No. 17-1623

IN THE

Supreme Court of the United States

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: May 29, 2018
Certiorari Granted: April 22, 2019

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Melissa Zarda, et al. v. Altitude Express, et al.
Case No. 15-3775

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
11/20/2015	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant William Allen Moore, Jr and Melissa Zarda, FILED. [1649107] [15-3775] [Entered: 11/23/2015 03:50 PM]
3/10/2016	66	JOINT APPENDIX, volume 1 of 6, (pp. 1-209), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/10/2016 by CM/ECF. [1723502] [15-3775]
3/10/2016	67	JOINT APPENDIX, volume 2 of 6, (pp. 301-598), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/10/2016 by CM/ECF. [1723504] [15-3775]
3/10/2016	68	JOINT APPENDIX, volume 4 of 6, (pp. 901-1200), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/10/2016 by CM/ECF. [1723505] [15-3775]

3/10/2016	69	JOINT APPENDIX, volume 5 of 6, (pp. 1201-1500), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/10/2016 by CM/ECF. [1723506] [15-3775]
3/10/2016	70	JOINT APPENDIX, volume 6 of 6, (pp. 1501-1800), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/10/2016 by CM/ECF. [1723507] [15-3775]
3/10/2016	71	JOINT APPENDIX, volume 3 of 6, (pp. 601-812), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 3/10/2016 by CM/ECF. [1723508] [15-3775] [Entered: 03/10/2016 07:43 AM]
3/10/2016	72	SPECIAL APPENDIX, on behalf of Appellant Melissa Zarda, FILED. Service date 03/10/2016 by CM/ECF. [1724117] [15-3775] [Entered: 03/10/2016 02:36 PM
3/15/2016	78	CORRECTED JOINT APPENDIX, volume 4 of 6, on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/15/2016 by CM/ECF. [1728083] [15-3775]

3/15/2016	79	CORRECTED BRIEF, on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 03/15/2016 by CM/ECF. [1728085] [15-3775]
6/29/2016	165	CURED DEFECTIVE Brief and Supplemental Appendix, on behalf of Appellee Altitude Express, Inc. and Ray Maynard, FILED. [1805200] [15-3775]
7/13/2016	184	CURED DEFECTIVE Reply Brief, on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. [1813930] [15-3775]
4/18/2017	244	OPINION, the district court judgment is affirmed, per curiam DJ, RDS, GEL, FILED. [2013376] [15-3775]
5/2/2017	255	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 05/02/2017 by CM/ECF. [2024479] [15-3775]
5/25/2017	271	ORDER, dated 05/25/2017, A poll having been conducted and a majority of the active judges of the Court having voted in favor of rehearing this appeal en banc, it is hereby ordered that this appeal be heard en banc. Appellants brief

		and appendix, and any amicus curiae briefs in support thereof, shall be filed by June 26, 2017. Appellees brief and appendix, and any amicus curiae briefs in support thereof, shall be filed by July 26, 2017. Appellants reply brief shall be filed by August 9, 2017. Oral argument will be held on September 26, 2017 at 2:00 p.m., FILED. [2043555] [15-3775]--[Edited 05/25/2017 by DC]
5/31/2017	276	ORDER, dated 05/31/2017, The Equal Employment Opportunity Commission (EEOC) is invited to brief and argue this case as amicus curiae in accordance with the schedule set in the Courts May 25, 2017 order, FILED. [2047418] [15-3775]
6/20/2017	290	ORDER, dated 06/20/2017, inviting Adam K. Mortara, Esq., of Bartlit Beck Herman Palenchar & Scott LLP, to brief and argue this case as amicus curiae in accordance with the schedule set in the Court's May 25, 2017 order, FILED. [2062566] [15-3775]
6/23/2017	296	AMICUS BRIEF, on behalf of Amicus Curiae EEOC, FILED. Service date 06/23/2017 by CM/ECF. [2065295] [15-3775]

6/26/2017	340	BRIEF & SPECIAL APPENDIX, on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 06/26/2017 by CM/ECF. [2066553] [15-3775]
6/26/2017	341	JOINT APPENDIX, volume 1 of 3, (pp. 1-300), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 06/26/2017 by CM/ECF. [2066555] [15-3775]
6/26/2017	342	JOINT APPENDIX, volume 2 of 3, (pp. 301-600), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 06/26/2017 by CM/ECF. [2066556] [15-3775]
6/26/2017	343	JOINT APPENDIX, volume 3 of 3, (pp. 601-719), on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 06/26/2017 by CM/ECF. [2066558] [15-3775]
7/26/2017	417	AMICUS BRIEF, on behalf of United States, FILED. Service date 07/26/2017 by CM/ECF. [2087034] [15-3775]--[Edited 07/27/2017 by AJ]
7/26/2017	421	AMICUS BRIEF, on behalf of Amicus Curiae Adam K. Mortara,

		FILED. Service date 07/26/2017 by CM/ECF. [2087042] [15-3775]
7/28/2017	436	BRIEF, on behalf of Appellee Altitude Express, Inc. and Ray Maynard, FILED. Service date 07/28/2017 by CM/ECF. [2088390] [15-3775]
7/28/2017	437	APPENDIX, volume 1 of 1, (pp. 1-96), on behalf of Appellee Altitude Express, Inc. and Ray Maynard, FILED. Service date 07/28/2017 by CM/ECF. [2088400] [15-3775] [Entered: 07/28/2017 10:18 AM]
7/28/2017	438	CURED DEFECTIVE BRIEF, APPENDIX, on behalf of Appellee Altitude Express, Inc. and Ray Maynard, FILED. [2088413] [15-3775]
8/9/2017	461	REPLY BRIEF, on behalf of Appellant William Allen Moore, Jr. and Melissa Zarda, FILED. Service date 08/09/2017 by CM/ECF. [2097226] [15-3775]
2/26/2018	503	EN BANC OPINION, vacating the district court judgment, remanding the case to the district court for further proceedings consistent with this opinion and affirming in all other respects, by RAK, DJ, JAC, RSP, RDS, RR, PWH, DAL, GEL,

		DC, RJL, SLC, CFD, FILED. [2243368] [15-3775]
2/26/2018	504	OPINION, Concurring, by Judge DJ, FILED.[2243391] [15-3775]
2/26/2018	505	OPINION, Concurring, by Judge JAC, FILED. [2243393] [15-3775]
2/26/2018	506	OPINION, Concurring, by Judge RDS, FILED.[2243402] [15-3775]
2/26/2018	507	OPINION, Concurring, by Judge RJL, FILED.[2243407] [15-3775]
2/26/2018	508	OPINION, Dissenting, by Judge GEL, FILED.[2243412] [15-3775]
2/26/2018	509	OPINION, Dissenting, by Judge DAL, FILED. [2243416] [15-3775]
2/26/2018	510	OPINION, Dissenting, by Judge RR, FILED. [2243419] [15-3775] [Entered: 02/26/2018 09:42 AM
2/26/2018	511	APPEAL, pursuant to opinion, dated 02/26/2018, AFFIRMED. [2243462] [15-3775]
2/26/2018	515	JUDGMENT, FILED. [2243702] [15-3775]
6/4/2018	536	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 06/01/2018, U.S. Supreme Court docket # 17-1623, RECEIVED. [2317416] [15-3775]

4/22/2019	537	U.S. SUPREME COURT NOTICE, dated 04/22/2019, U.S. Supreme Court docket # 17-1623, stating the petition for writ of certiorari is granted, RECEIVED. [2545274] [15-3775]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Donald Zarda v. Altitude Express, Inc.

