DOCKET NO.: CV 05 4016120S	:	SUPERIOR COURT
LUIS PATINO	:	J. D. OF HARTFORD
V.	:	AT HARTFORD
BIRKEN MANUFACTURING CO.	:	MAY 15, 2009

MEMORANDUM OF DECISION ON MOTIONS
TO SET ASIDE THE VERDICT (#117) AND FOR REMITTITUR (#118)

In this employment discrimination case, the principal issue raised by the defendant in its post-trial motions is whether General Statutes § 46a-81c imposes liability on a employer who fails to prevent its employees from creating a hostile work environment for a co-worker on account of his sexual orientation. The court concludes that an employer may be held liable, pursuant to § 46a-81c, for a hostile work environment because such an environment constitutes discrimination with respect to the employee's "conditions" of employment.

FACTS AND PROCEDURAL HSITORY

The plaintiff, Luis Patino, commenced this action by service of process on the defendant, Birken Mfg. Co. ("Birken"), on August 23, 2005. The present action arises under a complaint that Patino filed with the commission on human rights and opportunities ("CHRO") on January 26, 2004, alleging retaliation and hostile work environment, which the CHRO released from its jurisdiction on May 23, 2005. Patino's initial complaint contained six counts but he elected to proceed to the jury on only one count.

The case was heard before a jury beginning on January 27, 2009. At trial, the jury reasonably

could have found the following facts. Patino began working as a machinist at Birken in 1977 and his employment ended on November 8, 2004, when he was fired.[1] (Trial Transcript, January 27, 2009 [Tr.], pp. 3, 18, 90) Beginning in 1991, some of Patino's co-workers began calling him derogatory names for homosexuals in Spanish such as "pato" and "maricon," and also used slang words about homosexuals in Italian and English such as "pira," "faggot" and "homo." (Tr., pp. 15-16.) He heard these words "very often": "Oh, I would say two, three times a day sometimes. Sometimes I didn't hear anything. I would say five times a week or so." (Tr., p. 22.) The derogatory words were not spoken to Patino directly, but were made in his presence, such as directly behind his back, while he was concentrating on his work. (Tr., pp. 108, 122, 128-29.) Patino is a quiet person who dislikes confrontation, so he did not initially complain about hearing these words. (Tr., p. 22.) Patino was devastated and "overwhelmed by anger and by frustration and the humiliation" because of this harassment. (Tr., p. 23.)

After five or six years of hearing these words, he brought a complaint to his supervisor. (Tr., p. 23.) The supervisor arranged a five or ten minute meeting with himself, Patino, the owner of the company, and two of Patino's co-workers, during which the owner said that "bad words" were being said and "they're going to stop." (Tr., pp. 23-24.) The situation improved for a few weeks but then the harassment began again, and Patino again raised the problem with his supervisor. (Tr., p. 25.) The supervisor agreed to transfer one of the co-workers who had harassed Patino to another building, but kept the other co-worker at Patino's facility. (Tr., p. 25.) This move did not solve the problem, as other co-workers "join[ed] in the brouhaha . . . ." (Tr., p. 26.)

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[1] Patino does not allege that he was fired because of his sexual orientation. Instead, in a separate proceeding before a federal agency, he claimed that he was fired for engaging in certain whistleblowing activities.

Patino retained an attorney, who sent a letter to Birken on April 13, 1995. (Tr., p. 28; Pl.'s Exh. 1.) Patino received a reply from Gary Greenberg, who was Birken's vice president and general counsel; (Pl.'s Exh. 2.); suggesting that if Patino were suffering from mental and psychological stress as a result of his workplace, then Patino should be evaluated by a doctor because Patino works with precision instruments. (Tr., pp. 30-31.) Subsequently, Patino continued to suffer similar harassment, which he described as: "Some several guys screaming these words to each other, or going in back of my machine, they were screaming these words." (Tr., p. 32.)

Patino recorded what his co-workers were saying in a series of diaries. (Pl.'s Exh. 31-A through 31-E.) The first entry is in 1991 and the last entry is November 5, 2004. (Tr., p. 33.)

Additionally, Patino filed five complaints with the CHRO. (Tr., p. 34.) The first complaint was filed on September 30, 1996. (Tr., p. 36; Pl.'s Exh. 3.) After a hearing with the CHRO, Patino wrote a letter to Greenberg on September 3, 1997, describing incidents where co-workers had called him derogatory names. (Tr., p. 41; Pl.'s Exh. 4.) Greenberg responded with a letter dated September 9, 1997, which stated that he had completed an investigation of Patino's complaints and found that none of the co-workers accused of harassing Patino knew anything about the alleged occurrences and that none of Patino's named witnesses observed any of the alleged occurrences.[2] (Tr., p. 43; Pl.'s Exh. 5.) Patino and Greenberg exchanged further correspondence regarding the alleged harassment. (Pl.'s Exh. 6 and 7.) On September 16, 2007, Patino sent Greenberg a letter; (Pl.'s Exh. 8.); stating that he would not describe any more harassment incidents with Birken because it would be "an exercise in futility." (Tr., p. 48.)

[2] Patino's testimony contradicted Greenberg's letter, however, as Patino testified that he had never asked any of his co-workers to be his witnesses. (Tr. p. 45.)

