19 your client to shut up.

20 MR. ANTOLLINO: I know him well enough

21 that I can say that.

22 Q Did Don say anything to you regarding,

23 don't worry about how close I am because I'm gay?

24 Did he say something like that?

25 A I don't remember.

Page 91

1 Rosana Orellana 91

2 MR. ANTOLLINO: Let me just go outside

3 with Don and we'll go over some things, and

4 we're almost done.

5 (Whereupon, a short break was taken.)

6 MR. ANTOLLINO: So I'm going to deem

7 marked file VTS_01_1 -- Are you on the phone,

8 Counsel?

9 MR. ZABELL: No.

10 MR. ANTOLLINO: I can hear your

11 phone --

12 MR. ZABELL: I'm not on the phone,

13 Counselor.

14 MR. ANTOLLINO: Are you done?

15 MR. ZABELL: Go ahead.

16 MR. ANTOLLINO: I'm deeming marked

17 VTS_01_1.VOB dated February 19th, 2011, 171.1

18 megabytes, as Plaintiff's Exhibit 3.

19 (Whereupon, the DVD was deemed marked

20 as Plaintiff's Exhibit 3 for identification,

21 as of this date.)

22 MR. ZABELL: I just ask that you

23 prepare a copy for me of what is being

24 admitted into evidence here.

25 MR. ANTOLLINO: The problem with that

Page 92

1 Rosana Orellana 92

2 is I tried it with this, but I have the

3 transferred file.

4 MR. ZABELL: Just as long as you send

5 me a copy of the transferred file so we all

6 know we're looking at the same thing.

7 MR. ANTOLLINO: I'm looking at this

8 file and making it bigger. I tried several

9 times to make it bigger. I can't make it

10 bigger.

11 I'm going to go on the other side to

12 look at the video with you.

13 MR. ZABELL: Counsel, you have to make

14 sure you don't lean over the deponent.

15 If he makes you feel uncomfortable,

16 just move closer to me.

17 Q Is that Mr. Kengle you see?

18 A Yes.

19 Q It appears that he is at Skydive Long

20 Island?

21 A Yes.

22 Q Am I making you uncomfortable?

23 A A little bit.

24 Q How far would you like me to get from

25 you?

Page 97

1 Rosana Orellana 97

2 A Certain instructions?

3 Q Yes.

4 A Yes.

5 Q Did you want those instructions to be

6 clearly understood by you?

7 A Yes.

8 Q Did you want Don to make sure that you

9 clearly heard the instructions?

10 A Yes.

11 Q Did you want him to yell the

12 instructions at you?

13 A Loud enough so I could hear them.

14 Q Did you show anyone your video?

15 A Anyone else?

16 Q Yes. Other than your boyfriend's

17 grandmother.

18 A His parents. I believe I showed his

19 parents.

20 Q When was that?

21 A I don't remember the exact date.

22 Q Did you show anyone else?

23 A I believe that's it. I'm not sure if I

24 showed anybody else.

25 Q Do you know if Mr. Kengle asked for his

Page 98

1 Rosana Orellana 98

2 money back from Mr. Maynard?

3 A No.

4 Q Did Mr. Maynard offer him a free jump?

5 A I -- No, he didn't.

6 Q How do you know that?

7 A He didn't tell me about it, so I'm

8 assuming.

9 Q If Don had yelled at you in the

10 airplane, do you think that would have been

11 professional?

12 A If it's loud and it's for my safety,

13 yes.

14 Q Would you want him to use his judgment

15 as to how you can best understand his

16 instructions?

17 A Yes.

18 Q Did you get all of the instructions

19 that you needed to get in order to complete the

20 dive safely?

21 A Yes.

22 Q Were there any times that Mr. Zarda

23 moved closer to you to whisper into your ear or to

24 speak clearly into your ear in giving those

25 instructions?

Page 99

1 Rosana Orellana 99

2 A I don't remember.

3 Q You talked earlier about being

4 claustrophobic. Have you ever been diagnosed with

5 claustrophobia?