Case No. 2:10-cv-04334

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
9/23/2010	1	COMPLAINT against Altitude Express, Inc., Ray Maynard Disclosure Statement on Civil Cover Sheet completed -NO, filed by Donald Zarda. (Attachments: # 1 Civil Cover Sheet) (Serret, Liliana) (Entered: 09/29/2010)
1/10/2011	13	ANSWER to 1 Complaint by Altitude Express, Inc., Ray Maynard. (Zabell, Saul) (Entered: 01/10/2011)
3/11/2011	28	AMENDED COMPLAINT against Altitude Express, Inc., Ray Maynard, filed by Donald Zarda. (Antollino, Gregory) (Entered: 03/11/2011)
3/22/2011	30	ANSWER to 28 Amended Complaint by Altitude Express, Inc., Ray Maynard. (Zabell, Saul) (Entered: 03/22/2011)
3/28/2014	145	ORDER denying 132 Motion for Partial Summary Judgment; denying 139 Motion to Strike;

		granting in part and denying in part 109 Memorandum in Support [Defendants' Motion for Summary Judgment]. For the reasons set forth on the record on March 28, 2014, IT IS HEREBY ORDERED that defendants' motion for summary judgment (see D.E. 109) is granted in part and denied in part, that plaintiff's motion for partial summary judgment is denied in its entirety, and that defendants' motion to strike is denied. See Order for additional details. SO ORDERED. Ordered by Judge Joseph F. Bianco on 3/28/2014. (Chipev, George) (Entered: 03/28/2014)
11/19/2014	175	MOTION to Substitute Party (estate for deceased plaintiff), MOTION to Amend/ Correct/ Supplement 28 Amended Complaint (caption only) by Donald Zarda. (Attachments: # 1 Declaration of Gregory Antollino, # 2 Exhibit Probate Documents, # 3 Proposed Order) (Antollino, Gregory) (Entered: 11/19/2014)
12/3/2014	180	ORDER granting 175 Motion to Substitute Party. Donald Zarda terminated; granting 175 Motion to Amend Caption. Accordingly,

		IT IS HEREBY ORDERED that the motion for substitution of the plaintiff's estate for the deceased plaintiff is granted. The Court does not believe an in-person conference is necessary at this time. A telephone conference will be scheduled to address potential trial dates and a schedule for in limine motions. Ordered by Judge Joseph F. Bianco on 12/3/2014. (Bollbach, Jean) (Entered: 12/04/2014)
3/5/2015	190	MOTION in Limine regarding deceased plaintiff's pretrial testimony by William Allen Moore, Jr, Melissa Zarda. (Attachments: # 1 Deposition of Donald Zarda with trial designations in highlighted yellow) (Antollino, Gregory) (Entered: 03/05/2015)
8/7/2015	210	MOTION for Reconsideration re 145 Order on Motion for Partial Summary Judgment, Order on Motion to Strike, by William Allen Moore, Jr, Melissa Zarda. (Antollino, Gregory) (Entered: 08/07/2015)
8/7/2015	211	MEMORANDUM in Support re 210 MOTION for Reconsideration re 145 Order on Motion for

		Partial Summary Judgment, Order on Motion to Strike, filed by William Allen Moore, Jr, Melissa Zarda. (Antollino, Gregory) (Entered: 08/07/2015)
10/13/2015	231	Minute Entry for proceedings held before Judge Joseph F. Bianco: Jury Selection held and completed on 10/13/2015, Voir Dire held on 10/13/2015, Voir Dire Completed; Jury Trial held on 10/13/2015, witnesses sworn, exhibits entered; plaintiff and deft opens (Jury Trial set for 10/14/2015 09:30 AM in Courtroom 1020 before Judge Joseph F. Bianco.) (Court Reporter Owen Wicker.) (Bollbach, Jean) (Entered: 10/14/2015)
10/14/2015	232	Minute Entry for proceedings held before Judge Joseph F. Bianco: Jury Trial held on 10/14/2015, witnesses sworn and exhibits entered (Jury Trial set for 10/15/2015 09:30 AM in Courtroom 1020 before Judge Joseph F. Bianco.) (Court Reporter Owen Wicker.) (Bollbach, Jean) (Entered: 10/15/2015)

10/15/2015	236	Minute Entry for proceedings held before Judge Joseph F. Bianco: Jury Trial held on 10/15/2015, witnesses sworn, exhibits entered (Jury Trial set for 10/19/2015 09:30 AM in Courtroom 1020 before Judge Joseph F. Bianco.) (Court Reporter Owen Wicker.) (Bollbach, Jean) (Entered: 10/19/2015)
10/19/2015	237	Minute Entry for proceedings held before Judge Joseph F. Bianco: Jury Trial held on 10/19/2015, witnesses sworn, exhibits entered (Jury Trial set for 10/20/2015 09:30 AM in Courtroom 1020 before Judge Joseph F. Bianco.) (Court Reporter Ellen Combs and Owen Wicker.) (Bollbach, Jean) (Entered: 10/20/2015)
10/20/2015	238	Minute Entry for proceedings held before Judge Joseph F. Bianco: Jury Trial held on 10/20/2015, witnesses sworn, exhibits entered; plaintiff rests, deft rests (Jury Trial set for 10/21/2015 09:30 PM in Courtroom 1020 before Judge Joseph F. Bianco.) (Court Reporter Ellen Combs and Owen

		Wicker.) (Bollbach, Jean) (Entered: 10/20/2015)
10/21/2015	243	Minute Entry for proceedings held before Judge Joseph F. Bianco: jury trial held; plaintiff summation; deft summation, plaintiff rebuttal, jury trial ends, jury charged; deliberations begin; defts verdict. Jury Trial completed on 10/21/2015 (Court Reporter Ellen Combs and Owen Wicker.) (Bollbach, Jean) (Entered: 10/22/2015)
10/21/2015	246	JURY VERDICT SHEET (Bollbach, Jean) (Entered: 10/26/2015)
10/28/2015	247	JUDGMENT: IT IS ORDERED AND ADJUDGED that the plaintiff, estate of Donald Zarda, take nothing of the defendants, Altitude Express Inc. and Raymond Maynard, and that the action be dismissed on the merits. (Bollbach, Jean)cm (Entered: 10/29/2015)
2/26/2018	256	CERTIFIED ORDER of USCA 15-3775 as to 252 Notice of Appeal filed by William Allen Moore, Jr., Melissa Zarda. We convened this rehearing en banc to consider whether Title VII

		prohibits discrimination on the basis of sexual orientation such that our precedents to the contrary should be overruled. We now hold that sexual orientation discrimination constitutes a form of discrimination because of... sex, in violation of Title VII, and overturn Simonton and Dawson v. Bumble & Bumble, 398 F.3d 211, 217-23 (2d Cir. 2005), to the extent they held otherwise. We therefore VACATE the district court's judgment on the Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects. (Landow, Concetta) (Entered: 02/26/2018)
3/19/2018	257	MANDATE of USCA 15-3775 as to 252 Notice of Appeal filed by William Allen Moore, Jr., Melissa Zarda. IT IS HEREBY ORDERED, ADJUDGED and DECREED that, after en banc rehearing, the judgment of the district court on Zardas Title VII claim is VACATED and the case is MANDATE REMANDED for further proceedings consistent with this Court's opinion. The judgment of the district court is