Patino and Birken settled the initial CHRO complaint by Birken agreeing to hold a workplace harassment seminar for all of Birken's workers in November, 1997. (Tr., pp. 37, 40.) At the seminar, an attorney conducting the seminar stated that if an individual employee was caught making derogatory remarks, the employee could lose his job, be suspended, or even be sued by the company. (Tr., p. 48.) Some of the co-workers who harassed Patino did not attend this seminar, and Patino testified that he continued to be called "pato," "faggot" and "pira" afterwards. (Tr., pp. 38-39.)

Patino filed a second CHRO complaint in 1998. (Tr., p. 48; Pl.'s Exh. 9.) Patino withdrew the complaint, however, and wrote a letter to Greenberg on March 20, 1998, explaining his reasons for withdrawing the complaint. (Tr., pp. 50-51; Pl.'s Exh. 10.) Patino filed a third CHRO complaint in October 7, 1999. (Tr., p. 55; Pl.'s Exh. 17.) This action did not resolve the problem and Patino continued to write letters to Greenberg complaining of harassment. (Tr., pp. 56-59; Pl.'s Exh. 18 through 23.) Subsequently, Patino filed a fourth CHRO complaint on March 1, 2002; (Pl.'s Exh. 24.); and continued writing letters to Greenberg describing incidents of harassment. (Tr., pp. 66-67; Pl.'s Exh. 25 through 27.) Patino filed a fifth CHRO complaint in January, 2004; (Pl.'s Exh. 28.); which is the underlying subject of the present action. (Tr., p. 67.)

In the count that went to the jury, Patino alleged that Birken violated General Statutes § 46a-81c by creating "a hostile work environment because of the plaintiff's sexual orientation, failing to take adequate measures to alleviate the harassment or to remedy the hostile work environment after learning of their existence." (Complaint, ¶ 19.) This count further alleged that "[a]s a result of the defendant's conduct, the plaintiff has and will continue to suffer past and future economic, physical and emotional harm." (Complaint, ¶ 20.) For this count, Patino claimed "compensatory economic damages," costs, attorney's fees, interest and "such other further and different relief as to this Court may deem just and

equitable."

The court in relevant part instructed the jury as follows: "The plaintiff alleges that the defendant committed a discriminatory employment practice in violation of Connecticut General Statutes § 46a-81c. This statute provides in relevant part: 'It shall be a discriminatory practice . . . for an employer to . . . discriminate against [an individual] in conditions of employment because of the individual's sexual orientation.'

"For the purposes of this statute, sexual orientation means in relevant part 'having a preference for homosexuality.' Conditions of employment include the right to work in a non-hostile work environment.

"In this case, the plaintiff contends that between June 26, 2002, to November 8, 2004, he was harassed by co-workers on account of his sexual orientation and that harassment created a hostile work environment.

"To establish a claim of hostile work environment, the plaintiff has the burden to prove by a fair preponderance of the evidence that the workplace was permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create a hostile work environment.

"The plaintiff must prove that the work environment was both subjectively and objectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. You may determine whether an environment is sufficiently hostile or abusive by looking at all of the facts and circumstances you find to have existed.

"Now, even if you find that Mr. Patino has proven that other employees created a hostile work environment for Mr. Patino, you must next decide whether Birken manufacturing should be held liable

for the acts of individual employees. Under our law an employer, like Birken, is not necessarily liable for individual discriminatory conduct committed by one or more of its employees.

"Under what circumstances may an employer be held responsible for harassment conducted by one or more of its employees? Well, an employer may not stand by and allow an employee to be harassed by co-workers because of his sexual orientation. Thus, an employer will be held liable for harassment perpetrated by its employees if the employer provided no reasonable avenue for the plaintiff to complain of the harassment or the employer knew or should have known of the harassment but unreasonably failed to stop it.

"In other words, once an employer knows of sexual orientation harassment in the workplace, it has a duty to take reasonable steps to stop it. The reasonableness of the employer's action depends, among other things, on the nature and scope of the employer's investigation of the harassment claims, the severity and persistence of the harassment alleged, the effectiveness of any of the initial remedial steps, the nature of the work environment, and the resources available to the employer.

"An employer's response should be evaluated to determine how prompt, appropriate, and adequate it was. If an employer has in good faith taken measures that are both feasible and reasonable under the circumstances to combat the offensive conduct, it cannot be charged with discriminating on the basis of sexual orientation.

"In sum, for the plaintiff to establish that Birken manufacturing is liable to him, he must prove by a fair preponderance of the evidence the following elements: (1) The plaintiff was employed by the defendant; (2) the plaintiff was discriminated against in the conditions of employment because he was forced to labor in a hostile work environment; (3) the discrimination was on account of the plaintiff's actual or perceived sexual orientation; and (4) Birken should be held legally responsible for any

discriminatory conduct by its individual employees. . . ."

On February 3, 2009, the jury found in favor of Patino and awarded him $94,500 in non-economic damages.

Birken filed a motion to set aside the verdict and a motion for remittitur on February 17, 2009, and a supporting memorandum of law on February 20, 2009. Birken seeks to have judgment rendered in accordance with its motion for directed verdict, filed on January 28, 2009. Patino filed a memorandum of law in opposition to Birken's motions on March 6, 2009. Birken filed a sur-reply on March 13, 2009. Additionally, with permission of the court, amicus curiae briefs were filed by the Connecticut Employment Lawyers' Association on March 5, 2009, and the Lambda Legal Defense and Education Fund, Inc., on March 13, 2009. The court heard argument on Birken's motions on March 16, 2009.

