

**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)

**DEFENDANTS' RULE 56.1
STATEMENT OF MATERIAL
FACTS**

Pursuant to Rule 56.1 of the Local Civil Rules of this Court, Defendants Altitude Express, Inc. d/b/a Skydive Long Island and Ray Maynard (collectively "Defendants") submit herewith their statement of material facts which are not in dispute:

Background Information:

1. Altitude Express, Inc. d/b/a Skydive Long Island (hereinafter "SDLI") is a domestic business corporation operating under the laws of the State of New York. (New York State Department of State Entity Information for Altitude Express, Inc., Defendants Exhibit 1).
2. Ray Maynard (hereinafter "Maynard") is the owner and chief executive officer of SDLI. (Maynard Dep. pg. 10:7-9; Def. Ex. 1).
3. Maynard has been skydiving for over forty (40) years. (Maynard Dep. pg. 11:9).
4. Skydiving is a seasonal sport, as such, the skydiving season runs from approximately March to November each year. (Zarda Dep. pg. 286:4-14, 316:13-16). Skydiving can only be performed in good weather: "the sky must be clear, you must have visibility of three statute miles, you must be 500 feet below clouds,

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

5. In 2009, SDLI’s average gross receipts for the slowest six months are less than 33 1/3 % of the average gross receipts for the busiest six months. (SDLI’s Gross Receipts for 2009 (Defendants Exhibit 2)).
6. In 2010, SDLI’s average gross receipts for the slowest six months are less than 33 1/3 % of the average gross receipts for the busiest six months. (SDLI’s Gross Receipts for 2010 (Defendants Exhibit 3)).
7. A typical skydive takes between ten (10) and twenty (20) minutes to complete. (Zarda Dep. pg. 317:20-25). However, a tandem skydive generally takes anywhere from 15 to 20 minutes. (Zarda Dep. pg. 318:20-22).
8. The first priority for the instructor on a tandem jump is safety, the next is making the jump enjoyable for the customer. (Zarda Dep. pg. 140-141:18-6; Winstock Dep. pg. 91:20-22).
9. While the airplane is loud, the instructors “can hear each other speak, it’s not deafening.” (Winstock Dep. pg. 50:22-24).
10. Often jokes are made during the skydive to loosen the tension. (Maynard Dep. pg. 35:2-14, 38:13-18; Winstock Dep. pg. 30:9-12, 31:3-15).
11. These jokes are made to make the situation less tense, “the calmer a passenger is to exiting, generally the safer the skydive will be.” (Winstock Dep. pg. 30:16-22).

Plaintiff's Background Information

12. Plaintiff Donald Zarda (hereinafter "Zarda" or "Plaintiff") resides in Richmond, Missouri. (Zarda Dep. pg. 129:11-12).
13. In 2001, Zarda was an openly gay man, who "came out" sometime between 1999 and 2000. (Zarda Dep. pg. 54:7-12).
14. However, prior to "coming out", Zarda had relationships with women. (Zarda Dep. pg. 54:18).
15. Zarda was first hired by SDLI in the summer of 2001. (Zarda Dep. pg. 56:2-3).
16. Mr. Maynard, the ultimate decision maker, was the person who made the decision to hire Zarda. (Zarda Dep. pg. 56:19-20).
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).
18. After working most of the skydiving season in 2001, Zarda was then terminated from SDLI in September, because of a customer complaint. (Zarda Dep. pg. 57:10-19, 216-217:20-6, 285:11-16).

Activities at SDLI

19. After not working at SDLI for several years, at the end of the skydive season in 2008, Zarda stopped by the drop zone at SDLI to discuss the possibility

of his returning to work at SDLI in 2009. (Zarda Dep. pg. 60-61:12-13; Maynard Dep. pg. 148:24).

20. As a result of these discussions, Maynard decided to re-hire Zarda to work at SDLI for the 2009 summer season (Zarda Dep. pg. 58-59:22-6), as Zarda was a good instructor, a safe instructor, and “a good guy.” (Maynard Dep. pg. 149:9-12).

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

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).

