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# Verdict

May 15, 2012

Joanna L. Grossman

## **Another Frontier: Connecticut's High Court Recognizes a Cause of Action for Sexual-Orientation Harassment in the Workplace**



Over the last decade and a half, the country has been locked in a political and social fight over same-sex marriage. Last week, President Obama declared: “I have just concluded that for me personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.”

Obama's declaration is significant, since Obama had, in the past, always supported rights for same-sex couples generally, but not marriage per se. Yet this development is just one of a thousand data points that comprise the evolving battle over same-sex marriage, which voters, politicians, and opinion-makers continue to wage. The very same week Obama announced his stance, North Carolina voters amended their constitution to prohibit same-sex marriage, civil unions, domestic partnerships, and any other arrangement that might qualify as a “domestic legal union”—which is a status reserved for heterosexuals. Though late to the game, North Carolina joins thirty other states with similar, if typically narrower, constitutional amendments.

Same-sex marriage has become symbolic of gay rights generally. But the often singular emphasis on same-sex marriage obfuscates the many other important gay-rights battles that are still being fought—over rights that are just as important as the right to marriage is to the full citizenship of gays and lesbians in the United States. The workplace, long a site of civil rights battles, is perhaps the most important of all these other arenas. There, gay and lesbian workers have made many gains in fighting for non-discrimination rights, though the landscape is still uneven.

In this column, I'll situate a recent opinion from the Connecticut Supreme Court, *Patino v. Birken Manufacturing Co.* (<http://law.justia.com/cases/connecticut/supreme-court/2012/sc18441.html>), in which the court recognized a cause of action for sexual-orientation harassment, against the backdrop of the national legal landscape. Connecticut, like almost two dozen other states, has enacted a law prohibiting employment discrimination on the basis of sexual orientation. Until this case, however, it was not clear whether the law included a cause of action for sexual orientation harassment. This case, however, makes clear that, in Connecticut, gay and lesbian workers are protected against the full panoply of discrimination harms, and that employers can be held liable for failing to protect them against co-worker harassment.

## The Harassment of Luis Patino: A Longstanding Problem

The plaintiff in *Patino v. Birken* was long-suffering. Over the course of many years, Patino was subjected to vicious “name-calling on the shop floor” of Birken manufacturing, including derogatory slurs for homosexuals in English, Italian, and Spanish. His co-workers would speak these words in his presence, sometimes while standing directly behind him while he was operating machinery. Patino testified that he was devastated and “overwhelmed by anger and by frustration and the humiliation” from the harassment, and suffered a variety of ill effects. “[H]is body would shake, his work product suffered, and it became difficult for him to sleep.”

For years, Patino recorded the incidents in a diary, but did not complain to the employer about his co-workers’ behavior. This failure to immediately stand up for one’s rights may seem unusual to some, but empirically, it is common. Indeed, avoiding confrontation and trying to cope is the most common response of sexual-harassment victims. (I discuss patterns of victim response to harassment [here](http://writ.news.findlaw.com/grossman/20030408.html) (<http://writ.news.findlaw.com/grossman/20030408.html>)) After five or six years, however, Patino began to complain. He started first with his supervisor, who organized a meeting with Patino and his co-workers at which the company’s owner warned that the “bad words” were “going to stop.” And the slurs did indeed stop after the meeting, but only for a few weeks; when they started up again, Patino complained again. Some of the offenders were transferred to a different facility, but the problem persisted. Other co-workers joined forces with the remaining harassers, and the slur-yelling escalated.

At some point, Patino hired an attorney, who sent a demand letter to the company, complaining of the harassment. The company’s general counsel, now its president, wrote back to recommend that Patino undergo a psychological evaluation since he might pose a safety risk to others if he were working with precision machinery while his mental function was compromised due to the alleged harassment.

Patino filed a series of complaints with Connecticut’s human rights and opportunities commission, the first stop in an anti-discrimination lawsuit in that state. In response to one of these complaints, the parties settled, based on the company’s agreement to hold harassment training. But few of the harassing co-workers attended the training, and the problem did not go away.

Patino’s fifth complaint to the commission was the one that ultimately led to a lawsuit. He alleged that the company had created a hostile environment based on his sexual orientation by “failing to take adequate measures to alleviate the harassment or remedy the hostile work environment.” A jury found in Patino’s favor and awarded him \$94,500 in damages.

On appeal, the company argued, unsuccessfully, that Connecticut law does not recognize a cause of action for hostile environment harassment on the basis of sexual orientation.