DISCUSSION

I. MOTION TO SET ASIDE THE VERDICT

Birken advances several claims in its motion to set aside the verdict. First, Birken contends that the court incorrectly charged the jury because an employer may not be held liable pursuant to General Statutes § 46a-81c for sexual orientation discrimination based upon a claim of "hostile work environment." Second, Birken asserts that even if § 46a-81c contained language authorizing a hostile work environment claim against an employer, Patino could not prevail because the facts that the jury could reasonably have found do not support a finding of a hostile work environment. Third, Patino argues Patino failed to establish a prima facie case pursuant to § 46a-81c. Finally, Birken contends that Patino presented no evidence of damages and that the court should not have submitted a claim for emotional distress damages to the jury.

In response, Patino argues (1) that § 46a-81c provides a remedy for employment discrimination

claims based on sexual orientation in circumstances where an employer fails to prevent its employees from creating a hostile work environment, (2) he provided sufficient evidence upon which the jury could reasonably find that he suffered from a hostile work environment, (3) he established a prima facie cause of action under § 46a-81c and (4) the jury's award of damages is supported by the evidence.

"The trial court possesses inherent power to set aside a jury verdict [that], in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . ." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 702, 900 A.2d 498 (2006).

A. Hostile Work Environment

The court first addresses whether General Statutes § 46a-81c permits a claim of sexual orientation discrimination with respect to employment based on a hostile work environment. The court concludes that, pursuant to General Statutes § 46a-81c, an employer may be held liable for sexual orientation discrimination if it fails to take reasonable steps to prevent its employees from harassing a fellow employee on account of his sexual orientation.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after

examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Friezo* v. *Friezo*, 281 Conn. 166, 181-82, 914 A.2d 533 (2007).

General Statutes § 46a-81c provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation . . . ."

Patino claims that an employer may be liable for permitting its employees to create a hostile work environment under § 46a-81c because that statute makes it a discriminatory practice for an employer to discriminate against an individual in the "terms, conditions or privileges of employment" based on the individual's sexual orientation. He argues that the phrase "terms, conditions or privileges of employment" encompasses claims of employment discrimination against homosexuals based on a hostile work environment. Birken disputes this interpretation, arguing that the phrase cannot be construed to impose liability on an employer for a hostile work environment.

It is important to note, at the outset, that this phrase is identical to language in General Statutes § 46a-60 (a) (1), which protects employees from discrimination on account of the employee's race, sex, marital status, or other delineated characteristics, and is nearly identical to language in federal laws that prohibit workplace discrimination

For example, Connecticut's Fair Employment Practices Act, General Statutes § 46a-51 et seq., provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness." General Statutes § 46a-60 (a) (1).

Likewise, Title VII of the Civil Rights Act of 1964 § 703 (a) (1), 42 U.S.C. § 2000e-2 (a) provides in relevant part: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

No Connecticut court has squarely addressed the question of whether the phrase "terms, conditions or privileges of employment" in § 46a-81c protects employees who are gay and lesbian, or perceived to be gay and lesbian, from a "hostile work environment."

In matters involving the interpretation of our state's anti-discrimination laws, however, the Connecticut Supreme Court often looks to federal precedent because our state law is generally designed to be co-extensive with federal law.[3] *Dept. of Health Services* v. *Commission on Human Rights &*

[3] It is true that Connecticut law is not perfectly coextensive with federal law because there is no provision in Title VII that prohibits employment discrimination on account of an individual's sexual orientation. Nevertheless, courts' interpretation of the phrase "terms, conditions and privileges of employment" in federal law is still instructive as to what meaning should be ascribed to the same

Opportunities, 198 Conn. 479, 489, 503 A.2d 1151 (1986). The phrase "terms, conditions or privileges of employment" in Title VII has been broadly interpreted by federal courts. These courts conclude that this phrase embodies "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." (Internal quotation marks omitted.) *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

In *Meritor Savings Bank, FSB* v. *Vinson*, supra, 477 U.S. 62, the court heard a challenge to a ruling of the United States Court of Appeals for the District of Columbia that a Title VII action could be predicated on two types of sexual harassment: "harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."

In affirming the Court of Appeals, the United States Supreme Court held that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." (Internal quotation marks omitted.) Id., 64. Thus, Congress did not intend that discrimination that affects the "conditions" of employment should be limited only to "economic" or "tangible" discrimination, but all actions that create a workplace filled with "discriminatory intimidation, ridicule, and insult." Id., 64-65. In addition, the court concluded that sexual misconduct that does not effect a "quid pro quo" may still be considered sexual harassment under Title VII where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Id., 65.

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language in Connecticut's employment statutes.