23. However, on July 2, 2009, Zarda fractured his ankle during a landing with a tandem passenger, bringing his jumping season to an early close. (Zarda Dep. pg. 73:7-18, 75:6-22; Maynard Dep. pg. 150:12; Callanan Dep. pg. 44:17-20).

24. After fracturing his ankle, Zarda was put into a cast. (Zarda Dep. pg. 73:19-21). Zarda then showed up at SDLI in a cast. (Winstock Dep. pg. 35:16-20; Callanan Dep. pg. 46:23-24, 47:10-13).

25. Upon noticing the cast, Maynard requested Zarda put a sock over his foot. (Zarda Dep. pg. 347:12-18).

26. Maynard requested the cast be covered up as he did not “appreciate anyone being at the drop zone in a cast and on crutches. The students are nervous enough and if they see someone on crutches with a cast on, it’s not going to be

very good for the customers.” (Maynard Dep. pg. 160-161:24-9; Winstock Dep. pg. 96-97:15-14). This request was not specific to Zarda, as Maynard did not “want anybody, if possible, to be there on crutches in a cast.” (Maynard Dep. pg. 162:17-18).

27. As a result of his injury, Zarda could not work the remainder of the 2009 season. However, Maynard allowed Zarda to return for the 2010 season, after getting healthy. (Zarda Dep. pg. 76:22-25, 77:17-22; Maynard Dep. pg. 155-156:23-6, 165:15-18).

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).

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

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

31. Zarda is admittedly masculine in both appearance and actions. (Zarda Dep. pg 121-122:16-6, 365:3-10, 116:21-25, 364:21-23). As an individual who works out frequently and stays in shape (Zarda Dep. pg 87:20-21, 89:10), Zarda has an “athletic” appearance, which he admits often leads others to believe he is heterosexual. (Zarda Dep. pg. 121-122:16-6, 365:3-10). Zarda admits that he does

not “look like a lot of gay people might look.” (Zarda Dep. pg. 121:7-8). Zarda also acts masculine, not feminine. (Zarda Dep. pg. 116:21-25, 364:21-23).

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

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

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

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

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

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).
45. If any problems arose at SDLI, Zarda could have brought them to the attention of Rich Winstock, the Chief Instructor (hereinafter “Winstock”), or Mr. Maynard. (Zarda Dep. pg. 101:7-16; Winstock Dep. pg. 89:20-23).
46. Zarda felt comfortable speaking to Winstock about his problems, enough so that he disclosed a personal problem to Winstock in 2009. (Zarda Dep. pg. 102:18-23, 103:9-17).
47. However, Zarda admittedly “didn’t make any complaints to the owner, [Maynard], or [Winstock] about” about any gender or sexual orientation discrimination. (Zarda Dep. pg. 335:7-11, 101-102:22-9).
48. The only complaint Zarda made about SDLI was an oral complaint to Winstock, informing him that he had been suspended. (Winstock Dep. pg. 90:9-18).

The Jump in Question:

49. On June 18, 2010, David Kengle (hereinafter “Kengle”) brought his girlfriend, Rosana Orellana (hereinafter “Orellana”), to SDLI for a tandem skydive for her birthday. (Zarda Dep. pg. 201-202:24-4).
50. Zarda was the assigned instructor on the tandem jump with Orellana. (Zarda Dep. pg. 201-202:24-7).
51. During the skydive, Kengle and Orellana were in close proximity to their respective instructors. (Kengle Dep. pg. 18:13-18; Orellana Dep. pg. 43:13-18,

100:17-22). Orellana sat in front and Zarda sat directly behind her. (Orellana Dep. pg. 43:13-18). Kengle was also sitting in front of his instructor. (Kengle Dep. pg. 17:17, 23-25). Zarda then attached Orellana's harness to his harness. (Orellana Dep. pg. 41:12-20).