		AFFIRMED in all other respects. (Landow, Concetta) (Main Document 257 replaced on 4/11/2018) (Landow, Concetta). (Entered: 03/20/2018)
4/11/2018	258	MOTION for pre motion conference regarding successor liabilty [*sic*], MOTION for Discovery regarding successor liabilty [*sic*] by William Allen Moore, Jr, Melissa Zarda. (Attachments: # 1 Exhibit SDLI, Inc. Website (1), # 2 Exhibit SDLI, Inc. Website (2)) (Antollino, Gregory) (Entered: 04/11/2018)
4/12/2018	259	RESPONSE in Opposition re 258 MOTION for pre motion conference regarding successor liabilty [*sic*] MOTION for Discovery regarding successor liabilty [*sic*] filed by Altitude Express, Inc., Ray Maynard. (Zabell, Saul) (Entered: 04/12/2018)
4/12/2018	260	REPLY in Support re 259 Response in Opposition to Motion filed by William Allen Moore, Jr, Melissa Zarda. (Antollino, Gregory) (Entered: 04/12/2018)

5/21/2018		ORDER. With respect to the issue discussed at today's conference, the Court notes that New York Business Corporation Law Section 1006 provides that a dissolved corporation may participate in all court proceedings against it. Ordered by Judge Joseph F. Bianco on 5/21/2018. (Kuhn, Alyssa) (Entered: 05/21/2018)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of February, two thousand and eighteen.

Before: Robert A. Katzmann,
Chief Judge,
Dennis Jacobs,
José A. Cabranes,
Rosemary S. Pooler,
Robert D. Sack,
Reena Raggi,
Peter W. Hall,
Debra Ann Livingston,
Gerard E. Lynch,
Denny Chin,
Raymond J. Lohier, Jr.,
Susan L. Carney,
Christopher F. Droney,
Circuit Judges.

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore, Jr., co-independent executor of the estate of Donald Zarda,

Plaintiffs - Appellants,

v.

Altitude Express, Inc, doing business as Skydive Long Island, Ray Maynard,

Defendants - Appellees.

JUDGMENT

Docket No. 15-3775

The appeal in the above captioned case from a judgment of the United States District Court for the Eastern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that, after en banc rehearing, the judgment of the district court on Zarda's Title VII claim is VACATED and the case is

REMANDED for further proceedings consistent with this Court's opinion. The judgment of the district court is AFFIRMED in all other respects.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

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*Judge Sack and Judge Lynch, who are senior judges, are eligible to participate in this en banc pursuant to 28 U.S.C. § 46(c)(1) and 28 U.S.C. § 294(c).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, Plaintiff, -against- ALTITUDE EXPRESS, INC., dba Skydive Long Island, and RAY MAYNARD, Defendants.	**AMENDED COMPLAINT** 10-cv-04334-JFB-ARL **JURY TRIAL DEMANDED**

Plaintiff hereby alleges upon personal knowledge and information and belief as follows:

NATURE OF THIS ACTION

1. This action is brought by Plaintiff, a gay man, to recover damages for Defendants' discriminatory and otherwise illegal conduct in, among other things, discharging him because of a homophobic customer.

THE PARTIES

2. Plaintiff is a citizen of the State of Missouri.

3. Defendants Altitude Express, Inc., operating as "Skydive Long Island" in Calverton, New York is a corporation organized under the laws of the State of New York, located in Suffolk County, and operates as a "drop zone," i.e., a place where individuals can come to Skydive under the close supervision of experienced Skydive instructors.

4. Defendant Ray Maynard is the Chief Executive Officer of Skydive Long Island and, upon information and belief, its sole shareholder. Upon information and belief he is a citizen of New York.

5. Plaintiff is an experienced Tandem and Freefall (i.e., Skydive) instructor, who was an employee at Skydive Long Island for various summers in the last decade until his termination in July 2010.

JURISDICTION AND VENUE

6. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, among them Title VII of the Civil Rights Act of 1964 as amended and the Fair Labor Standards Act. Jurisdiction is also independently predicated on diversity of citizenship.

7. Venue is properly placed in this district pursuant to 28 U.S.C. § 1391(c) in that Defendants Skydive Long Island is deemed to reside in this judicial district.

FACTUAL ALLEGATIONS UNDERLYING PLAINTIFF'S CLAIMS

8. Plaintiff repeats and realleges the allegations set forth in all previous paragraphs as if fully set forth herein.

9. Plaintiff was employed at Altitude Express, Inc., dba Skydive Long Island (hereinafter "Skydive Long Island") as a Tandem & Accelerated Freefall Instructor in the summers of 2001, 2009 and 2010. Altitude Express has approximately 20-30 employees.

10. Plaintiff is has been a licensed instructor in this field since 1995. He has participated in 3500 jumps over the course of his distinguished career.

11. He worked for the defendants in the summers of 2001, 2009 and 2010. Skydiving is a seasonal sport and defendants operate mostly in the warmer weather, although not exclusively so.

12. While employed by Skydive Long Island, plaintiff was expected to be at work, seven days a week, until released.

13. The hours of operation were either 7:30 AM to sunset or 9:30 AM to sunset.

14. Plaintiff was expected not to leave the premises in case a potential customer came, unless it was raining.

15. Although expected to be on the premises approximately twelve (or more) hours per day, plaintiff was only paid per jump.

16. Some days went by when he would be there all day and not make a dime, not even minimum wage for the hours he spent at work at his employer's insistence.

17. A skydive is a forcibly intimate experience, for the safety of the passenger. Novices who yearn for the thrill of a skydive cannot do so on their own, and thus the instructor must strap himself hip-to-hip and shoulder-to-shoulder with the client.

18. Because of this, before they dive, students at Skydive Long Island must sign a release that contains the following language:

> If I am making a student jump, I understand that I will be wearing a harness which will

> need to be adjusted by the jumpmaster. If my jump is a tandem jump, I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to that of the tandem master. I specifically agree to this physical contact between the tandem master and myself.

19. Before the client and the instructor jump out of the plane, the client is typically sitting on the instructor's lap. The experience is typically tense for a novice, who is about to jump out of the plane with a stranger strapped to him or her.

20. Notwithstanding the waiver, in order to break the ice and make the client more comfortable, instructors often make light of the intimate situation by making a joke about it.

21. For example, when a man is strapped to another man, plaintiff witnessed instructors saying something like, "I bet you didn't know you were going to be strapped so close to a man." Plaintiff also heard instructors state, in reference to a budge protruding from the equipment, "That's the straps you're feeling.".

22. On more than one occasion, plaintiff heard straight instructors say, jokingly, when strapped to male clients, "Don't worry, I'm a lesbian." Or, when a straight man was strapped to a straight man (especially when his girlfriend was present), the instructor might say, "Does you're [*sic*] girlfriend know that you're gay?"

23. This was an openly tolerated form of banter. Plaintiff, as an openly gay man was often the butt of jokes about his sexual orientation. He had mixed feelings about that, but was not troubled when sexual

banter was a way of breaking the ice in a tense situation. On occasion, over the years, when he was tightly strapped to a woman he might say something like, "You don't have to worry about us being so close because I'm gay."

24. This was never a problem until one homophobic customer complained about it. On June 18, 2010, plaintiff was suspended for making this remark to a woman whose name, upon information and belief, is Rosanna.

25. It was known at work that plaintiff is gay and he was open about it. Notwithstanding this, however, the terms and conditions of employment were not the same as compared between plaintiff and other similarly situated employees.

26. Ray Maynard was hostile to any expression of sexual orientation that did not conform to sex stereotypes. Plaintiff has a typically masculine demeanor, but as one example, he criticized plaintiff's wearing of the color pink at work. Women at the workplace were allowed to wear pink, and did without criticism.