Based on a broad understanding of Congress' goals in enacting Title VII, the *Meritor* court held that Title VII protections extend "beyond the economic aspects of employment" and into the psychological trauma associated with a hostile work environment, providing a remedy for "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." (Internal quotation marks omitted.) Id., 66. All of these conclusions by the Supreme Court in *Meritor* were grounded in its construction of the meaning of the phrase "terms, conditions or privileges of employment," which the court broadly construed to include protection from a hostile work environment. Id. The court reasoned that an employee who encountered pervasive "discriminatory intimidation, ridicule, and insult" at work suffered discrimination in the "terms, conditions or privileges of employment" because of the employee's membership in a protected class. Id., 66-67. The court cautioned that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." Id., 67. To be actionable, the conduct "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." (Internal quotation marks omitted.) Id.

The *Meritor* court's broad construction of the phrase "terms, conditions or privileges of employment" has not been confined to cases involving gender discrimination. Instead, federal courts have construed this phrase to permit members of other protected classes, such as racial minorities, to bring hostile work environment claims. For example, in upholding a district court's finding that African-American and Hispanic prison guards were subject to a racially-hostile environment that their employer failed to remedy, the United States Court of Appeals for the Second Circuit held that "[i]t is well-established in other Circuits that a working environment overrun by racial antagonism constitutes a

Title VII violation. *Gilbert* v. *City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983); *Walker* v. *Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250 (8th Cir. 1981). The Fifth Circuit put it succinctly, 'a discriminatory and offensive work environment so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' may constitute a violation of Title VII.' *Vaughn* v. *Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (quoting *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972))." *Snell* v. *Suffolk County*, 782 F.2d 1094, 1102-103 (2d Cir. 1986).

Connecticut courts, guided by this broad construction of the phrase "terms, conditions or privileges of employment," have construed § 46a-60(a)(1) to impose liability on employers who permit employees to create a hostile work environment that impacts members of protected classes enumerated under the statute. Our law is clear that "once an employer has knowledge of a racially [or sexually] combative atmosphere in the workplace, he [or she] has a duty to take reasonable steps to eliminate it." (Internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 168, 717 A.2d 1254 (1998).

For example, in *Tosado* v. *State*, Superior Court, judicial district of Fairfield, Docket No. CV 03 0402149 (March 15, 2007, *Gilardi, J.*), the court denied an employer's motion for summary judgment, holding that issues of fact existed on the issue of whether an employee had endured a hostile work environment based on her race, sex and ancestry. The court held that "a hostile work environment claim . . . is not limited to sexual advances or sexual behavior . . . . It also includes nonsexual behavior directed at an employee because of her gender . . . and because of the plaintiff's *race and membership in other protected classes*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id.; see

also *Bramwell* v. *State*, Superior Court, judicial district of New Britain, Docket No. CV 97 0481200 (March 28, 2002, *Kocay, J.*) (hostile work environment claim based on racial discrimination); *Hartford* v. *Casati*, Superior Court, judicial district of Hartford, Docket No. CV 00 0599086 (October 25, 2001, *Berger, J.*) (Section 46a-60 precludes creation and maintenance of a hostile work environment featuring discrimination based on race, ethnicity, national origin and gender).

Thus, both state and federal courts construe the phrase "terms, conditions or privileges of employment" to impose liability on an employer for failing to prevent employees from creating a hostile work environment based on an individual's membership in a protected class. This broad construction is particularly warranted in light of the remedial purposes underlying General Statutes § 46a-60 (a) (1). See, e.g., *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 709, 802 A.2d 731 (2002).

A similarly broad construction applies to interpreting Connecticut's Gay Rights Law, which includes § 46a-81c. See *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 490, 673 A.2d 484 (1996) (*Borden, J.*, concurring) ("Remedial statutes such as the Gay Rights Law must be liberally construed in favor of those whom the legislature intended to benefit [i.e., gay men and lesbians] . . . .").

"General Statutes §§ 46a-81a through 46a-81n of the Gay Rights Law provide that it is the public policy of this state that individuals are not to be discriminated against because of their sexual orientation — that is, the law prohibits discrimination against a person based on his or her 'preference for heterosexuality, homosexuality or bisexuality, history of such preference or being identified with such preference . . . .' General Statutes § 46a-81a. This public policy reaches a wide spectrum of activities, including: membership in licensed professional associations (§ 46a-81b), employment (§ 46a-81c), public accommodations (§ 46a-81d), housing (§ 46a-81e), credit practices (§ 46a-81f), employment in

state agencies (§§ 46a-81h and 46a-81j), the granting of state licenses (§ 46a-81k), educational and vocational programs of state agencies (§ 46a-81m), and allocation of state benefits (§ 46a-81n)." *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, supra, 482 n.24.

In particular, the legislature enacted § 46a-81c "to protect people from pervasive and invidious discrimination on the basis of sexual orientation." *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, supra, 236 Conn. 481-82. As Connecticut's Supreme Court recently recognized, "[t]he antidiscrimination provisions of our gay rights law . . . represent a legislative consensus that sexual orientation discrimination, like gender discrimination several decades ago, is widespread, invidious and resistant to change." (Citation omitted.) *Kerrigan* v. *Commissioner of Health*, 289 Conn. 135, 209, 957 A.2d 407 (2008). To effect this purpose, the legislature added the designation of sexual orientation to the protected classes already enumerated in the state's antidiscrimination statutes. See 34 S. Proc., Pt. 3, 1991, p. 976, remarks of Senator Avallone. Although not squarely addressing the present claim, Connecticut courts have assumed without deciding that an employee may bring a hostile work environment claim pursuant to § 46a-81c.[4]

