15-3775

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR. AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiffs-Appellants,

— against —

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF (replacement)

GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant
725 Seventh Avenue, Suite 705
New York, New York 10001
(212) 334-7397

BERGSTEIN & ULLRICH, LLP,
Stephen Bergstein, Of Counsel
Attorney for Plaintiff-Appellant
12 Railroad Avenue
Chester, New York 10918
(845) 469-1277

March, 2015

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MELISSA ZARDA & WILLIAM MOORE,
EXECUTORS, ESTATE OF DONALD ZARDA,

Plaintiff-Appellant,

-against-

ALTITUDE EXPRESS & RAYMOND MAYNARD,

Defendants-Appellees

x----------x

ISSUES

1. The EEOC calls together the language of Title VII, fixing sexual-orientation discrimination as sex discrimination.Not so, says Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000). But deference given the EEOC; protections allowed gay people by the Supreme Court; and this Court's Title VII jurisprudence leave us with interpretations of gay-rights law that are inconsistent and elude Constitutional analysis. At long last, are Simonton and its progeny simply obsolete?

2. Did the court allow the defense to try the case by ambush and to appeal to potential juror prejudice?

3. "Gay Don" Zarda worked for defendants in 2001 but got canned, professedly, for revealing to customers *son homosexualité.* This reason was then legal under New York law. Maynard needed good skydivers, though, and rehired

plaintiff in 2009. New York had changed by then, disallowing gay discrimination. But Maynard again sacked Zarda, again for "de-closeting," even though laws protected him. Was evidence of the 2001 termination not irrelevant and prejudicial, given interim remedial legislation?

JURISDICTION

Subject-matter jurisdiction falls under Title VII of the Civil Rights Act ("CRA"). 28 U.S.C. § 1331. Plaintiff also met the requirements of diversity jurisdiction. 28 U.S.C. § 1332. His estate timely appeals from the October 28, 2015 judgment of the district court. Appellate jurisdiction is proper under 28 U.S.C. § 1291.

PROCEDURAL CHRONICLE

In 2010, Zarda filed, alleging sex discrimination under Title VII and sexual-orientation discrimination under the New York State Human Rights Law (NYSHRL codified at Executive Law § 296). Altitude Express does business as Skydive Long Island, where the lawsuit was filed (Bianco, J., presiding in the Eastern District of New York). Plaintiff's Title VII claim alleged he was gender non-conforming in his dress; often mistaken as straight, he corrected that assumption. But then he was accused of improperly touching his female skydive passenger whom he was required to touch; he was not so much instructor as

protector. He alleged that, as male – even if gay – Maynard lied about the articulation of touching a woman as a reason for termination; there was no investigation. His claim under the NYSHRL was classic sexual-orientation discrimination, in that he was also terminated for telling the same woman he was gay.

Zarda was an experienced skydiver, and unguarded about his sexuality. Studying aviation, he worked as a skydiving instructor ("tandem master") at "dropzones" like Skydive Long Island, know also as "SDLI." A dropzone is an airstrip for mini-planes; thrill-seekers fly to 13,000 feet, attached to instructors like Zarda. In June 2010, he jumped with Rosana Orellana and landed safely. The two were attached in a harness, and, as required, she signed a consent to "close" contact. A videographer recorded the adventure, which, on tape, seemingly ended well. But later David Kengle, Orellana's boyfriend, complained about Don's being open about being gay to Orellana; he said she was also uncomfortable at her hips. Don was fired.

Both sides moved for summary judgment. On March 28, 2014, the district court granted defendants' motion under Title VII, rejecting plaintiff's evidence of insufficient masculinity or his analogy to Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009), which suggests taking adverse action after failing to investigate a "sexual-harassment" type of complaint is sex stereotyping. (SPA23-27). The judge

denied the defense motion, as well as plaintiff's, under the NYSHRL, as "the disclosure of sexual orientation to Orellana was. . . in very close proximity to the termination. (SPA27-28). Additionally, another employee, Richard Winstock, "disclosed his heterosexual[ity] during" jumps and suffered no adverse action. (SPA28). "[T]he reason for the termination" later changed, making the evidence sufficient to question whether it "was because of the articulated nondiscriminatory reason. . . of a customer complaint about discomfort and being touched by the plaintiff during the [parachute] jump or" his "sexual orientation, or the disclosure" thereof. (SPA 28-29).

After discovery, the parties attempted to join a Pre-trial Order ("JPTO"), but plaintiff objected to defendants' list of 50 new witnesses. He moved for relief. The court nixed his request for a shorter list, but required defendants to provide modest additional information. (SPA9-11).

Sadly, Zarda was killed in a jumping accident before trial; the estate took over. (JA705). Both parties then designated portions of his deposition for trial and raised cross in-limine motions on which the Court did not rule until trial when 3 of the fifty were offered. Plaintiff moved again for for outright preclusion given late disclosure. Again, the court denied relief. (JA689-704).

Just before trial, plaintiff also moved to revive his Title VII based on the Baldwin v. Foxx decision, wherein the EEOC explains how Title VII covers sexual

orientation by its plain language. (JA702-222). The lower court held that Simonton tied his hands, and denied deferring to the agency, id., under Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), as we argued, nor Skidmore v. Swift & Co., 323 U.S. 134 (1944), as we argue, additionally, below.

Evidence closed, and the court instructed the jury under the "determinative factor" – "but for" – standard of causation. With this, our objection overruled, jurors returned a defense verdict. Judgment entered October 28, 2015; this timely appeal followed.

FACTS

1. Being Gay – An Escapade?

The Court construes evidence for the non-movant on summary judgment. Here, only the defense won this relief under Title VII. Since plaintiff's prime contention is that ruling, the pre-trial facts are construed favoring him. The potential for prejudice in evidentiary rulings and attorney misconduct is discussed in context.

We – plaintiff's legal team – use Don's name and pronouns in referring to our deceased client. We claim Defendants ended his employment because of sex, a factor inextricably intertwined with sexual orientation. He lost his job, at least partly, because he told Orellana that he was gay. She relayed this information to Kengle, who was outraged; she also said she felt uncomfortably touched by a gay

guy outing himself during her skydive. Plaintiff acknowledged to Maynard outing himself to allay Orellana's anxiety; someone joked that he was "moving in" on her. The close contact tandem skydiving requires – two strangers strapped together, chest-to-back – often invites such teenage-minded associations. Plaintiff denied unexceptional contact with Orellana because as experienced in the field and close connection is required for passenger well-being. See JA650, 681-82.

Orellana, 19, didn't complain nor want to. (JA454, 481). Kengle brooded, then called Maynard, who did not investigate, except to confront Zarda. Maynard attested that if "convinced" a complaint is true, he "would look into it." (JA317). Since Maynard did no investigation other than talk to Zarda, logically, he was only convinced that Don revealed he was gay. (JA113-14). Infuriated, Maynard took the money he'd refunded the passengers from Zarda's paycheck, then suspended him. Thereafter, Maynard didn't question Orellana nor anyone on the plane; he merely thought about it and fired Zarda a week later. (JA113-14, 350, 457, 481-82; 1343). He did, however, return the converted money.

The Orellana-Kengle videotapes both show rousing amusement. (EA1-2).[1] Maynard quibbled about this, but admitted he saw nothing "improper, inappropriate or unsafe" that had occurred between Zarda and Orellana. (JA.366-67). At trial, he backtracked and noted that Don's facial gestures could make

[1] Electronic appendix on disks, Volume I of II.

Orellana uncomfortable. (JA1433). This Court should make its own assessments: but plaintiff's position is that the jump was a fully entertaining, safe experience. Orellana and her partner each exclaimed "Awesome!" at landing. EA1[2:52]. Zarda – who had jumped thousands of times – acted like a good Disneyworld character: as if he could not share enough in the excitement.

At trial, the defense repeatedly invoked "creepy" gestures plaintiff made, as characterized by Maynard (JA1433), during the flight. (JA371-72, 688, 798-792, 847, 1416, 1507, 1551; EA.1 [0:55-1:08]). Maynard admitted he did not terminate Zarda because of these gesticulations, (JA371, 1457), but simply because he received a complaint *qua* complaint. JA371. The preoccupation with "creepy" is that Zarda put his finger on his teeth, then twirled it around, making devious expressions with his eyes. In fact, while of minor importance, the defense made this a major part of its theme, and we believe it influenced the jury. Tooth touching was Don's tic – like beard stroking – but the defense used it as a gateway to characterizing him as disgusting. In fact, William Moore was precluded, in attesting (with photo), that this is just what Zarda did. (JA1539-40, see also JA.812 (photo)). The judge said the facial tic had no bearing on Maynard's state of mind. JA.1540. This was true, but he let "creepy" come up over and over; we believed the inflammatory invocation invited response.

Skydivers are not performers per se, but should "enhance the video" – act silly, and "play[] for the camera." (JA1097, 1610). The customers pay extra for video. The goal is fun, so instructors use body language, perhaps mischievously, rather than bide time with deadpan visage.

When terminated, plaintiff secretly recorded Maynard. (EA5, Vol. I). The conversation was also transcribed at deposition (JA.586-90), and in it, Maynard barely mentions Orellana's hip, but insists Zarda's disclosure of his sexual orientation is an exposé of impermissible "personal issues," that he likens to "escapades." (JA.587). These words prove intent, demonstrating unadulterated prejudice; being gay is no more an escapade than being Italian. The idea of "escapades" reveals, if not homophobia, a severe misunderstanding of what it means to be gay.

Months after his termination, defendants attempted to disqualify Zarda from unemployment benefits, alleging "misconduct" for the disclosure of "personal information." But they mentioned nothing of Orellana's physical discomfort. (JA.737). Defendants noted other unspecified complaints against Zarda. Id. We learned that these alleged were similarly homo-ignorant: In 2001, two women "in tears" allegedly complained that plaintiff revealed his sexual orientation. That's it. (JA.335).

Plaintiff had a different understanding about 2001. (JA122). He understood Maynard fired him for refusing to perform an unsafe diving maneuver. (JA122). Ultimately, Maynard documented nothing. (JA336).