27. On one occasion, for example, plaintiff broke his ankle and had to wear a cast. It so happened that the color of the cast plaintiff chose was pink. When Ray saw the pink cast for the first time he scoffed at it and said, "That looks gay!" Later, at a staff meeting he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to plaintiff's cast. It was not a joke.

28. Plaintiff's toenails were also painted pink, which at the time was plaintiff's preference. Women

often wore open-toed sandals to work, as well as pink toenail polish.

29. Additionally, many other instructors were barefoot at the drop zone. When Ray saw plaintiff's pink toenail polish, however, he insisted that plaintiff wear a sock and cover up his foot.

30. Plaintiff would have begrudgingly tolerated these backwards attitudes towards men and their use of certain colors, had plaintiff not been fired for expressing to a customer that he was gay.

31. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including on videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video.[1] Men often talked of their sexual exploits, and Ray openly discussed his problematic marriage.

32. Plaintiff mentioning the fact that he is gay to a passenger, however, got him fired.

33. In his termination interview, Ray said that plaintiff was being fired because plaintiff had discussed his "personal escapades" outside of the office with a passenger (Rosanna).

34. This was completely untrue plaintiff merely stated he was gay.

35. Being gay is not an escapade; it is an immutable condition.

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[1] Customers who hired Altitude were referred to as "passengers."

36. All of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex. Plaintiff was fired, however, because the levity he used honestly referred to his sexual orientation and did not conform to the straight male macho stereotype.

37. Mentioning one's sexual orientation is as much a protected activity as mentioning to someone that one is Catholic, Scottish, or Hispanic.

38. Ray also made other statements in defense of his termination of plaintiff, including that plaintiff had allegedly touched Rosanna inappropriately.

39. It is unknown to plaintiff at this writing whether Rosanna actually made this statement, or whether Maynard made it up. Maynard told plaintiff that Rosanna had made such a statement about touching, however, in a written objection to plaintiff's request for unemployment benefits, a representative of Long Island Skydiving – Maynard, upon information and belief, did not mention the touching, but rather that plaintiff had revealed "personal information" about himself to a customer.

40. The "personal information" revealed was that plaintiff is gay; Maynard argued to the Unemployment Division that this was "misconduct" that should disqualify plaintiff from benefits.

41. Unemployment disagreed and plaintiff was awarded benefits. Neither Maynard nor Unemployment mentioned anything in connection with the alleged touching, either because it did not happen or, in the alternative, even Maynard did not believe it.

42. Again it is unknown at this writing whether Rosanna actually made this complaint of touching. Assuming she did, the fact that Rosanna would simultaneously complain that plaintiff was gay *and* that he touched her inappropriately underscores the facially pretextual manner of the reason for plaintiff's termination, especially in light of the release that all passengers must sign, acknowledging that they will be in close bodily contact with instructors.

43. Maynard, however, did not even investigate Rosanna's allegations by inquiring of plaintiff's side of the story. He did not question plaintiff about the allegations – again, assuming she made them - but decided to accept them as true because, after all, she was a woman, and therefore would give Maynard cover for firing plaintiff since a woman, in general, would be more likely to be believed in the context of a complaint about inappropriate touching by a man.

44. Even though there was a videotape of the jump that showed no inappropriate touching, Maynard dismissed said evidence and purposely lost custody of the tape so that plaintiff could not use it in his defense.

45. In all, the allegation of touching, if it were even made by Rosanna, was a false pretext for plaintiff's termination, which happened because of one homophobic customer's complaint about being near a gay person and of because of plaintiff's failure to conform to stereotypical gender roles for men.

46. Maynard knew that plaintiff is a homosexual and would have no motive to touch a female passenger in any manner other than to protect her safety in accordance with proper procedures.

47. Maynard knew that Rosanna had signed a release wherein she knew she would in close bodily contact with an instructor.

48. Maynard's reaction to Rosanna's baseless complaint – without even as much as asking for plaintiff's side of the story – is an instance of sex stereotyping, insofar as it validates a woman's complaint against a man whereas a man's complaint against a woman – gay or straight – would never have been accorded any credence in similar circumstances. Ray knew this, yet he was more than happy to use what he knew to be a patently false touching complaint against a man as a pretext for firing for being – and saying – that plaintiff is gay.

49. In the alternative, if Maynard made up the allegation of touching, it was meant to bolster his justification for terminating plaintiff for stating he is gay. Maynard's invoking a sex stereotype – i.e., that a woman who complains of being touched by a man must be believed without investigation – in order to justify an unlawful termination is just as bad as if the sex stereotype originated in Rosanna's mind in order to give credence to her frivolous complaint about being told that someone is gay. Plaintiff now sues for relief.

FIRST CAUSE OF ACTION

DISCRIMINATION UNDER TITLE VII

50. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

51. Plaintiff was fired because his behavior did not conform to sex stereotypes.

52. Such actions were in violation of Title VII.

53. By virtue of the foregoing, Plaintiff has been damaged.

SECOND CAUSE OF ACTION

SEXUAL ORIENTATION DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

54. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

55. Plaintiff was fired because of his sexual orientation.

56. Such actions were in violation of the Executive Law of the State of New York.

57. By virtue of the foregoing, Plaintiff has been damaged.

THIRD CAUSE OF ACTION

GENDER DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

58. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

59. Plaintiff was fired because his behavior did not conform to sex stereotypes.

60. Such actions were in violation of Title VII.

61. By virtue of the foregoing, Plaintiff has been damaged.

FOURTH CAUSE OF ACTION

VIOLATION OF THE FLSA

62. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

63. At all times mentioned herein, as limited by the applicable statutes of limitation, Defendants failed to comply with the FLSA, in that Defendants frequently required and permitted Plaintiff to work more than 40 hours per week, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in excess of the hours provided for in the FLSA.

64. Additionally, and even assuming defendant was not required to pay time and a half, plaintiff was entitled to a minimum wage at all times he was at the premises waiting for customers.

65. Plaintiff was not paid minimum wage for the time he was required to sit and wait around for potential skydive clients to appear and was illegally paid by the job, as if he were an independent contractor.

66. However, plaintiff was not an independent contractor and was entitled to a minimum wage in addition to whatever fee he would earn for each dive that he took.

67. Most of the records concerning the number of hours and excess hours worked by Plaintiff, are in the exclusive possession and under the sole custody and control of the Defendants.

68. Plaintiff is unable to state at this time the exact amount owing to them at this time, and proposes

to obtain such information by appropriate discovery proceedings to be taken promptly in this cause.

69. Upon information and belief, Defendants is and was at all relevant times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

70. Upon information and belief, Defendants are and were at all material times herein fully aware that Plaintiff worked more than 40 hours per week without receiving overtime compensation for such additional work and that plaintiff was entitled to a minimum wage for hours not compensated by diving customers.

71. Based upon the foregoing, Defendants, for violating the FLSA, are liable on Plaintiff's first cause of action in an amount to be determined at trial, plus liquidated damages, attorney's fees and costs.

FIFTH CAUSE OF ACTION

VIOLATION OF THE NEW YORK STATE OVERTIME LAW

72. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

73. At all material times herein Defendants failed to comply with, *inter alia,* NYLL § 663(1) and 12 NYCRR § 142-2.2 in that Plaintiff consistently worked for Defendants in excess of the maximum hours provided by state and federal law, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in excess of the hours provided for by state and federal law.

74. Upon information and belief, Defendants were at all material times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

75. Upon information and belief, Defendants' non-payment of overtime pay to Plaintiff was willful.

76. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's second cause of action in an amount to be determined at trial, plus a 25% statutory penalty, attorney's fees and costs.

