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.

En Banc Rehearing of the Panel Opinion Reported at 855 F. 3d 76 (2d Cir. 2017)

APPELLANT'S BRIEF & SPECIAL APPENDIX (corrected)

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ISSUE

Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?

We address the question as the Court has ordered, and answer emphatically Yes. But to paraphrase George Bernard Shaw, when some might ask, "Does it?", we might sometimes look to things that never were and ask instead, "Does it not?"[1]

JURISDICTION

The Court has subject-matter jurisdiction in that we present a federal question, 28 U.S.C. § 1331 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended, 42 U.S.C. § 1981a. The district court dismissed plaintiff Donald Zarda's sex discrimination claim on summary judgment.

[1] *Back to Methuselah,* Act I, *Selected Plays with Prefaces,* vol. 2, p. 7 (1949).

However, he also met the requirements of diversity jurisdiction, 28 U.S.C. § 1332. After the trial wherein the substituted plaintiff Estate lost under New York Executive Law § 296, Melissa Zarda and William Moore as Co-Independent Executors timely appealed from the October 28, 2015 judgment of the District Court. Appellate jurisdiction is thus proper under 28 U.S.C. § 1291.

The three-judge Panel (Jacobs, Sack and Lynch, JJ.) affirmed the District Court on April 28, 2017. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017). SPA.54-64 (Special Appendix, attached). The Estate – to which we wish to refer as "Plaintiff" or "Donald Zarda" – timely petitioned for *en banc* review on May 2, 2017. On May 25, 2017, the active judges of this Circuit ordered this rehearing. SPA.54-55.

PROCEDURAL BACKGROUND

In 2010, Donald Zarda filed his charge with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging sex discrimination as a victim of sex stereotyping as a violation of Title VII. After securing his right to sue, Zarda initiated litigation the same year against defendant Raymond Maynard, the sole owner of Altitude Express, doing business as "SDLI" or "Skydive Long Island" – the geographic descriptive being the situs of the lawsuit (Bianco, J., presiding in the Eastern District of New York, docket 10-4334). Plaintiff's Title VII claim alleged he was a victim of discrimination as gender non-conforming: often mistaken as

straight, Zarda readily corrected the assumption. He also wore a jaunty pink cap and painted his toenails in comparable delicate colors. JA.398-99.

The state claim alleged that Maynard fired Zarda because of his sexual orientation. The incident giving rise to Zarda's termination was a third-party accusation that Zarda had flirted with a young female skydive passenger Rosana Orellana, who had embarked upon an adventure in the sky with Zarda as her instructor. Someone made an assertion in the presence of her boyfriend, David Kengle, to the effect that "I bet you didn't expect your girlfriend to be strapped up to another guy!" No one challenged that the assertion was made in jest, as it had been many, many times before. As skydive instructor – or, officially, "Tandem Master" – Zarda was required to protect Orellana not only with his hands, but zip his torso to hers, with straps attaching at the hips. Passengers embarking on this kind of ride ris and therefore must remain at ease as they climb into a mini-aircraft, doors unguarded, ascend towards the firmament with the assistance of a parachute, then drift slowly towards earth. At first, adrenaline kicks in, then the tandem master pulls the ripcord and instructor and student alight upwards. In seconds, they reach a speed where the force of air resistance, pushing further upward until the torque balances with gravity, which pulls them downward. For a few moments, with the help of the parachute, there is no acceleration towards earth. The tandem pair fall at a slow, steady speed, and, with hope, land peacefully after enjoying the cool, calming influence of the landscape.

Only certain people choose this activity, perhaps without expectations. When these chosen climb into the rickety plane and get closer towards the fundamentally dangerous point of inflection – tumbling into the sky – the atmosphere must be simultaneously giddy but composed, tandem master in control. As Orellana was secured to Zarda, the third person exclaimed the weary workplace witticism: "I bet you didn't think your girlfriend was gonna to be strapped to another guy!" JA.303.

Shortly after this fabricated mirth, Zarda sensed Orellana's discreet disquiet. As they were in the sky, he outed himself as gay, because he suspected the cause of her perceived discomfort was the suggestion that, in taking Orellana so close to his person – as required – he was supplanting Kengle's role as her protector. In fact, Zarda had no interest in Orellana and characterized himself as "100% gay." JA.151. The photo and video evidence might signal snippets of her anxiety, but mostly it shows excitement. Nothing went wrong until Orellana told Kengle about Zarda's outing himself later the same day. Kengle brooded over the weekend, then complained to Defendant-Appellee Maynard who immediately suspended Zarda, and docked his pay; he fired Zarda a week later.

Zarda alleged that, as male, even if gay, Maynard terminated his employment because of this disclosure; he then threw in as pretext an uninvestigated, dubious allegation that "Gay Don" (as he was known) was also fired because he improperly touched Orellana on the jump in the plane and up in the sky; the investigation

consisted solely of a denial by Zarda.[2] (His claim under the New York State Human Rights Law was sexual-orientation discrimination, as protected - with fewer remedies and a higher standard of proof as compared to Title VII – as codified by New York Executive Law § 296.)

Zarda was unguarded about his sexuality. He was an outlier, residing mostly in regions of the United States where men and women of the "Homosexual Profession" live their lives *sotto voce* – Kansas, Missouri, Texas ("homosexual" being a term somewhat out of favor). As he studied aviation, Zarda worked as a tandem master at "drop zones" like SDLI. A drop zone is an airstrip for mini-planes; self-selecting thrill-seekers fly to 13,000 feet, attached by zippers, harnesses and straps to instructors like Zarda. Before Orellana went up in the sky, however, and as required, she signed a binding consent with fee-shifting fangs, warning her of "close" contact before she engaged in what is an objectively perilous activity: she could not sue Altitude Express.

A videographer recorded her adventure, which ended well-choreographed and as picturesque as imaginable. *See* EA (Orellana Jump); JA.388-90. Kengle seemed to enjoy his experience too, EA (Kengle Jump), but later called SDLI to

[2] The Court recently decided *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267 (2d Cir. 2016), holding a negligent investigation of sexual harassment may be actionable in certain situations. We alerted *Vasquez* to the Panel, Letter, F.R.A.P. 28(j), 9/9/2016. JA.59. We don't invoke *Vasquez* here, but will if this Court orders a remand. The issue of the bona fides of Maynard's investigation, raised repeatedly below, is now an issue of law.

complain about Zarda's openness about being gay to Orellana; he also said that she said she was uncomfortable at her hips during the airlift and upwards journey into the sky. JA.504. Zarda was suspended immediately, and fought for a week for reinstatement with the support of his supervisor, Richard Winstock. Maynard nevertheless discharged him. Zarda recorded the termination meeting, and the recording preserved direct evidence of motive and disparate treatment. EA.[3] (termination recording); JA.418-22.

Both sides moved for summary judgment. On March 28, 2014, the District Court granted defendants' motion under Title VII, rejecting plaintiff's evidence of colored masculinity as a sex stereotype and his analogy to *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009), which holds that taking adverse action after failing to investigate a complaint suggesting a sexual nuisance can be a form of sex stereotyping. (683-691; SPA.66-84.). The judge, however, upheld the state claim given the remaining diversity jurisdiction because "the disclosure of sexual orientation to Orellana was . . . in very close proximity to the termination. SPA.72. Additionally, another employee, Richard Winstock, had "disclosed his heterosexual[ity] during" jumps and suffered no adverse action (JA.682, SPA.72) – clear evidence of disparate treatment. "[T]he reason for the termination" later changed JA.681, SPA.72, making the evidence sufficient to question whether it "was because of the articulated nondiscriminatory reason. . . of a customer

[3] Electronic appendix on disk, permitted by order on motion, Volume I of II.

complaint about discomfort and being touched by the plaintiff during the [parachute] jump or" his "sexual orientation, or the disclosure" thereof. *Id*.

Sadly, Zarda died in a BASE jumping accident before trial.[4] The Estate of Donald Zarda moved to take over and the motion was granted with the intention of reading Zarda's deposition at trial. Months before trial was already scheduled, however, the EEOC handed down *Baldwin v. Foxx,* 2015 EEOPUB LEXIS 1905 (July 16, 2015). Plaintiff moved to revive the Title VII claim based on this new precedent (JA.708), wherein the EEOC explains how "sex" covers sexual orientation by its language and logic, in various ways, citing a growing body of case law. The lower court nevertheless held that *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), tied his hands, and would not defer to the EEOC as we had requested. JA.716, SPA.64-65.

The trial on the New York claim commenced and the court, over objection, instructed the jury under a complicated substantive charge under state law.[5] The

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[4] BASE jumping is wingsuit free-falling from Building, Antenna, Span – aerial bridges – and Earth, the last commonly fjords. Zarda gravitated to BASE jumping from skydiving; he felt uncomfortable having been accused of being a "gay pervert" for doing what he saw as his job: protecting the passenger. JA.718-19.

[5] The New York Pattern Jury Instruction recites a "but for" standard in proving discrimination, followed by the prima facie factors under *McDonnell Douglas v. Green,* 411 U.S. 792 (1973). This creates a complicated puzzle requiring a jury, after finding "but for," to consider the *de minimus* elements of *McDonnell Douglas* that is a bench issue. *Abrams v. Dep't of Pub. Safety*, 764 F.3d 244, 252 n.6 (2d Cir. 2014). *See* New York Pattern Jury Instructions—Civil, 9:1. We noted to the Panel that this instruction does not comport with Title VII, that the loss was infected by the instruction and a federal trial remained tenable. A federal instruction would avoid

jury returned a defense verdict. Judgment entered on October 28, 2015. JA.719, SPA.83. This appeal timely followed. (JA 718). After argument and submission, a Panel of this Court affirmed (JA 3), taking no position on the New York instruction, but agreeing that plaintiff would be entitled to a new trial if *Simonton* were overruled. *Id*. A poll of active judges of the Court granted *en banc* rehearing on May 25, 2017. (JA 1-2; SPA.55-56).

FACTS

The Court construes evidence for the non-movant on summary judgment and resolves issues of law, including the inference to be drawn from facts, *de novo*. Here, only the defense won summary relief under Title VII. Since plaintiff has abandoned the state law claim, the pre-trial facts are construed favoring him. We assume nothing in having access to an *en banc* rehearing on a legal question, and summarize the facts as succinctly, but as sufficiently as we would to a three-judge panel.

1. The Escapade.

We claim that defendants ended plaintiff's employment because of his sex, a status inextricably intertwined with sexual orientation. Zarda lost his job because he told Orellana that he was a gay man. This case highlights the ultimate gender non-

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McDonnell Douglas and advise the jury to decide if Zarda's sex was a "motivating factor" in the adverse actions he suffered. *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). Additionally, 42 U.S.C. § 1981(a) amends Title VII to provide a plaintiff with remedies even if the motivating factor does not cause adverse action, including attorneys' fees and equitable relief.

conforming stereotypes: (1) a man with an affectional preference for other men; and (2) his being open about it despite no other evidence as to his sexuality or its culture, save the pink-painted toenails. JA.392, 398 ¶ 15. Orellana relayed Zarda's revelation to Kengle, who was outraged; she or he (or both of them) bootstrapped this charge with a bit of logic reminiscent of Alice's Adventures Wonderland: that Zarda flirted with and touched her hip uncomfortably during the skydive. What is certain is that Zarda said, in response to his sense of Orellana's discomfort, that she need not worry about having him so close: he was gay "and ha[d] the ex-husband to prove it." JA.400 ¶ 23.

Plaintiff acknowledged to Maynard that he likely outed himself to a customer as he had in the past. He denied, however, any unexceptional contact with Orellana; experienced in his profession he, and anyone else similarly trained knew that passenger well-being requires close connection, particularly at the hips. JA.358, JA.368-370.

Orellana didn't want to complain to Maynard, and he never spoke to her. JA.596. He only confronted Zarda. Maynard said if "convinced" a complaint is true, he "would look into it." JA.599. Since Maynard did no investigation other than talking to Zarda, by his logic, he was convinced only that Zarda revealed he was gay. JA.402-405, ¶¶ 28-43. Nothing else mattered if in dispute, so why investigate? Enraged about the complaint at the moment he suspended him, Maynard took money from Zarda's paycheck that he'd earlier refunded the passengers. JA.146.

After that, he inquired nothing of anyone on the plane. Zarda's supervisor, Richard Winstock, tried to talk Maynard down (JA.404. ¶ 37), but Maynard discharged Zarda after the suspension. JA 404, ¶ 39. When this happened, however, he did return the docked portion of Zarda's paycheck. JA.629.