6 A No.

7 Q When you say you are, is it just -- I

8 mean, when did you learn that you were

9 claustrophobic?

10 A I'm not -- I haven't been diagnosed

11 that I'm claustrophobic, I just don't like being

12 in small spaces, you know.

13 Q This airplane was a very small space,

14 correct?

15 A Yes.

16 Q And you were strapped very tightly to

17 someone you had never met before, correct?

18 A Yes.

19 MR. ANTOLLINO: Nothing further.

20 MR. ZABELL: I have a few questions.

21 EXAMINATION BY SAUL D. ZABELL, ESQ.:

22 Q How are you, Ms. Orellana?

23 A Very good.

24 Q Ms. Orellana, did you have any issue

25 with Don Zarda's sexuality once he disclosed it to

Page 100

1 Rosana Orellana 100

2 you?

3 A No.

4 Q Did you have an issue with the fact

5 that he disclosed it to you?

6 A Yes.

7 Q Why is that?

8 A Because I didn't care. You know, I

9 didn't care if he was straight or gay or -- I

10 didn't care about his personal life.

11 Q Now, you were shown a video of your

12 jump, is that correct?

13 A Yes.

14 Q Did that video contain every minute

15 that you were strapped to Mr. Zarda?

16 A No.

17 Q Did you care that you were strapped to

18 Mr. Zarda?

19 A No.

20 Q Did you care that you were close to Mr.

21 Zarda?

22 A No.

23 Q Well, what was it about contact with

24 Mr. Zarda that bothered you?

25 A His hand on my hip, it was resting on

Page 101

1 Rosana Orellana 101

2 my hip, and he put his chin on my shoulder.

3 Q Could you describe how he put his chin

4 on your shoulder?

5 A Yes. It was resting on my shoulder.

6 MR. ZABELL: Let the record reflect Ms.

7 Orellana moved in about six to eight inches

8 with her chin indicating that it was his chin

9 moved forward.

10 Q Did you find anything inappropriate

11 about him resting his chin on your shoulder?

12 A Yes.

13 Q What was that?

14 A It was unnecessary.

15 Q Did you find anything inappropriate

16 with Mr. Zarda putting his hand on your hip?

17 A Yes.

18 Q What was that?

19 A It was unnecessary. I mean, he didn't

20 have to rest his hand on my hip. Once you're

21 fastened, you're fastened and you can put your

22 hands on your side.

23 Q Did there come a time that it appears

24 that Mr. Zarda had crossed the line to you?

25 A No.

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1 Rosana Orellana 102

2 Q Did there come a time where he

3 apologized for his conduct?

4 A Yes.

5 Q When was that?

6 A When we were free falling.

7 Q What did he say to you?

8 A He apologized for -- he said, don't

9 worry, I hope you didn't get offended, because I'm

10 gay, what happened on the plane.

11 Q Before he disclosed to you his

12 sexuality, did you know what his sexuality was?

13 A No.

14 Q Did you care what his sexuality was?

15 A No.

16 MR. ZABELL: Thank you. I have no

17 further questions.

18 MR. ANTOLLINO: When you say he

19 apologized for his conduct, do you know if he

20 was referring to the comments that were made

21 or these allegations that you've made about

22 the chin and the hips?

23 THE WITNESS: I don't know.

24 MR. ANTOLLINO: Nothing further.

25 MR. ZABELL: Would you like to conclude

Page 103

1 Rosana Orellana 103

2 today's deposition?

3 MR. ANTOLLINO: Yes.

4 MR. ZABELL: Just put so we're assured

5 a plain simple statement on the record

6 concluding today's deposition.

7 MR. ANTOLLINO: I have no further

8 questions. I said that already.

9

10

11

12

13 (Continued on following page to

14 allow for signature and jurat.)

15

16

17

18

19

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21

22

23

24

25

Page 104

1 Rosana Orellana 104

2 MR. ZABELL: Very well. Then it

3 appears as if the deposition of Ms. Orellana

4 is concluded.