SIXTH CAUSE OF ACTION

VIOLATION OF THE NEW YORK MINIMUM WAGE LAW

77. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

78. At all material times herein Defendants failed to comply with, *inter alia,* NYLL § 663(1) and 12 NYCRR § 142-2.1 in that Plaintiff consistently worked for Defendants without being paid even a minimum wage for hours in which there were no paying customers.

79. Upon information and belief, Defendants were at all material times herein aware that minimum wage is mandatory.

80. Upon information and belief, Defendants' non-payment of minimum wages to Plaintiff was willful.

81. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's

second cause of action in an amount to be determined at trial, plus a 25% statutory penalty, attorney's fees and costs.

WHEREFORE, Plaintiff demands as follows:

A. Compensatory damages in excess of the jurisdictional amount required of this court;

B. Punitive damages;

C. Cost of suit and attorneys fees;

D. Liquidated damages;

E. Such other relief as the Court may deem just and proper.

Dated: New York, New York

February 22, 2011

/s/

GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff
18-20 West 21st Street, Suite 802
New York, NY 10010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, Plaintiff, -against- ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD, Defendants.	**Case No.:** 10-cv-04334 (JFB)(ARL) **ANSWER TO AMENDED COMPLAINT**

Defendants, ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND and RAY MAYNARD by and through their counsel, ZABELL & ASSOCIATES, P.C., answer the Complaint as follows:

1. Defendants deny the allegations set forth in paragraph "1" of the Complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in paragraph "2" of the Complaint.

3. Defendants admit the allegations set forth in paragraph "3" of the Complaint.

4. Defendants deny the allegations set forth in paragraph "4" of the Complaint, but admit that Defendant Ray Maynard is the President of Skydive Long Island.

5. Defendants admit the allegations set forth in paragraph "5" of the Complaint.

6. Defendants deny the allegations set forth in paragraph "6" of the Complaint.

7. Defendants deny the allegations set forth in paragraph "7" of the Complaint.

8. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

9. Defendants admit the allegations set forth in paragraph "9" of the Complaint.

10. Defendants deny knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in paragraph "10" of the Complaint.

11. Defendants admit that Plaintiff worked for Defendants during parts of 2001, 2009, and 2010, and that skydiving is a seasonal sport, but deny the remaining allegations contained within paragraph "11" of the Complaint.

12. Defendants deny the allegations as set forth in paragraph "12" of the Complaint.

13. Defendants deny the allegations as set forth in paragraph "13" of the Complaint.

14. Defendants deny the allegations as set forth in paragraph "14" of the Complaint.

15. Defendants deny the allegations as set forth in paragraph "15" of the Complaint.

16. Defendants deny the allegations as set forth in paragraph "16" of the Complaint.

17. Defendants deny knowledge or information sufficient to form a belief as to the truth or veracity of

the allegations set forth in paragraph "17" of the Complaint.

18. Defendants admit the allegations as set forth in paragraph "18" of the Complaint.

19. Defendants admit the allegations as set forth in paragraph "19" of the Complaint.

20. Defendants admit the allegations as set forth in paragraph "20" of the Complaint.

21. Defendants deny the allegation set forth in paragraph "21" of the Complaint.

22. Defendants deny the allegations as set forth in paragraph "22" of the Complaint.

23. Defendants deny the allegations as set forth in paragraph "23" of the Complaint.

24. Defendants deny the allegations as set forth in paragraph "24" of the Complaint.

25. Defendants admit the allegation set forth in paragraph "25" of the Complaint that "it was known at work that Plaintiff is gay and open about it," but deny remaining allegations set forth within the paragraph.

26. Defendants deny the allegations as set forth in paragraph "26" of the Complaint.

27. Defendants deny the allegations as set forth in paragraph "27" of the Complaint.

28. Defendants deny the allegations as set forth in paragraph "28" of the Complaint.

29. Defendants deny the allegations as set forth in paragraph "29" of the Complaint.

30. Defendants deny the allegations as set forth in paragraph "30" of the Complaint.

31. Defendants deny the allegations as set forth in paragraph "31" of the Complaint.

32. Defendants deny the allegations as set forth in paragraph "32" of the Complaint.

33. Defendants deny the allegations as set forth in paragraph "33" of the Complaint.

34. Defendants deny the allegations as set forth in paragraph "34" of the Complaint.

35. Defendants deny knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in paragraph "35" of the Complaint.

36. Defendants deny the allegations as set forth in paragraph "36" of the Complaint.

37. Defendants deny the allegations set forth in paragraph "37" of the Complaint. Further, Defendants leave all conclusion of law to the Court.

38. Defendants deny the allegations as set forth in paragraph "38" of the Complaint.

39. Defendants deny the allegations as set forth in paragraph "39" of the Complaint.

40. Defendants deny the allegations as set forth in paragraph "40" of the Complaint.

41. Defendants deny the allegations as set forth in paragraph "41" of the Complaint.

42. Defendants deny the allegations as set forth in paragraph "42" of the Complaint.

43. Defendants deny the allegations as set forth in paragraph "43" of the Complaint.

44. Defendants deny the allegations as set forth in paragraph "44" of the Complaint.

45. Defendants deny the allegations as set forth in paragraph "45" of the Complaint.

46. Defendants admit that Defendant Maynard knew Plaintiff was gay, but deny the remaining allegations contained within paragraph "46" of the Complaint.

47. Defendants deny knowledge or information sufficient to form a belief as to the truth or veracity of the allegations set forth in paragraph "47" of the Complaint.

48. Defendants deny the allegations as set forth in paragraph "48" of the Complaint.

49. Defendants deny the allegations as set forth in paragraph "49" of the Complaint.

50. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

51. Defendants deny the allegations as set forth in paragraph "51" of the Complaint.

52. Defendants deny the allegations as set forth in paragraph "52" of the Complaint.

53. Defendants deny the allegations as set forth in paragraph "53" of the Complaint.

54. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

55. Defendants deny the allegations as set forth in paragraph "55" of the Complaint.

56. Defendants deny the allegations as set forth in paragraph "56" of the Complaint.

57. Defendants deny the allegations as set forth in paragraph "57" of the Complaint.

58. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

59. Defendants deny the allegations as set forth in paragraph "59" of the Complaint.

60. Defendants deny the allegations as set forth in paragraph "60" of the Complaint.

61. Defendants deny the allegations as set forth in paragraph "61" of the Complaint

62. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

63. Defendants deny the allegations as set forth in paragraph "63" of the Complaint.

64. Defendants deny the allegations as set forth in paragraph "64" of the Complaint.

65. Defendants deny the allegations as set forth in paragraph "65" of the Complaint.

66. Defendants deny the allegations as set forth in paragraph "66" of the Complaint.

67. Defendants deny the allegations as set forth in paragraph "67" of the Complaint.

68. Defendants deny the allegations as set forth in paragraph "68" of the Complaint.

69. Defendants deny the allegations as set forth in paragraph "69" of the Complaint.

70. Defendants deny the allegations as set forth in paragraph "70" of the Complaint.

71. Defendants deny the allegations as set forth in paragraph "71" of the Complaint.

72. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

73. Defendants deny the allegations as set forth in paragraph "73" of the Complaint.

74. Defendants deny the allegations as set forth in paragraph "74" of the Complaint.

75. Defendants deny the allegations as set forth in paragraph "75" of the Complaint.

76. Defendants deny the allegations as set forth in paragraph "76" of the Complaint.

77. Defendants repeat and replead each of their responses to the foregoing allegations as if fully set forth at length herein.