2. Events at the Dropzone: Frame by Frame.

Zarda was an experienced, talented skydiver. (JA1405 (Maynard), JA964-65 (Callanan) JA1254 (Winstock)). Most co-workers very much liked him; customers praised him. (JA1378 (Maynard), 592 (customer), 978 (Callanan), 1087 (Winstock)). Zarda testified that during the Orellana skydive, he tried to dispel discomfort by telling Rosana he was gay to ease the teenager's fear of proximity to a man. (JA148-49, 1043, 1266). Zarda's supervisor Winstock rated his jump with Orellana 97% (JA411); Maynard gave him 8 or 9 out of 10. (JA370).

Zarda outted in similar situations. As was common, someone joked at Kengle about close contact between Orellana and Don. (JA453). Such banter was feigned fun: "jokes" suggesting sexual innuendo are "golden oldie[s]" at dropzones nationwide. (JA1051, 1201-02). Zarda, objectively, was a happy, ebullient, good-looking, athletic fellow; if female customers were interested or someone suggested he was hot for a gal, Zarda came out as gay to "calm a situation" and take him "out of the hot seat. It's made me feel more comfortable to be able to say. . . 'don't worry. . . I'm gay, I have an ex-husband for proof[,]. . . so if [the boyfriend] hears. . . he can know, ['']he's not going to hit on my girlfriend.['']" (JA1053-54). But the

"golden oldie" did not please Kengle. (JA1206-07). Orellana was uncomfortable for different reasons, including that she is claustrophobic (JA1235) – not an ideal condition when closed in a mini-plane, ready to jump into the sky. Nevertheless, when her jump ended, she appears relaxed (JA1340-01), and poses with Don. (JA786). The stills from the plane even show her flirting with the camera. (JA1340).

Maynard's statement about "escapades" was obviously culturally misinformed, therefore after losing summary judgment, his team tried a new strategy. They honed in on Don's "creepy" expression, to which we objected in limine, along with his "perversions" and completely false dislike of women. (JA197, 569). The final moment of Orellana's jump depicts her comfortably posing with Zarda and Kengle, side by side, moments after Zarda's outing himself, and Orellana's alleged discomfort. No one complained then. When Kengle learned Zarda said he was gay, however, the incident got Don the ax. But he did nothing to merit termination in that jump: he followed the book, literally, which says: "If you think you [do] your student a favor by [varying] normal . . . procedures you could be making a fatal error[.]" (JA583-85) (parachute industry warning).

"Gay Don" allegedly mishandled Orellana's hip: We don't discount her complaint, but perhaps she should not go skydiving again, nor bungee jumping, on her "extreme" list. (JA.471). What is most important, she should not search for

adventure where a man can handle her. Indeed, to be privileged to pay to fall from a plane, passengers agree to "close physical" contact to the skydiver. (JA604). Winstock characterized this contact as "invasion," or of "the [passenger's] space." The release that Orellana didn't read that "let[s passengers] know we're" doing that for safety. (JA413-14. 1217, 1254).

Winstock, SDLI's chief instructor, had done over 7,500 jumps. (JA395). He now owns a different dropzone. (JA1240). He noted the obvious: "if [I'm] putting a harness around your. . . thigh and I need to tighten the strap, I might need to touch your thigh[.]"(JA395-96). Maynard admitted that a tandem master might even have to touch a passenger's ass. (JA351, 206 (picture)). Certain maneuvers require a bear hug, and Maynard wouldn't fire someone if there were a later complaint about hugging in this particular maneuver. (JA370, 208). For Zarda, however, a complaint about the hip – where there is attachment – was used to justify termination; but, we contend, this was plainly pretextual, especially given that Don was gay.

Orellana testified she was uncomfortable for many reasons, including that she was about to jump from a plane, and is claustrophobic. (JA487). Objectively, these seem good reasons to be scared. Maynard admitted skydiving is not for everyone, but "being crazy helps." (JA308). During pre-jump training, however, he shows a video of a parachuting expert warning of the risk one takes in "being

crazy": "There is not. . . a perfect parachute. . . airplane. . . pilot. . . parachute instructor or, for that matter. . . student. Each. . . is subject to malfunction or human error." (JA391). Maynard agrees. Id. He, therefore, requires every passenger to sign a waiver before performing a jump that can kill. Several have died at SDLI; with a risky fall comes euphoria, a check off the bucket list, but also potential tragedy. (JA306). Orellana didn't realize that making it out alive was alone an accomplishment; instead she added at trial that Zarda was vocally "sensual." (JA1232). In fact, the photos show Zarda's mouth near to Orellana's ear to give instructions, per practice. (JA795). Winstock explained that the instructor's mouth and passenger's ear are close for "safe communication"; "some instructors prefer. . . the left side, some . . . the right." But if the passenger's head in front, "when the parachute opens, [it] can. . . knock you out or crack your teeth." (JA405). Zarda preferred the right. (JA975). At age 19, Orellana's opinion of Zarda's technique was not to her liking, but bear-hugging and ass-touching complaints would not result in a termination, so why would a "sensual" whisper? We contend "sensual whispering" was not an issue for Maynard - only that Don said he was gay, and he said he was gay because he was gay.

Kengle and Orellana expressed at landing, anyway, that the experience had been "awesome." (JA1240). As they left the dropzone, however, one comment led to another, and suddenly, Zarda's telling Orellana he was queer blemished the

experience enough to complain. She wanted to let it go, but Kengle seethed; he'd paid $600 for the jump, was pleased initially, but in days, complained that Zarda had "ruined" Orellana's birthday. (JA1344-45). Maynard refunded his money. Kengle was not merely upset Orellana learned plaintiff was gay, but that Gay Don, as he was known, had also allegedly flirted with her. (JA1348-49). He described how men continually hit on "very beautiful" Orellana. (JA454). He was inured to this, id., or maybe not. Even a gay guy's attention of his girl hurts his bravado; he has no gay friends, and noted that he doesn't like how gay men act with women – that they think they have license to "flirt." (JA458-59). His common idea of giggling, nelly queens tapped into Maynard's thoughts of dirty "escapades," and the doubled prejudice combined to end Zarda's career. However, unemployed Kengle (JA450, 780) did get refunded. (JA455).

Maynard confronted Zarda, who asked to see the video. (JA1023-24). Request denied. As indicated, Maynard denied anything on the video suggested impropriety, but at trial, the defense invoked twelve chants of "creepy" and numerous other slurs.

Zarda's orientation was a playful subject of humor at work. (JA1020-21). See, JA607 ("don . . . [i]s a pussy. . .GAYYYYYY. . . u got it gay boy. . . do it pussssssy. . . thats pretty gay guys!!!" stop being a vagina and take the cast off now") (JA629-33). That's how "Gay Don" fit in. Indeed, that's how some

minorities assimilate – by making fun of their difference when the alternative is ostracism. Maynard went along with this until Kengle complained. Zarda retorted, "if you don't want [my orientation discussed at work], you should the staff" to stop making homo-jokes. (JA103-04). Maynard, knowing plaintiff was gay, and knowing his sexuality was comic fodder, therefore never told Zarda to cover his sexuality, id., even assuming such an instruction were legal. Coming out to one customer with a homo-ignorant boyfriend, however, got him fired.

Kengle alleged Zarda touched Orellana's hip making "her feel uncomfortable." (JA346). But see JA302 (Maynard: if someone complains about being touched at a point of attachment, it's not [a] legitimate" skydiving complaint.) Zarda and Maynard, with thousands of jumps' experience – Zarda slightly more JA363 – knew handling hips was part of the job. (JA1070 (Zarda), 1025 (Winstock), 1447 (Maynard)).

In response to this allegation, Zarda asked, "Ray, does that [complaint] make any sense to you? I mean, really?" Maynard responded. "It doesn't matter!" Articulating his words, he added, "This is not working anymore for me for you to be working here." (JA589). Maynard didn't say what he meant by "working for him": Don was a good worker by Maynard's admission. Maynard didn't bother to make inquiry of anyone on the plane, *not even Orellana.* (JA350). Even she wanted Zarda "to. . . protect" her as needed. JA484. Maynard said he just wanted

Don out because it "wasn't working" – so why interview Orellana? (JA589). She complained, so he refunded her money and got rid of Don: "It wasn't working." Don asked Ray, what is "*it*." Maynard never responded. Don was excellent. One young couple with no expectations had a complaint, but look at the video – you see they had a good time. What bothered Maynard was the revelation of Don's sexuality – which Maynard disguised as "personal information" – and relegated to an illicit "escapade." That might be ignorance, but it's still discrimination.

Winstock urged Maynard to forget it, (JA1075), but in a week, Zarda was canned. Fortunately, he secreted his IPhone, (JA586-590), and produced a recording from which a reasonable, non-prejudiced, properly-instructed jury could find that the words "just not working" (without explanation), "personal information" (that applied to no one else) and equating being gay with engaging in "escapades" were all evidence of discrimination. Nothing is said about "hips" until plaintiff notes the subject, and Maynard – listen carefully to the tone – says, "yeah, that too." Id.[2]

Plaintiff left the dropzone dolefully; he filed for unemployment. Defendants opposed the application because of "believed misconduct." (JA737). Although inappropriate touching would seem to be certain misconduct, touching wasn't mentioned. Id. But the opposition letter did mention the alleged 2001 complaints:

[2] Maynard alleged the whispering took place "under canopy" when the video could not record.

"This was not the first time that we had received complaints from paying customers regarding Mr. Zarda." Id. Zarda was under the impression that Maynard fired him in 2001 because he'd refused to make dangerous jumps. (JA1033). The alleged other complaints were old, undocumented and had to do with Zarda's coming out to two women, (JA1421, 1425-26, 1429), "on the verge of tears" after jumping "with Don [who recounted his] after-hours activities." (JA335). Again, Maynard didn't understand that being gay is an all-day affair. Id. But 2001 was before sexual-orientation laws came into effect in New York, and the 2001 termination was admitted over objection. (JA1135, 1647). Maynard, now subject to new lawmaking, re-hired Zarda in 2009 "because he was a good instructor. . . a good guy." (JA1487). He again never told plaintiff not to "say gay." (JA335, 1399). Nevertheless, without dispute, his identification as gay – or his "escapade" motivated his second termination.

3. Pretext and Disparate Treatment at Summary Judgment

Plaintiff mentioned his sexuality to allay customer anxiety. Likely, other men envied his good looks and Michaelangesque body. He preferred men, however; he wanted no part of any straight boyfriends' jealousy. (The defense attempted at trial to make it seem that his dating women *in his teens* meant he was hot for Orellana: How absurd; straight men don't *usually* develop physiques like that Don's if they want to attract women – but gay men do - to attract men.) Pre-

trial, the defense contended being gay was "personal," inappropriate for consumers, and suggested *any* complaints resulted in termination. (JA371). Both excuses were lies. Winstock mentioned his heterosexuality on jumps – but that was fine. (JA355). Also, other complaints did not result in banishment. (JA610, 617, 635).