Despite the broad construction of the phrase "terms, conditions or privileges of employment" in both federal and state law, Birken contends that the phrase in § 46a-81c cannot be construed to include a hostile work environment claim in the context of sexual orientation discrimination. In asserting this

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[4] For example, one judge of the Superior Court has assumed that a plaintiff, whose decedent allegedly suffered harassment based on his sexual orientation, could bring a hostile work environment claim under § 46a-81c. *Bogdahn* v. *Hamilton Standard Space Systems International, Inc.*, 46 Conn. Sup. 153, 158, 740 A.2d 1003 (1999). Likewise, the United States District Court for the District of Connecticut has held, without analysis, that § 46a-81c permits a plaintiff to introduce evidence of harassment based on sexual orientation to support a hostile work environment claim. *Morales* v. *ATP Health & Beauty Care, Inc.*, United States District Court for the District of Connecticut, Docket No. 3:06CV01430 (D. Conn. August 18, 2008).

claim, Birken relies heavily on the fact that § 46a-60 (a) (8) contains specific language authorizing hostile work environment claims in the context of gender discrimination, but that § 46a-81c, governing sexual orientation discrimination, does not. The omission of such language in § 46a-81c, Birken contends, indicates a legislative intent that § 46a-81c does not permit hostile work environment claims with respect to sexual orientation. See *Napoletano* v. *CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 252, 680 A.2d 127 (1996) ("[T]he use of different words [or the absence of repeatedly used words in the context of] the same [subject matter] must indicate a difference in legislative intention.") Thus, Birken argues that this court is prohibited by well-established canons of statutory construction from reading into § 46a-81c a provision that "clearly [is] not contained therein." (Internal quotation marks omitted.) *Teresa* v. *Ragaglia*, 272 Conn. 734, 745, 865 A.2d 428 (2005).

Birken's claim, while superficially appealing, cannot prevail. Initially, it is important to examine the precise language upon which Birken relies. General Statutes § 46a-60 (a) (8) provides: "It shall be a discriminatory practice in violation of this section: (8) For an employer, by the employer or the employer's agent . . . to harass any employee, person seeking employment or member on the basis of sex. 'Sexual harassment' shall, for the purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

Thus, by its very terms, § 46a-60 (a) (8) only applies to gender discrimination claims and does

not explicitly apply to the other forms of discrimination, such as racial, ethnic, or religious discrimination, prohibited by § 46a-60 (a) (1). Moreover, § 46a-60(a)(1), like § 46a-81c, does not contain any explicit language authorizing hostile work environment claims. As a result, Birken's argument, taken to its rational conclusion, would mean that hostile work environment claims may be brought *only* with regard to gender discrimination cases and may not be brought by employees alleging, for example, racial, ethnic or religious discrimination. Accordingly, if Birken were correct, an employer could not be held liable pursuant to General Statutes § 46a-60 (a) (1) for allowing white employees to intimidate and harass minority employees by displaying racially offensive symbols such as a noose. See, e.g., *Burke* v. *Civil Service Commission*, Superior Court, judicial district of Fairfield, Docket No. CV 93 0308415 (March 7, 1996, *Tobin, J.*) (Hangman's noose placed on truck of African-American police officer's car). Courts have "traditionally eschewed construction of statutory language that leads to absurd results or thwarts its manifest purpose." (Internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 812, 950 A.2d 1220 (2008).

Contrary to Birken's interpretation, the legislature's purpose in enacting § 46a-60 (a) (8) was not to provide a new cause of action for a hostile work environment claims that would be available only in gender discrimination cases or to foreclose such claims with respect to members of other protected classes. Instead, it was enacted to clarify what claims could be brought by victims of sex discrimination under § 46a-60.

Section § 46a-60 (a) (8) was adopted in 1980; see Public Acts 1980, No. 80-285; at a time when the legislature was aware that sexual harassment laws needed reinforcement. Susan Bucknell, the executive director of the permanent commission on the status of women, testified before the labor and public employees committee that her commission had been working on sexual harassment claims with

the state's commission on human rights and opportunities,[5] and that the language of the Fair Employment Practices Act needed to be amended to educate employers about the definition of gender discrimination. Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 1, 1980 Sess., p. 88. Under federal law, gender discrimination was not limited simply to cases, for example, in which a woman is denied a promotion solely on account of her gender, but also included cases involving sexual harassment, where there is not any direct adverse employment action by an employer on account of gender, but instead, an employee is subjected to unwelcome advances or requests for sexual favors or an employer permits a culture within the workplace that is so demeaning or intimidating that it interferes with work performance or creates a hostile work environment.