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

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

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

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

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

57. Kengle also noticed Zarda touching Orellana inappropriately in the plane. He observed Zarda putting his “hands on her hips” for practically the entire plane ride. (Kengle Dep. pg. 19-20:24-7, 22:2-4, 23:4-12, 23:16-24, 27:14-23).
58. Kengle observed that no other instructor, including his own instructor, was touching their customer in the same manner Zarda was touching Orellana. (Kengle Dep. pg. 23-24:22-5, 62-63:20-3, 66:15-18). Kengle felt uncomfortable with the behavior he observed from Zarda based on his observations of the other instructors. (Kengle Dep. pg. 23-24:22-5, 27:2-9, 62-63:20-3, 66:15-18).
59. While touching the customer’s hips is required at some point during the tandem jump, it does not require the instructor to touch the customer inappropriately. (Zarda Dep. pg. 173:3-6).
60. Then, “[a]t some point during the jump, [Zarda] sensed that [Orellana] was uncomfortable.” (Zarda Dep. pg. 174-175:22-6, 173:12-14).
61. After pulling the parachute (Orellana Dep. pg. 50:11-18), in an attempt to allay Orellana’s discomfort, Zarda disclosed his sexual orientation to Orellana. (Zarda Dep. pg. 139-140:22-8, 173:15-19; 228-229:2-10). He told her: “I hope I didn’t make you feel uncomfortable on the plane, I’m gay,” that he “had recently broken up with his boyfriend.” (Orellana Dep. pg. 50:14-18).
62. It was only after Zarda noticed Orellana’s discomfort with the jump that he disclosed this information to Orellana. (Zarda Dep. pg. 176:6-9, 177:14-16).
63. Orellana felt uncomfortable after Zarda disclosed this information to her. (Orellana Dep. pg. 52:2-7, 54:11-19, 55:6-9). It made her uncomfortable because she “wanted to learn about the scenery,” and “wanted him to speak about what

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

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

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

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

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

The Complaint

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

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

70. When he called SDLI, Kengle spoke to Lauren Callanan (hereinafter “Callanan”), who “took [his] story and let [him] know she would pass the information along.” (Kengle Dep. pg. 31:15-17; Callanan Dep. pg. 33:21-22).
71. Callanan relayed to Maynard that a customer complained, and provided him with Kengle’s name and phone number. (Maynard Dep. pg. 181:2-3).
72. Maynard then contacted Kengle later that day, telling Kengle “that he was very unhappy” with what Kengle and Orellana experienced during their skydive. (Kengle Dep. pg. 31:9-16).
73. During their phone conversation, Kengle complained to Maynard about what he and Orellana believed to be inappropriate touching by Zarda during the skydive. (Zarda Dep. pg. 156:16-23; Orellana Dep. pg. 69:11-13; Maynard Dep. pg. 181-182:16-12).
74. Kengle expressed to Maynard “his disappointment” in the company and with what the tandem master, Zarda, did during their jump. (Maynard Dep. pg. 181:16). Kengle explained that the skydive “was a present for [Orellana’s] birthday and that her birthday was completely ruined” because of Zarda’s behavior, and that he would never recommend SDLI in the future because of it. (Maynard Dep. pg. 181:21-23; Callanan Dep. pg. 33-34:24-4).
75. Kengle explained to Maynard that, during the jump, Zarda had his hands on Orellana’s hips, put his head on her shoulder, and whispered in her ear, which made her feel very uncomfortable during the jump. (Maynard Dep. pg. 182:6-17; Callanan Dep. pg. 34:7-12). He also explained that Zarda tried to justify his behavior by telling her that he was gay. (Maynard Dep. pg. 182:6-17; Callanan

Dep. pg. 34:7-12) He told Maynard that Orellana was upset that Zarda discussed his personal life with her. (Maynard Dep. pg. 182-183:22-8, 289:11-15; Callanan Dep. pg. 34:7-12).