Plaintiff maintained on summary judgment that Maynard's reasons were pretextual – no reasonable, non-prejudiced jury could find for the defense (we conceded the Title VII question, given the law at the time, required a trial). Plaintiff, a gay man, had to protect passengers and touch hips, male or female; defendant had other complaints that didn't lead to termination. As Maynard said "You can't have everybody happy and you can't have everybody return." (JA332). Orellana agreed that Zarda "[n]ever cross[ed] the line." (JA489). Though the defense made her complaint sound like a desecration, she swore the experience had been "awesome." (JA485, 566, 574, 1240). Her complaint was Kengle's complaint and about not having her cake and eating it too. Maynard admitted, if you don't want to be touched, "then maybe you should not skydive." (JA305). Nevertheless, discomfort is absent from the videos or pictures in this case notwithstanding that some who choose to skydive find it physically revolting. (JA368, reference to vomiting). Indeed, Maynard discredited, disavowed and raged against "outright lie[s]" in a nearly identical complaint. (JA618-19).

Before trial, Maynard barely mentioned Orellana's hips; the evidence suggests he disbelieves the claim. (JA365). "Ray's been doing tandems for three decades. [He knows] my reputation. . . . [and what's] involved in strapping passenger[s]. . . at the hips." (JA157) (Zarda). Maynard admitted hips were a point of attachment. (JA307). To complain that an experienced, gay skydiver gave a woman hip "discomfort" in an "improper" manner, when hips are points of attachment – that is like playing with a tiger then complaining of a scratch.

Zarda and Winstock mentioned their sexual partners to ease customers' anxiety. Maynard wanted customers at ease, and saw nothing wrong with Winstock's strategy. But Don got suspended for the same strategy from a gay person. Maynard acknowledged that people who dislike being touched should think twice about subjecting themselves to close environs: Orellana, after all, was claustrophobic. But her expressions in all videos run from occasionally neutral to mostly happy, at times rapturous. (JA781-802). After landing, she spoke, breathing heavily, "uh, that was awesome." (JA485, 566). Then, she and Kengle happily posed for a photo with Zarda, their bodies converging, Orellana moving closer to Zarda, not the other way around. (JA1372-73, EA1 2:52).

Winstock, plaintiff's superior, agreed Zarda was a good instructor and "never observed [Zarda's interacting] other than [like] normal employee" interaction. (JA1086-87). He denied "inappropriate behavior" with customers or

co-workers (JA1069). Having watched the Orellana video, he opined Zarda did as instructed: "enhancing" the background as a stooge for the camera. Id. "[T]andem instructors make many different signals with their hands for the video, like rolling fingers around [their] head." They also "joke with customers to alleviate" fear, (JA1072-73) perhaps imperfectly. Winstock thought Zarda's performance during the jump "outstanding." (JA411).

The waiver warns clients about to take part in dangerous activity that they will wear "a harness which will. . . be adjusted.. . . I understand" the instructor "will. . . put my body in close proximity to [his]. I specifically agree to this physical contact" (JA778): Not "agree," but "specifically agree." Zabell joked about the release on summation (JA1735); but earlier, he tried to get the case dismissed because of plaintiff's jump waiver. (JA1561). That's disparate treatment: had Orellana sued Maynard, he would have complete immunity, (JA601-05); but Maynard wouldn't enforce the waiver to protect Zarda. In other words, a death immunizes Maynard, but Zarda's coming out gets him fired with the additional slander coming from an inflammatory, uninvestigated accusation. The only confirmation Maynard made about Kengle's complaint was Zarda's coming out. Thus, the identification as gay was the reason for termination; the hip complaint was not only specious but uninvestigated. Although Maynard argued he fired Zarda for a complaint per se, other identical complaints showed this a lie. (JA617).

The defense lost its summary judgment motion (on the state claim), so instead of presenting the evidence as presented to the Court, it shifted gears at trial, emphasized "creepy" gestures and blatant homonegativity, combined with the odd attempt to make Zarda seem hetero-curious. Plaintiff's in-limine motion sought to preclude these discussions (JA197-200) as to relevance and prejudice. Most important, when a gay man's job is to "invad[e] a person's space," we contended it was incredulous he would go in for a grab or whisper sensually – at least not intentionally, despite Orellana's teenaged interpretations, with her boyfriend yards away. The odious defense that Zarda was a gay, women-hating pervert – new after summary judgment – proceeded and we didn't expect the judge to allow it. Also, the worker's compensation evidence – making plaintiff part of a different protected class – was allowed over objection, (JA199), even though defendant denied it factored in termination. (The Court, after denying preclusion of Worker's Compensation, made it seem like he was being generous: "I'll allow the question. But there is no claim. . . for. . . unlawful termination because of . . . Workers' Compensation[.]" (JA1473.)) We didn't want the issue to come in at all. The words sound favorable to plaintiff, but they mislead.

Maynard testified as if skydiving were an assembly line: "do[] your job[s,] talking about [. . . skydiving,] nothing else." (JA1458). *Au contraire!* Maynard knew Zarda's orientation was fodder for chatter (JA357), and that jokes about

male-female interactions were common. (JA309). He acknowledged Winstock told women he has wife and children. (JA1721). Maynard saw nothing wrong with this (JA1505-06), and admitted sharing family information to customers. (JA1450-53). Another skydiver told a passenger he was from New Zealand – milquetoast information indeed, but personal. (JA1509). Maynard testified that, "[i]f a customer complains, it wouldn't matter what they complained about." (JA1462). Logically then, a complaint that an employee comes from New Zealand will get one fired at SDLI. Identification of national origin is prohibited by the CRA, however, and the Court properly instructed that customer preference cannot justify discrimination, (JA1657-58), making Maynard in the wrong.

Maynard admitted he has thousands "coming through" SDLI and "can't have every customer. . . happy[.]" (JA1356). Indeed, before plaintiff's incident, a customer complained another "instructor was feeling up [his] girlfriend . . . .The girls explained once the parachute opened they were touching their brea[s]ts and . . . could not protect themselves." (JA760). Maynard did not investigate this complaint: He merely rejected it as slander: "[I]f someone was feeling up my girlfriend, I would. . . defend her dignity[.]" (JA619). Then why didn't Kengle? If "Gay Don" were feeling up Orellana, why did Kengle do nothing except look happy and relaxed? (JA.784, 786, 796).

4. The Defense

a. 50 Unidentified Witnesses in the Pretrial Order.

Defendants listed *50 new witnesses* in the JPTO. (JA694-97). Plaintiff had deposed all but one witness listed in initial disclosures; he could not depose another fifty, and moved for relief. Defendant opposed because the fifty were allegedly co-workers. Some were, but parties disclose *relevant witnesses* in discovery*,* not the JPTO; there is no exception for co-workers. The Court, to our dismay, denied the motion. He afforded plaintiff modest relief, holding

> a list of names doesn't [allow] the other side. . . to. . . prepare. So for people who were not deposed, you need to put. . . in. . . a couple of sentences that summarize[] their testimony. . . so that [plaintiff can]. . . object and prepare[.]. . . If [defense counsel] wants to call them, he [has] to demonstrate that [the testimony is] relevant, noncumulative [and presented] no prejudice.

(SPA9).

These words did nothing to allay prejudice (and were unenforced), because plaintiff needed to know who the few witnesses would be and to depose them. Defense counsel Saul Zabell never provided these "couple of sentences." It was not until plaintiff rested that he named *three* of the fifty new witnesses to testify. (JA1319-20). Plaintiff then moved to preclude; the late disclosure violated Rule 26(a)(1), the substance of the witnesses' testimony, not identified as ordered, not in the JPTO, nor initial disclosures, nor the modest "sentences" as ordered by the Court. (JA734-35).

The Court denied the motion: plaintiff should have made yet another pre-trial motion, he held. (JA1625, 1791). Nothing in his verbal or written orders supports this. Buried in the docket sheet, one sees an entry that plaintiff should write a letter a month after defense counsel writes his, though this is not in the order or transcript. (JA9, SPA6-19.) Defense counsel never wrote, so neither did plaintiff. The better practice, we acknowledge, would have been to write saying Zabell violated the order; but realistically, the diffident relief of these "couple of sentences" was useless anyway. We needed needles picked out of the haystack; instead, defense counsel provided nothing because he probably didn't know how he would try the case.

What litigant gets away with this? Discovery orders don't come often to the Circuit, so we ask you to opine. *Any* additional witnesses would have been contrary to Rule 26, but, if a few were named, we could have deposed them at least. Instead, we either had to guess or depose fifty witnesses. At trial, the judge additionally excused the nondisclosure because of the "transient nature" of dropzone workers – something about which there was no evidence except Zabell's ipse dixit assertion. (JA1790). Finally, the judge stated that a certain "transcript" supported his position. (JA1791). Some transcripts had been ordered by then, but he was not looking at the transcript on this motion: that was not prepared until "December 9, 2015." SPA18. The judge was mistaken; he simply disliked to sanction, but a lack

of sanction to one side can be a sanction to the other. The judge was obligated to alleviate the prejudice of fifty new witnesses after discovery, only three of which made the cut. It was, for plaintiff, like guessing who would win Miss America.

b. Appeals to Gay Prejudice.

Defense witness Wayne Burrell testified that Zarda was "unprofessional, rude [to females,] not talking to them, not being friendly." (JA1515). In five years of litigation, plaintiff had not a word's notice of this contention. Zarda, whom Burrell knew was gay, allegedly preferred taking male passengers over females, and asked others to swap passengers. (JA1516). Winstock said this was "common." (JA1092). Perhaps Zarda didn't want – as with Kengle and Orellana – to be accused of being part of a sexual triangle. But Burrell characterized Zarda with an ancient stereotype: "that homosexuals distrust, dislike, or are afraid of women." John Malone, Straight Women/Gay Men, p.9, 1980. The judge held that his and Shaw's testimony was – in this homonegative characterization – "critical." (JA710). If so, Burrell should have been identified early; that's just fair play. Instead, his name was slipped surreptitiously into the JPTO. Additionally, Zarda's alleged rudeness to women Maynard never proffered as a reason for termination; how can one be a "good guy," as Maynard testified (JA338, 1546), and be rude to women?