The Orellana-Kengle videotapes show both participants engaging in rousing amusement. EA1-2. Maynard quibbled about this, but admitted he saw nothing "improper, inappropriate or unsafe" that had occurred between Zarda and Orellana on their tandem jump video. JA.633. A court making inferences in favor of the non-movant must accept the construction that the evidence shows the jump was an altogether entertaining, safe experience. Orellana and her partner each exclaimed "Awesome!" at landing. EA1 [2:52]. Zarda – who had by then jumped thousands of times – acted like a hardworking character suited up and working the crowd at Disneyworld: he could not share enough in the gaiety.

Maynard contended he terminated Zarda simply because he received a "serious complaint" (JA.653) even if uninvestigated. The District Court accepted this as a neutral non-discriminatory reason for termination, dismissed the claim given the evidence of sex-stereotyping – and the law at the time – and marked the case for trial under New York law. JA.673-691.

During the termination meeting, plaintiff secretly recorded Maynard. EA.5, Vol. I. A transcription of the conversation (JA.412) shows that 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.639. 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 is 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 alleged physical discomfort. JA.656-57. Defendants noted other unspecified complaints against Zarda. *Id*. Plaintiff learned in discovery these alleged grievances were similarly related to Zarda's sexual orientation: In 2001, two women "in tears" allegedly moaned that plaintiff revealed his sexual orientation. JA.617. While plaintiff had a different understanding about 2001 (believing Maynard fired him for refusing to perform an unsafe diving maneuver, JA.394-96, ¶¶ 6-9), Maynard's response to the Department of Labor is further evidence that revealing a non-obvious, gender non-conforming status was contrary to his mindset. In any case, Maynard documented nothing about 2001. JA.617.

2. Events at the Dropzone: Frame by Frame.

Zarda was an experienced, talented skydiver. Most co-workers very much liked him; customers praised him. JA.425. Zarda's supervisor, Winstock, rated his jump with Orellana at 97% (JA.437); Maynard gave him 8 or 9 out of 10. JA.653.

Zarda had outed himself in other, similar situations. As was common, someone joked in a boyfriend's presence about close contact between his girlfriend and Zarda. JA.225-26. Such banter was feigned fun: "jokes" suggesting sexual innuendo are "golden oldie[s]" at drop zones nationwide. JA.224. Zarda was happy, ebullient, good-looking and athletic; if female customers were interested in him, Zarda came out as gay to "calm a situation" and take himself "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[,]. . . [S]o if [the boyfriend] hears. . . he can know, [I'm] not going to hit on [his] girlfriend.[']" JA.226. But this "golden oldie" did not please Kengle. JA.473-74. Orellana was uncomfortable for different reasons, including that she is claustrophobic (JA.481) – not an ideal condition when closed in a mini-plane, about to jump into the sky. Nevertheless, when her jump ended, she appears relaxed in the video (EA. Orellana Video) and after the jump poses with Zarda. *Id*. Some stills taken in the plane, EA.Photos, JA.361-87, show her flirting with the camera. *See, e.g.,* JA.387.

Zarda said he was gay, and the jump with Orellana got him fired. But he did nothing to merit termination, following the book in a most literal way: "If you think you [do] your student a favor by [varying] normal . . . procedures you could be making a fatal error[.]" JA.410-11 (parachute industry warning). Zarda allegedly mishandled Orellana's hip. But, to be privileged to pay to fall from a plane, passengers agree to close contact with the skydiver. JA.439. Winstock characterized

this contact as an "invasion" of "the [passenger's] space." The release says instructors should "let [passengers] know we're" doing that for safety. JA.321-24. Instructors know that handling hips was part of the job. JA 430, 437-38. Maynard admitted, and the visual record shows that a tandem master might even have to touch a passenger's posterior. JA.364. Certain air maneuvers require a bear hug, and Maynard wouldn't fire someone if there were a later complaint that someone was hugged. JA.652. A picture from the SDLI website shows a man pretending to take a nap on a woman's head (JA.341): This is a typical image of the parachute culture. For Zarda, however, a complaint of touching the hip – where there is an attachment – was used to justify termination. On summary judgment, this must be recognized as pretext: Zarda was gay and required to touch precisely this point of connection. Additionally, Orellana was uncomfortable for many reasons, among them that she is claustrophobic. JA.481. Objectively, this seems a good reason to be for discomfort having nothing to do with Don Zarda.

Maynard admitted skydiving is not for everyone, but that "being crazy helps." JA.590. During every jumper's pre-jump training, however, he presents 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." JA.672. Maynard shows this video because he agrees. *Id*. He also requires every passenger to sign a waiver before performing a jump that can kill. Several have died at SDLI;

with a chancy fall comes adrenaline rush, euphoria, a check off the bucket list, but also potential tragedy. JA.399, JA.587. Orellana realized, though perhaps not fully, that making it home alive was alone an accomplishment; indeed, she showed the video to her family. JA.506.

Maynard also mentioned at the termination that Zarda was whispering in Orellana's ear. JA.640. In fact, this is common; the photos show Zarda's mouth near Orellana's ear to give instructions, per accepted practice. JA.369, 381, 401 ¶ 25. The instructor's mouth and passenger's ear must be close for safe communication. If the passenger's head is in front of the mouth of the instructor, "when the parachute opens, [it] can. . . knock you out or crack your teeth." JA.431. Orellana's opinion of Zarda's technique was not to her liking, but bear-hugging and rear-end-touching complaints would not result in a termination, so why would a whisper? On summary judgment, a court must accept the inference that "whispering" was not an issue for experienced Maynard – only that Don said he was gay; and he said he was gay because he was gay, despite no obvious outward manifestations. These are not just one, but two gender non-conforming behaviors.

3. Pretext, Disparate Treatment and Further Evidence of Animus

When Maynard confronted Zarda and suspended him, Zarda asked to see the video. JA.403, ¶ 25. Maynard denied the request. *Id*. As indicated, Maynard agreed that nothing on the video suggested impropriety, and the only indubitably confirmed allegation was that Zarda said he was gay. Why did Zarda think he could get away

with this? Well, in this testosterone-crammed workplace, Zarda's orientation was subject of humor. *See* JA.353-56 ("don . . . [i]s a pussy. . .GAYYYYYY. . . u got it gay boy. . . do it pussssssssy. . . thats pretty gay guys!!!" stop being a vagina and take the cast off now") (as in original). That's how "Gay Don" fit in. Maynard went along with this until Kengle complained. Zarda retorted, "if you don'twant [my sexuality] to come up, I think you . . . should tell the staff" to stop talking about it. JA.146-47. Maynard, knowing plaintiff was gay, knowing this was comic fodder, never told Zarda to cover his sexuality. JA.616. Coming out to one customer, however, got him fired.

In response to the hip allegation, Zarda asked, "Ray, does that make any sense to you? I mean, really?" Maynard responded in substance, relying on Kengle. "Well, she felt that – that," but added, "[t]his is not working anymore for me for you to be working here." JA.415. Maynard didn't say what he meant by "not working anymore": Zarda was a good employee by even Maynard's admission. Orellana, too, wanted Zarda to protect her as needed. JA.507. Maynard said he just wanted Zarda gone because it "wasn't working" – so why interview Orellana? "It wasn't working." Zarda asked Ray, what is "*it*." Maynard never responded. Zarda was excellent. One young couple with few expectations had a complaint, but look at the video – they had a great time. What bothered Maynard was the revelation of Zarda's sexuality – which Maynard disguised as "personal information" – and relegated to an illicit "escapade." That might be ignorance, but it's still

discrimination, especially when personal information was fodder for workplace conversation all the time.

When Zarda came to meet Maynard to be terminated, he secreted his iPhone. JA.412-16. From that, he produced a recording from which a reasonable, properly instructed jury could find that the phrases "just not working" (without explanation), "personal information" (that applied to no one else) and equating being gay with engaging in "your escapades" were all proof of discrimination. Maynard's tone, which is demeanor, and therefore evidence, begins calmly then grows into a defensive rage. EA (termination recording).

Plaintiff left Long Island dolefully, packing his truck and hauling his gear back to Missouri. He filed for unemployment, which defendants opposed because of "believed misconduct." JA.343, 405-06, 669. Although inappropriate touching would seem to be self-evident misconduct, the letter did not mention the alleged act. JA.343. But again, the letter alluded to the alleged 2001 complaints: "This was not the first time that we had received complaints from paying customers regarding Mr. Zarda." *Id*. The alleged complaints were old, undocumented and allegedly had to do with Zarda's coming out to two ladies, seriatim, "on the verge of tears" JA.617-19, after jumping with Don, talking about his "after-hours activities." JA.617. Again, Maynard didn't understand that being gay is an all-day affair. *Id*. But 2001 was before New York enacted a sexual-orientation anti-discrimination law, and this Court in 2000 ruled that sexual orientation discrimination did not violate Title VII .

Maynard, nevertheless re-hired Zarda in 2009 "because he was a good instructor. . . a good guy." JA.620. He never told plaintiff not to say he was gay, but, it discomfited him; Zarda's identification motivated Maynard's terminating Don a second time.

Pre-trial, the defense contended being gay was "personal," inappropriate for consumers, and suggested any complaints resulted in termination. JA.92. Both excuses were demonstrably false. Winstock mentioned his heterosexuality on jumps, and that was acceptable. JA.355. Sharing personal information was rife at the workplace, and advertised to the public (JA.331-32) together with borderline lewdness. JA.361-63. Furthermore, complaints against heterosexuals did not result in banishment. Just before plaintiff's incident, when plaintiff was in Missouri, out of work with a fracture, a customer complained that a different "instructor was feeling up [his] girlfriend." She and some other women "explained that once the parachute opened [the instructors] were touching their brea[s]ts and . . . could not protect themselves." JA.335-340. 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[.]" JA 337.

"You can't have everybody happy and you can't have everybody return." JA.614. That's true in any industry. Orellana agreed that Zarda "[n]ever cross[ed] the line." JA.497. Though defense counsel tried to make her complaint sound like a desecration, she swore the experience had been "awesome." JA 503. Her complaint

was merely Kengle's complaint about not the discomfort of having another man touch his girlfriend. Maynard admitted, if you don't want to be touched, "then maybe you should not skydive." JA.587. Indeed, to complain that an experienced, skydiver, who also happened to be gay, 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.

SUMMARY OF ARGUMENT

In Divergent Paths: The Academy and the Judiciary, 2016, Judge Richard Posner noted a "certain staleness" in judicial culture – a tendency of judges "to recite propositions of doubtful veracity just because they had been repeated before." *Id*. at x. The learned Judge contrasted his frustration with the judiciary to the "refugees" in the legal academy, which he compared to "eunuchs in a harem[:] they know how it's done, they've seen it done every day, but they are unable to do it themselves." *Id.* at xi (attributed to writer Brendan Behan in describing literary critics).

While any practitioner, judge or law professor can understand the viewpoint from where Judge POsner speaks, neither statement applies in every case, not even on the question of the fully unattained but ever-expanding rights of sexual minorities. In 1988, shortly after the 5-4 decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) – unforgotten, cruel and deservedly overruled – the first important, academic analysis supporting the rights, including constitutional rights, of gay people to sexual

expression appeared in print. In "Homosexuality and the Social Meaning of Gender," 1988 Wisc. L. Rev. 187, Professor Sylvia Law of NYU Law offered a nuanced discussion, grounded in cultural history, explaining how sexual orientation discrimination is simply sex discrimination. Her survey of social history argued that the disapproval of gay men and lesbians was directed primarily at the violation of gender roles, not sexual activity, *id.* at 188, and the denial of the equal personhood of women. *Id.* at 197. Same-sex erotic activity was a widely recognized fragment of Ancient Society, but by the Middle Ages, sexual expression of any kind was not a part of the collective social currency. *Id.* at 198. By the 19th Century, urbanization and industrialization brought about what we consider the traditional family unit and its historically prescribed gender roles. Merely being Sapphic or swishy thereby "threatened family arrangements premised on sex-differentiated roles," *id.* at 200-02, and laws were enacted to discourage complication of the social organization by producing persons with ambiguous claims to a position" therein. *Id* at 199.

Chatting with Gloria Steinem, Justice Ginsburg expressed no surprise in this, noting that it "wasn't until 1981 that the [C]ourt struck down Louisiana's head and master rule, that the husband was head and master of the house." New York Times, "Table for Three: The Fights of their Lives" November 14, 2015, p.ST1.[6] (Alluding to *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).) This Court decided *Simonton v.*

[6] Available at https://www.nytimes.com/2015/11/15/fashion/ruth-bader-ginsburg-and-gloria-steinem-on-the-unending-fight-for-womens-rights.html?_r=0 .