5 (Whereupon, the examination of

6 this witness was concluded at 3:35 P.M.)

7

8 * * * *

9

10 STATE OF NEW YORK)

11)ss.:

12 COUNTY OF)

13 I have read the foregoing record of my

14 testimony taken at the time and place noted in the

15 heading hereof and I do hereby acknowledge it to

16 be a true and correct transcript of same.

17

18 _____

19 ROSANA ORELLANA

20 Subscribed and sworn to

21 before me on this _____ day

22 of _____, 2011.

23

24 _____

25 NOTARY PUBLIC

26 (Pages 101 to 104)

EXHIBIT E

EXHIBIT E KENGLE DEP.

0001
 1 1
 2
 3 UNITED STATES DISTRICT COURT
 3 EASTERN DISTRICT
 -----X
 4
 5 DONALD ZARDA,
 6
 Plaintiff,
 6
 - against - INDEX NO.:
 7 CV-10-4334
 ALTITUDE EXPRESS, INC., d/b/a
 8 SKYDIVE LONG ISLAND AND RAY MAYNARD,
 9 Defendants,
 10 -----X
 11
 Bee Reporting Agency, Inc.
 12 800 Veterans Memorial Highway
 Hauppauge, New York
 13 November 9, 2011
 3:39 P.M.
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 17 EXAMINATION BEFORE TRIAL OF DAVID
 18 KENGLE, a non-party witness, taken by the
 19 attorney for the Plaintiff, pursuant to Subpoena,
 20 and held before Deborah Thier, a Notary Public of
 21 the State of New York at the above-stated time and
 22 place.
 23

* * * * *

0002
 1 2
 2 APPEARANCES:
 3
 4 GREGORY ANTOLLINO, ESQ.
 Attorney for the Plaintiff
 5 18-20 West 21st Street - Suite 802
 New York, New York 10010
 6
 7
 8 ZABELL & ASSOCIATES, P.C.
 Attorneys for the Defendants
 4875 Sunrise Highway - Suite 300
 9 Bohemia, New York 11716
 10 BY: SAUL D. ZABELL, ESQ.
 11
 12 ALSO PRESENT:
 13 JHON SANCHEZ, ESQ.
 DONALD ZARDA
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0003
 1 3
 2 FEDERAL STIPULATIONS
 3
 4 IT IS HEREBY STIPULATED AND AGREED,
 5 by and between the parties hereto, through
 6 their respective Counsel, that the certifi-
 7 cation, sealing and filing of the within
 8 examination will be and the same are hereby
 9 waived;
 10
 11 IT IS FURTHER STIPULATED AND AGREED
 12 that all objections, except as to the form
 13 of the question, will be reserved to the
 14 time of the trial;
 15
 16 IT IS FURTHER STIPULATED AND AGREED
 17 that the within examination may be signed
 18 before any Notary Public with the same
 19 force and effect as if signed and sworn to
 20 before this Court.
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0004
 1 4
 2 DAVID KENGLE,
 3 The witness herein, having first been duly
 4 sworn by Deborah Thier, a Notary Public in and
 5 for the State of New York, was examined and
 6 testified as follows:
 7 DIRECT EXAMINATION BY GREGORY ANTOLLINO, ESQ.:
 8 Q Please state your name for the record.
 9 A David Kengle.
 10 Q What is your address?
 11 A 9 Garfield Place, East Northport, New
 12 York, 11731.
 13 Q Good afternoon, Mr. Kengle. My name is
 14 Greg Antollino.
 15 A Good afternoon.
 16 Q I'm going to be asking you some
 17 questions today.
 18 MR. ZABELL: I should point out that
 19 Mr. --
 20 MR. ANTOLLINO: Would you not
 21 interrupt.
 22 MR. ZABELL: Mr. Kengle has agreed to
 23 provide testimony as long as he's provided
 24 with a copy of his deposition transcript to
 25 review prior to signing it.