Bucknell's testimony indicates that employees had been bringing hostile work environment claims against their employers under the Fair Employment Practices Act prior to the 1980 amendment, but that advocates in this field had discovered deficiencies in that Act regarding sexual harassment claims. As she explained to the committee, "[c]urrently, the [CHRO's] interpretation, to its credit, of the Fair Employment Practices Act, is that sexual harassment is sexual discrimination. What I think [the committee] is addressing here is the need for language to ensure, and for the public to see that that is the case." Conn. Joint Standing Committee Hearings, supra, p. 89. Senator Curry agreed with her analysis, saying "that an explicit statement within the statutes of the state guaranteeing the right to be protected

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[5] Interestingly, Bucknell testified about a gender discrimination case brought pursuant to the Fair Employment Practices Act as a hostile work environment claim. Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 1, 1980 Sess., p. 87. She described this case as a type of sexual harassment "where there has been a difference in terms and conditions of the employment." Id. In the case, a waitress sued her employer, "an exclusive men's dining club" because a supervisor asked every new waitress "was subjected to attempts to secure sexual favors." Id. The plaintiff "felt that the supervisor could make her working *conditions* so unpleasant that she really would have had to quit . . . ." (Emphasis added.) Id.

from this kind of harassment is something that we ought to accomplish in this session." Conn. Joint Standing Committee Hearings, supra, p. 90.

Further supporting the conclusion that this legislation was intended to clarify existing law, rather than to create a new cause of action available only in gender discrimination cases, is the testimony of Representative Balducci, who remarked before the House of Representatives that "[t]hat this particular piece of proposed legislation is in [no] way intended to limit or modify current interpretations of the Fair Employment Practices Act in terms of prohibiting any form of discriminatory harassment including racial or religious harassment. . . . What we intend to do is set our scope a bit more clearly on a situation of sexual harassment." 23 H.R. Proc., Pt. 14, 1980 Sess., p. 4099.

In clarifying sexual harassment law, the legislature intended their amendment to conform to the interim guidelines on discrimination published in the Federal Register on April 11, 1980. See 23 H.R. Proc., Pt. 14, 1980 Sess., p. 4101, remarks of Representative Belden. As the United States Supreme Court recognized in *Meritor Savings Bank, FSB* v. *Vinson*, supra, 477 U.S. 65, the EEOC promulgated regulations in 1980 that defined two types of misconduct as "sexual harassment" actionable under Title VII: quid pro quo, meaning favorable treatment in return for sought sexual favors, or hostile work environment. See 29 C.F.R. § 1604.11 (a).[6] In light of these regulations, Representative Belden remarked that "the federal government has already in their interim regulation covered a lot of the ground in terms of interpretation that might be necessary in the enforcement in Connecticut of this particular

[6] 29 C.F.R. § 1604.11 (a) provides: "Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's

statute when enacted." 23 H.R. Proc., supra, p. 4102.

Thus, the legislative history of § 46a-60 (a) (8) shows that the legislature did not intend to foreclose the ability that existed before 1980 of other protected classes to bring hostile work environment claims, but rather to clarify the types of claims that could be brought in a sexual harassment action pursuant to the Fair Employment Practices Act.

Finally, Birken's construction of § 46a-81c is unwarranted because it would arguably place § 46a-81c in constitutional jeopardy. "[I]n choosing between two constructions of a statute, one valid and one constitutionally precarious, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted.) *State* v. *Jenkins*, 288 Conn. 610, 626, 954 A.2d 806 (2008).

In *Kerrigan* v. *Commissioner of Health*, supra, 289 Conn. 175, the Connecticut Supreme Court concluded that gays and lesbians are a "quasi-suspect" class entitled to equal protection under the state constitution. The *Kerrigan* court held that the denial of the right of gays and lesbians to marry – a right available to heterosexual couples – could not withstand constitutional scrutiny: "To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so." Id., 262-63.

In this case, Birken's construction of § 46a-81c could mean that gays and lesbian employees are barred from seeking redress for a hostile work environment while such an action would be available to similarly-situated individuals who fall into one of the protected classes enumerated in § 46a-60(a)(1). In other words, an African-American or Hispanic employee could bring a hostile work environment claim

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work performance or creating an intimidating, hostile, or offensive working environment."

against his employer for failing to prevent co-workers from making racially-offensive remarks, while a gay or lesbian employee would be forced to endure similar harassment without legal recourse. Such a result may be untenable under the principles of constitutional equality outlined in *Kerrigan*. Thus, Birken's construction would arguably place § 46a-81c in constitutional jeopardy.

In conclusion, § 46a-81c provides a remedy for employment discrimination claims based on sexual orientation, including claims stemming from the employer's failure to prevent co-workers from creating a hostile work environment. The fact that § 46a-81c contains no explicit hostile work environment provision is not dispositive because the statute prohibits discrimination "in terms, conditions or privileges of employment," which the United States Supreme Court has held is an "expansive concept" that authorizes hostile work environment claims in the context of discrimination against statutorily protected classes. *Meritor Savings Bank, FSB* v. *Vinson*, supra, 477 U.S. 66.

B. Sufficiency of the evidence

Birken's second claim for setting aside the verdict is that even if § 46a-81c authorizes a hostile work environment claim in the context of a discrimination claim based on sexual orientation, there was insufficient evidence for the jury to conclude that Patino endured a hostile work environment. Birken argues that Patino has not met this "traditionally high bar" and urges the court to apply a five-part test outlined by the Fifth Circuit Court of Appeals that a judge of the Superior Court adopted in *Majewski* v. *Board of Education*, Superior Court, judicial district of Fairfield, Docket No. CV 03 0406893 (January 20, 2005, *Arnold, J.*).[7]

[7] "To maintain a workplace sexual harassment claim, the claimant must show that (1) she belongs to a protected class; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment (i.e., that the harassment was sufficiently pervasive or severe to create an abusive work environment); and (5) the

Our Supreme Court has adopted the following test, however, to determine if the plaintiff has established the elements of a hostile work environment claim. "To establish a claim of hostile work environment, the workplace [must be] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." (Internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 166-67. The environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Id., 167. The United States Supreme Court has explained that "[t]his is not, and by its nature cannot be, a mathematically precise test. . . . [W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (Citations omitted.) *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 22-23, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993).