Runyon, 232 F.3d 33 in 2000, and in this rehearing, plaintiff asks the Court do away with the precedent as it believes it should, from the easiest – the conflict with its other jurisprudence – to a robust Constitutional disapproval Title VII's interpretation.

Even the panel in *Simonton* showed sympathy and restraint toward the plaintiff's case: "For the sake of decency . . . we hesitate before reciting in detail the incidents of Simonton's abuse [as] we think it is important both to acknowledge the appalling persecution Simonton allegedly endured and to identify the precise nature of the abuse so as to distinguish this case from future cases as they arise" *Id.* at 35. But because the decision based its holding on only a pleading, it left open the question for another day as to whether a plaintiff may allege subjugation to sex stereotypes, as recognized by *Price Waterhouse v. Hopkins*, 490 U.S. 8 (1989), as a basis to proceed under Title VII. *Simonton*, 232 F.3d at 37-38.

That day has not yet come; instead of remanding Mr. Simonton to allow him to replead, the panel relied on only one case within its jurisprudence, a romance-discrimination case involving heterosexuals, *De Cintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986). *See* 232 F.3d at 35-36. Additionally, the *Simonton* Court adopted four other circuit opinions, *id*. at 37-38, the first of which was *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989).[7] Courts

[7] The plaintiff in *Williamson* pled his case as race-discrimination that just happened to involve gay, white male comparators. The court read his pleading as sexual orientation discrimination nevertheless, and concluded that even if the black plaintiff were chided for wearing makeup, and the white comparators remained employed

continue to cite *Williamson* as binding against gay access to Title VII, as recently as 2016. *See Bland v. Burwell*, 2016 U.S. Dist. LEXIS 2032 (W.D. Mo. Jan. 8, 2016). *Bland,* for good measure, cited *Simonton*, in a peculiar twist to Oscar Wilde's aphorism, "Art imitates Life far more than Life imitates Art." "The Decay of Lying," Intentions, 1889, p.26.

Simonton, despite its politesse and open door, continued (until recently) its expanse throughout all Circuits (except the Federal Circuit, from which we see no case on point). The Supreme Court has never reached the issue and has held to the contrary. As the Seventh Circuit remarked in the momentous *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (*en banc*): "Notable in its absence from the debate over the proper interpretation of the scope of Title VII's ban on [sexual orientation discrimination as] sex discrimination is the United States Supreme Court." *Id at* 342.

This is so. The Circuits have looked only to the Circuits and *Simonton* was invoked as persuasive as recently as this year in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017) (*per curiam*), *petition for en banc filed* March 31, 2017. There are no divining the motives that flow from the power of any decision from any court, but one can easily imagine a judge in another Circuit thinking, "In Manhattan they agree; cite *Simonton*." This is not just speculation. Last year's 125th Anniversary

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while donning jewelry, there was no showing that the white men wore any makeup, thereby dooming the claim. 876 F.3d at 70. The jewelry was undescribed, but one imagines it was probably more flamboyant than a set of fraternity cufflinks.

of the Circuit prompted a dedicated volume of the Fordham Law Review, which devoted an article to "The Second Circuit and Social Justice." Professors Matthew Diller & Alexander Reinert noted the following:

> [The Second Circuit] has a long tradition of breaking new ground on issues of social justice. Unlike some circuit courts which have reputations in the area of social justice built around one or two fields, such as the [predecessor] Fifth Circuit's pioneering role in civil rights litigation or the Ninth Circuit's focus on immigration, there is no one area of social justice litigation that could be considered the Second Circuit's signature issue.

Id., Vol. 85, p.73. *Simonton* might have fanned the flames in answering the question presented as "No." However, if one accepts these Professors' account as true, to answer "Yes" on this rehearing may permit freedoms for gay and lesbian workers to reign outwardly west, south and north, as otherwise they might not so quickly.

Some courageous and otherwise outspoken judges have already come to look at the question presented in such a light, the first being *Centola v. Potter*, 183 F.Supp.2d 403 (D. Mass. 2002). *Centola* did not hold what we ask for, but held still that "[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Id.* at 410. Over time, and certainly as of late, other judges have distinguished, criticized, and adopted contrary interpretations to *Simonton,* either recognizing the door to *Price Waterhouse* as still ajar, wondering why a case still has not traversed the door jam, or perhaps concluding the door has effectively been closed, given *Simonton's* progeny. *See Christiansen v. Omnicom Grp., Inc*., 167 F. Supp. 3d 598, 620-21 (S.D.N.Y. 2016)

("The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims."), *rev'd in part*, 852 F.3d 195 (2d Cir. 2017) (*per curiam*), *petition for en banc rehearing filed,* April 28, 2017.

One of the most senior judges in the country, Warren W. Egington of Connecticut, was the first to hold that *Simonton* was stale, for, among other reasons, that (1) a cause of action for associational discrimination exists, *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008); and (2) "If interracial association discrimination is held to be 'because of the employee's own race,' [as *Holcomb* holds] so ought sexual orientation discrimination be held to be because of the employee's own sex. *Holcomb* and *Simonton* are not legitimately distinguishable." *Boutillier v. Hartford Pub. Schs.,* 221 F. Supp. 3d 255 (not numerated in publication but available at 2016 U.S. Dist. LEXIS 159093 at *27 (D. Conn. 2016).

Boutillier was followed by Southern District Judge Hellerstein's *Philpott v. New York,* 2017 U.S. Dist. LEXIS 67591) **2-4 (S.D.N.Y., May 3, 2017), which cited the "majority concurrence" by Chief Judge Katzmann and Eastern District Judge Margo Brodie in *Christiansen v. Omnicom Grp., Inc*., 852 F.3d 195, 202-207 (2d Cir. 2017), as perhaps a harbinger?[8] Judge Katzmann's concurrence was the second federal Court of Appeals decision to find sexual orientation as at least

[8] *Christiansen* is cited with his name in the District Court decision, but *Anonymous,* along with *Christiansen* as co-plaintiff on appeal. For the sake of consistency, we refer to the Circuit decision as "*Christiansen."*

potentially actionable under Title VII's "because of sex" language the first being the dissenting opinion in *Evans,* in which Judge Robin Stacie Rosenbaum noted:

> A woman should be a "woman." She should wear dresses, be subservient to men, and be sexually attracted to only men. If she doesn't conform to this view of what a woman should be, an employer has every right to fire her.
>
> That was the law in 1963—before Congress enacted Title VII of the Civil Rights Act of 1964. But that is not the law now. And the rule that Title VII precludes discrimination on the basis of every stereotype of what a woman supposedly should be—including each of those stated above—has existed since the Supreme Court issued *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), *superseded in part by* . . . 42 U.S.C. § 2000e-2(m)), 28 years ago.
>
> Yet even today the panel ignores this clear mandate. To justify its position, the panel invokes 38-year-old precedent—issued ten years before *Price Waterhouse* necessarily abrogated it—and calls it binding precedent that ties our hands. I respectfully disagree.

Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1261 (11th Cir. 2017).

Shortly after *Evans* and Judge Rosenbaum's spirited dissent, the Seventh Circuit agreed. Chief Judge Diane Wood's majority opinion was joined in concurrence by Judge Posner. Analogizing the Civil Rights Act to the Sherman Antitrust Act, he summoned the "Choking on Statutes" analogy from Judge Calabresi's A Common Law for the Age of Statutes, Harvard Press, 1982, Chapter 1. Judge Posner, while not going so far as to suggest that statutes be deemed obsolete, nevertheless acknowledged what he had earlier in Diverging Paths - that statutes need not be reflexively interpreted by invocation of a single precedent. A judicial interpretation of a statute may develop over time, and not be slapped down because

courts have said this so many times before. We recognize this rare chance for the Circuit to harmonize itself not only with *Hively*, but the Supreme Court's consistent interpretations of Title VII, which have never waded into the *Simonton* realm. The High Court always applies the "simple test" under Title VII "as to whether the evidence shows treatment of a person in a manner which" excepting sex, race, or any of the protected categories would otherwise be different. *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

A famous Senator rightly put it: "[T]here are still thirty states that do not have laws protecting Lesbian, Gay, Bisexual and Transgender workers. Gay couples can now enjoy all the rights and responsibilities of marriage, but if you get married on Saturday and get fired for being gay on Monday morning, that's a pretty crummy way to start a new life together, don't you think?" Al Franken, Giant of the Senate, 2017, p.207. The Senator is mildly inaccurate in stating that Minnesota was the first state to ban this type of employment discrimination in 1993 – it was actually second, after Wisconsin in 1992 – but his description of its implementation is apt. Though there were initially some "kerfuffles of the sort that might be a highlight of a" screwball comedy, eventually most figured out that "firing people because they're gay or lesbian or bisexual or transgender is really cruel and dumb. Nothing bad has happened because of Minnesota's law unless you are an employer in another state who lost a smart, hardworking and very talented worker to" one of Minnesota's many Fortune 500 companies. *Id*. at 207.

After the same-sex marriage ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the E.E.O.C., whom we are proud to call our co-party, ruled what Professor Law and many others had always believed to true – that sexual-orientation discrimination is sex discrimination. *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905 (July 15, 2015). There are several reasons for this which we have alluded to and will explore further. Nevertheless, the question this petition presents is one that the Court must answer to mend so many inconsistencies. The hands-off doctrine of *Simonton* – whose door is still open, perhaps – affords protections for heterosexuals in identical circumstances, in a manner that – though the question need not be reached – might even be unconstitutional.

STANDARD OF REVIEW

The Court reviews summary dismissal de novo, resolving any facts in dispute, and inferences to be made therefrom, in favor of the non-movant. *Sec. Plans, Inc. v. CUNA Mut. Ins. Soc'y*, 769 F.3d 807, 815 (2d Cir. 2014).

ARGUMENT

Sexual-Orientation Discrimination Is Sex Discrimination

I. The Question Is far from Academic

This Circuit covers three states, all of which have laws protecting against sexual orientation discrimination. Its major precedent this question and the answer in response to this rehearing will carry significant influence in other Circuits, as shown

by *Evans v. Georgia Regional Hosp*., 850 F.3d 1248 (11th Cir. 2017), which cited *Simonton, id.* at 1258, as well the Missouri District Court decision from last year that otherwise relied on Eighth Circuit dictum. *Bland v. Burwell, supra. See also Medina v. Income Support Div*., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing *Simonton*); *Bibby v. Phila. Coca-Cola Bottling Co*., 260 F.3d 257, 265 (3d Cir. 2001) (same). The Sixth Circuit erected the wall against the gays in *Vickers v. Fairfield Med. Ctr*., 454 F.3d 757, 763-64 (6th Cir. 2006), citing *Dawson v. Bumble & Bumble,* 398 F.3d 211, 217-19 (2d Cir. 2005), whose holding on the question is arguably dictum, but which itself relied on *Simonton*.

The Court would not have granted this rehearing if a majority considered the question academic. We begin, nevertheless, by emphasizing the human condition and the right to work in an environment free from discrimination; it is important for the Court to recognize is that state and local protections – even the New York City Human Rights Law – cannot protect all sexual minorities. "[T]itle VII affords greater financial relief, including attorneys' fees, than [Executive Law § 296, the New York State] Human Rights Law," *Margerum v. City of Buffalo,* 24 N.Y.3d 721, 736 (2015). This law does not deter with a potential award of punitive damages either. *Thoreson v. Penthouse Int'l*, 80 N.Y.2d 490, 499 (1992). The same is true under Connecticut's Fair Employment Practices Act, Connecticut Code - Sec. 46a-60. *Tomick v. United Parcel Serv., Inc*., 324 Conn. 470, 476 (2016). Each of these state remedies thus reduces the chance that an aggrieved, usually non-working, behind-in-

rent and expenses plaintiff may find counsel to act as a private attorney general with an economic incentive to enforce the rights that exist in print, or perhaps just in theory. Although the Vermont Fair Employment Practices Act, Vermont Statutes Title 21 § 495b and the New York City Human Rights Law, (City of New York Administrative Code, Chapter 1, § 8-107 *et seq*.) afford effective relief, these laws do not apply to federal employees. As of 2016, there were 141,100 federal employees in these states[9] whose sole remedy is Title VII. *Rivera v. Heyman*, 157 F.3d 101, 105 (2d Cir. 1998) (citing *Brown v. GSA*, 425 U.S. 820, 835 (1976), and the limited waiver of sovereign immunity).