0021

1 David Kengle 21
2 got a video of your jump?
3 A I got a video.
4 Q Who have you shown that to?
5 A You know, randomly to my family, my
6 parents, grandparents. I don't know. You know,
7 it hasn't really -- big a deal that we make a big
8 mental note of it that we show it to somebody. If
9 somebody asks us about it, we show it. It might
10 just be my family.
11 Q So you saw it about five or six times,
12 would that be fair?
13 A Yeah, five times.
14 Q How many times --
15 A We also watched it ourselves when --
16 ourselves when we got home that night, you know.
17 Q Let's talk about this inappropriate
18 touching.
19 What was inappropriate about what Don
20 was doing?
21 MR. ZABELL: Objection to form. You
22 may answer.
23 A There's a certain way that you, you
24 know, touch a female, you know, especially
25 someone's girlfriend. It's almost like dancing.

0022

1 David Kengle 22
2 You put your hands on their hips and you put, you
3 know, your chin on their shoulder like in a very
4 casual cavalier way.
5 When I noticed that he's talking, you
6 know, he's touching his hips in like a -- it's a
7 provocative way of doing things. I mean, I'm not
8 -- I don't know if that's a matter of opinion or
9 not, but if you ask most people, they would feel
10 uncomfortable with them acting like that with
11 their significant other.
12 Q Let's break it up one by one.
13 Where were you situated in the plane
14 that you could see Don touching his lips?
15 A Let's see. If I was in the plane -- If
16 we entered the plane and now, let's say, I'm
17 facing forward, I'm on the left side of the plane,
18 and I believe I was in the very last seat. So I'm
19 pretty sure Roxie was just slightly to my
20 right-hand corner. I don't believe she was
21 directly next to me, I believe there was somebody
22 there, and she was right in front of that person.
23 So it's kind of like -- it was slightly
24 to my left-hand corner, but not so much the
25 corner. I couldn't see her front as well, just at

0023

1 David Kengle 23
2 a little bit of an angle.
3 Q What did you see Don do?
4 A Well, the first thing I noticed was
5 that he had his hands on her hips. Now, I
6 understand that you have to harness, it requires,
7 you know, clipping, but that's it. I mean, I sat
8 there for the entire time with my guy and he
9 didn't put his hands on me. He didn't have to
10 hold me like this. It was just an unnecessary
11 thing. So you're thinking to yourself, why is he
12 touching her like this.
13 MR. ZABELL: Let the record reflect
14 when the deponent said, like this, he had
15 both hands on his hips.
16 Q So you saw Don putting his hands on
17 Rosana's hips --
18 A Right.
19 Q -- from where you were situated?
20 A Right.
21 Q How long were they there for?
22 A I mean, I felt practically the whole
23 time he was just holding her. It was like he was
24 holding her, that's what I mean. It wasn't like I
25 with my instructor. He was sitting behind me and

0024

1 David Kengle 24
2 I was sitting in front of him, but he wasn't
3 holding me. We happened to be latched together,
4 but with him, with Don and my girlfriend, he was
5 holding her the entire time.
6 Q Did you say anything?
7 A No, I didn't. Normally that would be
8 -- you know, I mean, I'm very vocal. I'm used to
9 -- my girlfriend is a very beautiful girl. I'm
10 used to her getting attention. So I wouldn't feel
11 uncomfortable voicing myself, but under this
12 particular set of circumstances, getting ready to
13 jump out of a plane, it's not something I can deal
14 with at the time.
15 Q Why?
16 A Because I'm about to jump out of a
17 plane. I didn't feel comfortable -- I mean,
18 you're a little nervous about the actual jump the
19 first time you're doing it, and also your
20 instructors, you have to trust them. I mean, they
21 aren't the type of people you want to have a
22 confrontation with right before you're about to
23 jump out of a plane. I mean, he wasn't my
24 instructor, but it didn't seem like the time and
25 place.