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

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

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

The Suspension and Termination

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

80. During the conversation, Maynard questioned Zarda as to whether he remembered the jump with Rosanna Orellana on June 18, 2010. (Zarda Dep. pg. 36:19-25). Zarda responded that he did not remember the specific jump. (Zarda Dep. pg. 37:2-5, 362:18-19, 37:8-11). Maynard then told Zarda that he “took a girl named Rosanna” on a tandem jump that day. (Zarda Dep. pg.). “At that time, [Zarda] didn’t remember anything specific about that jump.” (Zarda Dep. pg. 37:15-16).
81. Maynard then informed Zarda “there were some customers that came out and jumped, and it was a boyfriend and a girlfriend, and that [he] had taken the girl, and they had called and made a complaint.” (Zarda Dep. pg. 37:15-22; Maynard Dep. pg. 187:8-22, 196:10-18). Zarda again did not remember anything about the jump. (Zarda Dep. pg. 38: 3-6).
82. Maynard informed Zarda that the customer complained about how Zarda touched her, that he “touched her in a way that made her feel uncomfortable”, and that he touched her inappropriately “at the hips.” (Zarda Dep. pg. 43:10-13, 44:3). Maynard explained that Zarda made Orellana feel “very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder” and that she was “very uncomfortable for the entire jump” and his actions even led her to believe Zarda “was hitting on her”. (Maynard Dep. pg. 196:10-18).
83. Admittedly, this is not a complaint about Zarda’s sexual orientation. (Zarda Dep. pg. 360:14-17).

84. Maynard also questioned Zarda whether “anything about [his] sexual orientation came up” during the jump, and Zarda responded that he did not know. (Zarda Dep. pg. 38:8-10). He then told Maynard “that that comes up all the time around here,” as it is often joked about at the drop zone by the SDLI staff. (Zarda Dep. pg. 38:12-15).
85. Maynard then informed Zarda that the customers also complained that Mr. Zarda discussed his sexual orientation with the customer during the jump. (Zarda Dep. pg. 40:2-4). Which, Zarda only did after realizing Orellana was uncomfortable with what occurred during the jump. (Zarda Dep. pg. 176:6-9, 177:14-16).
86. Due to the nature of a tandem jump, discussing the instructor’s sexual orientation is not recommended during a jump. (Winstock Dep. pg. 95:5-9). As “that pre-jump phase is one of building trust, . . .there’s better ways to build trust.” (Winstock Dep. pg. 95:11-15).
87. Following this conversation, Maynard suspended Zarda for a week without pay. (Zarda Dep. pg. 40:6).
88. Zarda’s suspension had “nothing to do with him being gay.” (Maynard Dep. pg. 189:4-5) Rather, it was a function of the customer’s complaint regarding Zarda’s behavior. (Maynard Dep. pg. 187:18-22, 196:10-18).
89. After this discussion with Maynard, Zarda “sought Winstock’s counsel” to discuss the events that had just occurred. (Zarda Dep. pg. 35:11-22, 207-208:16-6). In response, Winstock notified Zarda he would discuss the matter with Maynard. (Zarda Dep. pg. 208:6-10).

90. After his one-week suspension, Maynard terminated Zarda, based on the complaint from Kengle. (Zarda Dep. pg. 218:20-21, Maynard Dep. pg. 282:3).
91. The termination conversation between Maynard and Zarda was tape-recorded by Zarda. (Maynard Dep. pg. 221:2-25).
92. During the termination conversation, in response to Zarda's inquiry regarding his sexual orientation, Maynard informed him "[i]t wasn't a gay issue. It was a personal issue . . . Because if it was a heterosexual thing -- if Ritchie Winstock was telling some chick of his escapades, he would be in the same situation. It's not about gay. It's about your personal life, talking to people about it . . . I don't care what you do and I don't care what those guys do, but what I do care about is that it's not shared with my customers." (Maynard Dep. pg. 226:3-16). "It's not a gay thing. It's about your personal escapades and what you're telling people." (Maynard Dep. pg. 226:19-22).
93. During the termination meeting, Maynard and Zarda discussed Kengle's complaint. They discussed the fact that Orellana felt Zarda touched her inappropriately, which made her uncomfortable. (Maynard Dep. pg. 227:8-10). Maynard explained that Kengle was upset because Orellana's birthday was ruined because Zarda touched her inappropriately on the hips (Maynard Dep. pg. 247:14-15), put his head on her shoulder, was whispering in her ear, and telling her "Don't worry about me, I'm gay." (Maynard Dep. pg. 229:3-21).
94. Despite his contention that he could not have touched Orellana inappropriately because of his sexual orientation (Zarda Dep. pg. 43:17-22),

Zarda admits that a homosexual man can touch a woman inappropriately. (Zarda Dep. pg. 228:13-15).