Thus, closest to the level where discrimination is likely to strike – and the Court knows that discrimination can occur in hidden, undetectable, devious ways – an LGBT population *in this Circuit* without the protections under Title VII are less likely or able to bring claims without the ability to attract competent counsel. Lesser visibility reduces the chance of being targeted, thus logically more likely the closeted LGBT will remain there. As Justice Edwin Cameron of South Africa's Constitutional Court noted in his memoir:

> Though my school years. . . . beneath the covers, I really was a sissy and wanted to be a sissy. But to be true to myself, and actually *be* a sissy in life indeed was unthinkable. . . . Instead, I deliberately coached myself to act with mannerisms and gestures I reckoned were more masculine. Stood squarely. Dropped my voice. Eschewed flamboyant gestures and speech. Played rugby.

[9] Governing.com, http://www.governing.com/gov-data/federal-employees-workforce-numbers-by-state.html (interactive).

> Dated girls. . . . I did not want to be homosexual . . . . a stigmatized, isolated, reviled minority whose sexuality was shamefully different – whose conduct was so despised[.]

Justices: A Personal Account, 2014, p.206 (italics in original).

Later in life, Justice Cameron had an epiphany when, after a brief, failed marriage to a woman, his former partner, Wilhelm, died. *Id.* at 216. This moment recalled the deep connection between them, and "I resolved I would never again apologise for something so deeply intrinsic to my nature that it makes me what I am as a human . . . I started speaking on public platforms about lesbian and gay equality." *Id.*

When apartheid fell, the new government needed a Constitution, which included protections on the grounds of race, gender, age, culture and religion "'easy cases' for Constitutional drafting." *Id.* at 213. The harder cases for inclusion were the sexual minorities. Justice Cameron nevertheless successfully persuaded his co-negotiators that "they had been reviled and stigmatized under apartheid as in most political systems. And they were a minority who needed constitutional protection more even, I argued, than numerically powerful groups." *Id.* He succeeded. Constitution of The Republic of South Africa, 1996 as amended, Chapter 2, § 9(c).

The lesson that sits with Justice Cameron's apt – though unstartling – conclusion that "the greatest ally of gay and lesbian persecution, and the greatest enemy of acceptance, is invisibility. . . . Sexual orientation is generally invisible, unless people choose to come out. Once families, neighbourhoods, communities,

congregations, or co-workers know that gayness is not an alien phenomenon, once they know they have lesbian and gay sisters, brothers, neighbours, colleagues, or friends, most people move quickly to acceptance." *Id.* at 215.

We have seen some increased acceptance in the United States, at least on an anecdotal level – though some would argue the opposite because of backlash. *See* Omar G. Encarnación, "The Global Backlash Against Gay Rights," Foreign Affairs, May 2, 2017, available at https://www.foreignaffairs.com/articles/2017-05-02/global-backlash-against-gay-rights; Richard Socarides, The New Yorker, "North Carolina and the Gay-Rights Backlash," March 28, 2016, available at http://www.newyorker.com/news/news-desk/north-carolina-and-the-gay-rights-backlash. Gay activist and writer Michelangelo Signorile thus warns against "victory blindness." It's Not Over, 2015, p.3. He argues that now is the

> time for us to be . . . intolerant of all forms of . . . bigotry against LGBT people. . . . Anything less than full acceptance and full civil rights must be defined as an expression of bias, whether implicit or explicit. And it has to be called out – even if that means challenging our friends, co-workers and others were know and respect – if we are to get beyond tolerance.

Id. at 175.

This case is not just about the elite "homosexual agenda, by which [is meant] the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). It is just as much if not more about those lacking in the power of elites who cannot afford – as Don Zarda

probably could not have afforded – to come out of the closet. Longer ago than one might have expected, author D.L. King published the first extensive look at black men of indeterminate sexuality: *On the Down Low: A Journey into the Lives of 'Straight' Black Men Who Sleep with Men*, 2005. The book was controversial and criticized in the African-American community as reinforcing stereotypes of black men as "self-loathing [and] secretive [.]" *New York Times Magazine*, "America's Hidden HIV Epidemic" June 6, 2017, p.38.[10] Indeed, King denied being gay until years after the book was published. *Id.* Nevertheless, he was the first to tell his story of a common version of shame, harming women and hiding his sexuality; he also revealed statistics from the Centers for Disease Control showing disparate rates among people with HIV as comprised disproportionately by black women. *On the Down Low*, at 9.[11]

Insofar as discrimination on the basis of sexual orientation may logically lead to gay men and lesbians legally unprotected remaining under cover, or in denial, sexual orientation discrimination has thus directly or indirectly contributed to many unhappy lives and the continued spread of HIV. Fortunately, there are so many paths

[10] Available at https://www.nytimes.com/2017/06/06/magazine/americas-hidden-hiv-epidemic.html. (All internet citations were visited as of June 25, 2017.)
[11] Statistics are at https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5247a2.htm. The CDC reports that the numbers today are largely unchanged. *See* CDC statistics at https://www.cdc.gov/hiv/group/gender/women/index.html. At present, in their lifetimes, one half of Afro-descendent gay men can expect to be diagnosed with HIV. *See* "America's Hidden HIV Epidemic," New York Times Magazine.

under Title VII as written and as interpreted by the Supreme Court that push light further into darkness.

II. ***Holcomb v. Iona College* Abrogated *Simonton***

We begin with associational discrimination – a theory largely unexamined in this context until *Baldwin* – because it is the simplest way to do away *Simonton* as recognized by the district court in *Boutillier,* 221 F. Supp. 3d 255, 2016 U.S. Dist. LEXIS 159093, at *27. "Two and two have been added together, and still they make only four." *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 152 (1950) (Jackson, J.). So too, one minus one make for none. Two of the three authors of *Simonton* have held that associational discrimination extends to the plaintiff's own race, "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 the latter's nuance renders this Court the one to make the statutory reconciliation by doing away with either one or the other. It goes without saying that associational discrimination can't be abolished so simply – it is a firmly entrenched doctrine allowing the "person aggrieved" provision of Title VII to be "allowed standing as broadly as is permitted[.]" *Thompson v. N. Am. Stainless*, 562 U.S. 170, 176 (2011) (Scalia, J.). In that case, a unanimous result with concurrences, the Court extended Title VII to what the Sixth Circuit wrongly characterized as "third-party retaliation." *Id.* at 172. Thus, if one's partner cannot be a victim of discrimination, and one's marital partner can be of the same sex, *see*

Obergefell v. Hodges, 135 S. Ct. 2584 (2015), then why can't a "person aggrieved" be one associated with a particular sex? This question is one *Holcomb* did not need 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 point: 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 she is disfavored against by association with another woman. Had Zarda been a woman, the suggestion of his sexuality would not have been problematic, as the evidenced by Winstock's experience as openly heterosexual, which the defense saw as perfectly fine. *Holcomb* is this Court's *Baldwin*, in part, dressed in the language of race. Extend *Holcomb* to same-sex partners and *Simonton* is dead.

Furthermore, the original panel in *Hively v. Ivy Tech Cmty. Coll.,* 830 F.3d 698 (7th Cir. 2016) (*Hively I*), while noting it was "presumptively bound by [its] own precedent," *id. at* 701, also noted that the "relationship in play need not be a marriage to be protected. A number of courts have found that Title VII protects those who have been discriminated against based on interracial friendships and other associations." *Id*. at 716, adhering to earlier precedent and rev'd on other grounds, 853 F.3d 339 (7th Cir. 2017) (*Hively II*). Title VII "on its face treats each of the enumerated categories exactly the same." *Id.* (*citing Price Waterhouse,* 490 U.S. at

244 n.9). Conclusively, therefore, insofar as the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it equally prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. One and one and one and one also add up to four.

III. Same-Sex Attraction Is High on the List of Non-Conforming Sex Stereotypes. To Identify Openly as LGBT, when One May Otherwise Cover as Heterosexual, Is Probably Even Higher.

In Don Zarda's experience, even those with refined gaydar who looked at or interacted with him – unless (as he attested), he was seen to throw a ball – would not know he had an inner Nancy. JA.182-84. But as so many cases have recognized, "the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear." *Centola v. Potter,* 183 F.Supp.2d 403, 408 (D. Mass. 2002). After the Circuits firmly decided that being – not to mention expressing – that one was part of a sexual minority was not protected by Title VII, the attempt to separate discrimination based on sexual orientation from that based on sex stereotyping became an elusive, arduous chore. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) ("it is often difficult to discern when [the plaintiff] is alleging that the various adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these" because "the borders [between these classes, if indeed they are separate classes] are so imprecise."); *Prowel v. Wise Bus. Forms, Inc.*, 579

F.3d 285, 291 (3d Cir. 2009) ("the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) ("We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes."); *Id.* at 1067 (Posner, J., concurring) ("Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter.").

However, as the *en banc* majority in *Hively II* recognized, it is time to stop repairing shredded shoestrings. Just as *Price Waterhouse* held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination, and the Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim, *Hively I* frankly acknowledged how difficult it is "to extricate the gender nonconformity claims from the sexual orientation claims." 830 F.3d at 709. That effort, it commented, has led to a "confused hodge-podge of cases," which *Hively II* simply held unworkable, haphazard and "limited [in its] success [in] trying to figure out how to draw the line between gender norm discrimination, which can form the basis of a legal claim under *Price*

Waterhouse's interpretation of Title VII, and sexual orientation discrimination[.]" *Id.* at 705-06 (citing Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 726 (2014) ("The challenge facing the lower courts since *Price Waterhouse* is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender.")

Chief Judge Katzmann recognized this in *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017), joined in concurrence by Judge Brodie, stating that

> such discrimination is inherently rooted in gender stereotypes. In *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004), we considered "a crucial question: What constitutes a gender-based stereotype?" While we did not definitively answer that question, we invoked the Seventh Circuit's observation that whether there has been improper "reliance upon stereotypical notions about how men and women should appear and behave" can sometimes be resolved by "consider[ing] . . . whether [the plaintiff's] gender would have been questioned for [engaging in the relevant activity] if he were a woman rather than a man."

Christiansen, 852 F.3d at 205 (page numbers omitted).

The time has come for this Circuit, as well, to recognize the unworkability of the line between impermissible sex-stereotyping and sexual orientation discrimination as a subset therein. The *en banc* rehearing has been voted by a majority of active judges and it is time to change panel precedents. Good reasons for this 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 inconsistent, if not precisely on point. *Hively II,* the Chief Judge's concurrence in *Christiansen,* as well as the district court cases cited herein, are judicial decisions dealing with a related or analogous issue. While we will not succumb to "victory blindness," the achievements of gay rights in the legal realm provide the torque upon which this Court should drive forward rather to stop and watch sexual minorities attempt to achieve their rights incrementally, dispensing with a plain reading Title VII as interpreted.[12]

IV. Sexual Orientation Discrimination Is Sex Discrimination Per Se

The EEOC concluded in *Baldwin* that

> 'Sexual orientation' as a concept cannot be defined or understood without reference to sex." 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.

2015 EEOPUB LEXIS 1905, at *6-7.

[12] As Amicus Lambda Legal Defense points out, the *Hively* dissent uses the wrong comparators by holding Ms. Hively was discriminated against simply as a gay woman. The dissent notes, "If the facts show that Ivy Tech hired heterosexuals for the six full-time positions, then the community college may be found liable for discriminating against Hively *because of her sex*. That will be so even if *all six positions were filled by women*. Try explaining that to a jury." *Hively II*, 853 F.3d at 373 (7th Cir. 2017). This analysis is sophistry and unnecessarily cynical. Any jury would be instructed under Hively's sex-stereotyping claim: "If you find that the termination of Ms. Hively's contract was motivated by a sex stereotype, which includes her affectional preference for women, you may find Ivy Tech liable for sex discrimination."

Judges Katzmann and Brodie agreed with this analysis in their majority concurrence in *Christiansen*:

> First, sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex. A person is discriminated against "because of . . . sex" if that person is "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 . . . (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). . . . [Alternatively,] an action constitutes sex discrimination under Title VII if "the evidence shows treatment of a person in a manner which *but for that person's sex* would be different," . . . and Title VII's prohibition "must extend to [discrimination] *of any kind* that meets the statutory requirements.