0025

1 David Kengle 25
 2 Q Had you ever been up in a plane before?
 3 A Plane skydiving, no.
 4 Q Had you ever taken any course in how
 5 it's appropriate to touch a person who's tandem
 6 skydiving?
 7 A Have I ever taken a course, no. I
 8 think common sense plays a big role.
 9 Q What does common sense tell you?
 10 A I mean, because I understand the video
 11 tells you there's going to be contact and the form
 12 tells you there's going to be contact, but all
 13 contact doesn't mean it's legitimate touching.
 14 But he can't grab her chest or breast and say --
 15 I'm not saying he did that, but there's definitely
 16 a line in the sand, as far as what's appropriate
 17 and not. Just because there's contact involved
 18 doesn't mean all contact, anything goes.
 19 Q So it depends on the circumstances?
 20 A Yeah, of course.
 21 Q If your girlfriend's safety were at
 22 issue, you'd want him to hold her breast?
 23 A If it meant saving her life, yes.
 24 MR. ZABELL: Don't answer his questions
 25 like you're having a conversation.

0026

1 David Kengle 26
 2 THE WITNESS: Sure.
 3 Q What did you see Don doing with his
 4 lips?
 5 A I noticed he was putting his finger
 6 kind of in his mouth. He was talking kind of like
 7 this to me. It's a little provocative. I mean,
 8 it's a form of flirting, if you ask me, and that's
 9 my opinion, and I noticed on the video, I guess
 10 maybe I couldn't see his eyes, you know, the angle
 11 as well, but when I was watching the video, we
 12 noticed that not only was he doing that into the
 13 camera for a brief second, but he was also kind of
 14 going like this to the camera guy like this, as if
 15 to say, you know, check it out. So I think that
 16 added to my feelings of being uncomfortable with
 17 it.
 18 MR. ZABELL: Let record reflect the
 19 deponent was shaking his head in a gesturing
 20 manner.
 21 Q You felt that what he did was sexually
 22 harassing of Rosana?
 23 A Well, I mean, I don't know the legal
 24 definition of sexual harassment, if it's a
 25 textbook -- you know, if it qualifies for that

0027

1 David Kengle 27
 2 extreme a term, but it was -- made us feel
 3 uncomfortable enough to complain about it and it
 4 was inappropriate.
 5 So, I mean, is everything inappropriate
 6 sexual harassment, I don't know, but it was
 7 definitely inappropriate in my opinion, and being
 8 that I was a paying customer, I felt that I should
 9 complain about it.
 10 Q You say he was touching his lips. Was
 11 there anything else other than touching his lips
 12 or touching your girlfriend's hips that you felt
 13 was inappropriate?
 14 A And he rested his chin on her shoulder
 15 at a certain point, again, in a very familiar way
 16 of interacting with somebody you just met, and
 17 again, my instructor did not at any point put his
 18 chin on my shoulder. He did not put his hands on
 19 my lips and he did not touch his lips and wiggle
 20 his tongue around when he was talking to me, and
 21 he was, my impression in the camera, you know,
 22 look at this, guy. It was very unique what I was
 23 seeing going on between Zarda and my girlfriend.
 24 Q So you thought that he was flirting
 25 with Rosana?

0028

1 David Kengle 28
 2 A Yes.
 3 Q Did you think he was sexually
 4 attractive to Rosana?
 5 A I don't know. I can't testify as to
 6 how he felt.
 7 Q Well, did it appear that he was
 8 sexually attracted to Rosana?
 9 A I honestly don't know.
 10 Q Based on what it appeared, not what he
 11 was actually feeling, what did it appear to you?
 12 A It appeared like he was being flirty.
 13 Now, one, he could have been flirty
 14 because he was sexually attracted to her, he could
 15 have been flirty just because he was showing off
 16 in front of his co-instructors, or he could have
 17 just been a flirty person. Some people are just
 18 flirty. I don't know why he was being like that,
 19 but that was the way he was --
 20 Q Was there anything --
 21 MR. ZABELL: Wait a minute, Counsel,
 22 you have to let him finish answering.
 23 MR. ANTOLLINO: You know what, I
 24 thought he was finished.
 25 A It was my fault.

