SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 18441

LUIS PATINO

v.

BIRKEN MANUFACTURING COMPANY

BRIEF OF *AMICI CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
CONNECTICUT LEGAL RIGHTS PROJECT and
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND
IN SUPPORT OF PLAINTIFF-APPELLEE
WITH ATTACHED APPENDIX

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TABLE OF CONTENTS

STATEMENT OF THE ISSUE

Does an employer that fails to take reasonable steps to prevent its employees from subjecting a coworker to an anti-gay hostile work environment discriminate "in terms, conditions or privileges of employment because of the individual's sexual orientation" in violation of General Statutes § 46a-81c(1)?

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENTS OF INTEREST OF THE *AMICI CURIAE*

Amici seek to ensure that Connecticut's laws prohibiting employment discrimination are not erroneously interpreted in a way that would allow employees to be subjected, without recourse, to severe or pervasive workplace harassment based on sexual orientation or other characteristics as to which discrimination is prohibited.

Amicus curiae Lambda Legal Defense and Legal Fund, Inc. ("Lambda Legal"), is a national organization with more than 30,000 members (including more than 1,000 members in Connecticut) dedicated to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. For more than 35 years, Lambda Legal has been advocating for equality under the law for people to work and live free of discrimination because of sexual orientation, gender identity, and HIV status, and has been counsel or *amicus* in scores of cases establishing their rights to do so. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (counsel) (striking down state laws criminalizing consensual adult sodomy prohibitions as unconstitutional); *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75 (1998) (*amicus*) (establishing viability of same-sex sexual harassment claims under Title VII); *Romer v. Evans*, 517 U.S. 620 (1996) (counsel) (striking down state constitutional provision prohibiting anti-discrimination protections for gay, lesbian, and bisexual residents under the federal constitution); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (amicus) (en banc ruling that harassment based on perceived nonconformity with sex stereotypes is actionable under Title VII): *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135 (2008) (*amicus*) (concluding that sexual orientation is at least a quasi-suspect classification under the Connecticut Constitution's equal protection clause and holding unconstitutional the state's barring of marriage between persons of the same sex).

Amicus curiae the Connecticut Legal Rights Project ("CLRP") is a state-wide private non-profit legal services organization created by order of the Court in *Doe v. Hogan*, United States District Court, District of Connecticut, Docket No. H88-239 (EBB) (October 19, 1989). CLRP's attorneys represent low-income people with psychiatric disabilities including those who have been harassed in the workplace or been subjected to a hostile work environment because of their mental disability.

Amicus curiae the Connecticut Women's Education and Legal Fund ("CWEALF") is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights.

Amici have no financial interest in the outcome of this case. They submit this brief with the goal of ensuring that the rights of employees to be free from discriminatory harassment are fully protected under Connecticut law. *Amici* have both specialized knowledge regarding the issues raised in this appeal and a compelling interest in the correct interpretation of General Statutes § 46a-81c, prohibiting employment discrimination because of sexual orientation, and § 46a-60, prohibiting employment discrimination because of other characteristics.

ARGUMENT[1]

This appeal raises the important question of whether an employer that fails to take reasonable steps to prevent its employees from subjecting a coworker to an anti-gay hostile work environment discriminates "in terms, conditions or privileges of employment because of the individual's sexual orientation" in violation of General Statutes § 46a-81c(1). The trial court's conclusion – that an employer discriminates in violation of Connecticut law by permitting a work environment that is intimidating, hostile or offensive based on sexual orientation – is the only conclusion consistent with longstanding interpretations of the identical phrase "terms, conditions or privileges of employment" in other state and federal antidiscrimination laws. In addition, as the trial court further correctly held, the specification of conduct of a sexual nature creating "an intimidating, hostile or offensive working environment" in the statutory definition of sexual harassment in subdivision 8 of § 46a-60(a) does not preclude liability for subjecting employees to other types of conduct creating a hostile work environment based on other characteristics as to which discrimination is prohibited under state law.

I. CONNECTICUT'S ANTIDISCRIMINATION STATUTES PROTECT EMPLOYEES FROM DISCRIMINATION BASED ON SEXUAL ORIENTATION AND OTHER CHARACTERISTICS THROUGH THE CREATION OF OR UNREASONABLE FAILURE TO PREVENT A HOSTILE WORK ENVIRONMENT.

Connecticut's antidiscrimination statutes protect against discrimination in "terms, conditions or privileges of employment" – a phrase that, as explained below, courts long have held to impose liability on employers for creating or unreasonably failing to prevent a hostile work environment. But Defendant-Appellant Birken Manufacturing Company

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[1] No counsel for any party wrote this brief in whole or in part. No party or their counsel or any persons other than the *amici curiae*, their members, or counsel contributed to the cost of preparation or submission of this brief.

("Birken Manufacturing") argues that those words should mean something different when it comes to sexual orientation discrimination. This Court should reject Birken Manufacturing's unprecedented and discriminatory interpretation.

The bottom line issue in this case is one of statutory interpretation. "In determining the intent of a statute, [this Court] look[s] to the words of the statute itself, 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." *King v. Sultar*, 253 Conn. 429, 437-38 (2000) (citations and quotation marks omitted).

As this Court has observed, "the [Connecticut] gay rights law [which includes § 46a-81c] 'was enacted in order to protect people from pervasive and invidious discrimination on the basis of sexual orientation.'" *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 208-09 (2008) (footnote omitted) (quoting *Gay & Lesbian Law Students Ass'n v. Bd. of Trustees, Univ. of Conn.*, 236 Conn. 453, 481-82 (1996)).

Under § 46a-81c(1), it is a discriminatory practice for "an employer . . . to discriminate against [an employee] in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation or civil union status[.]" The phrase "terms, conditions or privileges of employment" in § 46a-81c(1) is identical to language in Connecticut's parallel statute protecting employees from discrimination because of characteristics and statuses, including race, sex, and marital status, § 46a-60(a)(1), and is nearly identical to language included in Title VII. *See* 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination with respect to "compensation, terms, conditions, or privileges of employment").

"In defining the contours of an employer's duties under [Connecticut's] antidiscrimination statutes, [this Court] ha[s] looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964, the federal statutory counterpart to § 46a-60." *Brittell v. Dep't of Corr.*, 247 Conn. 148, 164 (1998) (citations omitted) (relying on federal cases involving claims of racial and sexual harassment to evaluate sexual harassment claim under § 46a-60(a)). Moreover, when considering whether a departure from interpretations of similar federal statutes would be appropriate, this Court has expressed reluctance to interpret Connecticut law to be less protective of civil rights than federal law, explaining "that under certain circumstances, federal law defines the beginning and not the end" of that interpretative endeavor. *State v. Comm'n on Human Rights & Opportunities*, 211 Conn. 464, 469-70 (1989) (citation and quotation marks omitted). This Court has "interpreted [Connecticut's] statutes even more broadly than their federal counterparts, to provide *greater* protections to our citizens, especially in the area of civil rights." *Comm'n on Human Rights & Opportunities v. Savin Rock Condo. Ass'n, Inc.*, 273 Conn. 373, 386 n.11 (2005) (citations and quotation marks omitted) (emphasis in original) (observing that an interpretation that would lead to less protection than afforded under federal law is a reason not to divert from federal courts' construction of the statute).

Because § 46a-60(a)(1) and Title VII also prohibit discrimination in "terms, conditions or privileges of employment," cases interpreting that phrase in those statutes are particularly useful guides for interpreting § 46a-81c(1).[2] *See Brittell*, 247 Conn. at 164-69

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[2] Of course, Connecticut's employment antidiscrimination statutes prohibit discrimination because of a number of characteristics beyond those covered by federal law. *Compare* § 46a-60(a)(1) ("race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical

(looking to Title VII cases to determine applicable standard of review and employer's substantive liability for sexual harassment under § 46a-60(a)); *see also Wroblewski v. Lexington Gardens, Inc.*, 188 Conn. 44, 53 (1982) (looking to federal precedents to for guidance in interpreting term "bona fide occupational qualification or need" in Connecticut antidiscrimination statute).

Courts have consistently interpreted protection from discrimination in "terms, conditions or privileges" as protecting employees "not only from economic discrimination, but also from harassment that is sufficiently severe or pervasive that it alters the terms and conditions of employment." *Smith v. Cingular Wireless*, 579 F. Supp. 2d 231, 246 (D. Conn. 2008) (evaluating sufficiency of evidence supporting Title VII hostile work environment race discrimination claim) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that sexual harassment violates Title VII's prohibition of sex discrimination)). *See also Brittell*, 247 Conn. at 167-68 (holding that an employer who allows a work environment permeated with sexual harassment violates § 46a-60(a)); *Kwentoh v. Conn. Dep't of Child. & Fam. Juv. Training Sch.*, 588 F. Supp. 2d 292, 301-02 (D. Conn. 2008) (evaluating sufficiency of evidence supporting Title VII hostile work environment race discrimination claim); *Buster v. City of Wallingford*, 557 F. Supp. 2d 294, 300 (D. Conn. 2008) (analyzing § 46a-60(a)(1) hostile work environment race discrimination claim).

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disability") *and* § 46a-81c ("sexual orientation or civil union status") *with* 42 U.S.C. § 2000e-2(a)(1) ("race, color, religion, sex or national origin"). But there is no reason to interpret Connecticut's statutes to allow adverse treatment based on a characteristic prohibited only by state law, like marital status or sexual orientation, where Connecticut law would not allow such treatment if based on a characteristic prohibited by both state and federal law, like race or sex. *See also* footnote 3, *infra*.

And courts have repeatedly analyzed hostile work environment claims as a form of discrimination in terms, conditions or privileges of employment. *See, e.g., Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (finding that evidence required trial on Title VII hostile work environment race discrimination claim); *Morales v. ATP Health & Beauty Care, Inc.*, 2008 WL 3845294, at *8, *12 (analyzing hostile work environment sex discrimination claim under Title VII and hostile work environment sexual-orientation-discrimination claim under § 46a-81c); *Buster*, 557 F. Supp. 2d at 300 (analyzing hostile work environment race discrimination claim under § 46a-60(a)(1)); *Smith*, 579 F. Supp. 2d at 246 (analyzing hostile work environment race discrimination claim under Title VII).

It is so well established that an employer discriminates by subjecting an employee to biased harassment that other employers accused of violating § 46a-81c by permitting a hostile work environment based on sexual orientation do not appear to have even debated the viability of such claims. *See, e.g., Morales*, 2008 WL 3845294, at *12-13 (analyzing hostile-work-environment claim based on sexual orientation); *Bogdahn v. Hamilton Standard Space Sys. Int'l, Inc.*, 46 Conn. Supp. 153, 156-59 (1999) (evaluating procedural and jurisdictional issues in hostile-work-environment claim based on sexual orientation). *See also Conway v. City of Hartford*, 1997 WL 78585, at *7 (allegation that defendant "continually subjected the plaintiff to verbal ridicule because of the plaintiff's . . . sexual orientation" stated legally sufficient hostile work environment sexual orientation discrimination claim).[3]

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[3] Although Birken argues that this Court should interpret § 46a-81c to be less protective of employees than § 46a-60(a)(1) because the latter includes "federally-protected suspect classifications[,]" s*ee Appellant Br.* at 16, that argument is specious for two reasons. First, this Court has held that sexual orientation is at least a quasi-suspect classification under

Any doubt as to the General Assembly's intent to provide statutory protection for people who are lesbian, gay or bisexual that is equal to the protection provided to other people should have been eliminated by 2009 Conn. Pub. Acts No. 09-13, which implemented the equal protection principles articulated in *Kerrigan* by amending Connecticut's marriage laws, eliminating civil unions, and repealing a set of non-substantive statutory provisions that, as this Court observed, had served to "diminish the effect of the laws barring discrimination against gay persons." *Kerrigan*, 289 Conn. at 205.

Because subjecting an employee to a hostile work environment discriminates against that employee in "terms, conditions or privileges of employment," this Court should hold that § 46a-81c protects lesbian, gay and bisexual employees from sexual orientation-based hostile work environments.

II. BY PROHIBITING HOSTILE WORK ENVIRONMENTS CREATED BY SEXUAL HARASSMENT, CONNECTICUT DID NOT AUTHORIZE OTHER FORMS OF DISCRIMINATORY HOSTILE WORK ENVIRONMENTS.

Birken Manufacturing's claim that § 46a-60(a) is the only statute protecting employees against hostile work environments is fundamentally flawed. The phrase "hostile work environment" appears only in subdivision 8 of subsection 46a-60(a), and only in

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the Connecticut Constitution's equal protection clause, requiring that classifications based on sexual orientation "serve[] important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Kerrigan*, 289 Conn. at 251 (citation and quotation marks omitted); *see also id.* at 175 ("laws singling [lesbians and gay men] out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of . . . historical prejudice and stereotyping"). Birken's proposed interpretation would, by judicial interpretation, classify lesbian, gay and bisexual employees for less protection without serving any such purpose. Second, the U.S. Supreme Court has never held that sexual orientation may not be a suspect or quasi-suspect classification, while some classifications listed in § 46a-60(a)(1) have been denied heightened scrutiny. *See, e.g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985) (rejecting claim that mental retardation is a Constitutionally suspect classification); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-15 (1976) (rejecting claim that age is a Constitutionally suspect classification).

connection with one type of discrimination: sexual harassment. The full text of subdivision 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, for an employment agency, by itself or its agent, or for any labor organization, by itself or its 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[.]

Subdivision 8 was adopted in 1980, the same year that the federal Equal Employment Opportunity Commission ("EEOC") declared that sexual harassment violates Title VII (*see Brittell*, 247 Conn. at 180 (Berdon, J., dissenting)), and nearly six years before the U.S. Supreme Court concluded that sexual harassment violates Title VII (*see Meritor*, 477 U.S. at 66). At the time the General Assembly enacted subdivision 8, the U.S. Supreme Court had not conclusively established that sexual harassment violated Title VII, and the General Assembly chose to ensure that Connecticut's antidiscrimination law did so.

But it was already established prior to *Meritor* – and, indeed, even prior to the EEOC's declaration in 1980 – that Title VII provides the right to work in an environment "free from discriminatory intimidation, ridicule, and insult" based on race, religion or national origin. *Meritor*, 477 U.S. at 65-66. *See, e.g., Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (ethnicity); *Gray* v. *Greyhound Lines,* 545 F.2d 169, 176 (1976) (race); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 161 (S.D. Ohio 1976) (religion); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin).

Although a number of sexual harassment cases do involve unwelcome sexual advances, courts have recognized that, to establish a claim of hostile work environment, the "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80 (1998) (recognizing viability of claim of same-sex sexual harassment). *See also Raniola v. Bratton*, 243 F.3d 610, 617, 623 (2d Cir. 2001) (reversing dismissal of Title VII claim based on harassing conduct that was sex-based but not of a sexual nature).[4]

Subdivision 8 prohibits sexual harassment as one form of discrimination because of sex, and specifies that such harassment is prohibited if it "creat[es] an intimidating, hostile or offensive working environment." § 46a-60(a)(8). However, it is inconceivable that subdivision 8 was intended to repeal protections against other grounds of discrimination against employees in the terms, conditions or privileges of their employment because of their sex, race or other characteristics.

Indeed, Birken Manufacturing's theory would interpret out of existence *all* claims of hostile work environment based on conduct other than "unwelcome sexual advances" – not

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[4] *See also Smith v. First Union Nat'l Bank,* 202 F.3d 234, 242 (4th Cir. 2000) (reversing summary judgment for defendant on a hostile work environment claim after the district court "failed to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions"); *Smith v. Sheahan,* 189 F.3d 529, 533 (7th Cir. 1999) ("It makes no difference that the assaults and the epithets sounded more like expressions of sex-based animus rather than misdirected sexual desire. . . . Either is actionable under Title VII as long as there is evidence suggesting that the objectionable workplace behavior is based on the sex of the target."); *Smith v. St. Louis Univ.,* 109 F.3d 1261, 1265 (8th Cir. 1997) (reversing summary judgment for defendant in a hostile work environment claim and remanding for consideration of non-sexual derogatory comments directed toward women more frequently than men); *Lipsett v. Univ. of Puerto Rico,* 864 F.2d 881, 905 (1st Cir. 1988) (finding that non-sexual conduct may give rise to a hostile work environment claim if it evinces "anti-female animus, and therefore could be found to have contributed significantly to the hostile environment").

only where the conduct is offensive or hostile because of sexual orientation, but also where the harassing conduct is offensive or hostile because of the individual's race, religion or disability. Birken Manufacturing's theory would also eliminate hostile work environment claims based on conduct that was offensive or hostile because of sex, but took some form other than sexual advances, requests for sexual favors or conduct of a "sexual" nature – since only those kinds of conduct are identified in subdivision 8. That limitation on the scope of an employer's duties would radically change Connecticut's laws by rendering them significantly *less* protective than those of Title VII. *Cf. Brittell*, 247 Conn. at 164 (looking to cases interpreting Title VII to guide and define the contours of employers' duties under Connecticut antidiscrimination statutes); *Savin Rock Condo. Ass'n, Inc.*, 273 Conn. at 386 n.11 (rejecting statutory interpretation that would afford less protection to employees than under federal antidiscrimination laws). The fact that courts have continued, *after* subdivision 8 was adopted in 1980, to analyze claims of hostile work environment based on traits other than sex and on incidents other than unwelcome sexual advances demonstrates that Birken Manufacturing's interpretation is incorrect. *See, e.g., Martin v. Town of Westport*, 329 F. Supp. 2d 318, 336 (D. Conn. 2004) (evaluating claim of racially hostile work environment under § 46a-60(a)(1)); *Newtown v. Shell Oil Co.*, 52 F. Supp. 2d 366, 371-72 (D. Conn. 1999) (evaluating hostile work environment sex-discrimination claim involving conduct other than sexual advances under § 46a-60(a)(1)).

Birken Manufacturing's proposed interpretation would contradict the very purpose of laws prohibiting employment discrimination by allowing employers to ignore all kinds of biased workplace harassment. An employer could ignore a female employee's coworkers who barrage her daily with statements that women do not belong in the workplace and that

if women are insufficiently deferential to men, they ought to be "smacked around." An employer could ignore an African-American employee's coworkers who repeatedly paper over her worksite with pictures of the Ku Klux Klan and burning crosses. An employer could ignore a Jewish employee's coworkers who paper the walls of his worksite with Nazi swastikas. It would undermine the purpose of Connecticut's antidiscrimination laws to interpret them as giving license to rampant workplace bigotry.

Connecticut's antidiscrimination laws impose liability on employers who create or fail to take reasonable steps to prevent a work environment permeated with hostile or offensive acts based on race, ethnicity, religion, sex, disability, sexual orientation, and other characteristics. Birken Manufacturing's argument that subdivision 46a-60(a)(8) sub silentio repealed or superseded those protections should be rejected.

CONCLUSION

For the foregoing reasons, and for those set forth by the Plaintiff-Appellee, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing brief complies with all the provisions of Practice Book § 67-2, and that pursuant to Practice Book § 62-7 a copy of the foregoing brief of *amici curiae* with the attached appendix was sent on August 10, 2010 by express United States mail, postage prepaid, to each counsel of record and to the trial judge who rendered the decisions which are the subject matter of this appeal, as listed below.

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IN SUPPORT OF PLAINTIFF-APPELLEE

APPENDIX TABLE OF CONTENTS

42 USC § 2000e-2(a)(1). Unlawful employment practices.

(a) Employer practices. 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[.]

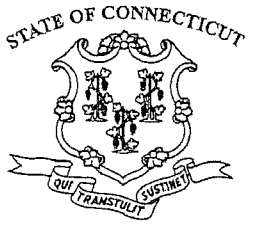
General Statutes § 46a-60(a)(1) and (8). Discriminatory employment practices prohibited.

(a) It shall be a discriminatory practice in violation of this section:
(1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, 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;
(8) For an employer, by the employer or the employer's agent, for an employment agency, by itself or its agent, or for any labor organization, by itself or its 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[.]

General Statutes § 46a-81c. Sexual orientation discrimination: Employment.

It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, 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 or civil union status, (2) for any employment agency, except in the case of a bona fide occupational qualification or need, to fail or refuse to classify properly or refer for employment or otherwise to discriminate against any individual because of the individual's sexual orientation or civil union status, (3) for a labor organization, because of the sexual orientation or civil union status of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based on a bona fide

occupational qualification, or (4) for any person, employer, employment agency or labor organization, except in the case of a bona fide occupational qualification or need, to advertise employment opportunities in such a manner as to restrict such employment so as to discriminate against individuals because of their sexual orientation or civil union status.



Substitute Senate Bill No. 899

Public Act No. 09-13

AN ACT IMPLEMENTING THE GUARANTEE OF EQUAL PROTECTION UNDER THE CONSTITUTION OF THE STATE FOR SAME SEX COUPLES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (*Effective from passage*) A marriage, or a relationship that provides substantially the same rights, benefits and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be recognized as a valid marriage in this state, provided such marriage or relationship is not expressly prohibited by statute in this state.

Sec. 2. (NEW) (*Effective from passage*) A marriage between two persons entered into in this state and recognized as valid in this state may be recognized as a marriage, or a relationship that provides substantially the same rights, benefits and responsibilities as a marriage, in another state or jurisdiction if one or both persons travel to or reside in such other state or jurisdiction.

Sec. 3. Section 46b-20 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

As used in this chapter:

[(a)] (1) "Registrar" means the registrar of vital statistics;

[(b)] (2) "Applicant" means applicant for a marriage license;

[(c)] (3) "License" means marriage license; and

(4) "Marriage" means the legal union of two persons.

Sec. 4. (NEW) (*Effective from passage*) A person is eligible to marry if such person is:

(1) Not a party to another marriage, or a relationship that provides substantially the same rights, benefits and responsibilities as a marriage, entered into in this state or another state or jurisdiction, unless the parties to the marriage will be the same as the parties to such other marriage or relationship;

(2) Except as provided in section 46b-30 of the general statutes, at least eighteen years of age;

(3) Except as provided in section 46b-29 of the general statutes, not under the supervision or control of a conservator; and

(4) Not prohibited from entering into a marriage pursuant to section 46b-21 of the general statutes, as amended by this act.

Sec. 5. Section 46b-25 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

No license may be issued by the registrar until both persons have appeared before the registrar and made application for a license. The registrar shall issue a license to any two persons eligible to marry under this chapter and section 4 of this act. The license shall be completed in its entirety, dated, signed and sworn to by each applicant and shall state each applicant's name, age, race, birthplace, residence, whether single, widowed or divorced and whether under the

supervision or control of a conservator or guardian. The Social Security numbers of [the bride and the groom] both persons shall be recorded in the "administrative purposes" section of the license. If the license is signed and sworn to by the applicants on different dates, the earlier date shall be deemed the date of application.

Sec. 6. Section 46b-21 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

[No man may marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother or stepdaughter, and no woman may marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather or stepson.] No person may marry such person's parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any marriage within these degrees is void.

Sec. 7. (NEW) (*Effective from passage*) (a) No member of the clergy authorized to join persons in marriage pursuant to section 46b-22 of the general statutes shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the first amendment to the United States Constitution or section 3 of article first of the Constitution of the state.

(b) No church or qualified church-controlled organization, as defined in 26 USC 3121, shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church or qualified church-controlled organization.

Sec. 8. (NEW) (*Effective from passage*) Wherever in the general statutes or the public acts the term "husband", "wife", "groom", "bride", "widower" or "widow" is used, such term shall be deemed to include one party to a marriage between two persons of the same sex.

Sec. 9. Section 45a-727a of the general statutes is repealed and the

following is substituted in lieu thereof (*Effective from passage*):

The General Assembly finds that:

(1) The best interests of a child are promoted by having persons in the child's life who manifest a deep concern for the child's growth and development;

(2) The best interests of a child are promoted when a child has as many persons loving and caring for the child as possible; and

(3) The best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family. [; and]

[(4) It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman.]

Sec. 10. Section 46b-38nn of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage. [, which is defined as the union of one man and one woman.]

Sec. 11. (NEW) (*Effective from passage*) (a) On and after the effective date of this section and prior to October 1, 2010, two persons who are parties to a civil union entered into pursuant to sections 46b-38aa to 46b-38oo, inclusive, of the general statutes, as amended by this act, may apply for and be issued a marriage license, provided such persons

are otherwise eligible to marry under section 4 of this act and chapter 815e of the general statutes and the parties to the marriage will be the same as the parties to the civil union.

(b) After the celebration of such marriage and upon the recording of the license certificate or notarized affidavit with the registrar of vital statistics of the town where the marriage took place pursuant to section 46b-34 of the general statutes, the civil union of such persons shall be merged into the marriage by operation of law as of the date of the marriage stated in the certificate or affidavit.

Sec. 12. (NEW) (*Effective from passage*) (a) Two persons who are parties to a civil union established pursuant to sections 46b-38aa to 46b-38oo, inclusive, of the general statutes, as amended by this act, that has not been dissolved or annulled by the parties or merged into a marriage by operation of law under section 11 of this act as of October 1, 2010, shall be deemed to be married under chapter 815e of the general statutes, as amended by this act, on said date and such civil union shall be merged into such marriage by operation of law on said date.

(b) Notwithstanding the provisions of subsection (a) of this section, the parties to a civil union with respect to which a proceeding for dissolution, annulment or legal separation is pending on October 1, 2010, shall not be deemed to be married on said date and such civil union shall not be merged into such marriage by operation of law but shall continue to be governed by the provisions of the general statutes applicable to civil unions in effect prior to October 1, 2010.

Sec. 13. (NEW) (*Effective from passage*) Nothing in section 11, 12 or 18 of this act shall impair or affect any action or proceeding commenced, or any right or benefit accrued, or responsibility incurred, by a party to a civil union prior to October 1, 2010.

Sec. 14. Section 46a-81a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

For the purposes of sections 4a-60a, 45a-726a and 46a-81b to [46a-81r] 46a-81q, inclusive, "sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952.

Sec. 15. Subsection (a) of section 17b-137a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2010*):

(a) The Social Security number of the applicant shall be recorded on each (1) application for a license, certification or permit to engage in a profession or occupation regulated pursuant to the provisions of title 19a, 20 or 21; (2) application for a commercial driver's license or commercial driver's instruction permit completed pursuant to subsection (a) of section 14-44c; and (3) application for a marriage license made under section 46b-25, as amended by this act. [or for a civil union license under section 46b-38hh.]

Sec. 16. Section 46b-150d of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2010*):

An order that a minor is emancipated shall have the following effects: (1) The minor may consent to medical, dental or psychiatric care, without parental consent, knowledge or liability; (2) the minor may enter into a binding contract; (3) the minor may sue and be sued in such minor's own name; (4) the minor shall be entitled to such minor's own earnings and shall be free of control by such minor's parents or guardian; (5) the minor may establish such minor's own residence; (6) the minor may buy and sell real and personal property; (7) the minor may not thereafter be the subject of a petition under

section 46b-129 as an abused, dependent, neglected or uncared for child or youth; (8) the minor may enroll in any school or college, without parental consent; (9) the minor shall be deemed to be over eighteen years of age for purposes of securing an operator's license under section 14-36 and a marriage license under subsection (b) of section 46b-30; [or a civil union license under section 46b-38jj without parental consent;] (10) the minor shall be deemed to be over eighteen years of age for purposes of registering a motor vehicle under section 14-12; (11) the parents of the minor shall no longer be the guardians of the minor under section 45a-606; (12) the parents of a minor shall be relieved of any obligations respecting such minor's school attendance under section 10-184; (13) the parents shall be relieved of all obligation to support the minor; (14) the minor shall be emancipated for the purposes of parental liability for such minor's acts under section 52-572; (15) the minor may execute releases in such minor's own name under section 14-118; and (16) the minor may enlist in the armed forces of the United States without parental consent.

Sec. 17. (NEW) (*Effective from passage*) Notwithstanding any other provision of law, a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society, shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods or privileges is related to the solemnization of a marriage or celebration of a marriage and such solemnization or celebration is in violation of their religious beliefs and faith. Any refusal to provide services, accommodations, advantages, facilities, goods or privileges in accordance with this section shall not create any civil claim or cause of action, or result in any state action to penalize or withhold benefits from such religious organization, association or society, or any nonprofit institution or organization

operated, supervised or controlled by or in conjunction with a religious organization, association or society.

Sec. 18. (NEW) (*Effective from passage*) The marriage laws of this state shall not be construed to affect the ability of a fraternal benefit society to determine the admission of members as provided in section 38a-598 of the general statutes or to determine the scope of beneficiaries in accordance with section 38a-636 of the general statutes, and shall not require a fraternal benefit society that has been established and is operating for charitable and educational purposes and which is operated, supervised or controlled by or in connection with a religious organization to provide insurance benefits to any person if to do so would violate the fraternal benefit society's free exercise of religion as guaranteed by the first amendment to the Constitution of the United States and section 3 of article first of the Constitution of the state.

Sec. 19. (NEW) (*Effective from passage*) Nothing in this act shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.

Sec. 20. Section 46a-81r of the general statutes is repealed. (*Effective from passage*)

Sec. 21. Sections 46b-38aa to 46b-38mm, inclusive, section 46b-38nn, as amended by this act, and section 46b-38oo of the general statutes are repealed. (*Effective October 1, 2010*)

Approved April 23, 2009

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(Cite as: 1997 WL 78585 (Conn.Super.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Hartford.
Trevor CONWAY
v.
CITY OF HARTFORD.
No. CV 950553003.

Feb. 4, 1997.

Before HALE, SULLIVAN, DORSEY and RICHARD A. WALSH, JJ.

Memorandum of Decision on Motion to Strike

HALE, Judge Referee.

*1 On June 5, 1996, the plaintiff, Trevor Conway, filed a second amended complaint. The second amended complaint names as defendants the city of Hartford (the city), Conway's former employer, and James E. Paradiso (Paradiso), Conway's former supervisor.

Conway began his employment with the city in December 1984. (Second Amended Complaint, count one, Ø7.) At this time, Conway, a transsexual, was a female who went by the name of Tracey A. Conway. (Second Amended Complaint, count one, Ø8.) Conway began hormone therapy in May 1990 and completed the gender reassignment process by September 1991. (Second Amended Complaint, count one, Ø9.) Conway is now male. (Second Amended Complaint, count one, Ø9.) Conway alleges that his work environment became hostile beginning in February 1990. (Second Amended Complaint, count one, Ø10.) Conway was terminated on June 9, 1993, effective June 30, 1993, under the alleged pretext of cutting labor expenses. (Second Amended Complaint, count one, Ø14.)

Conway alleges that he was denied employment after his termination when he applied for four advertised positions with the city for which he was qualified. (Second Amended Complaint, count one, Ø14.) He further alleges that, by January 28, 1994, the other employees who were terminated at the same time as he were all rehired by the city, whereas to date he has been denied employment. (Second Amended Complaint, count one, Ø15.)

Counts one and two of the second amended complaint, directed against the city and Paradiso, respectively, allege discriminatory practices in violation of General Statutes § 46a-58(a). Count three, directed against the city, alleges discrimination based on the plaintiff's mental disorder and physical disability in violation of General Statutes § 46a-60(a)(1). Counts four and five, directed against the city and Paradiso, respectively, allege that the defendants aided and abetted in discriminatory employment practices based on the plaintiff's mental disorder and physical disability in violation of General Statutes § 46a-60(a)(5). Count six, directed against the city, alleges sexual harassment in the form of the creation of a hostile work environment in violation of General Statutes § 46a-60(a)(8). Count seven, directed against the city, alleges discrimination on the basis of sexual orientation in violation of General Statutes § 46a-81(c)(1). Count eight, directed against Paradiso, incorporates by reference the allegations of count seven except the reference to General Statutes § 46a-81(c)(1). Count eight makes further allegations of "extreme emotional distress, pain and suffering, humiliation, ridicule and scorn." (Second Amended Complaint, count 8, Ø22.)

On July 22, 1996, the city and Paradiso filed a motion to strike counts one through seven of the plaintiff's second amended complaint, accompanied by a supporting memorandum of law. A supplemental memorandum in support of the motion to strike was filed by the defendants on October 9, 1996. The plaintiff filed a memorandum in opposition to the defendants' motion to strike on November 18, 1996.

*2 A motion to strike is the appropriate method to challenge the legal sufficiency of a complaint or any count therein. *Gulack v. Gulack,* 30 Conn.App. 305, 309, 620 A.2d 181 (1993). A motion to strike admits all facts well pleaded, but rejects consideration of legal conclusions or the truth or accuracy of opinions stated in the pleadings. *Novametrix Medical Systems*

v. BOC Group, Inc., 224 Conn. 210, 215, 618 A.2d 25 (1992). "In judging a motion to strike ... it is of no moment that the [party] may not be able to prove his allegations at trial." *Levine v. Bess & Paul Sigel Hebrew Academy of Greater Hartford, Inc.,* 39 Conn.Supp. 129, 132, 471 A.2d 679 (1983). "The motion [to strike] may also be used to test whether Connecticut is ready to recognize some newly emerging ground of liability." (Citations omitted; internal quotation marks omitted). *Castelvetro v. Mills,* Superior Court, judicial district of New Haven at New Haven, Docket No. 320396, 11 CONN. L. RPTR. 29 (February 1, 1994) (Gray, J.).

The defendants argue in their motion to strike that the Connecticut Fair Employment Practices Act (CFEPA), General Statutes §§ 46a-60 and 46a-81c, does not prohibit discrimination on the basis of transsexualism. The defendants further contend that the plaintiff's claims for damages based on emotional distress should be barred because they are compensable under the Workers' Compensation Act and thus are preempted by the Act. The defendants' memoranda delve into additional arguments which state the grounds for the motion to strike.

Counts One and Two

The plaintiff brings counts one and two under General Statutes § 46a-58(a), which reads: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability."

In their supplemental supporting memorandum of law, the defendants contend that General Statutes § 46a-58(a) does not encompass claims for discrimination in employment practices.

"We are persuaded that § 46a-58 does not encompass claims of discriminatory employment practices that fall within the purview of § 46a-60 ... the specific, narrowly tailored cause of action embodied in § 46a-60 supersedes the general cause of action embodied in § 46a-58(a)." *Commission on Human Rights & Opportunities v. Truelove & Maclean, Inc.,* 238 Conn. 337, 346, 680 A.2d 1261 (1996).

The plaintiff's factual allegations on which the entire complaint is based (see Second Amended Complaint, ØØ1-16) all stem from alleged discriminatory employment practices. Accordingly, in light of the holding in *Commission on Human Rights & Opportunities v. Truelove & Maclean, Inc., supra,* 238 Conn. 337, 680 A.2d 1261, the first and second counts of the plaintiff's second amended complaint must be stricken.

Count Three

*3 General Statutes § 46a-60(a)(1), the basis for count three, reads in relevant part: "For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, 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 ... *present or past history of mental disorder* ... learning disability or *physical disability,* including, but not limited to, blindness ..." (Emphasis added.) The plaintiff alleges that he was discriminated against on the basis of having both a past mental disorder and a physical disability. The following discussion will address each claim separately, beginning with "physical disability."

Physical Disability

The defendants contend that count three is insufficient because transsexualism, or gender dysphoria, is not a physical disability under the CFEPA. All parties concede that transsexualism is explicitly excluded from coverage as a disability under the federal Rehabilitation Act, 29 U.S.C. § 701 et seq., and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. The plaintiff argues, however, that, because Connecticut has not explicitly excluded coverage of transsexualism under the CFEPA as the federal statutes have, the Connecticut legislature intended to cover transsexualism as a mental disorder or physical disability under the CFEPA. The plaintiff further asserts that whether gender dysphoria is a disorder or disability is not a question of law to be decided at the present time, but rather an evidentiary matter.

This is a question of first impression in Connecticut. Given the lack of Connecticut authority on this issue

regarding transsexualism as a physical disability, this memorandum will look to federal law and cases of other jurisdictions for support.

It is highly persuasive that the Rehabilitation Act of 1973 and the ADA explicitly exclude transsexualism as a physical disability. "Although we are not bound by federal interpretation of Title VII provisions, we have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute." (Citations omitted; internal quotation marks omitted.) *State v. Commission on Human Rights & Opportunities,* 211 Conn. 464, 469-70, 559 A.2d 1120 (1989).

Two courts in other jurisdictions have also held that transsexualism is not a physical disability. In *Sommers v. Iowa Civil Rights Commission,* 337 N.W.2d 470 (Iowa 1983), the plaintiff, a transsexual, alleged a violation of the Iowa Civil Rights Act that prohibits discrimination against those with a "substantial handicap," either physical or mental, which "substantially limits one or more major life activities." *Id.,* 475. Under this standard, the court held that transsexualism was not a disability, noting that "no claim is made that a transsexual has an abnormal or unhealthy body." *Id.,* 476. In *Dobre v. National R.R. Passenger Corp. (AMTRAK),* 850 F.Supp. 284 (E.D.Pa.1993), the plaintiff, a transsexual, sought protection under the Pennsylvania Human Rights Act (PHRA), alleging that transsexualism is a physical disability which is protected under the PHRA. Under the Act, "disability" includes those impairments "which substantially limit[s] one or more major life activities." *Id.,* 288. Citing to *Sommers v. Iowa Civil Rights Commission, supra,* 337 N.W.2d 470, and the fact that "the plaintiff did not allege in the complaint that she suffers from any organic disorder of the body," the court held that transsexualism was not a physical disability. *Id.,* 289.

*4 In Connecticut, the definition of "physical disability" differs from that in either Iowa or Pennsylvania, which were applied in *Sommers v. Iowa Civil Rights Commission, supra,* 337 N.W.2d 470, and *Dobre v. National R.R. Passenger Corp. (AMTRAK), supra,* 850 F.Supp. 284. In Connecticut, "[a]n individual is physically disabled if he has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes of or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." General Statutes §§ 1-1f; 46a-51(15).

In light of (1) the persuasive authority of federal law Title VII in interpreting Connecticut's antidiscrimination statutes and the express exclusion of coverage of transsexualism in the ADA and the Rehabilitation Act; (2) the persuasive arguments in *Sommers v. Iowa Civil Rights Commission, supra,* 337 N.W.2d 470, and *Dobre v. National R.R. Passenger Corp. (AMTRAK), supra,* 850 F.Supp. 284; and (3) the plaintiff's failure to plead sufficient facts to demonstrate that his condition falls within the Connecticut definition of physical disability, the court believes that the plaintiff's condition as pleaded could not be found to be a physical disability under Connecticut law. Accordingly, count three is stricken to the extent it relies upon a cause of action for discrimination based on physical disability.

Mental Disorder

The defendants argue that gender dysphoria is not a mental disorder under General Statutes § 46a-60(a)(1). The plaintiff asserts that gender dysphoria is a recognized mental disorder in the DSM-IVR (Diagnostic and Statistical Manual of Mental Disorders).

This is a question of first impression in Connecticut. General Statutes § 46a-60(a)(1) does not provide a definition of "mental disorder," nor do the definition sections of the General Statutes, namely General Statutes §§ 1-1 et seq. (Provisions of General Application; Construction of Statutes) and 46a-51. The term, "mental disorder," is, however, defined in General Statutes § 17a-540 (Mentally Ill Persons; Patients Rights). General Statutes § 17a-540 reads, " 'Persons with a mental illness' means those children and adults who are suffering from one or more mental disorders as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders.' " See also *Canning v. Lensink,* Superior Court, judicial district of New Haven, Docket No. 274308 (February 5, 1993) (Reynolds, J.) (citing General Statutes § 17a-540, and stating, "[i]n the definition of 'mentally disordered' our statutes incorporate the definition in the most recent editions of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders' ").

Not Reported in A.2d, 1997 WL 78585 (Conn.Super.), 9 NDLR P 167, 19 Conn. L. Rptr. 109
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*5 The United States Supreme Court has looked to the DSM in defining a transsexual as "one who has a *rare psychiatric disorder* in which a person feels persistently uncomfortable about his or her anatomical sex, and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." (Emphasis added; internal quotation marks omitted.) *Farmer v. Brennan,* 511 U.S., 114 S.Ct 1970, 128 L.Ed.2d 811, 820 (1994) (citing American Medical Association, Encyclopedia of Medicine 1006 (1989), American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 74-75 (3d rev. ed.1987)).

In light of (1) the definition of "mental disorder" in General Statutes § 17a-540 that includes those diagnoses found in the DSM, (2) the United States Supreme Court's use of the DSM definition of a transsexual as one with a "rare psychiatric disorder," and (3) the parties' concession in the present case that gender dysphoria is a listed diagnosis in DSM-IVR, the defendant's motion to strike the plaintiff's cause of action for discrimination based on mental disorder is *denied.* But see *Sommers v. Iowa Civil Rights Commission, supra,* 337 N.W.2d 476 (holding that gender dysphoria is not a mental disorder because transsexualism does not hinder the performance of "major life activities," and further stating, "[a]n adverse societal attitude does not mean that the transsexual is necessarily perceived as having a physical or mental impairment"); *Dobre v. National R.R. Passenger Corp. (AMTRAK), supra,* 850 F.Sup. 289 (holding that gender dysphoria is not a mental disorder because transsexualism does not hinder the performance of "major life activities").

Counts Four and Five

In counts four and five, the plaintiff alleges that the defendants aided and abetted in performing unlawful discriminatory practices against the plaintiff, based on the plaintiff's past mental disorder and physical disability; (see Second Amended Complaint, counts four and five, ØØ17-21); in violation of General Statutes § 46a-60(a)(5).

General Statutes § 46a-60(a)(5) reads: "For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of *any act declared to be a discriminatory employment practice* or to attempt to do so." (Emphasis added.)

The defendants argue that counts four and five must fail because the plaintiff has not sufficiently pleaded facts to support the underlying claim of the unlawful discriminatory practice based on physical disability or mental disorder. The plaintiff merely rebuts that he has sufficiently alleged facts to support this claim for discrimination based on physical disability or mental disorder.

The defendants' motion to strike is *denied* in light of the above finding that the plaintiff has sufficiently pleaded facts to support a cause of action under General Statutes § 46a-60(a)(1) for discrimination based upon mental disorder.

Count Six

*6 Count six, incorporating by reference paragraphs 17-20 of count three that refer to gender dysphoria as a mental disorder and a physical disability, alleges: "Each and every one of the acts and omissions described herein were done to harass the plaintiff because of his sex, and were undertaken to interfere with the plaintiff's work performance and to create a hostile, intimidating and offensive working environment in violation of General Statutes § 46a-60(a)(8)." (Second Amended Complaint, count Six, Ø21.)

General Statutes § 46a-60(a)(8) reads: "It shall be a discriminatory practice in violation of this section for any employer, by himself or his agent ... by itself or its agent ... to harass any employee ... 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 ... 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."

The defendants contend that count six is legally insufficient because the plaintiff alleges discrimination on the basis of *change of sex* rather than sex. The defendants argue that transsexuals are not provided protection under Title VII, which serves as a guide in interpreting Connecticut antidiscrimination law.

This is a case of first impression in Connecticut. Be-

cause there is no Connecticut law on this subject, this memorandum will look to federal law in ascertaining the scope of Connecticut law. "Although the language of Title VII of the Civil Rights Act of 1964, § 703(a)(1); 42 U.S.C. § 2000e-2(a) and that of the Connecticut statute differ slightly, it is clear that the intent of the legislature in adopting 1967 Public Acts, No. 426 (which extended the provisions of the Fair Employment Practice Act ... to prohibit discrimination on the basis of sex) was to make the Connecticut statute coextensive with the federal. Although we are not bound by federal interpretation of Title VII provisions, we have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute. Nevertheless, we have also recognized that, under certain circumstances, federal law defines the beginning and not the end of our approach to the subject." (Citations omitted; internal quotation marks omitted.) *State v. Commission on Human Rights & Opportunities, supra,* 211 Conn. 469-70.

Federal courts have held that transsexuals are not covered by the protections afforded by Title VII or similar state statutes. See *Underwood v. Archer Management Services, Inc.,* 857 F.Supp. 96 (D.D.C.1994) (dismissing the plaintiff's claims alleging violation of the D.C. Human Rights Act); *Dobre v. National R.R. Passenger Corp. (AMTRAK), supra,* 850 F.Supp. 284, 288 (dismissing the claim under the Pennsylvania Human Rights Act, stating that "Title VII cases unanimously hold that Title VII does not extend to transsexuals nor to those undergoing sexual conversion surgery"); *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1085 (7th Cir.1984), cert. denied, 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985) ("the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e ... a person born with a female body who believes herself to be a male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born ... Had the Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites or transsexuals ..."); *Sommers v. Iowa Civil Rights Commission, supra,* 337 N.W.2d 476 (looking to federal interpretation of Title VII in holding that transsexuals are not afforded protection under the Iowa law that prohibits against discrimination based on sex); *Holloway v. Arthur Andersen & Co.,* 566 F.2d 659 (9th Cir.1977) (refusing to expand coverage of Title VII to include transsexuals); *Powell v. Read's, Inc.,* 436 F.Supp. 369 (D.Md.1977) (same); *Voyles v. Ralph K. Davies Medical Center,* 403 F.Supp. 456, 457 (N.D.Calif.1975) (same). But see *Maffei v. Kolaeton Industry, Inc.,* 164 Misc.2d 547, 626 N.Y.S.2d 391 (Sup.1995) (holding that a city ordinance prohibiting "gender" discrimination provides protection to transsexuals, disagreeing with the reasoning behind the federal cases which hold that Title VII does not protect transsexuals because Title VII does not prohibit discrimination based on sexual orientation, and noting that there is a difference between homosexuals and transsexuals[FN1]); *Holloway v. Arthur Andersen* & Co., *supra,* 566 F.2d 664-65 (Goodwin, J., dissenting) (stating, "I fail to see any valid Title VII purpose to be served by holding that a discharge while an employee is in surgery, or a few days before surgery, is not as much a discharge by reason of sex as a discharge a few days after surgery ... It seems to me irrelevant under Title VII whether the plaintiff was born female or was born ambiguous and chose to become female ...").

> FN1. The court explained, "[a] transsexual is not a homosexual in the true senseõthe latter seek sexual gratification from members of their own sex as member of that sex, whereas transsexual's erotic attractions are generally with persons of their own anatomic sex, but viewing themselves as members of the opposite desired sex." *Maffei v. Kolaeton Industry, Inc., supra,* 626 N.Y.S.2d 393.

*7 Given the weight of outside authority holding that Title VII and similar state statutes do not prohibit discrimination against transsexuals and the absence of any Connecticut legislative intent to cover discrimination against transsexuals, it is the court's opinion that General Statutes § 46a-60(a)(8) does not prohibit discrimination against transsexuals. Accordingly, the defendants' motion to strike count six of the plaintiff's second amended complaint is granted.

Count Seven

Count seven alleges a violation of General Statutes § 46a-81c(1) for discrimination based on sexual orientation. Sexual orientation is defined as "having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being

identified with such preference ..." General Statutes § 46a-81a.

The defendants argue that the plaintiff has failed to state his orientation or allege any facts to support this claim for discrimination based on sexual orientation. Lastly, the defendants argue that the plaintiff has actually alleged discrimination based on being a transsexual, not based on his sexual orientation.

The plaintiff asserts that he sufficiently pleaded facts to support a claim for discrimination based on sexual orientation. In count seven, paragraph 12(a), the plaintiff alleges, "Respondent Paradiso and the city of Hartford continually subjected the plaintiff to verbal ridicule because of the plaintiff's transsexualism and/or sexual orientation."

"In judging a motion to strike ... it is of no moment that the [party] may not be able to prove his allegations at trial." *Levine v. Bess & Paul Sigel Hebrew Academy of Greater Hartford, Inc.*, 39 Conn.Supp. 129, 132, 471 A.2d 679 (1983). Accordingly, the court finds that the plaintiff has pleaded sufficient facts to support a claim under General Statutes § 46a-81c(1) for discrimination based on sexual orientation[FN2] and the court holds that because "sexual orientation" is defined broadly to encompass all types of sexual preference, the plaintiff need not name his sexual orientation in the complaint. Therefore the defendants' motion to strike count seven is denied.

> FN2. Had the plaintiff failed to allege specifically discrimination based on "sexual orientation," but rather merely referenced his transsexualism as a basis for discrimination based on sexual orientation, the plaintiff's claim would have been legally insufficient. See *Underwood v. Archer Management Services, Inc., supra,* 857 F.Sup. 98 ("[i]n a Title VII context, courts have firmly distinguished transsexuality from homosexuality. The complaint is utterly devoid of any reference to the Plaintiff's sexual orientation, much less any discriminatory conduct on behalf of the Defendant discriminating against the Plaintiff's real or perceived preference or practice of sexuality. A conclusory statement that she was discharged on the basis of transsexualityõthe medical transfôrmation from being a man to a womanõdoes not constitute a claim for relief on the basis of being discharged for 'sexual orientation' ").

Count Eight

In count eight, directed against Paradiso, the plaintiff incorporates the allegations of count seven, except for the statutory reference to General Statutes § 46a-81c(1), and adds a claim for "extreme emotional distress, pain and suffering, humiliation, ridicule and scorn." (Second Amended Complaint, count eight, ØØ21-22.)

The defendants argue that this count is barred by the Workers' Compensation Act. The plaintiff asserts that intentional acts are not covered by the Workers' Compensation Act, and therefore the plaintiff's cause of action is not preempted by the Act.

Intentional acts do not fall within coverage of the Workers' Compensation Act, and thus are not preempted by the Act. "We consistently have interpreted the exclusivity provision of the act, General Statutes § 31-284(a), as a total bar to common law actions brought by employees against employers for job related injuries with one narrow exception that exists when the employer has committed an intentional tort or where the employer has engaged in willful or serious misconduct." *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 106, 639 A.2d 507 (1994). For the act to be intentional, the consequences of the act must have been intended, or the risk of injury must be foreseeable to a substantial certainty. *Id.*, 108-09.[FN3] "Intent is clearly a question of fact that is ordinarily inferred from one's conduct or acts under the circumstances of the particular cases." *Id.*, 111, 639 A.2d 507.

> FN3. "[I]ntent refers to the consequences of an act ... [and] denote [s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to follow from it. A result is intended if the act is done for the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue. An intended or willful injury does not necessarily involve the ill will or malevolence shown in express malice, but it is insufficient to constitute such

> an [intended] injury that the act ... was the voluntary action of the person involved. Both the action producing the injury and the resulting injury must be intentional. [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. The intentional injury aspect may be satisfied if the resultant bodily harm was the direct and natural consequence of the intended act. The known danger involved must go from being a foreseeable risk which a reasonable man would avoid and become a substantial certainty." (Citations omitted; internal quotation marks omitted.) *Id.*, 108-09.

***8** "In judging a motion to strike ... it is of no moment that the [party] may not be able to prove his allegations at trial." *Levine v. Bess & Paul Sigel Hebrew Academy of Greater Hartford, Inc., supra,* 39 Conn.Supp. 129, 471 A.2d 679. Accordingly, because intent is a question of fact to be decided by the jury, the court finds that the plaintiff's claim for emotional distress is not preempted by the Workers' Compensation Act and thus will not be stricken.

The defendant's motion to strike is granted as to counts one, two, three (as to the cause of action for discrimination based on physical disability) and six, and denied as to counts three (as to the cause of action for discrimination based on mental disorder), four, five, seven and eight.

Conn.Super.,1997.
Conway v. City of Hartford
Not Reported in A.2d, 1997 WL 78585 (Conn.Super.), 9 NDLR P 167, 19 Conn. L. Rptr. 109

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United States District Court,
D. Connecticut.
Yvonne J. MORALES f/k/a Javier Morales, Plaintiff,
v.
ATP HEALTH & BEAUTY CARE, INC., Defendant.
No. 3:06CV01430 (AWT).

Aug. 18, 2008.

Vincent Michael Simko, Jr., Belinkie & Simko Law Firm LLC, Bridgeport, CT, for Plaintiff.

Christopher Reilly, Kenneth William Gage, Paul, Hastings, Janofsky & Walker, New York, NY, for Defendant.

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ALVIN W. THOMPSON, District Judge.

*1 Yvonne J. Morales, f/k/a Javier Morales ("Morales"), brings this action against ATP Health & Beauty Care Inc. ("ATP"), setting forth claims for sex discrimination in violation of 42 U.S.C. § 2000e et *seq.* ("Title VII") and the Connecticut Fair Employment Practices Act, Conn. Gen.Stat. § 46a-60 et *seq.* ("CFEPA") and for retaliation against her for exercising her rights under Title VII and CFEPA. The defendant has moved for summary judgment on all claims. For the reasons set forth below, its motion is being granted.

I. FACTUAL BACKGROUND

Morales is a male-to-female transgender woman. Although Morales is biologically male, she identifies and presents herself as a heterosexual female who dates heterosexual men. She does not self-identify as a homosexual and does not see herself as a man.

On June 17, 2004, ATP hired Morales to work as a machine operator at its manufacturing plant in Stamford, Connecticut. Lizette Rosado-Martinez ("Rosado-Martinez"), ATP's Human Resources Manager, was aware of Morales' transgendered status at the time she was hired.

A. Morales' Complaints of Discrimination in the Decorating Department

Morales initially worked on an assembly line in the Decorating Department ("Deco"), where she removed defective jars and packed the remaining jars into boxes. Morales' immediate supervisor in Deco was Omar Lopez ("Lopez"). After working in Deco for some time, Morales felt that Lopez was discriminating against her.

"ATP's Personnel and Benefits Guide" sets forth the company's policies on discrimination and harassment. Employees who believe that they are being discriminated against or harassed are encouraged to make a report to their supervisor. Supervisors are responsible for acting promptly when they become aware of inappropriate or offensive behavior. If the problem is not resolved by the supervisor, or if the employee believes that the supervisor has treated him or her in a discriminatory manner, the employee is advised to report the problem to the Human Resources representative. Then, an investigation would be conducted to determine whether disciplinary action would be appropriate. At ATP, complaints of discrimination were handled by Rosado-Martinez. However, ATP had no written policies or procedures for the investigation of complaints of discrimination.

Morales met with Rosado-Martinez to complain about what she viewed as discriminatory behavior by Lopez. At the meeting, Morales told Rosado-Martinez that Lopez placed defective jars into her boxes and ignored her when she requested assistance.[FN1] Morales also stated that Lopez was homophobic. In response to Morales' complaints, Rosado-Martinez stated that she would contact Lopez in an effort to resolve the problem. Morales was initially satisfied with Rosado-Martinez's response when she left her office.

FN1. Morales claims that Lopez placed de-

> fective jars into her boxes because Lopez emphasized quantity over quality, and that he wanted Morales to pack as many jars as possible.

However, Morales continued to have difficulties with Lopez. According to Morales, Lopez would not allow her to switch stations with her co-workers. Lopez would also scream at her for working too slowly. In addition, Lopez screamed at Morales for returning late to her work station after lunch one day, even though Morales states that she timely returned to work and only briefly left her station to get a drink of water.

*2 Approximately a month after the first meeting with RosadoMartinez, Morales had a another meeting to complain about Lopez and Fernando Malave ("Malave"), who worked as a technician in Deco. Rosado-Martinez called in Felix Rivera ("Rivera"), a manager at ATP, to hear Morales' complaints. According to Morales, Rivera did not pay attention and left the office before she finished describing her complaints. Morales told RosadoMartinez that Lopez screamed at another employee when she switched positions with her. According to Morales, a third employee who witnessed the event told Rosado-Martinez that Morales was telling the truth. At Morales' request, RosadoMartinez called Lopez and Malave into her office. With Lopez and Malave present, Morales stated that Lopez would scream at her and other employees and ignore her when she asked for help fixing the machines. Morales stated that Lopez was discriminating against her and harassing her. Morales also stated that another employee at ATP had told her that Lopez said that "he was going to get rid of those faggots." (Def.'s L.R. 56(a)(1) Statement (Doc. No. 24), Ex. A at 120). Lopez and Malave denied Morales' allegations. At that point, Morales threatened to punch them in the face if they continued acting in the same manner. Rosado-Martinez stated that ATP would be monitoring the behavior of Lopez and Malave and concluded the meeting. Again, Morales stated that she was satisfied with Rosado-Martinez's response. However, Morales told Rosado-Martinez that she would sue the company if she had to complain about harassment again.[FN2]

> FN2. According to Morales, in addition to these meetings, Rosado-Martinez would come onto the production floor approximately once a month, and Morales would tell her that Lopez was treating her differently from the other employees.

After this second meeting, Morales began working overtime under a different supervisor in another department. Morales stated that Lopez stopped asking her if she wanted to work overtime in Deco and instead gave the extra hours to other workers. Also, Morales stated that after the meeting, RosadoMartinez told her "to be careful with Omar and Felix. They are trying to fire you." (*Id.* at 130).

B. Morales' Attendance Problems

At the start of her employment with ATP, Morales received a copy of "ATP's Personnel and Benefits Guide," which contained its policies on attendance and punctuality. Pursuant to ATP's policy on unexcused absences, an employee may receive a verbal reprimand after the first offense and a written reprimand after the second offense. The employee may be terminated after a management review for the third offense. Employees may also be subject to disciplinary actions for tardiness. Morales understood that her job required her "[t]o be punctual, to work hard, and be responsible." (*Id.* at 48).

Morales received verbal warnings about her attendance problems. On August 24, 2004, Morales received a written warning for failing to show up to work the previous Monday without notice. On October 1, 2004, Morales received a written warning for abandoning her work station without telling her supervisor in order to look for her missing dog.[FN3] On December 28, 2004, Morales received a written warning for not going to work on December 23 or December 28. That notice also stated that Morales failed to show up for work without giving notice to her employer on December 27. It further stated that Morales' attendance must improve, that she would be suspended for three days, and that she might be terminated if such an incident were to occur again.

> FN3. Morales claimed that she was taking her lunch break when she learned that the dog had been found and that she expected to be able to retrieve the dog and return to work within the hour allotted for lunch. When Morales learned that she would be returning late to work, she called another ATP employee, Raphael Sanchez, and asked him to inform Lopez that she would be late.

*3 On April 18, 2005, Rivera and Rosado-Martinez decided to terminate Morales' employment because of her attendance problems. However, Rosado-

Martinez eventually reconsidered this decision. Then, instead of terminating Morales, she decided to transfer her to the Molding Department ("Molding"), where she would be under a different supervisor. Morales maintained her level of seniority. Morales received a raise after being transferred to Molding. [FN4]

> FN4. ATP hourly employees are given raises on a group-wide basis once approved by ATP's compensation committee.

C. Morales' Complaints of Discrimination in the Molding Department

Ignacio Magnana ("Magnana") oversaw Morales' shift in Molding. Morales claims that Magnana behaved in an inappropriate manner and made offensive comments about her on five occasions.[FN5] First, after Morales had been in Molding for a month, Magnana told Morales, "Damn, you have a big pussy," on a day when Morales wore tight jeans to work. (*Id.* at 157). Second, approximately a month later, Magnana was standing with several men, and he asked Morales which of them was most attractive to her. Morales responded that none of them were attractive to her and told them that "all together you are not enough men to do one that I like." (*Id.* at 158). The men then began laughing. Third, approximately two weeks later, Magnana asked Morales if her ovaries hurt as she was holding her stomach walking to the restroom. Fourth, approximately a month after that incident, Magnana told Morales, "Yvonne, my dick is curved. If I stick it up your ass, I will take shit out of it." (*Id.* at 162). Fifth, when Morales showed a picture of herself when she was twelve years old to a coworker, Magnana indicated that he would not "fool around" with Morales now but that he probably would have done so when Morales was a boy. (*Id.* at 164). Morales found the first, third, and fourth comments by Magnana discussed above to be offensive. In addition to these five comments, Morales avers that "Magnana would regularly sneer at me and regularly yell at me for the smallest reasons." (Pl.'s Aff. (Doc. No. 36) at ¶ 7). Magnana did not make any other comments to Morales from June to October 2005, and Morales did not complain about any of the comments made by Magnana until she was at the meeting at which her employment with ATP was terminated.

> FN5. Morales admits that she also behaved inappropriately at times but states that none of her actions were offensive. For example, Morales admits taking excess plastic from a machine used to make beauty products packaging and molding the residue into a fake penis, and taping papers with jokes onto her co-workers' backs.

Morales also believed that Migdalia Pagan ("Pagan"), a team leader in Molding, was discriminating against her. Pagan was present for the first, third, and fifth comments made by Magnana. In addition, another employee told Morales that Pagan said that "she was going to get that faggot fired." (Def.'s Ex. A at 176). Morales also heard Pagan say, "I don't have a problem with faggots ... because I have one cousin-he's a faggot." (Pl.'s Mem. Opp. (Doc. No. 35), Morales Dep. at 248). Morales told her "[t]hat's not an appropriate word to say to a person." (*Id.*). Morales also states that Pagan was a "backstabber" and a "hypocrite" but did not treat her any differently from others. (Def.'s Ex. A at 182).

D. Termination of Morales' Employment

*4 Morales' attendance problems continued in Molding. On August 24, 2005, Morales received a written warning after missing two days of work. On September 26, 2005, Morales received another written warning for failing to come to work on September 23, 2005. The notice reads: "Mr. Morales is frequently absent from work, without an excuse. He was previously warned." (Def.'s Ex. A at D36). It also states that failure to improve will result in termination. After receiving this warning, Morales missed another day of work without notifying her employer.

On October 14, 2005, Morales was called into RosadoMartinez's office. When Morales went into the meeting, she knew that she would be terminated because of her violations of the attendance policy. Morales provided Rosado-Martinez with a letter that she wrote on October 10, 2005. In the letter, Morales states that, on October 7, 2005, Magnana yelled at her in front of another employee when Morales informed him that her machine stopped working. The letter further states: "I also talked about offensive behavior against me by my supervisor in a[sic] past and confronted other people who were spreading gossip about my sexual orientation. All this are [sic] making things impossible for me to do my job and I been feeling discriminated, feeling forced to leave (quit my job)." (Pl.'s Mem. Opp., Morales Dep., Ex. 20 at 2). Rosado-Martinez said that she would show Morales' letter to her boss, although Morales did not know who her boss was. In addition, Rosado-Martinez told Morales that she would talk to another supervisor named Edith about transferring Morales to

her department. Edith agreed to allow Morales to work for her. Rosado-Martinez then stepped out of the meeting with Morales to talk to her boss. However, when RosadoMartinez returned from meeting with her boss, she told Morales that her employment was terminated for her violation of the attendance policy. Rosado-Martinez apologized to Morales and told her that she did the best she could. Morales acknowledges that her attendance problems were, in part, a reason for her termination. Morales also believes that she was terminated because of the comments being made about her. After being terminated from ATP, Morales was diagnosed with severe depression, for which she sought treatment.

According to Dana Deardoff ("Deardoff"), ATP's Legal Services Manager, the company's business practices require the human resources manager to report all complaints of discrimination to senior management. Deardoff did not become aware of Morales' complaints of discrimination until after Morales' employment was terminated.

II. LEGAL STANDARD

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56(c). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Gallo v. Prudential Residential Servs.,* 22 F.3d 1219, 1223 (2d Cir.1994). Rule 56(c) "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *See Celotex Corp.,* 477 U.S. at 322.

*5 When ruling on a motion for summary judgment, the court must respect the province of the jury. The court, therefore, may not try issues of fact. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 58 (2d Cir.1987); *Heyman v. Commerce & Indus. Ins. Co.,* 524 F.2d 1317, 1319-20 (2d Cir.1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Anderson,* 477 U.S. at 255. Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined ... to issue-finding; it does not extend to issue-resolution." *Gallo,* 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is *both* genuine *and* related to a material fact. Therefore, the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248 (internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." *Id.* As the Court observed in *Anderson:* "[T]he materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* Thus, only those facts that *must* be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. *See Howard v. Gleason Corp.,* 901 F.2d 1154, 1159 (2d Cir.1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and ... draw all reasonable inferences in its favor." *Weinstock v. Columbia Univ.,* 224 F.3d 33, 41 (2d Cir.2000) (quoting *Delaware & Hudson Ry. Co. v. Consol. Rail Corp .,* 902 F.2d 174, 177 (2d Cir.1990)). Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant must be supported by the evidence. "[M]ere speculation and conjecture" is insufficient to defeat a motion for summary judgment. *Stern v. Trustees of Columbia Univ.,* 131 F.3d 305, 315 (2d Cir.1997) (quoting *Western World Ins. Co. v. Stack Oil, Inc.,* 922 F.2d 118, 121 (2d. Cir.1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. *Anderson,* 477 U.S. at 252.

*6 Finally, the nonmoving party cannot simply rest

on the allegations in its pleadings since the essence of summary judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. *See Celotex Corp.*, 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," *Weinstock*, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts, ... [and] must come forward with specific facts showing that there is a genuine issue for trial." *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir.1993)(quotation marks, citations and emphasis omitted). Furthermore, "unsupported allegations do not create a material issue of fact." *Weinstock*, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary judgment should be granted. The question then becomes: is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. *See Anderson*, 477 U.S. at 248, 251.

III. DISCUSSION

A. Disparate Treatment and Retaliation Claims

Based on the record here, the defendant is entitled to summary judgment on the plaintiff's disparate treatment claim. The plaintiff has failed to establish the elements of a *prima facie* case for disparate treatment under Title VII and CFEPA. Morales cannot establish that her job performance was satisfactory in light of her well-documented violations of ATP's attendance policy. *See Hendrics v. National Cleaning Contractors, Inc.*, 1998 WL 26188 at *3 (S.D.N.Y.1998) ("Excessive absenteeism has been repeatedly cited by courts as evidence of lack of satisfactory job performance."). Also, Morales cannot establish that the termination of her employment occurred under conditions giving rise to an inference of discrimination. First, Morales has not produced any evidence that suggests a nexus between allegedly discriminatory conduct by her supervisors and the decision to terminate her employment. Second, Rosado-Martinez, the person who ultimately informed Morales that she was being terminated, was the same individual who hired Morales knowing of her transgendered status. *See Carlton v. Mystic Transp ., Inc.*, 202 F.3d 129, 132 (2d Cir.2000) (internal citations and quotation marks omitted) ("When the same actor hires a person already within the protected class, and then later fires that same person, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire ... Case law teaches that where the termination occurs within a relatively short time after the hiring there is a strong inference that discrimination was not a motivating factor in the employment decision."). The evidence supports only the conclusion that the final decision to terminate Morales was motivated by a legitimate, non-discriminatory reason, i.e. Morales' numerous violations of ATP's attendance policies.[FN6]

> FN6. In addition, the plaintiff does not address her disparate treatment claim under Title VII and CFEPA in her opposition to the motion for summary judgment. Thus, it appears that she has conceded that the defendant should prevail on this claim. *See Albert v. City of Hartford*, 529 F.Supp.2d 311, 328-29 (D.Conn.2007) (collecting cases).

*7 Morales has also failed to respond to the defendant's arguments for summary judgment on her retaliation claim under Title VII and CFEPA, and the only evidence in the record reflects that the defendant should also prevail on the plaintiff's retaliation claim. Assuming *arguendo* that Morales could establish that she participated in a protected activity and that the defendant knew of the protected activity, Morales has not offered evidence of a causal connection between her complaints of discrimination and any adverse employment action. There is no evidence that Rosado-Martinez or any other person involved in the decision to terminate Morales' employment was motivated by retaliatory animus.

B. Hostile Work Environment Claim

Title VII makes it an "unlawful employment practice for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92-93 (2003) (citing 42 U.S.C. § 2000e-2 (a)(1)). In order to establish a hostile work environment claim under Title VII, a plaintiff must first show that "the workplace is 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." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). A plaintiff must show "not only that [he] subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive." *Demoret v. Zegarelli*, 451 F.3d 140, 149 (2d Cir.2006). In determining whether a hostile work environment exists, the court

looks to several factors, including "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." *Harris,* 510 U.S. at 23. "Isolated incidents or episodic conduct will not support a hostile work environment claim." *Richardson v. NYS Dep't. Corr. Serv.,* 180 F.3d 426, 437 (2d Cir.1999). "Rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of [his] working environment." *Cruz v. Coach Stores, Inc.,* 202 F.3d 560 (2d Cir.2000) (internal quotation marks omitted).

Second, a plaintiff "must demonstrate a specific basis for imputing the conduct creating the hostile work environment to the employer." *Feingold v. New York,* 366 F.3d 138, 149 (2d Cir.2004). Where, as here, the harassment is perpetrated by a supervisor with immediate or successively higher authority over the employee, "the employer is presumed to be absolutely liable." *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55, 63 (2d Cir.1998). However, the employer may still raise the *Faragher-Ellerth* affirmative defense, which "comprises two elements: that (1) the employer exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ferraro v. Kellwood Co.,* 440 F.3d 96, 101 (2d Cir.2006) (internal citations and quotation marks omitted). This affirmative defense can be raised "only if one of two further elements is met: either (1) the employee's supervisor took no tangible employment action, which involves an official company act, against the employee; or (2) any tangible employment action taken against the employee was not part of the supervisor's discriminatory harassment." *Id.*[FN7] "Otherwise, the employer is strictly liable for the supervisor's misconduct." *Id.*[FN8]

> FN7. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761 (1998).
>
> FN8. When the harassment is perpetrated by a co-worker rather than a supervisor, "the employer will be held liable only for its own negligence." *Distasio,* 157 F.3d at 63. In such cases, "an employer will be liable if the plaintiff demonstrates that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Perry v. Ethan Allen, Inc.,* 115 F.3d 143, 149 (2d Cir.1997) (internal citation and quotation marks omitted). Knowledge will be imputed to an employer when: "(A) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or (B) the official is charged with a duty to act on the knowledge and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment. *Id.* at 636-37 (citations omitted)." *Torres v. Pisano,* 116 F.3d 625, 636-37 (2d Cir.1997) (citations omitted).

***8** As a threshold matter, in order to set forth a hostile work environment under Title VII, Morales must demonstrate that she suffered discrimination because of her membership in a protected class. *See Brown v. Henderson,* 257 F.3d 246, 252 (2d Cir.2001) ("[i]t is axiomatic that mistreatment at work ... is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic."). In this case, Morales relies on "the 'gender stereotyping' theory of Title VII liability according to which individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class." *Dawson v.. Bumble & Bumble,* 398 F.3d 211, 218 (2d Cir.2005). Under this theory, "[o]ne can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance." *Id.* at 221.

With respect to Morales' claims that she suffered discrimination and harassment while working in the Deco Department, Morales has failed to produce any evidence that the alleged discrimination and harassment occurred because of her failure or refusal to conform to gender stereotypes. Morales complained that Lopez placed defective jars in her boxes, ignored her when she needed assistance, prevented her from switching stations, and frequently yelled at her on the production floor. Morales stated that Lopez was "homophobic" and that another employee told her that Lopez said that "he was going to get rid of those faggots." Morales provided no other reason for Lopez's conduct and did not offer any other evidence to

explain it. At most, Morales' complaints about Lopez's conduct amount to allegations that she was discriminated against based on her sexual orientation. Such complaints of discrimination are not legally cognizable under Title VII because the statute does not recognize homosexuals as a protected class. *See Simonton v. Runyon,* 232 F .3d 33, 35 (2d Cir.2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Dawson,* 398 F.3d at 218 ("a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.") (internal quotation marks omitted). Although Morales claims that Lopez used the term "faggot" to refer to both homosexual and transgendered employees, she still fails to offer evidence sufficient to support a conclusion that Lopez, or any other employee in the Deco Department, engaged in discriminatory conduct because of Morales' membership in a protected class.

Morales' allegations of harassment in the Molding Department, however, could be construed as asserting claims of discrimination based on both sexual orientation and gender, i.e. failure to comply with socially accepted gender roles. Morales claims that Magnana regularly screamed at her for "the smallest reasons" and made several inappropriate comments to her. Morales states that Magnana (1) told her that she had "a big pussy" on a day when she wore tight jeans to work; (2) asked her which of the men with whom Magnana was standing was most attractive to her; (3) asked her if her ovaries hurt as she was holding her stomach while walking to the restroom; (4) told Morales that "[his] dick is curved" and "if [he sticks] it up [Morales'] ass, [he] will take shit out of it"; and (5) told Morales that she would not "fool around" with Morales as a female but probably would have done so when she was a boy. Morales also stated that Pagan was present for the first, third, and fifth comments. In addition, another employee told Morales that Pagan said that "she was going to get that faggot fired," and Morales has heard Pagan used the word "faggot" in reference to a homosexual man. The comments allegedly made by Pagan and the second and fourth comments made by Magnana appear to be directed at Morales' sexual orientation, and therefore, they are not actionable under Title VII. However, the first, third, and fifth comments appear to be directed at Morales' failure to conform to societal stereotypes about how men should appear, and therefore, Morales has produced evidence of membership in a protected class with respect to her claim of harassment and discrimination, based on these comments by Magnana.

*9 Nevertheless, the plaintiff has failed to create a genuine issue of material fact as to whether the harassment she suffered solely on account of her failure to conform to gender stereotypes was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Morales has produced evidence that she frequently complained about harassment by her supervisors, that she threatened to bring a lawsuit against ATP if the harassment continued, that she considered leaving ATP because of the harassment, and that she suffered from anxiety and depression. However, Morales' subjective perceptions of the hostility of her working environment at ATP did not derive solely from the discriminatory conduct Morales experienced because of her sex. The three comments by Magnana arguably directed at Morales' failure to conform to gender stereotypes constitute the only evidence produced by Morales that would support a conclusion that she suffered discrimination on that basis. Morales testified in her deposition that she found two of these three comments made by Magnana to be offensive.[FN9] She has not produced any other evidence of discriminatory intimidation, ridicule, or insults based on her membership in a protected class during her approximately 18 months of employment with ATP. Therefore, Morales cannot demonstrate that the incidents of discriminatory conduct were sufficiently severe or pervasive to alter the conditions of her working environment. *See Faragher v. City of Boca Raton,* 524 U.S. 775, (1998) (internal citations and quotation marks omitted) ("Properly applied, [the standards for judging hostility in the workplace] will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing ... We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment ...").

> FN9. Morales testified that she found the first, third, and fourth comments made by Magnana to be offensive. The fourth comment, however, was not directed at Morales' failure to conform to gender stereotypes. Morales never reported any of these comments to Rosado-Martinez prior to her final meeting with her.

Morales argues that the discriminatory harassment she suffered was not limited to the offensive comments made by Magnana. Morales avers that "Magnana would regularly sneer at me and regularly yell at

me for the smallest reasons." In her letter to Rosado-Martinez, Morales also states that Magnana screamed at her in front of another employee in violation of company policy when her machine stopped working. The Second Circuit has stated that "[f]acially neutral incidents may be included, of course, among the totality of the circumstances that courts consider in any hostile work environment claim, so long as a reasonable fact-finder could conclude that they were, in fact, based on sex." *Alfano v. Costello,* 294 F.3d 365, 378 (2d Cir.2001). In this case, Morales has failed to produce evidence to support an inference that Magnana's yelling and sneering at Morales was motivated by discriminatory animus. With one exception, Morales does not provide any details about the circumstances under which Magnana yelled at her. With respect to the incident where Magnana screamed at Morales when her machine stopped working, Morales has not offered evidence from which a reasonable fact-finder could infer that Magnana's actions were motivated by gender-based animus. Because Morales has failed to produce evidence of a linkage or correlation to the claimed ground of discrimination, these other incidents do not support her contention that she was subjected to a hostile work environment because of her sex. *See Alfano,* 294 F.3d at 378 ("It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination."); *Figueroa v. City of New York,* 118 Fed.Appx. 524 (2d Cir.2004) (upholding grant of summary judgment where the plaintiff's allegations of gender discrimination did not meet the threshold for frequency and severity and where the plaintiff failed to show the required linkage between sex-neutral incidents and discriminatory animus); *Manessis v. New York City Dept. of Transp.,* 2003 WL 289969 (S.D.N.Y.2003) ("... the record establishes that the two arguably discriminatory comments, both isolated, relatively mild and insufficient in themselves to create a hostile work environment, cannot support an inference that the other eight incidents were motivated by discriminatory animus."). Thus, Morales has failed to satisfy the first element of her hostile work environment claim.

*10 Assuming *arguendo* that Morales has created a genuine issue of material fact as to whether there was a hostile work environment, the court turns to the second element of her claim, i.e. whether the conduct creating the hostile work environment can be imputed to the employer. Since the discriminatory harassment was perpetrated by Morales' supervisor, ATP is presumed to be absolutely liable. However, ATP has raised the *Faragher-Ellerth* affirmative defense, which is available in this case because Magnana did not take any tangible employment action against Morales.

With respect to the first element of this defense, ATP has produced evidence demonstrating that it exercised reasonable care to prevent and correct promptly any harassing behavior and Morales has failed to create a genuine issue of fact as to this point. First, ATP provided Morales with a copy of its "Personnel and Benefits Guide," which described the company's anti-harassment policy that was in effect during the period of the Morales' employment. That policy prohibited harassment on the basis of, *inter alia,* an individual's gender. It emphasized that offensive behavior, including harassment, would not be tolerated at ATP. It also provided a procedure for employees to complain about harassment to a supervisor or to an HR representative. *See Ferraro v. Kellwood,* 440 F.3d at 102 ("An employer may demonstrate the exercise of reasonable care, required by the first element, by showing the existence of an antiharassment policy during the period of the plaintiff's employment, although that fact alone is not always dispositive."). Morales utilized these procedures when she brought complaints of discriminatory conduct by Lopez and Malave to Rosado-Martinez's attention. Rosado-Martinez held a meeting with Morales, Lopez, and Malave to discuss Morales' allegations of discrimination. She indicated that the company would be monitoring the behavior of Lopez and Malave. Morales stated that she was initially satisfied with the manner in which Rosado-Martinez handled the situation. When Morales' complaints of discrimination and harassment by Lopez persisted, Rosado-Martinez transferred Morales to another department. Morales contends that when she was transferred to the Molding Department, she continued to be subjected to discrimination and harassment, this time by Magnana. However, she never reported any complaints about Magnana to RosadoMartinez until she was called into Rosado-Martinez's office for the final termination meeting. Rosado-Martinez again attempted to locate work for Morales with a different supervisor, but the decision was ultimately made to terminate Morales' employment because of her well-documented history of violations of ATP's attendance policies.[FN10] For these reasons, the only conclusion supported by the evidence is that ATP exercised reasonable care to prevent and correct promptly any harassing behavior by its employees.

FN10. While working in the Deco Department, Morales received a verbal warning

> about her attendance and two written warnings for failing to show up for work without first notifying her employer. She also received a written warning for abandoning her work station. When she was transferred to the Molding Department, Morales received two more written warnings for missing work. The last of these warnings explicitly stated that Morales was frequently absent from work without excuse and warned her of possible termination. After receiving this warning, Morales missed another day of work. Morales concedes that she was frequently absent from work.

Second, ATP has also satisfied its burden with respect to the second element of the *Faragher-Ellerth* defense and Morales has failed to create a genuine issue of fact as to this point. "The defendant bears the ultimate burden of persuasion on this element, but it may carry that burden by first introducing evidence that the plaintiff failed to avail herself of the defendant's complaint procedure and then relying on the absence or inadequacy of the plaintiff's justification for that failure." *Ferraro,* 440 F.3d at 103. With respect to her complaints of discrimination and harassment by Magnana, it is undisputed that Morales failed to avail herself of ATP's complaint procedure until her final meeting with Rosado-Martinez, at which point even Morales realized she would be terminated for her attendance violations. Morales conceded that she had been satisfied with the manner in which Rosado-Martinez handled her complaints about Lopez and Malave while she was working in the Deco Department. In addition, Rosado-Martinez had demonstrated a willingness to accommodate Morales by transferring her to another department under a different supervisor. Morales does not provide a reasonable justification for her failure to avail herself of ATP's complaint procedure when she was working in the Molding Department. Therefore, the court concludes that Morales' failure to use the complaint procedure was unreasonable and that the ATP has also met its burden with respect to the second element of the *Faragher-Ellerth* defense.

*11 In her opposition to the motion for summary judgment, Morales contends that ATP's responses to her complaints were inadequate. In support of this argument, Morales relies heavily on *Distasio v. Perkin Elmer Corp.,* 157 F.3d 55 (2d Cir.1998), a case in which the court considered when harassing conduct by a co-worker, which created a hostile work environment for an employee, can be imputed to an employer. In such a case, the court held that an employer will be liable if the plaintiff "can demonstrate that the company either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Distasio,* 157 F.3d at 63 (internal quotation marks and citation omitted). In *Distasio,* the Second Circuit held that knowledge of the harassment was imputed to the employer because the company's sexual harassment policy explicitly stated that the company is considered to have direct knowledge of a complaint once an employee complains to a supervisor or HR representative and because supervisors had a responsibility under the company's express policy to relay sexual harassment complaints to the company. The court also stated that "[w]hile the fact that a complaint was unreported may be relevant in considering whether an employer had knowledge of the alleged conduct, an employer is not necessarily insulated from Title VII liability simply because a plaintiff does not invoke her employer's internal grievance procedure if the failure to report is attributable to the conduct of the employer or its agent." *Id.* at 64. On the issue of whether the employer's response was reasonable, the court noted that the supervisor's only response to Distasio's complaint was to speak with the co-worker who harassed him. The supervisor "did not follow company policy that required him to report Distasio's complaints to Human Resources," and the court concluded that "[t]his failure to comply with the company's own reporting requirements is evidence tending to show that the company's response was inadequate." *Id.* at 65.

Morales argues that the facts of her case are similar to those presented in *Distasio.* In her opposition, Morales contends that she "was so demoralized and depressed by the continuing harassment without any action on the part of ATP that she gave up pressing her complaints." (Pl's Mem. Opp. at 15). Morales also contends that, although she was initially satisfied with RosadoMartinez's response to her complaints, the harassment she was experiencing only became worse after she complained. She argues that, like the supervisor in *Distasio,* Rosado-Martinez's only response to her complaints was to speak with the people who harassed her. She contends that Rosado-Martinez did not follow the company's policy requiring her to report Morales' complaints to senior management, as evidenced by the fact that one of her supervisors, Dana Deardoff, was never informed of Morales' complaints until after Morales' termination.

*12 As an initial matter, the court in *Distasio* was analyzing whether the harassing conduct of a co-

worker could be imputed to an employer. In this case, the employer is presumed liable because Magnana was Morales' supervisor, and the court is analyzing the separate issue of whether the employer can raise the *Faragher-Ellerth* affirmative defense to the plaintiff's claim. In addition, *Distasio* is distinguishable in other respects. First, unlike the policy considered in *Distasio,* ATP's policy on harassment does not expressly state that complaints brought to the human resources manager must be relayed to her supervisors. Although Deardoff testified that the company's business practices require the human resources manager to report all complaints of discrimination to senior management, such business practices are not contained in any written policy promulgated by the company. Second, contrary to Morales' contention, Rosado-Martinez did more than just speak with her supervisors in response to her complaints. Rosado-Martinez transferred Morales to a different department where she would not be supervised by Lopez. Although Morales notes that she was transferred and Lopez was not, there is no evidence to support the contention that the decision to transfer Morales was not an adequate remedy for the alleged harassment by Lopez. Morales contends that the harassment persisted under Magnana's supervision, but Morales made no complaints about Magnana until the final meeting with Rosado-Martinez. Third, unlike *Distasio,* where the plaintiff's supervisor allegedly told her not to say anything about her co-worker's conduct, Morales has not produced any evidence to show that her failure to report her claims at an earlier time was caused by the conduct of ATP or its agent. Morales eventually drafted a letter to Rosado-Martinez on October 10, 2005, which voiced her concern about harassment by Magnana. This letter, however, was not given to Rosado-Martinez until October 14. According to Morales, Rosado-Martinez then showed his letter to her supervisor before Morales was terminated for violating ATP's policies on attendance. Although Deardoff was not notified of Morales' complaints until after her termination, there is no evidence that all employee complaints of discrimination had to be reported to Deardoff. For these reasons, the court finds unpersuasive Morales' argument that there is evidence that would support a conclusion that ATP's response to her complaints of discrimination was inadequate.[FN11]

FN11. Morales also cites to *Brunson v. Bayer Corp.,* 237 F.Supp.2d 192 (D.Conn.2002), a case in which the plaintiff alleged sexual harassment by a co-worker. In denying summary judgment in that case, the court held that a genuine issue of material fact existed as to whether knowledge of the harassment could be imputed to the employer where the plaintiff notified two production floor supervisors of the harassment and they failed to report the harassment to management in accordance with the company's handbook and business practices, thereby failing to adequately respond to the plaintiff's complaints. For the reasons set forth above, *Brunson* is also distinguishable from this case.

Accordingly, the court concludes that (1) there is no genuine issue of material fact as to whether a hostile work environment existed and (2) that the defendant has established the *Faragher-Ellerth* affirmative defense as a matter of law. Therefore, ATP's motion for summary judgment is being granted with respect to Morales' Title VII hostile work environment claim.

Morales also brings a hostile work environment claim under CFEPA. CFEPA claims are evaluated using the same framework as an Title VII claims. *See Brittell v. Dept. of Corr.,* 247 Conn. 148, 164 (1998) ("Although the language of [Title VII] and that of [CFEPA] differ slightly, it is clear that the intent of the legislature ... was to make the Connecticut statute coextensive with the federal [statute]."). However, unlike Title VII, CFEPA also prohibits discrimination in employment based on an individual's sexual orientation. *See* Conn. Gen.Stat. § 46a-81c. Thus, Morales may use evidence of harassment based on her sexual orientation, in addition to evidence of harassment based on her failure to conform to gender stereotypes, to support her hostile work environment claim under CFEPA. *See Cruz v. Coach Stores,* 202 F.3d 560, 572 (2d Cir.2000) ("Given the evidence of both race-based and sex-based hostility, a jury could find that [a manager's] racial harassment exacerbated the effect of his sexually threatening behavior and vice versa."); *Feingold,* 366 F.3d 138, 151 ("while [the plaintiff] has not alleged sufficient facts to make out a hostile work environment claim based solely on race, his allegations of racial animosity can nevertheless be considered by a trier-of-fact when evaluating [the plaintiff's] religion-based claim .").

*13 Morales has failed to produce sufficient admissible evidence to support a hostile work environment claim based solely on her sexual orientation. Morales has produced her opinion that Lopez was "homophobic" and the double hearsay statements by Lopez and Pagan. Assuming *arguendo* that Morales has produced admissible evidence of harassment based

on her sexual orientation, and that such evidence could be aggregated with the evidence of harassment based on her sex to support a hostile work environment claim,[FN12] Morales' claim under CFEPA fails because ATP has established the *Faragher-Ellerth* affirmative defense as a matter of law. *See Brittell,* 247 Conn. at 167, n. 30 (recognizing the availability of the *Faragher-Ellerth* affirmative defense under Connecticut law). Therefore, ATP's motion for summary judgment is also being granted with respect to Morales' CFEPA hostile work environment claim.

> FN12. Both of these propositions are dubious. First, as noted above, the evidence adduced by Morales to support the contention that she was discriminated against on the basis of her sexual orientation is likely inadmissible. Also, the Second Circuit has noted that "[a] question remains as to whether a plaintiff may aggregate evidence of racial and sexual harassment to support a hostile work environment claim where neither charge could survive on its own." *Cruz,* 202 F.3d at 572, n. 7. Because the court in *Cruz* concluded that the plaintiff "adduced sufficient evidence to support independent racial and sexual harassment claims," it did not reach this issue. *Id.*

IV. CONCLUSION

For the reasons set forth above, defendant ATP Health & Beauty Care, Inc.'s Motion for Summary Judgment (Doc. No. 36) is hereby GRANTED.

The Clerk shall enter judgment in favor of the defendant on all counts and close this case.

It is so ordered.

D.Conn.,2008.
Morales v. ATP Health & Beauty Care, Inc.
Not Reported in F.Supp.2d, 2008 WL 3845294 (D.Conn.)

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