852 F.3d at 202 (emphases in original, some citations omitted).

The counterintuitive hypothesis necessarily involves some guesswork, and as applied to this case one must suspend disbelief and perhaps imagine two scenarios. First, most simply, had Zarda been a woman, no one would have said in front of a "her" and Orellana: "I bet you didn't think your girlfriend was gonna get strapped up to another guy!" The teleology of events would not have played out as it had, and Zarda would not have been fired.

In the alternative, Lewis Carroll could have constructed a scenario wherein the statement was made, the hypothetical female Zarda then reassured Orellana that he was gay and had an ex-husband to prove it. Perhaps repetition of the "golden oldie" would have been an insult to Zarda; or perhaps it would have been confusing to everyone; or perhaps it would have been understood as part of the SDLI workplace culture where sexuality was discussed so openly: "[Y]ou pulled your pork with us,

now come and get laid at the skydlve long island luau," JA.342, "u got it gay boy. . . do it pussssssy. . . thats pretty gay guys!!!" stop being a vagina and take the cast off now." JA.353-56. The actual scenario wherein Zarda's expressing his sexuality *and* being accused of disreputably touching Orellana where she agreed and needed to be touched seems as if it comes from Alice in Wonderland, through the looking glass and down the rabbit hole; but the obverse scenario would at least not have provoked thoughts of sexual dalliance: no jealousies activated, and likely no complaints about the gay men and their license to flirt.

But Zarda was a man, and what happened to him in real life – being fired for being a man attempting to extricate himself from the innuendo that he was heterosexual and had an interest in Orellana – was impermissibly based on his gender.

V. Simonton Has Lost Its Moorings. Legislative Inaction Is Uninformative, and an Improper Manner in which to Divine Legislative History.

A. *Simonton*'s Holding Was Limited to One Plaintiff and the Cases upon which It Was Grounded Have Lost their Influence.

The EEOC contends, as does plaintiff, that *Simonton* was incorrectly decided. *Simonton* relies on cases "implicitly overruled by *Price Waterhouse* and *Oncale* as well as *Ulane v. Eastern Airlines, Inc*., 742 F.2d 1081, 1085 (7th Cir.1984), which was explicitly overruled *Hively II,* 853 F.3d at 341. *Simonton* also cites *DeSantis v. Pacific Tel. & Tel. Co*., 608 F.2d 327, 329-32 (9th Cir. 1979), which was abrogated

by 42 U.S.C. § 1981a, and its predecessor case law. *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*.[13]

Skidmore v. Swift & Co., 323 U.S. 134 (1944), tells us that agency opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" insofar as they have the power to persuade. *Id.* at 140. The EEOC's position is that *Simonton* is feeble, if not lifeless. A panel of this Court perhaps signaled as much in *Fowlkes v. Ironworkers Local 40,* 790 F.3d 378 (2d Cir. 2015). *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) (allowing a transgender plaintiff to proceed under Title VII). Without extended analysis, *Fowlkes* would appear incompatible with *Simonton* and demonstrates that Circuit judges see that the time has arrived to rethink the protections afforded the LGBTQ under Title VII. It would have been easy to affirm in *Fowlkes,* given the significantly late filing of the plaintiff's EEOC charge. 790 F.3d at 382.

[13] Our thanks to Jeremy Horowitz and his amicus brief in *Burrows v. The College of Central Florida* (11th Cir. 15-14554), which settled before appellate disposition, but which may be found at http://www.eeoc.gov/eeoc/litigation/briefs/burrows.html.

What about *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)? *Dawson* relies on *Simonton*, and if the latter case should fall, *Dawson* should as well. However, *Dawson,* while recognizing the difficulty in drawing a distinct line between sex stereotypes and leaving the LGBT out of the ambit of Title VII, 398 F.3d at 215, characterized *Simonton* as holding that being gay should *not* be used to "bootstrap protection for sexual orientation into Title VII." *Id.* at 218. That's not exactly what *Simonton* said. In fact, while declining to remand to allow the plaintiff to amend, *Simtonton* said, "we think the wisest course is to defer consideration of the merits of such an argument *to another case* in which it comes to us after being properly pled and presented to the district court." 232 F.3d at 38 (emphasis added). *Dawson* thus closed the metaphoric closet door on gays under *Price-Waterhouse* when to do so was not the holding (or the *dicta*) of *Simonton.* It was also unnecessary to *Dawson's* holding. "A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'" *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring). As Judge Leval opined in his 2006 Madison Lecture at NYU, "What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum." 2006 *NYU Law Review* 81:1249, 1258.

Ms. Dawson presented many theories of relief under Title VII, the New York State and New York City Human Rights Laws, and thus there are many zones to

explore in the appellate decision. The District Court granted summary judgment on each of her theories, including explicit sexual orientation anti-discrimination laws available under Executive Law § 296 and the New York City Administrative Code. *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 313 n.4 (S.D.N.Y. 2003). Thus any discussion of the plaintiff's sexual orientation claim was unnecessary to the holding.

As to sex stereotyping, it appears that *Christiansen* has clarified *Dawson*, insofar as the *per curiam* opinion allowed the plaintiff a remand on the question of his sex stereotyping claim: "*Simonton* and *Dawson* do not suggest that a "masculine" woman . . . has an actionable Title VII claim unless she is a lesbian; to the contrary, the sexual orientation of the plaintiff in *Price Waterhouse* was of no consequence." *Christiansen,* 852 F.3d at 200. Judge Hellerstein noted this clarification in *Philpott,* 2017 U.S. Dist. LEXIS 67591 at *3.

Ultimately, insofar as it relies on *Simonton* – which we ask the Court overrule – the only part of *Dawson* necessary to the holding is the affirmance of the dismissal of plaintiff's uncomplicated sex discrimination claim under Title VII: She alleged she was subject to a hostile work environment and her being a woman in any guise subjected her to discrimination. These theories were rejected without reference to sex stereotyping or sexual orientation and are the only zones necessary to the holding:

> [The Co-worker's] comments were "crude and offensive," but that any liability against Bumble & Bumble arising from the comments was precluded by the salon's disciplining of [him] after Dawson complained of his actions. . . . [Insofar as] Dawson [alleges her termination] as being based upon a belief that only men could succeed in the styling profession. . . . Since [the supervisor's] alleged comments refer to a preference for males, and make no mention of gender stereotypes or sexual orientation . . . Dawson has produced no credible evidence that gender stereotypes played any part in Bumble & Bumble's decisions as to promotions to hair stylist.
>
> Further, assuming *arguendo* that Dawson has made out a prima facie case of gender discrimination on the basis of [the supervisor's] alleged comments, Bumble & Bumble has successfully met its burden to refute any inference of discrimination arising from them. As noted by the district court, Bumble & Bumble presented statistical evidence that "nine out of fifteen assistants . . . selected for the advanced styling class while Dawson worked at the Salon were women" and that "of the 38 assistants hired by the Salon during the 17 months Dawson was employed, only four of them, all of them women, advanced through the entire educational program and were promoted to stylist.

Dawson, 398 at 223-24 (2d Cir. 2005). This unique case was distinctive to its facts, but broke no new ground under Title VII. The remaining issues were unnecessary to the holding, given (1) the affirmance of the dismissal of the outright sexual orientation claims under the New York laws; (2) the loosely misinterpreted dictum in *Simonton;* and (3) the clarification by *Christiansen,* which allows the plaintiff to proceed on the grounds that, though gay, he presented as effeminate, and allowing him to proceed on a claim for sex stereotyping. *Christiansen,* 852 F.3d at 200.

B. Supporting any Holding on Legislative Inaction Is Improper. The Text of Title VII as Interpreted by the Supreme Court Governs.

The attempt to divine congressional intent under Title VII is futile and can offend the norms of 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. Indeed, 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 distinct view of associational discrimination until 2008. *Holcomb*, 521 F.3d at 138.

A lack of Congressional action is always a weak, counter-intuitive manner in which to divine Congressional intent. The Civil Rights Act passed over fifty years ago. Only a repeal of Title VII would disallow this Court from adopting the reasoning in *Hively* or *Baldwin*. An argument that Title VII lies within the purview of the Legislative branch is true as to matters where the statute is clear, but ignores the interpretive functions of the judiciary. Is it not close to certain that few members of the 88th Congress envisioned a man asserting a claim of sex discrimination in an all-male workplace, or a white worker claiming discrimination after being rejected by a company that hired only whites. *But see Oncale v. Sundowner Offshore Servs* , 523 U.S. 75 (1978). *See also Parr v. Woodmen of the World Life Ins.Co*., 791 F.2d 888 (11th Cir. 1986) (prohibiting discrimination based on interracial marriage and

relied upon by *Holcomb*, 521 F.3d at 129). Referring to the non-passage of legislation does not suggest the legislative history of Title VII is limited. This Court should not repeat the mistake of *Simonton* – recognized by the *Simonton* panel as a poor method of statutory interpretation – in relying on legislative inaction to proposed laws overlapping with Title VII,

In an excellent recitation of legal history – as opposed to legal analysis per se – Yale Law School Professor William Eskridge wrote in "Interpreting Legislative Inaction," 87 Michigan Law Review 67 (1988)[14] that legislative inaction can be used to support potentially limitless propositions. The Supreme Court "has grappled with such arguments since the nineteenth century, oftentimes finding inaction arguments persuasive but other times finding them unappealing." *Id*. at 67. These debates intensified in the 1980's with the appointment of Justice Scalia, "who has articulated sophisticated arguments against giving positive meaning to legislative inaction." *Id.* at 68. For example, as he concurred in *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010), "The Constitution gives legal effect to the 'Laws' Congress enacts, Art. VI, cl. 2, not the objectives. Members aimed to achieve in voting for them." (citing *Oncale*). *Oncale* and the late Justice's concurrence are thus on point with our interpretation of Title VII, that "statutory prohibitions often go beyond the principal evil [that Congress intended] to cover reasonably comparable evils[.]" *Id*. at 79.

[14] Available at http://digitalcommons.law.yale.edu/fss_papers/3826

Judge Egington covered this ground in *Boutillier*, 221 F. Supp. 3d 255, 2016 U.S. Dist. LEXIS 159093 at **23-24, citing Supreme Court precedent:

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional 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*.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (emphasis in original).

VI. Are there Constitutional Implications in the Question Presented? Yes.

The question has been limited to the statute, but may a statute be unconstitutionally applied when it gerrymanders away a protected class? We say yes, though the Court need not reach this question if it agrees with any of Points II-V. The "Supreme Court has wisely cautioned against unnecessary constitutional rulings. It is a long-honored principle that a court should decide a constitutional question only when there is no other basis for resolving the dispute." *Ashwander v. Tenn. Valley Auth*., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *see also Tory v. Cochran*, 544 U.S. 734, 740 (2005) (Thomas, J., dissenting)

However, in addition to rejecting statutory norms offered by the Supreme Court, the jurisprudence of ten circuits *vis-à-vis* sexual orientation as sex discrimination 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 case overrules *Simonton*; they just make it jurisprudentially inconsistent with both cases. The Circuits made up the law in the area, and, now inconsistent, as has the Seventh, the Circuits should free gay people from judge-made jurisprudence, never sanctioned by the Supreme Court. Affording constitutionally heightened scrutiny to gay people creates a new legal world in which *Simonton* does not fit. The Constitution cannot afford the a constitutionally protected class access to one right, then deny an arguably lesser right by resort to precedent that, at least initially, did not consider the constitutional question, or rely on then canons of construction outlined in *Oncale*: social norms; or legislative non-action. *Simonton* relies on one, perhaps both, and came well before *Windsor* and *Obergefell*.

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 Judge Katherine Polk Failla courageously asked the Circuit to "erase" the "impractical" lines drawn between sex stereotyping and the limitations of *Simonton*. *Christiansen v. Omnicom Grp., Inc*., 167 F. Supp. 3d 598, 620-21 (S.D.N.Y. 2016). Now is the chance.

The Constitution bestows gays heightened scrutiny. What difference does that point make to Title VII? Well, social exclusion of the LGBT reflects disapproval of their nonconformity with gender-based expectations, who have suffered a history of discrimination as beautifully outlined by Judge Weinstein in *Roberts v. UPS, Inc.*,

115 F. Supp. 3d 344, 360 (E.D.N.Y. 2015). 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 straight people; gay men and lesbians cannot be carved out of Title VII because they belong to a unique category. The recent Supreme Court decisions regarding LGBT jurisprudence are inconsistent with a regime – unmoored in legislative history – that Title VII does not include lesbians and gay men.