0029

1 David Kengle 29
 2 Q Do you have anything more to say?
 3 A I assume that he motioned -- the way
 4 that he motioned in the video was if to say that's
 5 usually the way -- I mean, I know guys, that's a
 6 group of guys, you know, motioning, oh, check this
 7 girl out, she's attractive. So the fact he's
 8 motioning, kind of signaling she's attractive, I
 9 would assume that he found her attractive.
 10 Q How did you learn about Skydive Long
 11 Island?
 12 A I think I Googled Skydive Long Island.
 13 I wanted to go skydiving on Long Island.
 14 Q Did you pay cash or credit?
 15 A Cash I'm pretty sure. Yeah, it must
 16 have been cash.
 17 Q You jump out of the plane and you land
 18 on the ground. What happened then?
 19 A Well, I landed first because I jumped
 20 first. So there was a -- you know, I was waiting
 21 for Rosana to land. She finally landed. We, you
 22 know, finished up.
 23 We were both a little taken aback with
 24 the whole thing. We handed in our equipment. We,
 25 you know, got our stuff and we left.

0030

1 David Kengle 30
 2 When we were driving home, I asked her,
 3 you know, what did you think, how was your
 4 experience. The experience was mostly for her, it
 5 was her birthday, it was something she wanted to
 6 do. I mean, I kind of wanted to skydive myself,
 7 but it was mostly for her.
 8 The first thing she said was, I would
 9 have liked it better if I had a different
 10 instructor, and I said, I noticed, he made me feel
 11 uncomfortable too, and she said, yeah, after we
 12 jumped, when he pulled the chute and we were
 13 floating down, we were talking about different
 14 things, and I was like, what do you mean, and he
 15 just kept mentioning his personal life -- I mean,
 16 his sex life. I don't think he got graphic.
 17 He mentioned -- I think he was
 18 apologizing about whatever, because -- he claimed
 19 that, you know, I hope I didn't make you feel
 20 uncomfortable, you know, like reassuring, and I
 21 think he was talking about his boyfriend or
 22 ex-boyfriend and like -- I don't know. This is
 23 what she said.
 24 So then I felt, you know, extra
 25 uncomfortable, because it added to what I had

0031

1 David Kengle 31
 2 already felt was inappropriate. So now you're
 3 talking about extra inappropriate behavior here.
 4 We went about the rest of our day.
 5 Like I said, it was her birthday. We went out for
 6 dinner, we went out for the night, and the more I
 7 thought about it -- and especially we paid
 8 whatever it was, eight, nine hundred dollars to go
 9 skydiving, and I felt it was not -- you know, that
 10 that was inappropriate for what we were paying for
 11 it. You know, the overall experience I felt was
 12 tainted because of the incidents described.
 13 So after thinking about it for a day, I
 14 decided to make a phone call, and I called Skydive
 15 Long Island. I believe I talked to a female
 16 worker there that took my story and let me know
 17 that she would pass the information along, and she
 18 was very upset about what I was telling her.
 19 She then, I guess, told the owner,
 20 because the owner contacted me by that day -- by
 21 the end of the day and, you know, he told me that
 22 he was very unhappy to hear -- you know, I told
 23 him the story pretty much as I just told you and,
 24 you know, he -- I'm trying to remember if he --
 25 'cause I answered you before that I only talked to

0032

1 David Kengle 32
 2 him once, but I'm trying to remember if we only
 3 had the one conversation or if he told me he was
 4 going to look into it and get back to me. I'm not
 5 a hundred percent. But by that day he had
 6 basically let me know, you know, that he was
 7 really sorry.
 8 At first he said if we are ever
 9 interested in coming back for a second jump, he'd
 10 make sure we had a better experience. I told him
 11 we weren't really interested in -- we just kind of
 12 planned it for a special occasion, it's not the
 13 type of thing we're going to do every weekend or
 14 -- at that point he offered to refund our money
 15 because he was so upset with the fact that we had
 16 such a horrible experience.
 17 Q What did you say?
 18 A I told him that, you know, I appreciate
 19 that. I mean, I've worked -- I worked in customer
 20 services and I've seen that done. I definitely
 21 didn't think that was, you know, the wrong
 22 decision for him to make. I understand. Did he
 23 have to do that, no. I mean, I just -- it said a
 24 lot about his character, the fact he was willing
 25 to refund our whole money just because of the