78. Defendants deny the allegations as set forth in paragraph "78" of the Complaint.

79. Defendants deny the allegations as set forth in paragraph "79" of the Complaint.

80. Defendants deny the allegations as set forth in paragraph "80" of the Complaint.

81. Defendants deny the allegations as set forth in paragraph "81" of the Complaint.

82. Defendants deny all the allegations contained within the WHEREFORE clause of the Complaint.

AFFIRMATIVE DEFENSES

AS AND FOR THE FIRST AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR THE SECOND AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiff failed to mitigate or otherwise act to lessen or reduce the injuries alleged in the Complaint.

AS AND FOR THE THIRD AFFIRMATIVE DEFENSE

The Complaint, and each of its claims for relief, is barred in whole or in part by all applicable statutes of limitation.

AS AND FOR THE FOURTH AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiff did not suffer any damages attributable to any actions of Defendants.

AS AND FOR THE FIFTH AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiff's claims for relief are barred, in whole or in part, by the doctrine of laches, waiver, estoppel, and/or unclean hands.

AS AND FOR THE SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claim for liquidated damages is barred because Defendants acted in good faith and reasonably

believed that their conduct complied with the applicable provision of the Fair Labor Standards Act.

AS AND FOR THE SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is estopped from pursuing the Complaint, and each of its claims for relief, by reason of the Plaintiff's own actions and courses of conduct.

AS AND FOR THE EIGHTH AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over Plaintiff's claims, which are barred, in whole or in part, by his failure to satisfy the statutory and/or administrative prerequisites to the bringing of this action.

AS AND FOR THE NINTH AFFIRMATIVE DEFENSE

Defendants are exempt from the minimum wage and maximum hour requirements of the Fair Labor Standards Act.

AS AND FOR THE TENTH AFFIRMATIVE DEFENSE

Defendants are exempt from the minimum wage and maximum hour requirements of the New York Labor Law.

AS AND FOR THE ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

AS AND FOR THE TWELFTH AFFIRMATIVE DEFENSE

Plaintiff does not have a contractual right to overtime wages, and therefore, his claims should be dismissed.

AS AND FOR THE THIRTEENTH AFFIRMATIVE DEFENSE

Defendants breached no contractual obligations due and owing to Plaintiff.

AS AND FOR THE FOURTEENTH AFFIRMATIVE DEFENSE

The Court does not have supplemental or subject matter jurisdiction over the Plaintiff's state law claims.

AS AND FOR THE FIFTEENTH AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiff did not suffer any damages attributable to any actions of Defendants.

AS AND FOR THE SIXTEENTH AFFIRMATIVE DEFENSE

Any and all workplace actions taken against Plaintiff were for legitimate, non-discriminatory reasons.

WHEREFORE, the answering Defendants demand judgment dismissing Plaintiff's Complaint with costs, disbursements and attorneys' fees; awarding judgment against Plaintiff and for such other and further relief as this court may deem just and proper.

Defendants expressly reserve the right to amend its Answer and assert additional defenses and/or supplement, alter or change this Answer upon completion of appropriate investigation and discovery.

Dated: Bohemia, New York
March 22, 2011

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: */s/ Saul D. Zabell*
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UNITED STATES DISTRICT COURT
SOUTHERN [*SIC*] DISTRICT OF NEW YORK

DONALD ZARDA, Plaintiff, -against- ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD, Defendants.	NOTICE OF MOTION 13-cv-7170-JFB [*SIC*]

PLEASE TAKE NOTICE that pursuant to the applicable Federal Rules of Civil Procedure and of the United Eastern District of New York, plaintiff will move under Local Rule 6.1, or on such terms and at such time as the Court may order:

1. Reinstating the Title VII claim based on new authority;

2. Such other relief as the Court may deem necessary and proper.

Dated: New York, New York
August 7, 2015

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff
275 Seventh Avenue Suite 705
New York, NY 10001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,	
Plaintiff	Civil Action No.
vs.	10 CV 4334 (JFB)
ALTITUDE EXPRESS, et ano.,	
Defendants.	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR RECONSIDERATION OF THE DISMISSAL OF THE TITLE VII CLAIM

GREGORY ANTOLLINO, ES
Attorney for Plaintiff
275 Seventh Avenue
Suite 705
New York, NY 10001
(212) 334-7397

August 7, 2015

PRELIMINARY STATEMENT

Congratulations – or condolences, as the case might be; I know you are a cautious judge, and this might be an uncomfortable position to be in, but You can be the first judge to hold that Title VII protects sexual orientation discrimination. You not only have that power, ab initio, as any court, rogue or otherwise, has power; but, for the reasons that follow, you *should* be the first judge to [] hold that Title VII protects sexual orientation. The law, if you follow it closely, has

opened up ever so slightly to allow this. The weight of authority at this time in history demonstrates that, while this admittedly is a close question, the deference you owe the EEOC under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) would not only allows, but essentially requires you to defer to agency interpretation in the absence of evidence of Congressional intent. You are in a position to ignore the mandate of *Chevron*, or apply the wooden, dated rule of *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) beyond that which the panel recognized its holding. *Simonton* was a close case written in precatory language; it was even amended to **remove** the following headnote (originally 7):

> Because the term "sex" in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e *et seq.*, refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.

Compare *id.* with its prior incarnation, reported at 225 F.3d 122 (2d Cir. 2000). The Second Circuit allowed the *result* to stand in the amended opinion, but forsaw [*sic*] that the statement set forth in that headnote should not enter the federal reporter. Headnotes don't count for holdings: We're taught that in the first week of law school, but the removal of this headnote is significant because it speaks to the Circuit's intent in affirming the dismissal of a sexual-orientation discrimination claim on the narrow grounds of the grant of a 12(b)(6) motion, recognizing that the law would likely develop in such a way as to make such a blanket statement imprudent. Further, *Simonton* did *not analyze the legislative history of Title VII*, but

merely subsequent Congressional attempts to make it Title VII more clear. 232 F.3d at 35. But at the time there was no agency interpretation and that's not the way a court applies *Chevron*; the question is simply whether the agency's interpretation is reasonable, and whether Congressional intent in adopting the particular statute in question said anything *different* about how the agency interpreted the statute. *Simonton* not only did not analyze agency interpretation, but it not analyze the original congressional intent, which it admitted was vague. *Id.* at 35, citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).[1]

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[1] Imagine a member of Congress introducing a bill protecting from discrimination Muslim worshippers who follow Sharia law. Such a bill would get nowhere in this political climate, notwithstanding that Title VII protects religious worship of any kind. If, hypothetically, that were to happen and a person thereafter were to bring suit alleging discrimination on the grounds of membership in the sect of Muslim faith that follows Sharia law, *the responsibility of the Court would be to protect the minority based on the plain language of the statute*, not interpolate Congressional intent from the 1960's based on a more current wave of discrimination. *See, e.g.*, *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), aff'd 670 F.3d 1111 (10th Cir. 2012) (granting injunction on legislative effort to outlaw Sharia Law on multiple grounds.). The polity did not speak of Sharia Law when the Civil Rights Act was passed, and no one knows why Title VII was adopted with sex as a protected class. The fact is that sex was thrown into the Act by an amendment to derail the bill, by an avowed racist, one "Mr. Smith" from Virginia, who absurdly noted: "The census of 1960 shows that we had [an imbalance] in this country . . . of 2,661,000 females. Just why the Creator would set up such an imbalance of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the

The question for this Court is not only whether *Chevron* deference trumps appellate precedent. The question is more nuanced to these facts: First, would the rules of *Chevron* apply without regard to appellate authority; (2) whether there is any bright line rule forbidding a district court from applying *Chevron* given newly adopted agency decisionmaking; and (3) whether these nuanced circumstances including (1) an almost complete absence of legislative history; (2) a clear statement of interpretation by the agency; (c) a very carefully worded decision in *Runyon* that was subsequently amended; and, most significantly (d) subsequent Second Circuit authority that has given deference to the EEOC's interpretation of the application of Title VII to sexual minorities. Finally, I'll throw in the judical [*sic*] economy argument. This is clearly a close call, but if you follow *Chevron* and you look to the clear development of Title VII in favor of the protection of sexual minorities like Donald Zarda, you would be courageous, but well suited to grant this motion.