Professor Law points out various Constitutional theories in her groundbreaking work, *see* Wisc. Law Rev. at 222, et seq., that exceed the scope of the question presented. We contend, nevertheless 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 sex-stereotyping or associational discrimination than are heterosexuals. *Simonton* was decided at the end of an extended period of LGBT intolerance and decided on what are by now surely rickety precedents. We respectfully contend that, save *Hively*, appellate decisions gerrymander lesbians and gay men out of Title VII, and to do so violates the Equal Protection Clause of the Constitution, Amendment XIV.

CONCLUSION

Appellant respectfully asks that the *En Banc* Court answer the Question Presented as "Yes," overrule *Simonton* as it sees it sees fit, as well as *Dawson*, *if*

necessary. The Panel has already noted that Zarda may receive a new trial if *Simonton* is overruled. This is consistent with the District Court's denying summary judgment to the defense on Zarda's New York sexual orientation discrimination claim, thus the En Banc Court should remand to the District Court, consistent with its holding.

Dated: New York, New York
June 28, 2017

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant

Dated: New Paltz, New York
June 28, 2017

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-appellant, hereby certifies pursuant to Federal Rule of Procedure 32(a)(7)(C) that this brief contains 12,736 words from Question to Conclusion as computed by the word processing program Microsoft Word used to prepare the brief. The font is Times New Roman, a proportional font, at 14 point. The brief was scanned for viruses using the program Antivirus Thor.

Dated: New York, New York
June 28, 2017

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant

SPECIAL APPENDIX AND TABLE OF CONTENTS

15-3775
Zarda v. Altitude Express, Inc.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

ORDER

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 25th day of May, two thousand seventeen.

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

Plaintiffs-Appellants,

v. 15-3775

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

Defendants-Appellees.

Following disposition of this appeal on April 18, 2017, a judge of the Court requested a poll on whether to rehear the case *en banc*. 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*. *See* Fed. R. App. P. 35(a). The *en banc* panel will consist of the active judges of the Court, as well as those senior judges who sat on the panel that heard the initial appeal. *See* 28 U.S.C. § 46(c).

The parties are instructed to brief only the following question: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?"

We invite amicus curiae briefs from interested parties. 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, 2016 at 2:00 p.m. at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

15-3775
Zarda v. Altitude Express

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: January 5, 2017 Decided: April 18, 2017)

Docket No. 15-3775

- -x

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda, and WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda,

Plaintiffs-Appellants,

- v.-

ALTITUDE EXPRESS, doing business as SKYDIVE LONG ISLAND, and RAY MAYNARD,

Defendants-Appellees.

- -x

Before: JACOBS, SACK, and LYNCH, Circuit Judges.

Donald Zarda, a skydiver, sued his former employer in the United States District Court for the Eastern District of New York (Bianco, J.), asserting (inter alia) sexual-orientation discrimination in violation of New York state law and sex

discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. The district court, relying on our decision in Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000), declined to hold that discrimination based on sexual orientation constituted discrimination based on sex for purposes of Title VII. The state-law claim for sexual-orientation discrimination went to trial where a jury found for the defendants. On appeal, Zarda argues that Simonton should be overturned. We do not entertain that argument because a panel of this Court could not overturn another panel's decision. Moreover, we reject Zarda's argument that he is entitled to a new trial on his state-law claim because of alleged evidentiary errors, unfair discovery practices, and prejudicial arguments to the jury based on gay stereotypes. Consequently, we **AFFIRM** the judgment of the district court in all respects.

GREGORY ANTOLLINO, New York, NY, for Appellants.

Stephen Bergstein, Bergstein & Ullrich, LLP, Chester, NY, for Appellants.

SAUL D. ZABELL, Zabell & Associates, P.C., Bohemia, NY, for Appellees.

Lenora M. Lapidus, Gillian L. Thomas, Ria Tabacco Mar, and Leslie Cooper, American Civil Liberties Union Foundation, New York, NY; Erin Beth Harrist, Robert Hodgson, and Christopher Dunn, New York Civil Liberties Union Foundation, New York, NY, for Amici Curiae American Civil Liberties Union; New York Civil Liberties Union; 9to5; National Association of Working Women; A Better Balance; Coalition of Labor Union Women; Equal Rights Advocates; Gender Justice; Legal Voice; National Women's Law Center;

Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland; Women's Law Project, in support of Plaintiffs-Appellants.

Michael D.B. Kavey, LGBTQ Rights Clinic, New York, NY; Omar Gonzalez-Pagan, Lambda Legal Defense and Education Fund, Inc., New York, NY; Gregory R. Nevins, Lambda Legal Defense and Education Fund, Inc., Atlanta, GA, for Amicus Curiae Lambda Legal, in support of Plaintiffs-Appellants.

PER CURIAM:

Plaintiff Donald Zarda, a skydiver, alleges that he was fired from his job as a skydiving instructor because of his sexual orientation.[1] He sued his former employer, Altitude Express (doing business as Skydive Long Island) and its owner Raymond Maynard (collectively "Altitude Express"), asserting that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., and New York law.[2] The United States District Court for the Eastern District of New York (Bianco, J.), found a triable issue of fact as to whether Zarda faced discrimination because of his sexual orientation in violation of New York law, but otherwise granted summary judgment to Altitude Express on Zarda's discrimination claims. In particular, the district court held that the defendants were entitled to summary judgment on Zarda's Title VII claim because Second Circuit precedent holds that Title VII does

[1] Zarda died in a skydiving accident before the case went to trial, and two executors of his estate have replaced him as plaintiff. Zarda and his estate's executors are collectively referred to as "Zarda."

[2] Zarda also alleged violations of state and federal laws relating to overtime and minimum wage. Those claims are not before us on appeal.

not protect against discrimination based on sexual orientation. At trial, the jury found for the defendants on Zarda's state-law claims.

On appeal, Zarda requests that we reconsider our interpretation of Title VII in order to hold that Title VII's prohibition on discrimination based on "sex" encompasses discrimination based on "sexual orientation." Since a three-judge panel of this Court lacks the power to overturn Circuit precedent, we decline Zarda's invitation.

Separately, Zarda asserts that several errors infected the trial on his state-law discrimination claim, warranting a new trial. Finding no abuse of discretion by the district court, we affirm the judgment in all respects.

I

In 2010, Rosanna Orellana and her boyfriend David Kengle went skydiving at Altitude Express. Each purchased tandem skydives, in which the instructor is tied to the back of the client so that the instructor can deploy the parachute and supervise the jump. Zarda was Orellana's instructor.

At some point, Zarda informed Orellana that he was homosexual and he had recently experienced a break-up. Zarda often informed female clients of his sexual orientation--especially when they were accompanied by a husband or boyfriend--in order to mitigate any awkwardness that might arise from the fact that he was strapped tightly to the woman.

When Orellana and Kengle compared notes on their respective skydives, and Kengle learned that Zarda had disclosed his sexual orientation, Kengle called Altitude Express to complain about Zarda's behavior. Zarda was fired shortly thereafter. Predictably, the parties dispute *why* Zarda was terminated. Altitude Express observes that Orellana had various complaints about Zarda's behavior, and the company contends that Zarda was fired because he failed to provide an enjoyable experience for a customer. For his part, Zarda asserts that he acted appropriately at all times and was fired because of his sexuality: either because of

his supervisor's prejudice against homosexuals or because he informed a client about his sexuality.[3]

II

The district court determined that there was a genuine dispute of material fact regarding the reason for Zarda's termination. However, the district court concluded that Zarda was entitled to a trial only with respect to his state-law cause of action. See N.Y. Exec. Law § 296(1)(a) (defining discrimination on the basis of sexual orientation as "an unlawful discriminatory practice"). Zarda's Title VII claim, by contrast, was dismissed at summary judgment.

That outcome ultimately resulted from longstanding tension in Title VII caselaw. While this Court has stated that Title VII does not prohibit discrimination based on sexual orientation, Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000), the Supreme Court has held that Title VII does forbid discrimination based on a failure to conform to "sex stereotypes," Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). See also Dawson v. Bumble & Bumble, 398 F.3d 211, 217-19 (2d Cir. 2005) (reaffirming Simonton). In light of these precedents, Zarda premised his Title VII cause of action on the ground that he had been terminated for failing to conform to sex stereotypes. Specifically, Zarda alleged that his employer "criticized [Zarda's] wearing of the color pink at work" and his practice of painting his toenails pink, notwithstanding Zarda's "typically masculine demeanor." J. App'x at 30. Accordingly, the district court, granted summary judgment in favor of defendants without analyzing whether Zarda could rely on a "sex stereotype" that men should date women. Instead, the district court limited its analysis to the "sex stereotypes" alleged by Zarda, including "what you may wear or how you may behave." Special App'x at 26. Determining that Zarda failed to establish the requisite proximity between his termination and his proffered instances of gender non-conformity (not including the fact that he dated other men), the district court granted summary judgment to defendants on Zarda's Title VII claim.

[3] Zarda alleged that another skydiving instructor had disclosed that he was heterosexual but was not punished.

During these proceedings, the Equal Employment Opportunity Commission ("EEOC") issued a decision setting forth the agency's view that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII. See Baldwin v. Foxx, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). Relying on Baldwin, Zarda moved the district court to reconsider its grant of summary judgment on his Title VII claim. The district court denied the motion, holding that Simonton was contrary to the EEOC's decision, and that it barred Zarda from recovering on a theory that discrimination based on sexual orientation violated Title VII.

After his state-law sexual-orientation claim proceeded to trial and a jury found for the defendants, Zarda appealed.

III

Zarda asserts that Simonton's holding that "Title VII does not proscribe discrimination because of sexual orientation" is incorrect and should be overturned. 232 F.3d at 36. As a threshold matter, Altitude Express contends that we need not consider this argument in light of the jury verdict in favor of the defendants on Zarda's state-law discrimination claim. Essentially, Altitude Express argues that the scope of Title VII's protections are irrelevant to Zarda's appeal because the jury found that Altitude Express had not discriminated.

Altitude Express is incorrect; Zarda's sex-discrimination claim is properly before us because the district court held him to a higher standard of causation than required by Title VII. Under Title VII, a plaintiff must demonstrate that sex "was a 'substantial' or 'motivating' factor contributing to the employer's decision to take the [adverse employment] action." Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 85 (2d Cir. 2015). Accordingly, to show causation for sex discrimination under Title VII, "[i]t suffices . . . to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." Univ. of Tx. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

At trial, the district court instructed the jury that Zarda could prevail on his state-law sexual-orientation discrimination claim only if he could prove that "he would have continued to work for Altitude Express . . . except for the fact that he was gay."[4] J. App'x at 1771. In other words, the jury charge required Zarda to prove but-for causation, which is a higher standard of causation than is necessary for Title VII sex-discrimination claims. See Vega, 801 F.3d at 86 ("[A] plaintiff in a Title VII case need not allege 'but-for' causation.").

If Zarda is correct that discrimination based on sexual orientation is equivalent to prohibited sex discrimination under Title VII, then he would have been entitled to a jury instruction on the less stringent "motivating-factor" test for causation. See Gordon v. N.Y. City Bd. of Educ., 232 F.3d 111, 116 (2d Cir. 2000) (indicating that an instruction that advises the jury on an erroneously high burden of proof warrants a new trial). It is entirely possible that a jury thought that Zarda's sexual orientation was "one of the employer's motives" (i.e. a "motivating factor") in its termination decision, but was not a "but-for cause" of his firing. In sum, if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial.

Zarda's request that we overturn Simonton is therefore not mooted by the jury verdict on his state-law claim. Nonetheless, we decline Zarda's invitation to revisit our precedent. A separate panel of this Court recently held that Simonton can only be overturned by the entire Court sitting in banc, see Christiansen v. Omnicom Grp., No. 16-478, 2017 WL 1130183, at *2 (2d Cir. Mar. 27, 2017), and the same is true in the case at bar, see United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004); cf. Hively v. Ivy Tech Comm. Coll., No. 15-1720, 2017 WL 1230393, at *1-2 (7th Cir. Apr. 4, 2017) (in banc) (overturning, as an in banc court, prior Seventh Circuit precedent holding that Title VII did not prohibit discrimination based on sexual orientation).

In Christiansen, the panel nonetheless remanded to the district court after concluding that the plaintiff had stated a plausible claim of "gender

[4] We express no view as to whether the district court correctly instructed the jury on New York law.

stereotyping," which is actionable under Title VII. 2017 WL 1130183, at *4. That route is unavailable to Zarda, since, as explained above, the district court found that Zarda failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes, and Zarda did not challenge that determination on appeal. Consequently, Zarda may receive a new trial only if Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation--a result foreclosed by Simonton.