Defense witness Duncan Shaw then testified, "When you work with [a company] for so long[, you] . . . feel like you're a part of it." (JA1598). He flew to Central Islip from California on his dime, and waited days in the courthouse hallway to testify. However, when asked, he refused to speak to us. (JA1598-99). At trial, a multi-leveled bombshell: Shaw relayed that Zarda gossiped with staff about "partying and sleeping with people," and retold "specifics of what happened during the night. . . [g]oing into physical acts he engaged in," (JA1577-78), once in the presence of a veteran, his wife, and – gilding the lily – "a young baby." (JA1579). The physical acts were "bedroom-related" and people allegedly. . . threw their hands up," leaving. (JA1580). "Bedroom-related physical acts" is a phrase both suggestive and vague: sleeping, sexual activity, urination, showering are among such acts. The judge, however, directed the witness not to detail. This re-enforced the implication that these "acts" must have been sexual. (JA1578).

Shaw testified he saw hetero-boyfriends "upset because [of] their girlfriends[']" distress at Zarda's behavior." (JA1582). Upset so palpable that it sows anger that one can *see* is hard to imagine. We chose not to explore these vagaries: it was inevitable that either defense witness – who had not been subject to deposition – would malign Zarda further; we had no impeachment for this fanciful pillory, and it would just have made things worse; the judge is not liberal on cross examination, and did not even let us impeach Kengle, even though Kengle

changed his deposition testimony for Zabell. (JA201-02). Had we taken depositions of Shaw and Burrell, we could have made informed decisions: that's just fair play. The judge was restrictive; even when we tried to rebut the continual sensationalism of Zarda's "putting his fingers in his mouth" -- Zarda had a tic in which he touched his teeth -- the judge precluded a response. (JA1642-43). SDLI argued *it would have deposed Moore* on this minor rebuttal point. JA1641-42. So too would plaintiff have deposed the three defense witnesses. The judge ruled the "mouth touching" was irrelevant to intent, so why did he let the defense harp on it?

Shaw was on the plane with Orellana and poured on aversion for Zarda. He also testified Zarda swapped passenger women for men – the reasons being "pretty obvious." (JA1583). The phrase was stricken, but that Zabell asked the question, and Shaw answered with revulsion, demonstrates the defense strategy. Let's not pretend a judge can unring a bell where a dead man is subject to a clarion of vilification as a woman-hating sex addict. Maybe Zarda preferred male passengers because he was an attractive "musclehead" (as defense counsel so described him, JA278), who was not apparently gay; perhaps he preferred no accusations of interest in women. There was no evidence he mishandled a man. If he switched women for men, to suggest his desire to do so was wrong was prejudicial.

The Kengle video doesn't support Shaw's testimony in the least (EA2):

Shaw allegedly had to had to "distract" Kengle because the latter was upset that Zarda was making "creepy" expressions. (JA1589).

Watch EA2 and ask, "Where did I see Kengle showing distress? Where does Shaw manifest these 'distractions?'" Shaw appears to act like any instructor playing to the camera and does not interact with Kengle until landing. At trial, Shaw invoked his skydiving superiority to that of dead Don's. (JA1614). How curious. What is clear is that Shaw disliked Zarda and was close to Maynard, for whom he had testified in 2000. (JA1595). We contend the defense knew Shaw would show up, but hid him. His testimony could not have withstood a thorough deposition, which we would have asked for and gotten if Zabell did not secrete him in fifty names.

Back to the jump: Kengle lands first, then comes Orellana. EA1 at 2:52. She and Kengle then take a pose, not with Shaw – who was there – but with statuesque Zarda, who had allegedly just flirted with Kengle's girlfriend. (JA786). A jury could have found it inconsistent: why this closeness after what allegedly went on in the plane? The one thing that is certain is that at the moment of landing, Kengle was unaware that Zarda had revealed his sexuality to Orellana – she told him on the ride home. JA481.

That, we contend, was the capstone that turned the scene at JA786 into the disgusted, dismissive tone of Maynard's "You can. . . get your stuff out!" (JA589).

Shaw testified that there was a lot of moving in the plane. (JA1590). A passenger practically sits on an instructor's crotch after they first strap together, then they oddly shuffle on their bottoms on carpeted modular benches out of the plane. (JA794-95). Shaw testified – in opposition to both Maynard and Winstock – that the instructor's hands would be "far away" from the passenger's thighs. (JA1590). Far? That's not true. (JA793 (Shaw's hands near Kengle's hips)).

The final defense witness, Curt Kellinger, testified that being gay was okay with Ray, who asked him to look "for anyone. . . talented." Kellinger "watched [Zarda] jump [and] land. He's a very nice guy, [and] wants to be near Fire Island because he is gay. . . Ray said, 'Tell him to come down.'" (JA1629). Kellinger was least harmful to plaintiff, but we had the right to depose his opinion of Maynard's alleged gay tolerance. Kellinger also added more "speculation that [Zarda] didn't like" being near women (JA1633) – hearsay, or a ridiculous stereotype of gay men.

c. **Defendants' Homophobic, Disingenuous, Insulting Summation.**

Lauren Callahan, SDLI's former office manager, worked with Zarda. She said not only that he was good, but that clients praised his performance. At deposition, Zabell represented her. (JA422). At trial, she had a new job, and on cross, Zabell challenged her memory regarding a "belief" that there were "multiple complaints" about Zarda. (JA1017-18). On redirect, she remembered not a single

one. (JA1018-19). In summation, defense counsel twisted Callanan's deposition testimony of "belief" – which she didn't remember – into fact, (JA1719-1720), emphasizing she had been called by plaintiff. (JA1720). Plaintiff subpoenaed her to testify to minor matters, but Zabell's was a devious vouch: she admitted testifying reluctantly (JA991) and remembering no complaints other than Kengle's.

Zabell accused plaintiff's counsel of relying on "passion." rather than evidence. (JA1716-17). In fact, plaintiff's summation was demonstrably fact-laden. JA1691-1712. By contrast, defense counsel relied on Callanan's deposition, and then he got worse: He dropped two shameless bombs: The first involved Dr. Ira Helfand, plaintiff's damages witness – an older physician, married with adult children. Helfand had long been Zarda's friend; we chose him because of his intelligence and community standing.

Though explained in detail during testimony (JA940-957), Helfand's relationship with plaintiff was denigrated in summation as "oddness." (JA1717-18). Plaintiff objected; objection overruled. (JA1718). The characterization advanced the stereotype that a relationship between adult men is odd in itself, or at least between men of different generations. Helfand, the older, wiser, more established must have been getting something from younger Zarda. No other reason – and Zabell didn't provide one – could "odd" describe this relationship than to suggest the nefarious.

Then, although there was no evidence in Duncan Shaw's testimony (1574-1622), Zabell branded his words as proof that Don's chit-chat at work about "graphic sexual experiences." This was a lie, unless one assumes the judge's admonition not to go into detail explained the shameless vagary of "bedroom experiences."

The next explosion came when defense counsel characterized Winstock's sharing his "personal information," as acceptable in comparison to Zarda's. First, Zabell set the scenario:

> Question: Have you ever informed a passenger at a tandem jump that you were married and have children?
>
> Answer: Yes[.]
>
> Question: For what reason?
>
> Answer: [U]sually with older women when. . . extremely nervous[, I] tell them [I am] married with children. Tends to calm them down. [I give] them. . . security knowing [I] have a reason to make this work.

(JA1721).

Then came the blast. Defense counsel added,

> That sounds like a legitimate reason for sharing some personal information.. . . *But there is a difference between relating to someone that you just broke up with your boyfriend while you're falling from the sky and saying to someone, Look, I'm married.* I got kids. I have a reason to make it to the ground. You're going to be safe. There is no need to worry here. *I think that there is a difference, and I. . . know that you guys are smart enough to pick up on that.*

(JA1721-22) (emphasis added). What the difference was, defense counsel could

never say. Had he done so would be to admit the image of a traditional, heterosexual family is good and calming, whereas mentioning gay orientation is not so delightful. However, to Don, his coming out at work diffused jealousy and made plain to the passenger (and her partner) that he had no sexual interest. To paraphrase Zabell, that's seems a legitimate reason for sharing personal information. His suggestion otherwise was an appeal to prejudice. The defense repeated again and again that Zarda *wasn't* treated differently because he was gay, but it concluded its case with an appeal to differential treatment. Defense counsel used discrimination to defend discrimination. This strategy was an outrage to the integrity of the judicial forum.

Plaintiff attempted to rectify this homophobia in rebuttal, but was stopped by the judge. We attempted to recharacterize the relationship between Helfand and plaintiff as one of advice. (JA1745-46). Evidence in the record explicitly showed this. (JA940-957, JA122). Zabell objected; the judge did not just sustain, but rubbed the idea into the ground by striking the remark. (JA1745-46). The Court later explained he allowed the "oddness" comment because

> that is fair for a lawyer to do in terms of the credibility of witnesses, what relationships may have existed is fair argument, arguing that it was odd.

(JA1693). But wait: not any unexplained, ad hominen attack is allowed in summation, in a trial about about discrimination against gay people who have historically been regarded as "odd." Also, the judge did not apply the same rule to

us; he stopped our attempt to recharacterize Helfand as credible, the relationship not odd but natural. We respect Judge Bianco, but a lack of recognition of bias is why we have Title VII.

SUMMARY OF ARGUMENT

This trial about bias was rendered imbalanced by bias. Grounded not just in a pleading, but undisputed evidence played out in real time with new actors. This is a textbook channel to clarify Title VII as protecting sexual orientation, in this period of constitutional and EEOC protections afforded gay people, and bring Title VII caselaw into line with both the statute's text and the tenor of Supreme Court decisions.

True, plaintiff got an adverse state-law verdict, but the judge, over objection, instructed the jury under a burden – "motivating factor" – higher than required under Title VII. Plus, he threw in a McDonnell-Douglas charge, despite acknowledging Circuit authority disallowing it. Thus, there's at least one answer for plaintiff's loss: the instructions held him to an unfair standard. Though hundreds, perhaps thousands of Circuit opinions morph state and federal standards, the jury didn't know this. Further, while the judge felt he couldn't extend Title VII to this case, he defied the Circuit rule that the bench does not instruct on burden-shifting.