PROCEDURAL SUMMARY

The procedural events leading to this motion are, synoptically, as follows: Plaintiff filed his complaint in 2010 alleging sexual orientation discrimination under state law and discrimination under Title VII alleging sex stereotypes under the nuanced rules afforded by the Second Circuit. *See, e.g.*, *Sassaman v. Gamache*,

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Congress and President Johnson should take immediate steps to correct, especially in this election year. Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their 'right' to a nice husband and family?" 110 Cong. Rec. 2577 (1964) (quoted in Francis J. Vaas, Title VII: Legislative History, 7 B.C.L. Rev. 431, 441-42 (1966)).

566 F.3d 307 (2d Cir. 2009). At the time of summary judgment, the Second Circuit had promulgated a case-by-case approach in which to a litigant could allege sexual sex stereotypes as a subset under Title VII, but shyed away from blatant sex stereotype claims based on the stereotype that men associate sexually with other men. The reasoning, as stated in *Simonton*, was that Congress had not adopted a sexual orientation discrimination cause of action, ipso facto, it must not have interpreted Title VII to have been inclusive of sexual orientation discrimination. Though I would have preferred otherwise, this Court did not, on summary judgment, believe that there were sufficient facts to make it to the jury under Title VII, but allowed the sexual orientation claim to go trial given diversity. Sadly, the plaintiff died young, but there was sufficient evidence to allow his estate to substitute for the plaintiff and the case is scheduled for trial on October 13.

ARGUMENT

I. CHANGES IN THE INTERPRETATION OF TITLE VII

The EEOC, starting in 2011, began to take a more expansive view of Title VII as it related to sexual minorities. First, in *Macy v. Holder*, EEOC Appeal No. 0120120821, the Commission found that a transgender woman was discriminated against on the basis of Title VII, despite *additional* federal protections for gay and lesbian and transgender employees. The Commission held:

> While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender

> identity, she clearly expressed her desire to have her claims investigated through [the Title VII]. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Id. at p.6. After *Macy* came down, no less than the Second Circuit applied it in reversing Judge Kaplan[2] on an equitable-tolling issue. *Fowlkes v. Ironworkers Local 40*, 2015 U.S. App. LEXIS 10339 (2d Cir. N.Y. June 19, 2015):

> It was not until *Macy v. Holder*, (E.E.O.C. Apr. 20, 2012), published after *Fowlkes* filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII. Thus, Fowlkes's failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had "taken a firm stand" against recognizing his Title VII discrimination claims.

Id. at *18. I think your answer is right there. The Second Circuit recognized *Macy* as explaining Title VII, notwithsanding [*sic*] no previous caselaw supporting the argument, and, indeed, some caselaw that seemed to contradict it. Now we have *Complainant v. Foxx*, Appeal No. 0120133080, which I

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[2] The decision said it was both Judge Preska and Kaplan; PACER confirms it was actually Judge Kaplan who sat in the district court.

have provided the court and holds straight away that sexual orientation discrimination is sex discrimination both because of sex steretypes [*sic*] and for associational discrimination. It chided the analysis that other courts have reached in rejecting the claims of sexual minorities' use of Title VII by holding that associational discrimination has long been recognized as a cognizable claim under Title VII, despite that said statute does not carve out a niche for blacks who date whites. The same is true as to sex stereotypes; there is no statutory language that creates a cause of action for "masculine women," nor, for that matter, sexual harassment – something that wasn't recognized until the 1970's, *Meritor*, nor same-sex sexual harassment, which wasn't recognized until the 1990's. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79, 78-80 (1998) ("statutory prohibitions often go beyond the principal evil [they were passed to combat] 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."). Lower courts and litigants cannot veritably wait until the Supreme Court rules on every single controversy. District Courts have to take a stand on issues that are foreseeably in the offing. Judge Weinstein recently held *Foxx* to be a landmark decision *Roberts v. UPS, Inc.*, 2015 U.S. Dist. LEXIS 97989, *40 (E.D.N.Y. July 27, 2015) and described how the arc of history over the last few decades – and, indeed, since the filing of this case – has changed markedly towards gays and lesbians. *Id.* at 39-42. He noted that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including

the inference that the existing legislation already incorporated the offered change." (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citations omitted)). It so happened that *Roberts* case was a diversity matter filed by the plaintiff in federal court, that pled no cause of action under Title VII, merely five claims under the City Administrative Code. (I checked PACER as to this, and Judge Weinstein's analysis doesn't mention Title VII as a basis for plaintiff's claims.) His analysis as to Title VII is therefore dicta, but one of the most highly respected and smartest judges in the country cannot be ignored.

II. *FOXX* ALONE WOULD REQUIRE *CHEVRON* DEFERENCE

The question presented to the Court is whether, in the midst of circuit caselaw that goes in one direction, what should the court do when the agency that interprets the law in question comes out with a holding seemingly, but not entirely, contrary to the Circuit authority. First, the question would be whether *Foxx* would require *Chevron* deference in the first instance. *Chevron* requires a two-part test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the

> court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, *the question for the court is whether the agency's answer is based on a permissible construction of the statute*.

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

A. *Foxx* Satisfies *Chevron* Step One: Statutory Ambiguity

Chevron deference is afforded to the adjudicatory function of the EEOC. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). *See also Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325, 1335–36 (2011) citing *Mead*, 522 U.S. at 229, 234–35; *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874–75 (2013). Thus, the EEOC's commission decision in Foxx should be afforded deference insofar as its opinion resolves "ambiguities in statutes within [the] agency's jurisdiction to administer . . . [and] the agency [filled] the statutory gap in a reasonable fashion." *Nat'l Cable & Tele. Comms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Furthermore, as noted above in lengthy footnote 1, as well as *Meritor*, Title VII's legislative history does not address the meaning of the term "sex." Statutory terms are deemed "ambiguous" for *Chevron* purposes where no clear meaning can be divined after subjecting the text to traditional tools of statutory interpretation, including looking at the structure of the statute, drawing inferences of intent from statements of

statutory goals, applying myriad canons of interpretation, and assessing statements from legislative history. *K Mart Corp v. Cartier, Inc.*, 486 U.S. 281, 300 (1988). Where traditional tools of interpretation fail to divine definitive meaning, "ambiguity" is established. As such, the Supreme Court has repeatedly upheld that agency's interpretations pertaining to sex. *See, e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679–83 (1983) (interpreting sex to include discrimination against men and to reach inequitable employer provided health benefits); *Meritor*, 477 U.S. at 65 (interpreting sex to include sexual harassment); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (interpreting sex to include gender and sex stereotyping); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78–79 (1998) (interpreting sex to include same-sex sexual harassment). Because the meaning of "sex" is ambiguous, *Foxx* satisfies the first step of *Chevron*.