IV

Zarda asserts that he is entitled to a new trial on his state-law, sexual-orientation discrimination claim for several reasons. None has merit.

A

Evidentiary Rulings. Zarda contends that the district court improperly admitted two types of prejudicial evidence. He suggests that the probative value of the evidence was substantially outweighed by its resulting prejudice. See Fed. R. Evid. 403. We review the district court's decision to admit this evidence for abuse of discretion. Harris v. O'Hare, 770 F.3d 224, 231 (2d Cir. 2014).

Zarda contends that the district court improperly admitted evidence concerning an occasion, nine years earlier, on which Zarda had been terminated from Altitude Express. As an initial matter, Zarda does not clearly identify the evidence he believes was improperly admitted, or why it was prejudicial. In any event, as the district court observed, evidence relating to the circumstances of an employee's previous termination is relevant to determining the circumstances of the same employee's later termination. Zarda has not shown that any prejudice substantially outweighed the relevance of this evidence. Accordingly, we see no abuse of discretion.

The district court also admitted deposition testimony in which Zarda acknowledged that there was a (small) possibility that the cause of his termination in 2001 was his filing for Worker's Compensation benefits. Assuming that this statement was prejudicial, any prejudice was negligible.

Zarda stated at deposition that Worker's Compensation might have played no more than a minimal role in his firing; moreover, Zarda's supervisor testified that he knew it would be illegal to fire someone for seeking Worker's Compensation benefits, and that he did not fire Zarda for this reason.

B

Witness List. Zarda argues that the defendants hindered Zarda's trial preparation by listing dozens more proposed witnesses in the parties' joint pre-trial order than the defendants intended to call. Zarda apparently argues that the district court should have precluded the defense witnesses from testifying, pursuant to Rules 26 and 37(c)(1) of the Federal Rules of Civil Procedure.

Even when Rule 37(c)(1) allows for witness preclusion, preclusion is not mandatory. Design Strategy, Inc. v. Davis, 469 F.3d 284, 297-98 (2d Cir. 2006). Here the district court had good reason to allow the testimony. The court found that the evidence was important, that Zarda had some notice regarding the potential testimony, and that there was no indication that the defendants had engaged in improper gamesmanship. We review a district court's decision to preclude testimony based on Rule 37(c)(1) for abuse of discretion, and we see none here. Patterson v. Balsamico, 440 F.3d 104, 117 (2d Cir. 2006).

C

Appeals to Prejudice. Zarda contends that defense counsel improperly influenced the jury by appealing to prejudice against homosexuals. On review, we consider whether the district court abused discretion by failing to grant relief. Marcic v. Reinauer Transp. Cos., 397 F.3d 120, 124 (2d Cir. 2005). Zarda is entitled to a new trial "only if [opposing] counsel's conduct created undue prejudice or passion which played upon the sympathy of the jury." Id. at 127 (quoting Matthews v. CTI Container Transp. Int'l, Inc., 871 F.2d 270, 278 (2d Cir. 1989)).

Although Zarda complains of several allegedly offensive remarks, the context of each comment suggests that the statements were not improper

references to stereotypes. For example, Zarda argues that counsel's description of the relationship between Zarda and one of his witnesses as "odd" is prejudicial. However, the witness was testifying in support of Zarda's claim for emotional damages, and defense counsel made this comment while trying to *downplay* the closeness of Zarda's relationship with the witness in order to make the jury skeptical of the witness's knowledge of Zarda's emotional state. The district court held that the characterization of the relationship as "odd" was a fair argument that went to the credibility of the witness. Zarda has not shown that the district court's ruling was an abuse of discretion or an "error[] . . . that w[as] 'clearly prejudicial to the outcome of the trial;'" consequently, he is not entitled to a new trial. Marcic, 397 F.3d at 124 (quoting Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 17 (2d Cir. 1996)).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

RULING ON RENEWAL OF TITLE VII CLAIM BASED ON BALDWIN V. FOXX

10/13/15

THE COURT:

Last week I said I didn't want to -- I had a jury trial going on, I didn't want to place the reason for my denial of the motion for reconsideration by plaintiff to either reinstate the Title VII claim or to what the jury decided in the event that the Second Circuit changes its precedent with respect to that issue. I want to place my reasoning on the record.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, . Civil No. 10-CV-04334-JFB-GRB
.
Vs. .
. 824 Federal Plaza
. Central Islip, NY
ALTITUDE EXPRESS, INC., ET AL, .
d/b/a Skydive Long Island . March 28, 2014

Ray Maynard
. . . . . .

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Plaintiff:
GREGORY ANTOLLINO, ESQ.
276 Seventh Avenue.
Suite 705
New York, NY 10001

For The Defendants:
Altitude Express and
Ray Maynard
ZABELL & ASSOCIATES
BY: SAUL ZABELL, ESQ.
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Bohemia, NY 11716

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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THE CLERK: Calling Case 10-CV-4334, Zarda versus Altitude Express. Please state your appearance for the record.

MR. ANTOLLINO: Gregory Antollino for plaintiff, good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Antollino.

MR. ZABELL: And Saul Zabell for the defendants. Good afternoon, Judge.

THE COURT: Good afternoon. As you know, I scheduled this conference because I wanted to rule on the pending motions. I decided, given that they have been now pending for some time to place an oral ruling on the record. It's possible I may also do a written opinion on this, I haven't decided whether to or not yet, but I didn't want the case to be delayed further. So I'm going to place the ruling on the record. I just ask you to bear with me, it should take about 10 or 15 minutes, and then we'll discuss the next steps going forward.

So first just let me for the record state that the standard I'm applying for summary judgment is set forth in an opinion that I wrote several years ago, Zhao versus State University of New York, 472 F Sup 2nd. 289 Eastern District of New York (2007). I adopt that standard in its entirety, I won't repeat it here. In short with respect to summary judgment obviously the facts are accepted as true and all reasonable inferences are drawn in favor of the nonmoving party.

Here, we have cross motions for summary judgment so when considering each motion I'm applying that standard for the benefit of the nonmoving party. I also adopt as contained in that opinion the framework for analyzing a gender discrimination claim, which is similar both in the Federal law and State law in terms of the McDonnell Douglas burden-shifting analysis which I am applying here. And that case also dealt with gender stereotyping. It has some case law with respect to that as well, which is obviously part of the subject of this suit.

So I adopt that standard in its entirety and I move now to each of the claims. First, well, actually I should say the threshold matter. There was a motion to strike a portion of the reply memorandum of plaintiff's partial summary judgment motion because it raised the issue of sex discrimination stereotyping, which was not the subject of the plaintiff's motion.

I'm denying the motion to strike, there was no prejudice even by raising that. And in fact it was pretty much the same arguments that had been made previously. So the motion to strike it is denied. I have considered it, but it hasn't affected the ruling, again because it contained similar arguments.

The Court will first address the gender discrimination claim under Federal law for gender stereotyping.

Having reviewed the evidence under the applicable standard I'm granting the motion for summary judgment on that claim because I find that the plaintiff has failed to meet even the prima facie burden, as minimal as it is, that the adverse action gave rise to an inference of discrimination based up gender stereotyping.

But evening assuming arguendo the prima facie burden was met, the defendants here articulated a nondiscriminatory reason, namely the customer complaint about how the plaintiff was touching her and I believe there was insufficient evidence that the articulated reason was a pretext for gender discrimination based upon stereotyping. Although for reasons I'll state in a moment when I get to the New York State claim, I believe there is sufficient basis to have it go forward with respect to a sexual orientation discrimination.

But sticking with the gender discrimination claim, there were a number of theories that were, I guess three theories that were asserted by plaintiff with respect to gender discrimination based on stereotyping. I note that to some extent I believe some of these theories are inconsistent with each other and to some extent inconsistent with a sexual orientation claim, and to some extent inconsistent with Mr. Zardo's deposition at page 215 where he indicated it was, Ray fired me for being gay.

But in any event I have analyzed them independently

of each other and I've even looked at them in conjunction to the extent that that can be done. I'm just going to through them.

The first theory I guess was that the plaintiff was fired because of stereotyping that a male must be guilty of sexual harassment if it is alleged. There's simply no evidence to believe that that stereotype was motivating Mr. Maynard in this situation. There's no, for example there's no evidence of comments, there's no female comparators who were treated differently. There is literally nothing to support that theory.

The only thing that the plaintiff points to in the papers, and this was discussed at oral argument, is what plaintiff believes was a sloppy investigation in terms of the interview of the plaintiff not allowing him a chance to see the video and other issues with how the investigation was conducted.

However, the law is clear that disputes about the thoroughness of an investigation by itself cannot be enough to create an inference of discriminatory intent. This case is no exception to that. That's actually set forth in a case that the plaintiff cites in support of its position, Sassaman v. Gamache, 566 F.3rd, 307. It's a 2nd Circuit 2009 case where at page 315 the 2nd Circuit states, "We emphasize that we do not hold that an arguably insufficient investigation of a complaint

of sexual harassment leading to an adverse employment action against the accused is, standing alone, sufficient to support an inference of discriminatory intent. Rather, we hold only that where plaintiff can point to evidence closely tied to the adverse employment action that could reasonably interpret it as indicating that discrimination drove the decision, and arguably insufficient investigation may support an inference of discriminatory intent."

So here, where there is nothing other as it relates to this claim, no other evidence other than a dispute about the thoroughness of the investigation, I conclude that that is not sufficient to give rise to an inference of discrimination, and certainly, certainly not sufficient to overcome the articulated nondiscriminatory reason for the termination.

Sassaman obviously is clearly distinguishable from this case because it wasn't just a dispute about the adequacy of the investigation, there was a direct comment by the supervisor that you probably did what she said you did because you're male.

So obviously a completely different situation where in addition to the investigation there was direct proof of discriminatory intent based upon that comment. So I don't believe under that theory there's any possibility that this could survive summary judgment. And secondly, to the extent the sloppy investigation I think was a separate theory, for the

reasons I just stated I don't believe that the sloppy investigation of itself can be sufficient to allow this claim to, -- I should say the disputes about the sloppiness of the investigation because the defendants have a different version with respect to the investigation itself.

Moving to the other theory which is based on the, I guess the plaintiff did not conform to male stereotyping, -- to not conform to male stereotypes in terms of being teased about wearing certain things, a pink hat and other similar types of issues, the defendants noted as a threshold matter that Zarda stated in his deposition that he was masculine in appearance. But putting that issue aside, I don't think that's, the key issue as it relates to this.

The key issue is that any teasing or comments with respect to those types of items, there is no relationship, that no rational Jury could draw any relationship to those, to the termination decision. In terms of proximity to the adverse action, there was no proximity. It's clear what the proximity and the adverse action with this whole issue with the customer, which included the disclosure of the customer's sexual orientation, it had nothing to do with conforming to male stereotypes in terms of what you may wear or how you may behave, -- zero to do with that.

As Mr. Zabell noted in his papers also, Mr. Zardo was rehired after these alleged incidents regarding what he was

wearing. There's simply no connection between those, no possible connection that can be drawn by a rational Jury between those events and the termination decision here.

So for all of those reasons I'm granting the motion as it relates to the gender discrimination claim.

With respect to the State claims, first as a jurisdictional matter the complaint does allege diversity of jurisdiction. As was discussed at the oral argument, there was no dollar amount in the amended complaint. Mr. Antollino did put in a letter articulating why he believes the $75,000 threshold had been surpassed. And I conclude based upon that letter that there is a good faith basis for him to allege that based upon the categories of damages that he outlined. And therefore, I believe that the jurisdictional requirement for diversity of citizenship is met.

I will ask him at the conclusion of this to amend the complaint as a technical matter to put in the allegation of, in excess of $75,000. So I will move to the State law claims, the sexual orientation claim, the defendant's motion for summary judgment on that is denied for the following reasons.

The plaintiff's evidence, unlike the gender discrimination claim, in addition to disputing the adequacy of the investigation itself, the plaintiff has several other pieces of evidence that they point to with respect to that that I believe are more than sufficient to create a genuine issue of

fact that must be resolved at trial, including primarily, I guess most significantly the timing of the disclosure of sexual orientation to the customer and the termination was obviously in very close proximity and was the subject of the interactions between Mr. Zardo and Mr. Maynard.