Notwithstanding direct evidence, Zarda lost. This demonstrates the NYSHRL, at least as instructed, is insecure compared to Title VII, and, here, the

judge permitted the defense to commandeer the case with irrelevancies to manipulate the jury with unverified, additional motivations for termination, any of them potentially "determinative." Or perhaps the jury thought the evidence did not support burden shifting: a *de minimus* legal issue the judge did not fully explain.

This debacle of dispute resolution occurred at the right time to recognize that "sex" under the CRA includes sexual orientation. The definition of "sex" has been debated over decades, but eventually, courts always reject reasoning that departs from the purpose of a remedial law. A Circuit panel recently gave the gift of equity to a transgender litigant, based on the deference afforded the EEOC in Macy v. Holder, 2012 EEOPUB LEXIS 1181 (E.E.O.C. Apr. 20, 2012). Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 386 (2d Cir. 2015). Fowlkes would have been unthinkable without Macy, which is grounded in text; the modest relief provided to a unique plaintiff shows the Court recognizes that Title VII applies to sexual minorities and the EEOC is owed deference. The Zarda Estate took this case at no small effort not simply to win money, but to clarify Title VII when it is impossible to reconcile Oncale with Simonton, Dawson, Windsor and Obergefell (full citations *infra*).

Coincidentally, after Obergefell, the EEOC ruled what many have always believed true – that sexual-orientation discrimination is sex discrimination. In part, it is associational discrimination, and also it feeds on stereotypes. Baldwin v. Foxx,

2015 EEOPUB LEXIS 1905 (July 15, 2015). (JA.709-22). Associational discrimination is actionable for race, so why not sex? This is a question that the Court must answer to mend inconsistency. This Court held that associational discrimination extended to the plaintiff's *"own* race, "and not just the person to whom he associated. Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008). Holcomb post-dated Simonton and its nuance renders this Court the one to make the statutory reconciliation.

Though the issue is not on point, we contend that because gay people have Equal Protection to marriage, courts should not avoid a Constitutional analysis where gays are held to a different standard when alleging claims of stereotyping or associational discrimination; heterosexuals can. Simonton was brought towards the end of a long period of LGTB intolerance and decided on rickety precedents. We respectfully contend that appellate decisions gerrymander lesbians and gay men out of Title VII. Plaintiff should be tendered relief under Title VII, even if his NYSHRL trial was fair.

It was not in the least, however, and the Court should give guidance on potential retrial. Point II is inessential to Point I, given that plaintiff lost Title VII on summary judgment. Point II demonstrates, nonetheless, that the verdict under state law should be vacated as a repeat of the treatment accorded people of difference in American courtrooms. Discrimination plaintiffs rarely have a

"smoking gun." Here, plaintiff came close: a recording with the slur of "escapade." Think of that word applied to the associations of an interracial couple. Additionally, the evidence showed the employer accepted a practice wherein one could not convey gay orientation but could come out as straight. This is plain disparate treatment.

If remedial laws are to work, they must be enforced. It was therefore detrimental for the jury to know that defendants fired plaintiff in 2001, allegedly for saying he was gay. This is subtle, but not everyone in New York lives a life where gay rights are a given. Plaintiff disputed he was terminated in 2001 for saying he was gay, but assuming it was true, the reasoning of the 2001 termination tainted plaintiff as defiant, making him the victim in 2010 of what was not protected in New York in 2001. Admitting the 2001 evidence punished plaintiff for identifying as gay in 2010. Plaintiff moved in limine to exclude this and much other evidence, but defense counsel felt free to open with this and other issues sub judice, moving onto plaintiff's protected use of worker's compensation. The compensation issue was not a claim plaintiff made against defendants, but it made Zarda seem troublesome: so gay as to offend the sensibilities of women, and prone to workplace injury.

Defense counsel played to bias and obfuscation throughout litigation and trial. The judge gave plaintiff a few nice rulings –the residual non-hearsay

paragraph on damages, for example – but he totally slighted Fed. R. Civ. P. 26, permitting the defense to try the case by ambush, and allowing 50 new witnesses dumped into the pretrial order. Plaintiff's attempt to remedy this well before trial failed. We wanted identification and depositions; the judge ordered tiny relief with which the defense didn't comply. The judge did nothing to enforce his order, and blamed plaintiff for not moving on the issue, again. Ultimately, plaintiff didn't know who of these witnesses would testify, nor the substance of their evidence. The three witnesses brought in were Maynard's close compatriots and it is likely he knew they would arrive. They were smuggled into a list of co-workers, to preclude the massif of moves plaintiff would have to make to get depositions. Free to testify previously unquestioned, they pilloried Zarda with stereotypes of gay men.

Further reviling these wounds, defense counsel's summation appealed to intolerance. He argued, without explanation, that plaintiff's evidence of disparate treatment was fair; then, again without evidence, commented on plaintiff's relationship to an older, ostensibly heterosexual man, as "odd." The implication was unmistakable, and one that underlies all homophobia: that a connection between two adults of the same sex is unsavory. The judge then forbade plaintiff's challenge to this narrow-mindedness, and reinforced double standards.

The judge gave a complicated, protested instruction including McDonnell-Douglass burden shifting and "determinative factor," which doesn't apply to Title

VII, nor, as far as we can see, the NYSHRL. There's no surprise that the jury just wanted out. This trial shows that gays are still misunderstood, and that "sex" should be recognized as including "sexual orientation" If gay stereotypes can be a defense to a class now protected Constitutionally, then there are inconsistencies to resolve. Zarda is gone, but his estate deserves the rights he was entitled to while alive.

STANDARD OF REVIEW

Summary dismissal is reviewed de novo, Sec. Plans, Inc. v. CUNA Mut. Ins. Soc'y, 769 F.3d 807, 815 (2d Cir. 2014), and evidentiary errors reviewed for abuse of discretion. Harris v. O'Hare, 770 F.3d 224, 231 (2d Cir. 2014). Such abuse may be considered in the totality. U.S. v. Certified Environmental Services, Inc., 753 F.3d 72, 96 (2d Cir. 2014).

Attorney conduct is examined as to whether intolerant statements appealed to a jury's potential biases, depriving the opposing party of a fair trial. Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534, 540 (2d Cir.1992). Jury instructions are reviewed de novo; an improper instruction that instructs the jury on [the] burden of proof is generally not harmless. Gordon v. New York City Bd. of Educ., 232 F.3d 111, 115-16 (2d Cir. 2000).

ARGUMENT

I. Sexual-Orientation Discrimination Is Sex Discrimination.

A. Baldwin Undoes Simonton, and Constitutional Developments Require a Rethinking of Title VI.

Simonton holds that sexual-orientation discrimination lacks the shelter of Title VII. For reasons explained below, Simonton need not be overruled, but merely recognized as inconsistent with current law. For example, Baldwin, which is entitled to Skidmore, if not Chevron deference accepts sexual-orientation discrimination for what it is: stereotyping, because a man would only date a woman and vice versa; or associational discrimination, as it marginalizes the plaintiff because of *his* sex, not just that of the person he associates. See Holcomb, 521 F.3d at 138 (racial association).

Baldwin concluded that "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex." Baldwin, 2015 EEOPUB LEXIS 1905, at *6. If "an employer suspends a lesbian employee for displaying a photo of her female spouse. . . but does not . . . a male employee for displaying a photo of his female spouse. . . her employer took an adverse action against [the lesbian] that [it] would not" had she been male. Id. at *7. Some courts agree: see Hall v. BNSF Ry. Co., 2014 U.S. Dist. LEXIS 132878, at *6-9 (W.D. Wash. Sep. 22, 2014); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); Videckis v. Pepperdine Univ., 2015 U.S. Dist. LEXIS 167672, at *15-16

(C.D. Cal. Dec. 15, 2015) ("the distinction is illusory and artificial[.]). None of these cases bind the Circuit, but far-flung districts are where law develops.

Finally, sexual orientation "involves gender stereotypes." 2015 EEOPUB LEXIS 1905, at *9. Discrimination exists when employees are treated differently "based on their appearance, mannerisms, or conduct," but "[s]exual orientation discrimination and harassment '[are] often, if not always, motivated by a desire to enforce" gender norms, including those of romantic and sexual attraction. Id. at *1 (quoting Centola v. Potter, 183 F.Supp.2d 403, 410 (D. Mass. 2002)); Terveer v. Billington, 34 F.Supp.3d 100, 116 (D.D.C. 2014) (gay man proceeds on affectional-stereotype theory). Even if the "norms" are defined by heterosexuals, that is either a distinction without a difference or discrimination per se.

These cases pre-date Baldwin, and now apply with greater force. The EEOC is entitled to deference either under Chevron, as the agency charged with enforcing Title VII, or insofar as it is able to persuade. Skidmore, 323 U.S. 140 (1944)). Baldwin is persuasive, and at least one court has already so found. Isaacs v. Felder Servs., LLC, 2015 U.S. Dist. LEXIS 146663, at *8-9 (M.D.Ala. Oct. 29, 2015).

The EEOC contends, as does plaintiff, that Simonton was incorrectly decided. As amicus to the Eleventh Circuit in a pending case, the agency aptly noted that Simonton relies on cases "implicitly overruled by Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) and Oncale v. Sundowner Offshore Servs, 523 U.S.

75, 79-80 (1998)," as well as the discredited Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir.1984), which held Title VII forbids discrimination only "against women because they are women and against men because they are men." But Ulane predated Price-Waterhouse. Simonton also cites DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-32 (9th Cir.1979), which held that Title VII does not protect against sex stereotypes. DeSantis is no longer good law given Price Waterhouse and the 1991 amendments to the CRA. Cf. Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001) (recognizing abrogation). Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir.1982), which Simonton also cited "is four-paragraphs, predated Price-Waterhouse and Oncale, and relies entirely on DeSantis." The agency makes a very persuasive case against Simonton. Amicus Brief in Burrows v. The College of Central Florida, (11th Cir.15-14554) at Point D. The brief is found at http://www.eeoc.gov/eeoc/litigation/briefs/burrows.html

Skidmore tells us that agency opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," 323 U.S. at 140, even if rendered in an appellate brief. Auer v. Robbins, 519 U.S. 452, 462 (1997). The EEOC's position is that Simonton is feeble, if not lifeless. A panel of this Court perhaps signaled as much in Fowlkes. 790 F.3d at 386. Fowlkes made no grand pronouncements, but extended equity to a transgender litigant based on the EEOC's Macy v. Holder, 2012 EEOPUB LEXIS 1181 (E.E.O.C. Apr.