Under this standard, upon which the jury was explicitly instructed, the jury could reasonably have found that Patino was forced to endure a workplace that was permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. The jury heard Patino testify that he heard derogatory words for homosexuals multiple times per week over an extended period of time, and that this treatment made him feel angry, frustrated and humiliated. Furthermore, the jury also had the opportunity to review Patino's

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employer knew or should have known of the harassment and failed to take prompt remedial action." *Hirras* v. *National Railroad Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996).

diaries in which he recorded many of these incidents. This evidence provided more than a sufficient basis for the jury's finding for Patino.

Birken further argues that Patino has failed to offer adequate proof of a hostile work environment because the derogatory words he heard on the job were not directed at him and some of these words were spoken in languages that he admittedly did not know, such as Italian. (Tr., p. 112.)

Federal courts hold that discriminatory conduct does not need to be directed at the plaintiff or to his face in order to be actionable. For example, the Second Circuit Court of Appeals held that an employee who knew that her supervisor was saying offensive comments about her gender and ethnic background outside of her presence could constitute an objectively and subjectively hostile environment. *Torres* v. *Pisano*, 116 F.3d 625, 633 (2d Cir. 1997). See also *Schwapp* v. *Avon*, 118 F.3d 106, 111 (2d Cir. 1997) ("Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment . . . the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment.").

Here, Patino consistently overheard his co-workers making derogatory remarks about his sexual orientation in his presence, if not to his face. The fact that he did not speak Italian is irrelevant because he knew what the particular Italian slur meant in English. Based on these facts, Patino's workplace was both objectively and subjectively hostile because a reasonable person would find it abusive and Patino in fact perceived it to be hostile.

Furthermore, the cases cited by Birken on the issue of indirect or second-hand hostility are factually dissimilar from the present case. See *Leibovitz* v. *New York City Transit Authority*, 252 F.3d 179, 182 (2d Cir. 2001) (no hostile work environment where plaintiff allegedly suffered due to her subjective belief that other women in her office were being sexually harassed); *Nurriddin* v. *Goldin*, 382

F. Sup. 2d 79, 108 (D. D.C. 2005) (no hostile work environment where plaintiff's only evidence of racial hostility was one computer file on a co-worker's computer containing racist jokes and stories); *Ledan* v. *Danbury*, Superior Court, complex litigation docket at Waterbury, Docket No. X01 CV 04 4001301 (July 18, 2006, *Sheedy, J.*) (41 Conn. L. Rptr. 750) (no hostile work environment where plaintiff heard a single crude sexual remark about a female co-worker).

Finally, Birken contends that Patino failed to establish that it acted unreasonably in response to his allegations. When an employer learns of a hostile work environment in its workplace, it has a duty to take reasonable steps to eliminate it. "The standard is essentially a negligence one . . . and reasonableness . . . depends among other things on the gravity of the harassment alleged . . . the severity and persistence of the harassment . . . and . . . the effectiveness of any initial remedial steps . . . and the nature of the work environment . . . and the resources available to the employer. . . . An employer's response should be evaluated to determine how prompt, appropriate, and adequate it was. . . . [T]o determine whether the remedial action was adequate, we must consider whether the action was reasonably calculated to prevent further harassment. . . . [O]nce an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think [it] can be charged with discriminating on the basis of race [or sex]. . . . Whether an employer has fulfilled [its] responsibility [to take reasonable steps to remedy a discriminatory work environment] is to be determined upon the facts in each case." (Citations omitted; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 168-69.

The jury could reasonably have found that Birken's response was inadequate given the gravity of the harassment alleged by Patino over the course of many years. Despite numerous complaints from Patino about the harassment, Birken took little action to address the problem aside from conducting a

brief investigation; (Tr., p. 43; Pl.'s Exh. 5.); and holding a seminar that was not attended by some of the co-workers who harassed him. (Tr., p. 38.) Although Birken management did interview some employees regarding whether they had spoken the derogatory words, these employees would deny the allegations and Birken would simply credit their statements over Patino's complaints. (Tr., pp. 43-44.) In fact, rather than take affirmative steps to stop the abuse, Birken's vice president and general counsel Greenberg responded to one incident of harassment by telling Patino that he should seek mental health counseling because Patino's ability to operate precision machinery could be compromised by his distress. (Tr., pp. 30-31.) These facts support the jury's finding that the Birken's actions were not reasonably calculated to prevent further harassment.

C. Prima face cause of action under General Statutes § 46a-81c

Birken's third argument for setting aside the verdict is that Patino has not established a prima facie case cause of action under General Statutes § 46a-81c. Birken argues that Patino has not proven that he was directly discriminated against by Birken in the "terms, conditions or privileges of employment" because of his sexual orientation. This claim is premised on Birken's prior claim that § 46a-81c does not impose liability on an employer for permitting a hostile work environment. Because the court has rejected Birken's statutory construction claim and concluded that an employer may be held liable for a hostile work environment as it relates to sexual orientation discrimination, Birken's argument fails.