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

96. However, contradictorily, Plaintiff testifies repeatedly that he believes the reason he was terminated is because of his sexual orientation. (Zarda Dep., pg. 116:9-12, 134:12-15, 215:8, 278-279:11-2, 281:21-24).

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

Wage Facts

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

99. On the weekends the employees are expected “to be there at 7:30 because we try to get wheels up by 8 o’clock.” On the weekdays the employees are

expected “to be there at 9:30 to have wheels up by 10 o’clock.” (Maynard Dep. pg. 306:6-10; Callanan Dep. pg. 59:5-10).

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

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

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

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

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

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

106. However, in those instances when the instructors could leave, Zarda chose not to leave SDLI because it was “more convenient.” (Zarda Dep. pg. 293:4-22). Zarda testified that for him, “once [he] made the trip out there, [he] would stay from where [he] came from . . . For some people that live out there . . .they could kind of come and go . . . but it didn’t really work out for [him] that way.” (Zarda

Dep. pg. 293:9-22). Because Zarda lived “a little bit of a distance” away, it was less convenient for him to “drive all the way back to Coram and then come all the way back to” SDLI. (Zarda Dep. pg. 293-294:23-7, 319:11-20, 322:11-16).

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

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

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

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

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

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

113. For the week of June 8, 2009 to June 14, 2009, Zarda worked four (4) days, jumping 16 times, and earning \$640.00. (Def. Ex. 5; Def. Ex. 7).
114. For the week of June 15, 2009 to June 21, 2009, Zarda worked five (5) days, jumping 27 times, and earning \$1,112.00. (Def. Ex. 5; Def. Ex. 7).
115. For the week of June 22, 2009 to June 28, 2009, Zarda worked four (4) days, jumping 37 times, and earning \$1360.00. (Def. Ex. 5; Def. Ex. 7).
116. For the week of June 29, 2009 to July 5, 2009, Zarda worked two (2) days, jumping 9 times, and earning \$370.00. (Def. Ex. 5; Def. Ex. 7).
117. For the week of May 10, 2010 to May 16, 2010, Zarda worked two (2) days, jumping 19 times, and earning \$760.00. (SDLI Jump Log for 2010, (Defendants Exhibit 6); Def. Ex. 7).
118. For the week of May 17, 2010 to May 23, 2010, Zarda worked four (4) days, jumping 20 times, and earning \$600.00. (Def. Ex. 6; Def. Ex. 7).
119. For the week of May 24, 2010 to May 30, 2010, Zarda worked six (6) days, jumping 30 times, and earning \$992.00. (Def. Ex. 6; Def. Ex. 7).
120. For the week of May 31, 2010 to June 6, 2010, Zarda worked five (5) days, jumping 34 times, and earning \$1,150.00. (Def. Ex. 6; Def. Ex. 7).
121. For the week of June 7, 2010 to June 13, 2010, Zarda worked six (6) days, jumping 21 times, and earning \$811.00. (Def. Ex. 6; Def. Ex. 7).
122. For the week of June 14, 2010 to June 20, 2010, Zarda worked three (3) days, jumping 35 times, and earning at least \$772.00. (Def. Ex. 6; Def. Ex. 7).
123. For the week of June 21, 2010 to June 27, 2010, Zarda worked one (1) day, jumping 9 times, and earning \$370.00. (Def. Ex. 6; Def. Ex. 7).

124. Zarda “liked being able to make good money” skydiving, as the skydiving “instructors make pretty good money in that short amount of time.” (Zarda Dep. pg. 209-210:24-5).
125. For the period of January 1, 2007 to July 23, 2009, the minimum wage in the State of New York was \$7.15 per hour. (New York State Department of Labor History of the Hourly Minimum Wage (Def. Ex. 8)).
126. For the period of July 24, 2009 to the present, the minimum wage in the State of New York was \$7.25 per hour. (Def. Ex. 8).
127. Plaintiff withdraws all claims for minimum wage and overtime under the FLSA. (ECF Doc. No. 106 (Defendants’ Exhibit 10)).

Dated: Bohemia, New York
February 11, 2013

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

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