20, 2012). Without extended analysis, Fowlkes would not appear to be incompatible with Simonton, but demonstrates that judges of the Circuit see the coming change pertaining to the protections afforded the LBGTQ. It would have been easy to affirm in Fowlkes, given the significantly late filing. 790 F.3d at 382.

It was undisputed that plaintiff's expression of his sexual orientation was a motivating factor in his termination. It is undisputed that, pre-suit, dissemination of "personal information" was never prohibited at SDLI. It was undisputed that the decision maker made no investigation into the bona fides of the entire complaint against plaintiff – just the coming out part, which was verified. Finally, there was no dispute that the passenger agreed to physical contact including at the hips. (JA1070-72). The defense was anemic, yet survived on narrow-mindedness and salacious innuendo. The judgment should be reversed, and summary judgment reopened. If the case should be tried on liability, the district court should re-examine the error of the totality of the rulings challenged in Point II.

B. Jury Instructions Render the Error Harmful.

Plaintiff was denied a fair trial. Nevertheless, we must answer theoretically: Assuming he got a fair trial, since the jury found against him, why would the appeal matter? The answer is unassailable. Although there are perhaps thousands of cases that dispense New York and federal claims on summary judgment, this judge instructed the jury under the higher "determinative factor" standard, over

objection (JA1713, 1715). He knew well the difference. Monette v. Cnty. of Nassau, 2015 U.S. Dist. LEXIS 42523, *15, *40 (E.D.N.Y. Mar. 31, 2015) (Bianco, J., "determinative factor" means "because of" or "but for"). By contrast, a Title VII violation is proved "when the complaining party demonstrates that. . . sex. . . was a motivating factor for [adverse action even if] other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

There can be a sizable gap in the standard of proof between "motivating" and "determinative." Take this case: It was undisputed that plaintiff told Orellana he was gay. We contend that was not just *a* factor but *the* motivating factor for Zarda's termination. But her boyfriend also complained that her hips were uncomfortable. Touching the hips was so tenuous a reason for firing a gay plaintiff whose job required touching, and Maynard emphasized at the termination meeting that communication of "personal information" was the reason for termination. (JA388). Hip discomfort and "whispering" only arose when plaintiff inquired of it at the termination meeting (JA358, 362), but Maynard stopped investigation once plaintiff admitted he likely told a customer he was gay – he didn't even talk to Orellana. (JA 347). The other reasons dominated the trial, because after losing summary judgment, what was left was discrimination, which the judge allowed: "odd" relationship, women-hating, sex-talking and creepy-face defenses, and diversions that Maynard either denied, or said nothing about whatsoever.

(JA372). The Judge's decision was buttressed by further discrimination and the unrevealed witnesses. In addition, though denied by the Maynard, plaintiff's use of worker's compensation surfaced *immediately* in opening, as well as evidence of plaintiff's 2001 termination (JA919, 929), allegedly based on his stating he was gay. A termination for such a reason would have been legal in New York in 2001; the compensation issue was protected, but made Zarda seem troublesome. These secondary and tertiary reasons, if believed, could easily have led a jury to conclude that although sexual orientation might have been a "motivating factor," one or more of the other ephemera "determined" the outcome, denying him relief under the judge's instruction. His instructions further confused the jury with burden-shifting under McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). This Court has repeatedly said this is a bench issue. See Abrams v. Dep't of Pub. Safety, 764 F.3d 244, 252 n.6 (2d Cir. 2014).

Analyzing the facts under the "motivating factor" standard, as Title VII permits, allows for a different outcome. A jury easily could find that discrimination against plaintiff as a gay man "played a role" in his termination, even was not the "but for" cause. This Court has recognized that "but for" is more "defendant friendly" than "motivating factor." Recently, in Cassotto v. Donohoe, 600 Fed.Appx. 4 (2d Cir. 2015), this Court upheld a retrial in light of University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013), which notes

that "but-for" causation is not required under Title VII. Id. at 2523. Nassar "made clear that the 'substantial or motivating factor' standard on which the district court instructed the jury" was not just inaccurate but plain error that "*might* have affected the verdict"; a correct instruction "*might* have led to a different verdict." Cassotto, 600 Fed.Appx. at 5-6 (emphases added).

Cassotto applies here. A finding under one causation standard means not that a jury would reach the same result under the other. Thus, even with the same evidence, plaintiff can prevail on remand.[3] These instructions, going to the burden of proof, were not harmless. Gordon, 232 F.3d at 115-16.

C. Baldwin Renders Simonton Stale. New Constitutional Law also Requires Reconsideration of Judge-Made Omissions of Gay People from Title VII.

One panel may generally not overrule another, but this rule is inapplicable when "an 'intervening Supreme Court decision. . . casts doubt on. . . controlling precedent.'" In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 24-25 (2d Cir. 2015) (citing Wojchowski v. Daines, 498 F.3d 99, 106 (2d Cir. 2007)). The Supreme Court "need not address the precise issue already decided[.] Rather, this Court employs a practical approach to determine" if "a conflict, incompatibility, or inconsistency between [earlier] precedent and" intervening Supreme Court decisions. Id. The determination is "subtle," but "requires [one

[3] Again, it is also unclear that New York law requires "but for" causation.

panel] to conclude that a decision of a[nother]. . . is 'no longer good law.'" Id. See Union of Needletrades v. INS, 336 F.3d 200, 203 (2d Cir. 2003) (single-panel catalyst theory for attorneys' fees no longer extends to the Freedom of Information Act as Supreme Court rejected the theory under other laws). Also, there is the subtly different "mini-en banc" procedure, where a panel circulates a proposed opinion to active members "and overrules [the] prior panel" if there is "no objection." Diebold Found., Inc. v. C.I.R., 736 F.3d 172, 183 n.7 (2d Cir. 2013). Compelling reasons to change panel precedent include "a change in applicable regulations, a judicial decision dealing with a related or analogous issue, a change in the social or economic context of an issue, or some other important new information." Bethesda Lutheran Homes & Servs. v. Born, 238 F.3d 853, 858 (7th Cir. 2001) (Posner, J.). We present all of these. While Title VII is not per se implicated by the gay-marriage cases, they are not consistent.

Indeed, in addition to rejecting statutory norms offered by the Supreme Court, this Circuit's jurisprudence vis-à-vis sexual orientation under Title VII is incompatible with United States v. Windsor, 133 S.Ct. 2675 (2013) and freedom of association, the underpinning of Obergefell v. Hodges, 135 S.Ct. 2584 (2015). Neither overrules Simonton: they just make it look strange. The Circuits made up the law in the area, and, now inconsistent, the Circuits should free gay people from judge-made jurisprudence, never sanctioned by the Supreme Court. Affording

constitutionally heightened scrutiny to gay people, not a point on this appeal, creates a new legal world in which Simonton does not fit. The Constitution cannot afford gay people access to one right, then an arguably lesser right by resort to precedent that, at least initially, did not rely on canons of construction as outlined in Oncale: social norms; or legislative non-action. Simonton relies on both. Title VII's wording is broad, and has been interpreted to include scenarios not considered at its adoption. Sex stereotyping is one scenario and a basis to read "sex" to include "sexual orientation." Simonton stands in the way, but one Southern District Judge just asked the Circuit to "erase" the "impractical" lines drawn between sex stereotyping and the limitations of Simonton. Christiansen v. Omnicom Grp., Inc., 2016 U.S. Dist. LEXIS 29972 (S.D.N.Y. Mar. 9, 2016), p*49-50. Now is the chance.

The Constitution bestows gays heightened scrutiny. What difference does that point make to Title VII? Well, social exclusion of the LGTB reflects disapproval of their nonconformity with gender-based expectations. Private employers are not bound to afford all Constitutional protections in the workplace; but courts, interpreting Title VII, must provide Equal Protection to gay and lesbian people as afforded straights; gay people cannot be carved out of Title VII because they belong to a unique category. The recent Supreme Court decisions regarding

LGTB jurisprudence are inconsistent with a regime – unmoored in legislative history – that Title VII does not include lesbians and gay men.

The attempt to divine congressional intent under Title VII is futile and some attempts offend statutory construction. As the late Justice Scalia held, when the Supreme Court extended same-sex workplace harassment under Title VII, he acknowledged it was

> not the principal evil Congress was concerned with. . . . But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale, 523 U.S. at 79-80.

Congress adopted Title VII, without suggestion that sex stereotypes were illegal, see Price Waterhouse, nor sexual harassment. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). This Court did not recognize its nuanced view of associational discrimination until 2008. Holcomb, 521 F.3d at 138. Associational discrimination was extended to race because the Supreme Court held that the "person aggrieved" provision of Title VII "allowed standing as broadly as is permitted[.]" Thompson v. N. Am. Stainless, 562 U.S. 170, 176 (2011). In that case, the Court extended Title VII to what the Sixth Circuit wrongly characterized as "third-party retaliation." Id. at 172. If one's partner cannot be a victim of discrimination, and one's partner can be of the same sex, then why can't a "person

aggrieved" be a person associated with a particular sex? This previous question is one Holcomb did not have to answer, but the Court should now.

The losing party in Holcomb argued: Congress never amended Title VII to include associational discrimination, but two of three judges in Simonton rejected this argument: The aggrieved "employee suffers discrimination because of the employee's own race." Holcomb, 521 F.3d at 139. So too does a lesbian endure discrimination based on her *sex* if disfavored against by association with another woman. Had Zarda been a woman, the suggestion of his sexuality would not have been a problem, as the evidenced by Winstock's experience, which the defense baldly argued the jurors should see as obviously different but just fine. This was a naked plea to justify disparate treatment of heterosexuals and homosexuals. The summation was prejudice in action. Holcomb is this Court's Baldwin, dressed in the language of race. Extend Holcomb to same-sex partners and Simonton is dead.

The Circuit has disallowed gay people access to Title VII, however and one reason posited is the lack of Congressional clarification. However, congressional inaction is an improper method of divining congressional intent. Simonton agrees with this proposition, then applies it nevertheless. 232 F.3d at 32-36. Simonton led to Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005), a prototypical "bad facts/bad law" difficult to reconcile with City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). Manhart applies the "simple test" under

Title VII "of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." Id. at 702. Zabell's obvious but unexplained message, "there is a difference [between Zarda and Winstock], and I . . . know that you guys are smart enough to pick up on that." (JA1721-22). The defense summation gathered all the simplicity and differential treatment that requires Title VII protection. Manhart.