D. Damages

Finally, Birken argues that the verdict should be set aside because Patino presented no evidence of his actual damages and was not entitled to receive damages for emotional distress because he failed to request them in his complaint. Birken also argues that the jury erred in awarding Patino compensatory

non-economic damages in the amount of $94,500 because these damages were tantamount to an award of punitive damages.

It is true, as Birken contends, that Patino did not seek economic damages such as back pay or medical expenses, but he did request, as discussed in greater detail below, emotional distress damages. Emotional distress damages are not equivalent to punitive damages; they are a form of compensatory damages designed to put the plaintiff in as good a condition as he would have been if he had not been forced to endure a hostile work environment. Thus, the jury was instructed that they could award damages for "any emotional distress and mental anguish" that Patino suffered from June 26, 2002, through November 8, 2004, as a proximate cause of Birken's wrongful conduct. At trial, Patino testified that the harassment he suffered over this period made him feel angry, sad, humiliated and diminished. (Tr., p. 78.) He left work feeling depressed and had difficulty sleeping. (Tr., p. 92.) Yet Birken management's response to Patino's complaints was to "diagnose" him as having a "paranoid delusion" and to advise him to obtain psychiatric care. (Tr., pp. 92-93.) We assume that the $94,500 award constituted the jury's common sense evaluation of Patino's emotional distress.

Birken also claims the jury's damages award was excessive. "In considering a motion to set aside the verdict as excessive, the court should not act as the seventh juror with absolute veto power. Whether the court would have reached a different [result] is not in itself decisive. . . . The court's proper function is to determine whether the evidence, reviewed in a light most favorable to the prevailing party, reasonably supports the jury's verdict." (Citation omitted; internal quotation marks omitted.) *Campbell* v. *Gould*, 194 Conn. 35, 41, 478 A.2d 596 (1984). "The size of the verdict alone does not determine whether it is excessive. The only practical test to apply to this verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so

shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) *Mather* v. *Griffin Hospital*, 207 Conn. 125, 139, 540 A.2d 666 (1988).

The jury's award was not patently unreasonable. For example, in *Delgado* v. *Cragganmore Associates Ltd. Partnership*, United States District Court for the District of Connecticut, Docket No. 3:01CV1633 (D. Conn. October 31, 2001), the court reviewed numerous discrimination cases where the plaintiffs received emotional distress awards and held that a prejudgment remedy of approximately $77,000 reflecting potential emotional distress damages was "not unreasonable for very serious discrimination cases." The court considered compensatory damage awards for severe discrimination cases that ranged from $100,000 to $400,000. The court also found that a range of emotional distress awards from $5000 to $65,000 were appropriate for less severe discrimination cases. Viewed in the light most favorable to the plaintiff, the evidence supports a jury finding that Patino suffered sufficiently severe discrimination that warranted a compensatory damage award on the higher end of this scale.

Finally, Birken argues that the court's jury instruction concerning damages was improper because Patino's prayers for relief for count one of his complaint, which was the count submitted to the jury, requested "compensatory economic damages" but did not seek damages for emotional distress or pain and suffering. First, it is important to note that although the specific prayer for relief that pertains to count one does not mention emotional distress or harm, count one itself, in paragraph twenty, refers to emotional harm as a category of damages. Second, at the time of the case's submission to the jury, Birken raised no objection to the jury considering emotional distress damages. Indeed, the court specifically inquired of Birken whether it had any objection to the plaintiff's verdict form or to the court's jury instructions. Birken stated that it had no objections beyond its on-going assertion that § 46a-

81c does not permit hostile work environment claims. Finally, Birken itself submitted a request to charge on emotional distress and pain and suffering. Under all of these circumstances, the court concludes that Birken was not prejudiced by any lack of clarity in Patino's complaint regarding the types of damages he sought

To cure any technical defect in his complaint, Patino has submitted an amended complaint, pursuant to Practice Book § 10-60, that adds non-economic damages to the claims for relief sought for count one in the original complaint. "A trial court may allow, in its discretion, an amendment to pleadings before, during, or . . . after trial to conform to the proof. . . . see also Practice Book § 10-62." (Citation omitted; internal quotation marks omitted.) *Stuart* v. *Stuart*, 112 Conn. App. 160, 182, 962 A.2d 842 (2009). The court has granted Patino permission to amend the complaint;

For all of the reasons set forth above, the motion to set aside the verdict is denied.

II. MOTION FOR REMITTITUR

Birken's motion for remittitur essentially repeats aspects of its fourth argument for setting aside the verdict. Birken argues that because the jury had no basis for finding actual damages, its verdict amounted to punitive damages, which was outside the jury instructions. Furthermore, Birken argues that the verdict shocks the conscience.

As stated above, the jury's award of non-economic damages conformed to the court's instructions and did not constitute an award of punitive damages. The award does not shock the conscience because it falls "within the necessarily uncertain limits of fair and just damages"; *Campbell* v. *Gould*, supra, 194 Conn. 42; and is proportional to compensatory damages awarded in cases. Therefore, Birken's motion for remittitur is denied.

Prescott, J.