## The General Legal Landscape for Sexual-Orientation Discrimination

Whether employees are protected from sexual-orientation discrimination at work varies by jurisdiction. This is so, in large part, because there is no federal law banning employers—or anyone else—from discriminating on the basis of sexual orientation. Title VII of the Civil Rights Act of 1964 prohibits employers with at least fifteen employees from discriminating on the basis of race, color, religion, sex, or national origin. The statute does not expressly cover sexual-orientation discrimination, and every court to consider the issue has ruled that “sex” does not include “sexual orientation.” Thus, gays and lesbians have no direct protection against discrimination under Title VII. (Title VII is not the only federal anti-discrimination law, but the others, such as Titles IX and VI, and Section 1981, are narrower and none of them applies to sexual orientation.)

To the extent that gays and lesbians have successfully deployed Title VII, it has been in same-sex harassment cases or via sex-stereotyping theory. In 1998, in *Oncale v. Sundowner Services* (<http://supreme.justia.com/cases/federal/us/523/75/case.html>), the U.S. Supreme Court ruled that Title VII prohibits same-sex sexual harassment, as long as the plaintiff is able to prove that the harassment occurred because of the victim’s sex. The Court observed that this requirement might be met in one of three ways: (i) with evidence of the perpetrator’s homosexuality; (ii) with evidence that the perpetrator in fact targeted only members of one sex;

or (iii) with evidence that the harassment took the form of gender-role policing—that is, it was perpetrated to punish an employee for failing to live up to traditional gender norms. The most obvious type of Title VII claim permitted by the Court in *Oncale* would be one brought based on sexual harassment of a male by a gay male supervisor who was motivated by sexual desire.

The application of the third approach suggested in *Oncale* is facilitated by an earlier ruling of the Court, handed down in 1989, *Price Waterhouse v. Hopkins* (<http://supreme.justia.com/cases/federal/us/490/228/>). There, the Court recognized that the application of a sex stereotype is a form of sex discrimination. Thus, the Court found that illegal discrimination had occurred when an un-feminine woman was turned down for partner at least in part because of the way she dressed and conducted herself. By the same logic, an effeminate man who has been harassed by straight workers may have an actionable claim if he can prove that the harassment he endured was motivated by “gender-policing”—that is, by trying to punish or rein in his gender non-conformity. But courts have been wary of “boot-strapping” in this area—remaining reluctant to allow gay or lesbian plaintiffs using sex-discrimination theory to remedy what is at core sexual-orientation discrimination (and thus is not actionable).

Since the 1970s, there have been efforts to establish federal-law protection against sexual-orientation discrimination. The Employment Non-Discrimination Act (ENDA) has been introduced in virtually every Congress for more than a decade, but has never passed. ENDA would, if enacted, ban discrimination on the basis of an individual’s “actual or perceived sexual orientation,” which the legislation defines to include “homosexuality, heterosexuality, or bisexuality.” Covered employers would not be allowed to take sexual orientation into account when deciding whether to hire, fire, or promote someone. ENDA would largely borrow its substance and procedure from Title VII, although it would not permit disparate-impact claims (that is, challenges to neutral rules that disproportionately impact a protected class without being justified by any business necessity). ENDA would also exempt religious organizations completely from the Act.

The 2007 version of ENDA was passed by the House of Representatives, but never made it to a vote in the Senate. This version of the bill prohibited sexual-orientation discrimination, but was silent on gender-identity or transgender discrimination. Current versions of the bill in the House and Senate prohibit both. If ENDA passes, sexual orientation (and maybe gender identity, depending on the version of the bill that was passed) will be added to the list of protected characteristics under Title VII. Employers would then be prohibited from taking any action on the basis of sexual orientation, regardless of motive. This broad protection would include protection against sexual-orientation harassment—whether or not it fits one of the three scenarios suggested by the Court in *Oncale* to be actionable.

### **State Laws Against Sexual-Orientation Discrimination**

While ENDA has stalled in Congress repeatedly, many states have adopted laws to prohibit sexual-orientation discrimination. These laws are not limited to the workplace. Some states have added provisions to their public-accommodations laws to prohibit sexual-orientation discrimination by stores, restaurants, hotels, and other businesses that serve the public. Some have amended housing laws to ban sexual-orientation discrimination by landlords and others connected with housing.

As of this year, 2012, about half the states have enacted laws prohibiting sexual-orientation discrimination in various contexts, including employment, housing, and public accommodations; sixteen of these expressly cover gender-identity discrimination. (The ACLU provides a helpful state-by-state map [here](http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map) (<http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>).) Some states only restrict discrimination by public employers, some by all employers above a certain size. Moreover, even in jurisdictions where it is not required by law, an increasing number of large employers prohibit sexual-orientation discrimination as a matter of company policy. Given the very high prevalence of sexual-orientation discrimination documented by surveys, these developments are crucial.