II. Prejudice Rendered the Trial Unfair.

A. The 2001 Termination

The defendants' justification for firing Zarda in 2001 – when he had effectively no protection from sexual orientation discrimination – was that he identified as gay. (JA335). Maynard testified that two women came to him "in tears" complaining that Zarda had revealed "his escapades." The complaints are conveniently undocumented. The idea that not just one woman, but two, seriatum, in tears, would be offended by a gay man outing himself seems, if possible, fanciful. Straight women and gay men have a special rapport: despite gender differences, romantic interest is not part of the equation in such a bond, making relations less sexually uptight. John Malone, Straight Women & Gay Men, 1980, p.23.

Assuming the truth Maynard's reasons for the 2001 termination, it was technically legal, given Title VII as interpreted and New York law. It was only in

2003 that New York changed, and such change required great care in the presentation of evidence. Zarda never alleged his 2001 termination was discriminatory, nor could he: he disbelieved Maynard's reasons and only learned them – if true – in this litigation. Nevertheless, while Maynard's reasons for 2001 seem just weird, we cannot prove them pretextual and don't need to.

Why then was the reasoning of the 2001 termination allowed into evidence? We contend it was so prejudicial as to outweigh its probative value (JA1135, JA198 mistakenly referring to 2001 as "1990"), which was none. It probably lost plaintiff the trial. The jurors could have reasoned that Maynard's "determinative factor" was to give Zarda what he deserved: Termination for again "saying gay." In another context, we might have pointed to Maynard's reasoning as evidence for us, but we did not think such it was relevant given a new law, and likely prejudicial. The suggestion that Zarda kept coming out, even if true, goes to propensity, which is never allowed under Fed.R.Evid 403. More important, given remedial legislation, Zarda should not have to carry the burden of an era when he could not have gone to court and examined the pretext of Maynard's unlikely explanation. The court said it allowed 2001 into evidence just because it was "fair game" (JA1135). But his ruling deserves no reverence because it "did not explain the application of this standard to the facts. . . bare conclusion[s do] not invite deference." Wade v. Franzen, 678 F.2d 56, 58 (7th Cir.1982) (Posner, J.).

"Saying gay" in 2001, if it went to intent was a reason to exclude it from evidence: The intent Maynard could legally have in 2001 was not the intent he could have in 2010. Maynard admitted he never told plaintiff not to tell customers he was gay (JA103-04), assuming such direction were legal. Saying and being are so intertwined that that the former must have assurance if the law means anything.

This propensity evidence was also remote in time, and, in the intervening years, Maynard hired plaintiff again because he was a "good skydiver . . . a good guy." (JA1487). Perhaps Maynard believed he *should* tolerate a "seemingly straight" gay man on his premises; but could not in practice. Don was a good worker, but it was just was "not working anymore for Maynard for [him] to be working [t]here." (JA589; EA5, 4:29). Prejudice is mysterious, but the facts of the 2001 termination – and even with an in limine motion pending, the defense opened on (JA928) – were wholly prejudicial; it allowed the jury to conclude that plaintiff was wrong because he would not stop identifying as gay. The starting date of legislation is the law. No court would allow a plaintiff to sue on pending legislation, or after limitations had expired. Why then would conduct plaintiff could not sue for, and that occurred before the effective date of the NYSHRL, come into evidence? There was no reason, and the district court's explanation was weak. Wade, 678 F.2d at 58. The judge merely said 2001 was "fair game" and did

not even address the prejudice aspect. JA.1135. Zarda should not have had to carry the burden of a less-tolerant era

B. Worker's Compensation

An injured employee may not sue his employer for injury under the Worker's Compensation Law ("WCL"). WCL aims to compensate worker accidents without determining fault. Cline v. Avery Abrasives, Inc., 96 Misc.2d 258, 264-65 (Sup.Ct. 1978). WC is a societal bargain, and discrimination against employees who use it is illegal. WCL §§ 120, 125. Its users are therefore members of a protected class. A court would never allow evidence that, in addition to saying he was gay, plaintiff said he was German or had a black partner. Nevertheless, counsel made Zarda's use of WC in his opening (JA929), to which we objected, and had objected in limine. (JA199). The judge immediately overruled us, (JA929) and later let the WC issue into evidence over objection, JA933-34, with a complicated credibility analogy. Id. Plaintiff only speculated about this at deposition, and defendant denied he fired plaintiff for using WC. (JA1473). There was no relevance, and it was prejudicial given WC protections.

Thus, Zarda was doubly discriminated against at trial. WC gave the jury another potentially "determinative factor." Its disclosure was not only prejudicial but affronted McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). In that seminal case, if the employee makes a prima-facie showing, the employer must

articulate a "non-discriminatory reason" for adverse action. In this case, the articulation was Kengle's complaint, MSJ.28-29, *not* plaintiff's use of WC. The standard for the employer's articulation might be minor, but it must be "nondiscriminatory." 411 U.S. at 802. A court cannot allow an employer to articulate that, say, "we didn't fire her because she was black, but because she was a Jew."

Employment discrimination exists, but is hard to prove, and this judge's holding, if not deconstructed, would encourage plaintiffs to pursue weak alternative claims. In this case, the WC issue was pure speculation that would not have survived dismissal. The district court's allowing it into evidence – despite agreement by both sides that it was not the articulation – was prejudicial, and contrary to public policy.

C. Trial by Ambush

Witness preclusion is severe, but Rule 26 makes sanctions self-executing to avoid ambush. Rules 16(f) and 37(e) also permit sanctions for gamesmanship. Here, a mere seven witnesses identified under Rule 26(a) (initial disclosures) JA677-78, morphed into 57 in the JPTO. JA694-97. The defense did not comply with the scrap of relief the judge afforded plaintiff in response to this list; we contend the defense knew the three defense witnesses they would call and buried them in fifty

to throw us off scent. Litigation as such is contemptible, and so, in itself, is basis for reversal whatever the defendant intended.

Each of the three new witnesses had testified for Maynard before (JA1595), at least one flew in at his own expense. (JA1598-99). The defense easily could have identified them under Rule 26, or *limited* the JPTO to three new witnesses. Even when plaintiff moved for a more definite statement, had the court ordered the defendants to pick a reasonable few out of 50, it could have avoided prejudice; plaintiff could have moved to reopen discovery, take short tele-depositions, and the parties would be on equal footing. Instead, defense counsel was coy, and the judge did nothing to ease our burden – he did not even remedy Zabell's ignoring the mini-relief he ordered. Each witness took the stand to testify to matters unheard by his team or plaintiff, who was not there to rebut.

Further, we contend the defense (newly identified) testimony was not only irrelevant but grounded in gay stereotypes. We think it fair to sum the defense case as making Zarda seem like a lady-hating pervert. This prejudice was exactly what plaintiff feared in making his in limine motion (JA197-200): an appeal to homonegativity, propensity, and the values of a society where some still consider gay orientation immoral.

We hope this Court finds this ambush nakedly unfair; and reversible error. What happened here was no harmless error. With lack of notice, we had to flip a

coin to decide what would be worse: cross-examine and ask dreaded questions to which we did not know answers, or ignore the witnesses to send the message that the testimony had no bearing on the termination. It didn't, in fact; it was only Zarda's saying gay. Of course, whether or not this is true is irrelevant: prejudice blinds even the intelligent. Given the verdict, the strategy we chose didn't work. That would be our fault but for the fact we were not on notice, despite Rule 26(a)(1) and two motions to avoid defense counsel's underhandedness.

Rule 26 requires witness identification as discovery begins, not well after it's over. The statutory sanction of exclusion is "self-executing." Rule 26(a)(1); Lopez v. City of N.Y., 2012 U.S. Dist. LEXIS 83611, at *3 (E.D.N.Y. June 15, 2012). In practice, courts forgive late disclosures if the error is harmless or can be rectified. Lavigna v. State Farm Mut. Auto. Ins. Co., 736 F. Supp. 2d 504, 510 (N.D.N.Y. 2010). But 50 late depositions weren't a workable option. The district court fashioned a micro-remedy in comparison to the disclosure of new witnesses, and it was not complied with. Rather than blame the defense for its failure, the court blamed plaintiff, even though we asked a year in advance to correct the ambush; as the case got closer to trial, the self-executing sanction was the only proper response. It is drastic sanction, but consider the alternative: a party who, under the rules, is entitled to examine a witness before trial knows nothing of the witness' testimony until trial. That's unfair and not what the Federal Rules require.

An attorney can make an informed decision not to depose, but the rules require the party be allowed to make that decision in discovery. Defendants' amended initial disclosures contained seven witnesses. (JA677-78). Defense counsel's intent was not to call 57 witnesses, but to engage in sharp practice – to make it impossible for plaintiff to know which of 57 would be called so that we couldn't adequately prepare. Let's not kid anyone: actions like this don't happen in the absence of recklessness or bad faith. That's why there is Rule 26.

By trial, plaintiff moved to preclude their testimony. The court waived off the motion, noting that we should have made another motion a month before trial. (JA1791). Thus, arguably, because of defense gamesmanship, we should have taken time from preparing for trial and concentrated on unknown witnesses. This was such an impractical suggestion given these facts as to make it a charade of federal procedure.

We could do nothing but hope for the best. That's not a federal trial works. This Court has defined "trial by ambush" as the late disclosure of a single witness, United States v. Baum, 482 F.2d 1325, 1332 (2d Cir.1973), or an expert report. United States v. Kelly, 420 F.2d 26, 29 (2d Cir.1969). Withholding 50 names – only a few of which would be called – until after discovery did nothing other than to insulate all new witnesses from scrutiny. The rules provide a presumption of no more than ten depositions for each side at seven hours each. What defense counsel

did, in this case, was appalling, and the judge's response didn't enforce plaintiff's procedural – and given the testimony – substantive rights.

Ultimately, Burrell, Shaw and Kellinger each then characterized plaintiff as a sex-crazed, women-hating, oversharing lout. These homonegative stereotypes, as discussed below, were immaterial to the contested issue: was plaintiff terminated for identifying as gay or just a complaint, no matter the subject? Had these witnesses been identified, they could have been deposed. Depositions allow for sifting cross-examination and allow impeachment at trial. Witnesses *may* be examined for the first time at trial, and for strategic reasons an attorney might go that route. But we would not have; we wanted to know who would testify as to what, and the rules allow us that right.