0061

1 David Kengle 61
2 A Well, as I said the first time you
3 asked me this, I believe that he was covering his
4 bases in the fact that he thought there was
5 something inappropriate in the plane. It could
6 have been the jokes or the contacts or a
7 combination of two, but he was aware there was
8 something inappropriate and he felt it was
9 justified because he was gay. That's what I get.
10 Q Do you understand what is inappropriate
11 in terms of what an instructor is to do to strap
12 in or in terms of how to maintain proximity?
13 A I understand.
14 Q Do you understand anything about what's
15 appropriate in terms of a tandem instructor in
16 terms of how to strap a person in and how to
17 maintain proximity?
18 A Do I understand how to strap persons in
19 in terms of proximity? I don't have an
20 understanding of the procedures they're trained
21 in, as far as attaching gear or a harnessing or
22 what their physical actions are supposed to be in
23 terms of protocol, no, I don't have an
24 understanding of that.
25 I do have an understanding of proper

0062

1 David Kengle 62
2 behavior in, you know, an ethical sense of any
3 situation as far as -- you know, I mean, if
4 somebody kisses my girlfriend, is it because I
5 don't have an understanding of skydiving protocol
6 that's not inappropriate or grabbed her backside.
7 Like I said before, I have an understanding of
8 what I believe is inappropriate for any situation
9 in terms of that.
10 Q Is there any allegation that my client
11 kissed your girlfriend?
12 A No. I was using a metaphor.
13 Q Is there any allegation that my client
14 touched your girlfriend's backside?
15 A No.
16 Q For all you know, it could be a
17 procedure for instructors to remain attached by
18 the hands to the client's hips, for all you know,
19 correct?
20 A For all I know, but from what I
21 witnessed on the plane, the other instructors,
22 nobody else was doing it except him. So, I mean,
23 am I inclined to believe that he was the only one
24 following the correct procedure or am I inclined
25 to believe everybody else was doing it the right

0063

1 David Kengle 63
2 way and he was not doing it the correct way?
3 Q How many instructors were on the plane?
4 A Off the top of my head, at least five,
5 six, seven.
6 Q You don't know how much experience any
7 of those instructors had, correct?
8 A Well, I remember asking an instructor,
9 I don't think it was my instructor, I think it was
10 while we were waiting outside for our jump and we
11 had time to kill, I believe I was asking somebody
12 that worked there how much experience you had to
13 have in order to be an instructor or even just
14 jump without a tandem. So they gave me the
15 answer. You know, ten jumps before you can jump
16 alone and ten thousand hours to be an instructor.
17 Q So you don't know how many hours any of
18 those instructors had, correct?
19 A No.
20 Q You don't know how many jumps any of
21 those instructors had done, correct?
22 A Right, including your client, no.
23 Q So you don't know if the other
24 instructors you saw other than my client were
25 acting appropriately or not according to

0064

1 David Kengle 64
2 procedures for tandem instructors, correct?
3 A I'm sorry?
4 MR. ANTOLLINO: Could you read it back.
5 (Whereupon, the requested section was
6 read back by this reporter.)
7 A I feel like you're asking me do I know
8 whether or not my instructor not touching me by
9 the hips or the other instructors not instructing
10 him -- not putting their clips on their students
11 -- I feel like you're asking me whether or not
12 that was correct protocol. I don't know if --
13 Q I asked you a question and she read it
14 back.
15 A I don't understand your question.
16 Q Doesn't matter what the meaning is.
17 A I feel its meaning is not -- the
18 question is not clear.
19 Q You don't know if any of those four
20 instructors other than my client followed proper
21 procedure at all?
22 MR. ZABELL: Objection to the question.
23 Q You can answer.
24 A From what I experienced and what I saw,
25 based on the video -- they were moving in sync