B. *Foxx* Satisfies *Chevron* Step Two: Permissible Interpretation

Chevron step two is satisfied where the agency's interpretation is deemed to "reasonably effectuate Congress's intent for" the underlying statute and presents a tenable policy decision in light of statutory goals." *Texas v. United States*, 497 F.3d 491, 506 (5th Cir. 2007) citing *Chevron*, 467 U.S. at 845 ("If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," a court will not disturb that choice "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned."). *See*

also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (noting deference at step two is afforded where the agency is deemed to have made a "reasonable policy choice" and quoting *Chevron*, 467 U.S. at 845).

As the Supreme Court has recognized elsewhere, Title VII's proscription of discrimination "because of . . . sex" reaches "reasonably comparable evils" that are captured by the statutory text even where they lie outside Congress' "principal" target at enactment. *Oncale*, 523 U.S. at 79 (Scalia, J.). Thus, although Congress did not expressly state that Title VII would reach male-on-male sexual harassment, the broad statutory proscription of all "discrimination because of . . . sex" necessarily captures it. *Id.* ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *see also Newport News*, 462 U.S. at 697–81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat). Moreover, the EEOC's interpretation of Title VII need not be the "best one" in order for it to be "reasonable." *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988) (affording *Chevron* deference and noting "it is axiomatic that the EEOC's interpretation of Title VII . . . need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be *reasonable* to be entitled to deference.") (emphasis added).

The reasonability of the interpretation of sex is made plain by the end of the decision where the Commission states,

> Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. . . . Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.

Foxx at 6-7. There is nothing unreasonable about this interpretation and indeed it is self-evident. Furthermore, the Commission notes later in its decision that there is nothing in Title VII that protects "masculine women," "people in interracial relationships," women as "mothers," or non-religious people, but all of these categories are protected under Title VII. This analysis is unassailable, not just reasonable.

III. *CHEVRON* DEFERENCE SHOULD TRUMPS CIRCUIT AUTHORITY, AT LEAST WHERE THE AUTHORITY DID NOT ENGAGE IN A *CHEVRON* ANALYSIS

I have found two cases that mention in passing, but that do not discuss, a court's obligations under *Chevron* versus contrary circuit authority. In *Nazif v. Computer Scis. Corp.*, 2015 U.S. Dist. LEXIS 78673 (N.D. Calif. 2015), the district court noted the lack of circuit authority on a point for which there was agency authority in a footnote, p*17, n.5. The same is true in *Austin v. Jostens, Inc.*, 2008 U.S. Dist. LEXIS 83412 p*33 (D. Kan. 2008). Both of these courts merely noted that there were no conflicts between Circuit and agency authority and did not analyze how to grapple with such a conundrum were it to exist. There is one decision, however, wherein the Ninth Circuit held on its own accord that *Chevron* deference trumped another form of statutory construction adopted by the Supreme Court in interpreting statutes pertaining to Indian Tribes. *Confederated Salish & Kootenai Tribes v. United States*, 343 F.3d 1193, 1198 (9th Cir. 2003). This decision is instructive insofar as the Ninth Circuit, without guidance from the higher court, decided that *Chevron* deference would trump other binding authority from the Supreme Court. So too must this Court decide whether newly created *Chevron* deference should trump Circuit authority that is obviously evolving. Further, I contend that *Fowlkes v. Ironworkers Local 40*, gives you that permission. The Circuit appointed counsel to the plaintiff in *Fowlkes*, whose case was dismissed because it had not been filed within ninety days (plus time for mailing) of the issuance of the right to sue

letter. It allowed a healthy period of equitable tolling, however, noting that

> Fowlkes may have a colorable argument that filing a charge alleging discrimination based on his transgender status would have been futile. When Fowlkes filed his 2011 complaint, the EEOC had developed a consistent body of decisions that did not recognize Title VII claims based on the complainant's transgender status. . . . It was not until *Macy v. Holder*, published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII. . . . Thus, Fowlkes's failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had "taken a firm stand" against recognizing his Title VII . . . claims.

Fowlkes v. Ironworkers Local 40, 2015 U.S. App. LEXIS 10339, *17-18 (2d Cir. N.Y. June 19, 2015). The Circuit authority, indeed, had for the most part followed the earlier line of EEOC interpretation. *See*, *e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) and *Morales v. ATP Health & Beauty Care, Inc.*, 2008 U.S. Dist. LEXIS 63540, *23 (D. Conn. Aug. 18, 2008) (citing *Dawson*). Now, all of the sudden, because of a new agency interpretation, a plaintiff is given the rare gift of an equitable tolling. This says something. This says that the Circuit looks to E.E.O.C. guidance in interpreting Title VII claims, and that you would be well advised to as well. Is the Circuit going to reverse you because you applied *Chevron* deference

when it, too, is applying *Chevron* deference in a changing environment for sexual minorities? I don't see how a higher Court can insist that you afford deference under *Chevron*, yet simultaneously disregard it because of dated authority that does not afford *Chevron* deference. The Circuit, if this case reaches it, too, will have to give *Chevron* deference. As one commentator noted:

> Thus, if the Court's prior decision speaks in clear and unambiguous terms to the precise issue at hand, the prior decision should be controlling. But if the Court has not confronted the precise issue or if its holding is ambiguous, then the Court should uphold the agency's reasonable interpretation of the Court's precedent. This approach reconciles the values of stability, predictability, and rule of law underlying stare decisis with the advantages of flexibility and political accountability underlying *Chevron*.

Rebecca White, "The Stare Decisis 'Exception' to the *Chevron* Deference Rule," 44 Florida Law Review 727-28 (1992). *Chevron* "broke new ground by invoking democratic theory as a basis for its deferential approach to judicial review." Thomas W. Merrill, "Judicial Deference to Executive Precedent," 101 Yale L.J. 969, 972-75 (1992) (discussing varying pre-*Chevron* methods used by the Supreme Court in determining when to defer to agency interpretation of statutes). As the Supreme Court has stated, "Precedent is not 'sacrosanct'; given a strong enough justification for overruling its precedent, the Court will not hesitate to do so." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989). The Second Circuit

binds you to *Chevron* deference, *New York v. FERC*, 783 F.3d 946 (2d Cir. 2015), and it recognized in *Fowlkes*, while not mentioning *Chevron*, that the agency's position has changed. *Simonton* cannot withstand *Foxx*, so you should recognize the change that is occurring and reinstate the Title VII claim.

IV. JUDICIAL ECONOMY MITIGATES IN FAVOR OF REINSTATING TITLE VII

During the conference, the Court noted that you would not prefer to allow the jury to deliberate on punitive damages, available under Title VII but not the New York Law, simply on the grounds of judicial economy. Nevertheless, I mention it again because with this new authority, it is almost certain that courts will adopt *Foxx*. It would be burdensome to everyone to retry a case on the grounds of punitive damages when, in the contingency that I am wrong – and I will not seek to execute a punitive damages judgment pending appeal, nor need we litigate attorneys' fees until a mandate issues – that we have to come back and do this all over again after five years of litigation and the death of the plaintiff. *See, e.g.*, *In Re: Nexium* (*Esomeprazole*), slip op. (D. Mass July 30, 2015) (in discussing a trial, an experienced judge notes, "Like many judges, I reasoned that, since we were but a day away from submitting the case to the jury, the better part of valor lay in going to verdict and then unwinding it should I become convinced that the Defendants were entitled to judgment as matter of law."

CONCLUSION

Plaintiff asks that the Court reconsider the earlier order and reinstate the Title VII claim.

Dated: New York, New York
7 August 2015

/s/
Gregory Antollino, Esq.