So I think that is another, -- is one piece of evidence that certainly can be relied on with respect to the sexual orientation claim. There are some other pieces of information or evidence that if credited and drawn most favorably to the plaintiff could also be utilized to support that claim. There's this issue regarding another employee, I think it was Weinstock if my memory is correct, who disclosed in some manner being heterosexual during a jump and there was no adverse action taken with respect to that.

Obviously I know the defendants argue the circumstances were different than alleged to an allegation of improper touching. But in any event, again this has to be construed most favorably to the plaintiff. With respect to the defendant's motion it is something that they could as part of their other evidence utilize for the purpose of creating a genuine issue of fact.

There is some evidence that, in the unemployment form that the reason for the termination was not completely consistent with the reasons given at other times. And I believe that all of these things, while each of these things in

isolation would not be sufficient, I believe together they are certainly sufficient to create an issue of fact or whether the termination was because of the articulated nondiscriminatory reason given by the defendants of a customer complaint about discomfort and being touched by the plaintiff during the jump or whether he was terminated because of the sexual orientation, or the disclosure of his sexual orientation by the plaintiff.

So the defendant's motion on the State law claim for sexual orientation discrimination is denied. And similarly, the plaintiff's cross motion for summary judgment on the sexual orientation claim is denied. Looking, again, now looking at the evidence from the defendant's standpoint most favorably for purpose of the plaintiff's motion, it's undisputed that a customer complaint was made.

While there's a dispute about whether it should have been sufficient for the termination or not, -- certainly the fact that a complaint was made does provide some support for the defendant's position. There was some investigation done, it wasn't an immediate termination, it was a suspension with some discussion with the plaintiff. And again, while there's a dispute about whether that was sufficient under the circumstances of that, -- if that's construed most favorably to the defendant it certainly creates enough of an issue of fact with regard to his intent to preclude summary judgment in the plaintiff's favor on this.

And there's also evidence that there was knowledge of the plaintiff's sexual orientation far before this event transpired. Obviously that doesn't address the issue of whether or not the disclosure of the sexual orientation was the basis for the discriminatory act that's alleged, -- but as the issue of whether or not it was over the sexual orientation itself, certainly that evidence would support the defendant's position.

So the evidence in the record if construed most favorably to the defendant is certainly sufficient to overcome plaintiff's motion for summary judgment on the issue of whether or not the articulated reason, the articulated nondiscriminatory reason was the real reason for the termination.

Turning briefly to the hostile work environment claim, again, that standard is set forth in Zhao. I won't repeat it here, but the isolated incidents related to the comments about what the plaintiff was wearing or behavior, or similar things of that nature are, it's not even close to being sufficiently pervasive or severe to possibly have a Jury rationally conclude that it was a hostile work environment.

This issue is about, -- this case is about the termination, it's not about a hostile work environment. So the motion is granted with respect to that.

Turning to the wage claim, I'm denying the cross

motions on the wage claim, because the record, the Court just can't discern from the record, again construing it most favorably to the nonmoving party in each situation, whether or not this can be resolved as a matter of law, based upon the facts that are in, that have been submitted in the summary judgment motion. Certainly, the defendants have attached records which accredited would allow them to prevail on this claim. And so that's why the plaintiff's motion for this is denied.

But I'm also denying the defendant's motion because there's some disputes about the adequacy of the record keeping about, there's a dispute about whether the plaintiff was required to be there in the vicinity of the location for certain periods of time. And I believe that the Zarda affirmation that was submitted in opposition on April 8, 2013, is sufficient to at least create an issue of fact that this can't be resolved at summary judgment. Although it does not seem to be a particularly strong claim, I believe it's sufficient to survive summary judgment.

The overtime claim, plaintiff did not even separately brief the overtime issue and I'm granting summary judgment on the overtime issue because I don't see any evidence that would support an overtime claim under New York law as opposed to a minimum wage claim.

So the cases that survive, excuse me, the claims

that survive summary judgment are the sexual orientation claim under New York law as well as the minimum wage claim under New York law. And those are the claims that will proceed to trial.

Okay, so Mr. Antollino, I am just going to ask that you formally just, I guess it would be the second amended complaint.

MR. ANTOLLINO: Certainly.

THE COURT: I'm sorry, what did you say?

MR. ANTOLLINO: Certainly.

THE COURT: What did you say, Mr. Antollino?

MR. ANTOLLINO: I'm sorry? No, I just said certainly.

THE COURT: Okay. So just put that in for a week from today, and Mr. Zabell, you can just file another answer.

MR. ZABELL: Your Honor, if I may, we had discussed at our last conference that if Your Honor's decision did in fact come down the way it came down today that I would be given an opportunity to brief the issue based upon the deposition testimony and the discovery documents that Mr. Zarda turned over that they do not meet the 75,000 jurisdictional requirement.

THE COURT: Okay. Well, if, if, I'm not going to let that the way everything else that we're going to do, because the case has been around for too long. So I will let you put something in. But what I'm going to do is I'm going to have

them put in the amended complaint, if you believe that there's not a good faith basis based upon the letter that he submitted, I think it was June 13 or something like that where he put in the various categories of damages. I guess in lieu of an answer you could file a motion to dismiss on jurisdictional grounds, okay.

MR. ANTOLLINO: Judge, and just to be clear, the standard is not whether or not the damages are provable, but whether there is a good faith basis to allege them.

THE COURT: Yes. I know that standard, I've been through it a few times.

MR. ANTOLLINO: I just wanted to make it clear as to all parties that if there were any motion it would be that I do not have a good faith basis --

THE COURT: Right.

MR. ANTOLLINO: -- to assert this. Not that it's not going to be provable. It's not a summary judgment motion --

THE COURT: Right.

MR. ANTOLLINO: It would be I do not have a good faith basis to pay it.

THE COURT: Right. That's why I thought your letter was, you know, very detailed in terms of looking at other cases in terms of emotional damages and things like that, of what a good faith potential recovery would be. So I think Mr. Zabell, as you probably gathered, you have a real uphill battle on

that, but I won't prevent you from, -- I said I would give you a chance and I think you're entitled to a chance. So if you want to put in, but I am going to ask that you put that in, you know, quickly. And then I'll give Mr. Antollino a chance to respond to that, okay.

MR. ANTOLLINO: Thank you, Judge.

THE COURT: So I mean, do you want to set a motion schedule for that now, then, Mr. Zabell, since I have you? Do you want to just do that?

MR. ZABELL: Yeah, that, I can get 15 days, Judge?

THE COURT: Yes. So then Mr. Antollino will put it in by April 4. And then 15 days would be, that would be a weekend --

MR. ZABELL: Wait, wait.

THE COURT: April 21?

MR. ZABELL: Wait, I'm sorry, Judge, 15 days is, that's going to take me to, let's see. That's not going to take me to April 4, that will take me --

MR. ANTOLLINO: I'm going to put in the amended complaint toot sweet. So you know, it will be 15 days from the day that I put in the amended complaint, not April 4. I mean, I really feel that if Mr. Zabell is actually going to pursue this motion it's not only a waste of his client's money, it's a waste of the Court's time. And I'll look at it very carefully, but I have, I've made a thorough letter on that point because I

knew I was correct on this and I think that if Mr. Zabell is going to waste his client's money and the Court's time he'd better have a good faith basis to make the argument that I don't have a good faith basis to say that this could happen.

So I may make a, I may decide to make a cross motion for sanctions if we have to waste our time on a point which is really theoretical, not something that I have to prove. Theoretically I can get more than $75,000 on this case. It's not going to the Jury now and it's not, it's not even summary judgment. It's just me having a good faith basis. So what he's arguing is that I am in fact, -- have a bad faith argument by making his argument that I don't have a good faith basis.

THE COURT: Okay. Let's just get it scheduled, Mr. Antollino, okay. You can make a cross motion, you can make whatever motion you'd like to, but let's, so you said you're going to put it in Monday then? The amended complaint?

MR. ANTOLLINO: Yeah, I'll put it in, I'll put it in this weekend.

THE COURT: Okay. So if he puts it in this weekend, Mr. Zabell, do you want 15 days then from Monday?

MR. ZABELL: Yes, please.

THE COURT: So we'll say, that would be, say April 15. How long do you want to respond? Mr. Antollino, if you, if you believe that you've covered this in your letter you can just submit a letter to me saying you're relying on your

previous submission, you don't have to write up something, you know, you don't have to repeat what you said previously, okay?

MR. ANTOLLINO: Okay, all right.

THE COURT: So how long do you want?

MR. ZABELL: Well, give me ten days from his response.

THE COURT: Okay. So April 25 will be the opposition, and then a week for any reply, Mr. Zabell?

MR. ZABELL: That will be sufficient, thank you, Judge.

THE COURT: Okay, so that's May 2. I won't have an argument on this because I think it's a fairly straightforward issue. Unless I have questions I'll just, I'll either do what I did today where I'll have a phone conference and I'll rule on it, or I'll issue a short order, okay.

But in terms of the, it's not, just to mention, Mr. Antollino this is not going to affect obviously the trial date in this case because we weren't going to have the trial that soon anyway. So the, what I'll do is I'll make the pretrial order due, it shouldn't be too complicated, maybe 30 days from May 2 then?

MR. ZABELL: That's fine.

MR. ANTOLLINO: I can work with that, Your Honor.

THE COURT: So we'll say June 2, pretrial order. And then within 10 days of that we'll have a call to set a trial

date, which I anticipate would be in the all, okay?

MR. ZABELL: Okay. Your Honor, there is one last thing, and I bring it up as much for humor's sake as anything else. But I can say in every conference that I've had with Mr. Antollino, Mr. Antollino has brought up the issue of seeking sanctions against me. I just, I bring it up for comedy's sake, it's Friday afternoon. I just think it's, it's well worth noting.

MR. ANTOLLINO: I'd like to bring up a little comedy. One of the World Trade Center jumpers from this week was actually one of the witnesses mentioned in the pretrial although disclosures, although he never put in an affidavit or was deposed. So that's some real comedy.

THE COURT: All right. I don't think we need any more comedy, okay.

MR. ANTOLLINO: Okay. Who's the reporter on this?

THE COURT: I'm sorry, what did you say?

MR. ANTOLLINO: The court reporter, the court reporter?

THE COURT: Oh, there is no court reporter here. We put this on the, this is being recorded digitally. So if you want to order the transcript just contact my deputy and she'll tell you who in the clerk's office, -- or it's in our rules I guess, too, who in the clerk's office you can call to order it. They send it out to an agency and they produce the transcript,

okay.

MR. ANTOLLINO: Okay.

THE COURT: Okay, thank you, counsel, have a good weekend.

MR. ANTOLLINO: Thank you, bye.

MR. ZABELL: Everybody have a good weekend.

* * *

C E R T I F I C A T I O N

I, **TRACY GRIBBEN**, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____

/S/ TRACY GRIBBEN

TERRY GRIBBEN'S TRANSCRIPTION SERVICE DATE: April 1, 2014

RULING ON RENEWAL OF TITLE VII CLAIM BASED ON BALDWIN V. FOXX

10/13/15

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ESTATE OF DONALD ZARDA,
Plaintiff

-against-

ALTITUDE EXPRESS INC., ET AL.
Defendants.
----------X

JUDGMENT IN A CIVIL CASE

Case Number: CV-10-4334

__X__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

____ **Decision by Court.** This action came to trial/hearing before the Court. The issues have been tried/heard, and a decision has been rendered.

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.

Dated: Central Islip, New York
October 28, 2015

DOUGLAS C. PALMER
Clerk of Court

/S/
By: Michele Savona
Deputy Clerk

GREGORY ANTOLLINO
ATTORNEY AT LAW

275 SEVENTH AVENUE, SUITE 705
NEW YORK, NEW YORK 10001

TEL. (212) 334-7397
FAX (212) 334-7399

June 28, 2017

Catherine O'Hagan Wolfe
Clerk of Court
Second Circuit Court of Appeals
40 Foley Square
New York, NY 10007

Re: Zarda v. Altitude Express, 15-3775

To the Clerk of Court or to Whom it May Concern:

I, on behalf of Plaintiff-Appellant, filed a brief and special appendix with incorrect pagination and several purely typographical errors. I called the case manager yesterday about bouncing the brief to refile it, but in the interest of finishing the matter, I have jumped the gun. It is my understanding that no motion is required for a brief that corrects purely typographical errors, however, if I am incorrect, I expect someone will contact me. The original hard copies were served by overnight mail on June 26. If this brief is not bounced (which again makes no substantive changes), I will hand deliver the corrected briefs by Friday.

Sincerely,

Greg S. Antollino

Gregory Antollino

cc: all parties by ecf