0065

1 David Kengle 65
2 with what I saw in the video. They were following
3 the procedures outlined in the video.
4 Did I know anything more than that, no.
5 In the video I watched, I didn't see anything
6 necessarily about it's necessary to hold hands on
7 her hip, and the -- put your chin on the neck and
8 touch your lips and roll it around your tongue. I
9 didn't see any of that on the video.
10 Q We're talking about the chin and hips,
11 and you don't know if that was according to
12 protocol or not, correct?
13 A No.
14 Q And you don't know whether the hands on
15 the hips were according to protocol or not, I
16 correct?
17 A No.
18 MR. ANTOLLINO: No further questions.
19 MR. ZABELL: I have a few questions.
20 EXAMINATION BY SAUL D. ZABELL, ESQ.:
21 Q Did your diving instructor rest his
22 chin on your shoulder?
23 A No.
24 Q Did you happen to observe Mr. Zarda
25 resting his chin on Ms. Orellana's shoulder?

0066

1 David Kengle 66
2 A Yes.
3 Q Did it look as if he was nuzzling her?
4 A I don't know about -- I mean, nuzzling
5 I think implies movement. I don't think that
6 there was movement. I think it was, you know,
7 resting more like I'm kind of doing right now in a
8 more familiar way. It was more than just leaning
9 over to whisper instructions or something like
10 that. I don't even think he was talking. I think
11 it was just a very casual cavalier movement to
12 kind of rest your chin on my girlfriend's
13 shoulder. I don't think I would call it nuzzling,
14 I think I would just call it resting.
15 Q Did you happen to recall any other
16 instructors resting their chin on the shoulder of
17 their jumping partner?
18 A No.
19 Q Did you happen to notice any of the
20 other instructors pulling on their lips and
21 motioning towards their dive partners?
22 A No.
23 Q Did your instructor rub his lips and
24 then motion to you?
25 A Not that I recall, no.

0067

1 David Kengle 67
2 Q I think you were trying to say it
3 before, before you were rudely interrupted, that
4 the video only showed a fraction of the actual
5 time that you were on the plane.
6 Is that correct?
7 A Correct.
8 Q And it only showed a fraction of the
9 time that you were descending from the plane, is
10 that correct?
11 A Correct.
12 Q Were there acts that you observed that
13 were inappropriate that were not on the video?
14 A Yes.
15 Q So there was much more contact than
16 just the brief part of the video that you were
17 shown, is that correct?
18 A Yes.
19 Q Did you complain about Mr. Zarda's
20 behavior?
21 A Yes.
22 Q What exactly did you complain about?
23 A I complained that -- I mean, it's like
24 I said, the experience that, you know, we had
25 planned, that we had thought about doing, it was

0068

1 David Kengle 68
2 supposed to be a special kind of experience. It's
3 not something you do everyday. I haven't gone
4 skydiving since, I'd never gone before.
5 This was -- we considered this to be a
6 special kind of thing and a thing we expected to
7 be an expense, so we expected a certain level of
8 quality with the experience, and I think
9 inappropriate behavior affected the quality of the
10 experience.
11 I also understand that, you know, it's
12 not to say that, you know, if the experience was
13 an hour and, you know, fifty-eight minutes of it
14 are -- there's nothing inappropriate, the two
15 minutes that are inappropriate are important, and
16 I feel like me getting subpoenaed here and me
17 having to go through all this when I'm being asked
18 to defend myself, I feel like the fact that I have
19 to explain all this, it seems very common sense to
20 me this is an inappropriate thing, and this is
21 something I wouldn't think twice about complaining
22 about a second time.
23 Q Did you complain because of Mr. Zarda's
24 sexual orientation?
25 A No.