### **Connecticut’s Sexual-Orientation Discrimination Law**

With this background in mind, I’ll now discuss the Patino case itself. In 1991, the Connecticut legislature passed a law banning employment discrimination on the basis of sexual orientation. The law, section 461-81c of the

Connecticut General Statutes, does not allow 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. . . .”

The question in *Patino* is whether this provision is expansive enough to prohibit hostile-environment harassment. This may seem like a strange line of argument, given that Connecticut’s code expressly bans sexual-orientation discrimination. The more common type of litigation in this area is about whether a statute, like Title VII, which does not ban sexual-orientation discrimination, can be read as if it does. But the employer in *Patino* argued that while the Connecticut statute may ban “discrimination,” it does not ban this particular form of discriminatory conduct—hostile-environment harassment. The Connecticut court rightly rejected this argument, however, for the following reasons:

First, the court concluded that the phrase “terms, conditions, or privileges of employment” is a term of art in antidiscrimination law, which has come to encompass a standard set of claims, including harassment claims.

Second, the court noted that Connecticut’s antidiscrimination laws have always interpreted to be at least as broad as federal ones are. Thus, an employer’s duties under Connecticut law will include any duties imposed by Title VII. And, there is no question that sexual harassment is actionable under Title VII, even though the statute makes no mention of it. The U.S. Supreme Court ruled in *Meritor Savings Bank v. Vinson* (<http://supreme.justia.com/cases/federal/us/477/571/>) (1986) that hostile-environment harassment is a form of actionable sex discrimination. It so ruled, in part, because the legislature’s use of the phrase “terms, conditions, or privileges of employment” was broad enough to evince a congressional intent “to strike at the entire spectrum of disparate treatment of men and women in employment.” And a hostile environment, as defined by the Court, is one that is severe or pervasive enough to alter the *terms and conditions* of the workplace.

Third, other anti-discrimination statutes in the Connecticut code, which also utilize the “terms, conditions, and privileges” phrase, have been interpreted by the state supreme court to encompass a cause of action for hostile-environment discrimination. Courts have, for example, allowed claims for disability and racial harassment. And, as a general rule, the same phrase will be given the same meaning across provisions emanating from the same legislative body.

Fourth, the court rejected the employer’s suggestion that the sexual-orientation discrimination law was narrower than other anti-discrimination provisions because it could not be understood as redressing a “constitutional tort” since the federal Equal Protection Clause has not been interpreted to give special scrutiny to sexual-orientation classifications. The court found no support in any of its laws for this differentiation, however.

Fifth, although the sex-discrimination provision in the Connecticut code does expressly include a hostile work environment in its definition of unlawful discrimination, the Connecticut court concluded that such language is not the exclusive means by which the legislature could create such a cause of action. The court, in previous cases, as noted above, had allowed a cause of action for hostile-environment harassment under statutes that did not expressly mention it. And such interpretations were entirely consistent with the legislature’s clear goal of eradicating all modes of workplace conduct that create an unequal playing field for a disadvantaged group.

Once the Connecticut court concluded that Connecticut’s sexual-orientation discrimination law prohibits hostile-environment harassment, the court had no trouble concluding that the jury’s verdict in favor of Patino was supported by the evidence. The jury was presented with evidence that “derogatory comments were made multiple times per week, sometimes several times a day, over a prolonged period of time, despite the plaintiff’s repeated complaints to his supervisors. . . . [H]is coworkers constantly yelled slurs in his presence as he worked on the shop floor.” This more than satisfied the legal definition of a hostile environment, the court concluded. (The court, thankfully, was unmoved by the employer’s argument that the harassment was muted by the fact that Patino did not understand all of the languages in which the slurs were spoken.) And Patino should not, despite the employer’s urging to the contrary, be punished because “his strong work ethic” and “ability to withstand harassment on the job” had allowed him to put up with the harassment for so long.

### **A Surprising Aspect of the Case: An Employer Willing to Litigate What Was Quite Plainly Illegal**

## Discrimination Up to the State's Highest Court

*Patino v. Birken* was, in many ways, an easy case. Connecticut has made clear its disapproval of sexual-orientation discrimination by adopting an express provision prohibiting it. What's surprising is that this employer litigated all the way to the state supreme court over whether that statute, which broadly prohibits employment discrimination on the basis of sexual orientation, could be read to exclude one of the most common forms of discrimination. The Connecticut Supreme Court was right to conclude, unanimously, that it cannot. None of this kind of state-by-state litigation would be necessary, however, if Congress would simply pass ENDA and create a level playing field for gay and lesbian workers in all states.



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