We contended Shaw outright made up his story. So, too, Burrell, about whose suggestion that Zarda was rude to women we'd never heard of before. Finally, on some key issues such as "any complaint leads to termination" we know Maynard lied. We asked for but were denied a "falsus in uno" charge. (JA.1663). The judge said this charge is disfavored, id., but not so. Sims v. Blot, held it "fits within commonly accepted practices." 354 F.App'x 504, 506 (2d Cir. 2009). If the evidence supports it and it fits the fact, we deserved that charge. Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 101 (2d Cir. 1999). At a minimum, Maynard,

Kengle and Orellana were all impeached from deposition testimony. (See JA.1573).

The judge precluded two of plaintiff's proposed rebuttal witnesses, however, the two executors. He ruled that their minor proposed testimony had "zero probative value." (JA1157). In fact, we contend both Melissa Zarda and William Moore had brief, relevant testimony, for the reasons stated on the record. Id. (Don went on a gay cruise because he lived alone in an airport shack; he was not a hedonist as the defense characterized him). See also JA.683-84 and JA.812 (PX 46 – photo mismarked in original ecf appendix as PX 37) (Don touched his teeth all the time, not just with Orellana.) See also JA1426-27 & JA.201 where the judge disallowed us to point out that Kengle changed deposition testimony *as requested by Zabell*)). This testimony would have taken little time and had some "tendency to make [some] fact less probable." F.R.E. 401(a). We would not appeal on these preclusions alone, but we deserved modest rebuttal; and evidentiary errors added up. The judge gave us some good rulings, we won't deny, but the defense objected to nearly everything, *even demanding foundation of his clients' business records supplied in discovery.* (JA.958-60). So even if we won some rulings, that didn't mean the defendants' overruled objections or evidence it proffered had merit.

D. Appeals to Prejudice

This was a case of a customer complaint – and Maynard admitted there would always be unhappy customers – and the identification of plaintiff's sexuality to a customer. There was direct evidence of discrimination, plain evidence of disparate treatment and overwhelming evidence of pretext that – as Maynard successfully struggled to have the jury believe – *any* complaint generates termination. But Maynard admitted this not completely true, which means this "rule" didn't exist, or only applied to Zarda.

A discrimination plaintiff will rarely have "smoking gun" evidence – and rarely in recorded form. Prejudice manifests itself subtly, everywhere. We have no evidence of juror bias, but many indications that the defense resorted to the theme that Zarda was a gay stereotype. The judge apparently couldn't see what was happening, despite our objections. The defense strategy worked, but this prejudice must never prevail at any trial – especially one involving claims of bias. Pappas, 963 F.2d at 540 (regional bias) (citing Koufakis v. Carvel, 425 F.2d 892, 905 (2d Cir. 1970) (reference to mafia) and Minneapolis, S. P. & S. S. M. R. Co. v. Moquin, 283 U.S. 520, 521 (1931) (Jackson, J.) (unspecified prejudice in summation warrants new trial even in the absence of objection).

The word "odd" means abnormal; in summation, Zabell impugned Dr. Ira Helfand in a way that suggests to us that he was getting something from Zarda,

(JA1717-18), even though Helfand identified ostensibly as heterosexual. (JA940). Helfand, the owner of an urgent-care center, had known Zarda for years; they remained associated by email and phone, an occasional visit when their paths overlapped. (JA945). He regarded Zarda as "mind boggled" when suspended: plaintiff thought it absurd that "a gay guy was being accused of being sexually inappropriate with a woman." Helfand recounted Zarda's anger "that he was not [shown] the video that" would demonstrate "no misconduct[.]" (JA944). "All the instructors are strapped to their customers, and [Zarda] was infuriated for. . . protecting his[, and even] being penalized." (JA946). He summarized Zarda's feelings at termination as "extremely concerned about his future. He did not think he would be able to work at another skydiving facility so long as this cloud [hung over him. Skydiving] was his livelihood, how he viewed himself[.]" (JA951). "He started to spend more time BASE jumping. . . [and] didn't think he" could be an instructor. "He was at times explicitly suicidal in his thinking," expressing "the thought repeatedly. . . that he just did not see any way out[.]" He believed "[t]here was no way he was going to be able to put his life back together. . . no point in staying alive." (JA951). [5]

[5] BASE jumping is free-falling in a wingsuit from Building, Antenna, Span – aerial bridges – and Earth, the last usually cliffs in the fjords.

Helfand knew Zarda and cared about him. They shared no "oddness," yet the judge allowed defense counsel to leave the jury with the impression that two male adults were odd because "that's what lawyers do" in questioning credibility. (JA1745-46). But the counter-suggestion that theirs was a normal relationship based on advice – suipported by evidence – was not only alledgedly objectionable but stricken. Id. The judge's rationale was that he didn't "remember" such evidence. (JA940-957). A judge traditionally notes that the jurors' memory controls. He did not here, and there's no way explain the disparate treatment – yes – of allowing an alleged custom: "[T]hat's what lawyers do" extended to defense counsel, but disallowing plaintiff's counsel the same custom in response.

We never argued that Zarda committed suicide because of his termination, but history shows that sexual minorities choose suicide when subjected to public shame. Here, defendants fired, by their admission, a good employee; he was also an unflappable, openly gay man, and was fired, at least partly, for identifying who he was, his termination backed up with the self-indicting accusation that he improperly touched a woman he was supposed to touch. This horror is of the type that makes many lesbians and gay men internally broken, marginalized as disgusting. Helfand described the dread of Maynard's branding him a "gay pervert" (JA.580), and how that stopped him doing what he loved, skydiving, for fear of a repeat accusation. (JA950-54). He moved to BASE jumping as an

alternative, and it was undisputed that BASE jumping killed him. Helfand's testimony was compelling, and aptly summarizes how gay people feel when they a community ostracizes them because of their difference, and how easy it is to impugn their way of life as grotesque.

We believe Judge Bianco would not reprimand defense counsel at any cost, and lacked insight into how the defense communicated bias during this trial. "[H]omonegative beliefs . . . [include] homosexual stereotypes, such as 'Homosexuals fornicate all the time.'" Hill, Journal of Homosexuality at 103. The judge allowed this stereotype to come in, even though it had nothing to do with the termination. He not only by permitted the defense witnesses to testify without fair notice, but reinforced their testimony. Consider this: When Shaw testified, he related that the deceased plaintiff would talk about "[p]artying and sleeping with people." When we objected, the court overruled us, adding to the witness, "You don't have to go into every detail." (JA1578). That limitation suggested there *were* details – details too shocking for to hear. It also proves that had we deposed Shaw, we could have probed, and potential revealed him a liar, conveniently out of memory, or that such conversation was common dropzone fodder for everyone.

But with plaintiff unavailable to refute Shaw, and despite that talking to co-workers about his nightly conquests was not the reason for termination, the defense was able to characterize plaintiff not only as oversexed, but insensitive to women

and children. Hill notes that the bias that gays will corrupt minors shows as statistically significant in criminal verdicts. Journal of Homosexuality at 95. Significantly, Shaw threw "a young baby" (JA1579). In the Proposition 8 trial, historian George Chauncey testified that discrimination against gays emphasizes "the importance of protecting children. . . despite the lack of any evidence showing that gays and lesbians pose a danger to children." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 937 (N.D. Cal. 2010), vacated on other grounds, 133 S.Ct. 2652 (2013). Just as in Prop. 8, the defense had to trot out a child – whom Shaw admitted couldn't understand the alleged conversation. (JA1579). If this was true, why bring it forth? The answer lies in homophobia, still alive here in the Second Circuit.

Although plaintiff's actual nightly endeavors were never detailed – hush, hush – the defense depicted plaintiff as a homo-monster, asking, with no basis in fact, questions about his use of the phrase "fags first" (JA1090) (a variation on "ladies first," invoking the anti-female stereotype) to the "creepy," face and "sensual" voice, to switching women for men. It was left to imagination what he did with the men. As the Ninth Circuit held in SmithKline Beecham Corp. v. Abbott Labs., "Empirical research. . . show[s] that discriminatory attitudes toward gays and lesbians persist and play a significant role in courtroom dynamics." 740 F.3d 471, 486 (9th Cir. 2014). *This trial proves it.* Zabell relied on these dynamics

in deriding plaintiff's evidence of pretext in his summation as proof of his being different and wrong. Noting there is a difference between a man telling a woman that he "has a wife and children and wants to go home to them" versus plaintiff's statement that "I am gay and have the ex-husband to prove it," Zabell could not explain the difference other than to say, *"I think that there is a difference, and I . . . know that you guys are smart enough to pick up on that."* (JA1721-72) (emphasis added). Indeed, prejudice is usually unstated. The judge did nothing to call this out, nor justify the objectively disparate treatment between Zabell's right to call a witness "odd," yet disallow plaintiff's attempt to rehabilitate that witness as wise, (JA1746), when the record supported it. Our best guess is that the affable, well-respected judge didn't appreciate his mindset: Biases creep upon us, unbeknownst to the person reinforcing them. As Judge Posner said, "One must not exaggerate the impact of a judge's career and demographic characteristics on [his] decisions. Most judges are conscious. . . of [biases] and try with considerable success to overcome them." Tyson v. Trigg, 50 F.3d.436, 439 (7th Cir.1995). We agree, but we do not believe Judge Bianco overcame his unconscious biases. He is extremely analytical and of perfect temperament. But we do not believe he gave us a fair trial. Though many individual rulings were fair, in the totality, he rendered the trial unfair, requiring reversal.

CONCLUSION

Appellant asks that the Court vacate the judgment and remand for further proceedings.

Dated: New York, New York
March 19, 2016

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant

STEPHEN BERGSTEIN
Attorney for Plaintiff-Appellant

CERTIFICATION PURSUANT TO FRAP 32(a)(7)(C)

Gregory Antollino, an attorney admitted to this Circuit and attorney for plaintiff, hereby certifies pursuant to Federal Rule of Procedure 32(a)(7)(C) that this brief contains 14,963 words as computed by the word processing program (Microsoft Word) used to prepare the corrected brief, and permission was granted to file an oversized brief not exceeding 15,000 words. The font is Times New Roman, a proportional font, at 14 point. The brief was scanned for viruses using MacKeeper.

Dated: New York, New York
March 19, 2016

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant