DOCKET NO. HHD-CV-05 4016120-S	:	SUPERIOR COURT
LUIS PATINO	:	JUDICIAL DISTRICT OF
v.	:	HARTFORD AT HARTFORD
BIRKEN MANUFACTURING CO.	:	MARCH 13, 2009

MEMORANDUM OF LAW OF *AMICUS CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE VERDICT

Lambda Legal Defense and Legal Fund, Inc., ("Lambda Legal") submits this memorandum as *amicus curiae* in the above captioned case to address whether an employer who creates or allows to exist a work environment that is intimidating, hostile or offensive to an employee who is gay, lesbian or bisexual, discriminates against the employee "in terms, conditions or privileges of employment because of the individual's sexual orientation" in violation of Conn. Gen. Stat. § 46a-81c(1).

As is set forth in more detail in the petition seeking permission to file this memorandum, filed March 6, 2009, Lambda Legal is a national organization dedicated to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation and public policy work and, for more than 35 years, has been advocating for equality for gay men and lesbians throughout the United States. As *amicus* in this case, Lambda Legal seeks to ensure that Section 46a-81c is properly interpreted to ensure the right of lesbian and gay employees to a workplace free from severe or pervasive harassment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 2009, after trial, the jury returned its verdict for Plaintiff Luis Patino and awarded him compensatory damages of $94,500, on Plaintiff's claim that his employer, Defendant Birken Manufacturing Co., violated Conn. Gen. Stat. § 46a-81c(1) by discriminating against him because of his sexual orientation in the terms, conditions or privileges of his employment by creating or failing to remedy a discriminatory, anti-gay hostile work environment. Complaint ¶ 19. On February 17, Defendant moved to set aside the verdict and for judgment as a matter of law. Defendant argued, inter alia, that because the text of Section 46a-81c does not include the phrase "hostile work environment," an employer cannot be liable under that statute for creating, or for failing to take reasonable steps to remedy, a work environment permeated with anti-gay intimidation, ridicule and insult that is sufficiently severe or pervasive to alter, for the worse, the terms or conditions of employment for an individual who is gay or lesbian. See Motion to Set Aside Verdict (Entry No. 117.00) at 1; Memorandum of Law in Support (Entry No. 119.00) at 2-5. Defendant's interpretation is antithetical to the letter and the spirit of Connecticut's antidiscrimination statutes, and must be rejected.

II. ARGUMENT

"In determining the intent of a statute, [the Connecticut Supreme 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 the Connecticut Supreme Court has observed, "the [Connecticut] gay rights law [which includes Section 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 and Lesbian Law Students Ass'n v. Board of Trustees, Univ. of Conn., 236 Conn. 453, 481-82 (1996)); see also Kerrigan, 289 Conn. at 260 (under equal protection clause of Connecticut Constitution, statutory scheme barring marriage between persons of the same sex cannot stand).

A. Connecticut's employment antidiscrimination statutes protect employees from discrimination in the form of a hostile work environment

Under Section 46a-81c(1), it is a discriminatory practice for "an employer . . . 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[.]" (emphasis added). The phrase "terms, conditions or privileges of employment" in Section 46a-81c(1) is identical to language in Connecticut's parallel statute protecting employees from discrimination because of other traits, characteristics and statuses such as race, sex, and marital status, 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"); and see Conn. Gen. Stat. § 46a-60(a)(1) (prohibiting discrimination "in compensation or in terms, conditions or privileges of employment").

"In defining the contours of an employers' duties under [Connecticut's] state antidiscrimination statutes, [the Connecticut Supreme 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)). Of course, Connecticut's antidiscrimination statutes protect against discrimination because of a number of traits, characteristics and statuses in addition to those covered by federal law. Compare Conn. Gen. Stat. § 46a-60(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 disability, including, but not limited to, blindness") and Conn. Gen. Stat. § 46a-81c ("sexual orientation or civil union status") with 42 U.S.C. § 2000e-2(a)(1) ("race, color, religion, sex or national origin").

Because the relevant language of the statutory provision at issue is similar or identical to the language in Title VII and § 46a-60, cases interpreting those statutes provide particularly useful guidance.[1] See Brittell, 247 Conn. at 164-69 (looking to federal cases to determine applicable standard of review and employer's substantive liability for sexual harassment claim

[1] Sections 46a-60(a)(1) and 46a-81c, like Title VII, each prohibit discrimination "in terms, conditions or privileges of employment" and there is no basis to interpret of that phrase differently in federal as opposed to state statutes – nor to interpret the phrase differently in two parallel state statutes. Moreover, Defendant's proposed interpretation would afford less protection to lesbians and gay men, in contradiction to the equal protection principles articulated in Kerrigan, 289 Conn. 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.")

under Conn. Gen. Stat. § 46a-60(a)); see also Wroblewski v. Lexington Gardens, Inc., 188 Conn. 44, 53 (1982) (looking to federal precedents for guidance in interpreting term "bona fide occupational qualification or need" in Connecticut antidiscrimination statute). The phrases referring to "terms, conditions or privileges" – which appears in both Title VII and Connecticut's antidiscrimination laws – has been interpreted to mean "that employees are protected 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 claim of racially discriminatory hostile work environment under Title VII) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399 (1986) (sexual harassment violates Title VII's prohibition of sex discrimination)). See also Kwentoh v. Conn. Dep't of Child. and Fams. Juv. Training Sch., 588 F. Supp. 2d 292, 301-02 (D. Conn. 2008) (evaluating sufficiency of evidence supporting claim of racially discriminatory hostile work environment under Title VII); Brittell, 247 Conn. at 167-68 (work environment permeated with sexual harassment, if not adequately responded to, violates Conn. Gen. Stat. § 46a-60(a)); and Buster v. City of Wallingford, 557 F. Supp. 2d 294, 300 (D. Conn. 2008) (analyzing hostile work environment claim of discrimination because of race under Section 46a-60(a)(1).

Courts have repeatedly recognized and analyzed hostile work environment claims as ones that involve discrimination in the terms, conditions or privileges of employment. See, e.g., Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) (hostile work environment claim of discrimination because of race under Title VII); Morales v. ATP Health & Beauty Care, Inc., No.

06CV01430, 2008 WL 3845294, at *8, *12 (D. Conn. Aug. 18, 2008) (analyzing hostile work environment claim of discrimination because of sex under Title VII, and hostile work environment claim of discrimination because of sexual orientation under Conn. Gen. Stat. § 46a-81c); Buster, 557 F. Supp. 2d at 300 (analyzing hostile work environment claim of discrimination because of race under Section 46a-60(a)(1)); Smith, 579 F. Supp. 2d at 246 (analyzing hostile work environment claim of discrimination because of race under Title VII).

In the few cases evaluating claims that an employer discriminated because of a plaintiff's sexual orientation in violation of Section 46a-81c by permitting a hostile work environment, there does not appear to have been any dispute that such claims were viable under that statute. See, e.g., Morales, 2008 WL 3845294, at *12-13 (analyzing hostile work environment claim of discrimination because of sexual orientation); Bogdahn v. Hamilton Standard Space Sys. Int'l, Inc., 46 Conn. Supp. 153, 156 (1999) (evaluating procedural and jurisdictional issues of hostile work environment claim of discrimination because of sexual orientation). See also Conway v. City of Hartford, No. CV 950553003, 1997 WL 78585, at *7 (Conn. Super. Ct. Feb. 4, 1997) (allegation that defendant "continually subjected the plaintiff to verbal ridicule because of the plaintiff's . . . sexual orientation" stated legally sufficient hostile work environment claim of discrimination because of sexual orientation).

The uniform interpretation of the phrase "terms, conditions or privileges of employment" in Section 46a-81c, as well as the uniform interpretation of parallel language in other employment antidiscrimination statutes recognizing the viability of hostile work environment

claims, demonstrate that 46a-81c, like those other laws, protects employees from hostile work environments that alter the terms, conditions or privileges of their employment.

B. By prohibiting hostile work environments created by sexual harassment, Connecticut did not authorize other discriminatory hostile work environments

Defendant's claim that Conn. Gen. Stat. § 46a-60(a) protects employees against hostile work environments, but Section 46a-81c does not, is fundamentally flawed. Defendant's argument relies on quotes from selected passages of Subsection 8 of Section 46a-60(a), and the omitted words make a significant difference in meaning. The full text of Subsection 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[.]

Subsection 8 was adopted in 1980, the same year the Equal Employment Opportunity Commission 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, 106 S. Ct. at 2405 (1986) (sexual harassment violates Title VII)). At the time Subsection 8 was adopted, the 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.

However, prior to Meritor – and, indeed, even prior to the EEOC's declaration in 1980 – it was already established that Title VII provides employees the right to work in an environment "free from discriminatory intimidation, ridicule and insult" that is based on race, religion and national origin. Meritor, 477 U.S. at 65-66, 106 S. Ct. at 2404-05. See, e.g., Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (race); Compston v. Borden, Inc., 424 F. Supp. 157 (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, 118 S. Ct. 998, 1002 (1998) (recognizing viability of claim of same-sex sexual harassment). See also Raniola v. Bratton, 243 F.3d 610, 617, 623 (2d Cir. 2001) (evidence of harassment that was sex-based but not sexual presented issue of material fact for trier of fact to resolve when evaluating whether work environment was hostile to female plaintiff because of sex in violation of Title VII).[2]

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[2] See also Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000) (reversing summary judgment for defendant in 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-

Subsection 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." Conn. Gen. Stat. § 46a-60(a)(8). However, it is inconceivable that Subsection 8 was intended to repeal protections against other discrimination against employees in the terms, conditions or privileges of their employment because of their sex, race or other traits or characteristics.

Indeed, Defendant's theory would interpret out of existence *all* claims of hostile work environment based on conduct other than "unwelcome sexual advances" – not only where the conduct is hostile or offensive because of sexual orientation, but also those where the harassing conduct was offensive or hostile because of the individual's race or religion, or where the conduct was offensive or hostile because of sex, but took some form other than sexual advances, which is the only type of conduct prohibited by Subsection 8. Those newly limited contours of an employer's duties under Connecticut's antidiscrimination statutes would be 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). The fact that courts have continued, *after* Subsection 8 was adopted

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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 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").

in 1980, to analyze claims of hostile work environment based on traits other than sex, and based on incidents other than unwelcome sexual advances demonstrates that Defendant'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 claim of sex-based but non-sexual hostile work environment under § 46a-60(a)(1)).

Connecticut's antidiscrimination laws do not authorize employers to create and allow work environments permeated with hostile or offensive acts toward employees because of their race, ethnicity, religion, sex, disability or sexual orientation. Respectfully, the Court must reject Defendant's unduly restrictive interpretation of Sections 46a-60(a)(8) as having repealed or superseded those protections.

III. CONCLUSION

For the foregoing reasons, an employer who permits a work environment that is intimidating, hostile or offensive to employees who are lesbian or gay discriminates in terms, conditions or privileges of employment because of sexual orientation in violation of Conn. Gen. Stat. § 46a-81c.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the above Memorandum of Law of Lambda Legal Defense and Education Fund, Inc. as *Amicus Curiae* was mailed and sent by facsimile or electronically delivered on March __, 2009 to all counsel and pro se parties of record and that written consent for electronic delivery was received from all counsel and pro se parties of record who were electronically served.

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