Cases Concerning Sexual Orientation and Gender Identity-Based Workplace Harassment in Select States with Protective Laws

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LGBTQ+ Workplace Harassment:
Assessing, Investigating, and Litigating Sexual Orientation and Gender Identity-Based Bias in States with Protective Laws
Lavender Law 2020
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As of July 23, 2020

California

Statutes and Regulations

- Gov. Code § 12940: Fair Employment and Housing Act prohibiting employment discrimination and harassment based on sexual orientation, gender identity, and gender expression.
- Cal. Code Regs., tit. 2, §§ 11030-34: "Regulations Regarding Transgender Identity and Expression" interpreting the FEHA.

Cases

Akoidu v. Greyhound Lines, Inc., No. B147046, 2002 WL 399476 (Cal. Ct. App. 2002) (unpublished)

- Affirming summary judgment for employer and coworkers, determining that former employee failed to establish that his coworkers' homophobic comments—including "mother-fucker," "woman," "sissy," "gay," and "homosexual"—were directed at him "because he was a man or because of any sexual attraction," and not "simply a reflection of personal animosity" toward him. *Id.* at *1, *7.

Hope v. Cal. Youth Auth., 134 Cal. App. 4th 577 (Ct. App. 2006)

- Affirming jury verdict that supervisor's ongoing "derogatory remarks based on [gay employee's] sexual orientation" amounted to a hostile work environment in violation of FEHA. *See id.* at 580-81, 589. The court concluded that substantial evidence supported that the employee faced sufficiently severe or pervasive harassment, including his supervisor's calling him a "motherfuckin' faggot," "homo," "faggot ass bitch," or similar derogatory term every day and instructing other employees to not help him with his work. *Id.* at 589-91. Although the plaintiff also alleged harassment based on HIV status, the court did not discuss this ground as it determined that the evidence was sufficient to support liability for harassment based on sexual orientation. *Id.* at 589 n.1.

Kovatch v. Cal. Cas. Mgmt. Co., 65 Cal. App. 4th 1256 (Ct. App. 1998) (note: this case arose under the Labor Code, but FEHA has since incorporated those provisions)

- Reversing summary judgment to employer on gay employee's claim of constructive discharge as a result of sexual orientation-based harassment because his supervisor's repeated homophobic and derogatory remarks created work conditions that a reasonable employee in the plaintiff's position would have found "intolerable." *Id.* at 1261-66. The supervisor's remarks included telling the plaintiff that the area in which he lived was the "fag capitol of San Diego," that their waiter at dinner "looks like a big fag," that another employee was a "fag," that another employee was fired because he was gay, that he better get his act together along with "I know you have a problem with women," and, "I don't like you. You're a faggot, and there is

no place for faggots in this company," as well as giving the employee a birthday card with imprints of a kiss on it and the message "Where do you want it?" printed on the inside. *Id.* at 1268-70. The court also noted that the repeated evidence of "antigay animus" could show a continuous pattern of discrimination. *Id.* at 1270-71.

Pearl v. City of Los Angeles, 36 Cal. App. 5th 475 (Ct. App. 2019) (note: the sole issue on appeal is whether the court abused its discretion in reducing damages).

- Upholding jury verdict for employee and trial court's remittitur, and noting that "the jury found [the plaintiff] was subjected to unlawful harassment in his employment based on *perceived sexual orientation*; [the plaintiff's] supervisors knew of the harassment, participated in, engaged in, assisted in or encouraged the harassing conduct and failed to take immediate and appropriate corrective action; and the harassment and his supervisors' failure to prevent harassment and retaliation were substantial factors in causing [the plaintiff's] harm." *Id.* at 483. The plaintiff's supervisor created a photoshopped image of the plaintiff and another employee embracing on a jet ski, showed it to other employees and supervisors, and made it his desktop screensaver; his coworkers said in his presence, "Quit being a fag," "That's some gay shit," and "All fags stick together"; and he arrived at work one day to find a corn cob, an anal sex toy, and coupons for hot dogs on his desk. *Id.* at 478-80.

Terris v. Cty. of Santa Barbara, No. B268849, 2017 WL 4683778 (Ct. App. Oct. 19, 2017) (unpublished), *vacated on other grounds*, 20 Cal. App. 5th 551 (Ct. App. 2018)

- Affirming summary judgment to employer, concluding that lesbian employee could not claim sexual orientation discrimination if her employer did not know of her sexual orientation when making homophobic comments. *Id.* at *1, *4. The court noted that a "huge gap in the causal nexus" between derogatory remarks and an adverse employment action and the fact that the employer "did not know [the employee's] sexual orientation and his 'stray remarks' were not directed at her" rendered no triable issue of fact as to sexual orientation discrimination. *Id.* "[B]igoted language alone does not support a FEHA case," and "proof of 'discriminatory animus' is necessary." *Id.* at *4.

Illinois

Statutes and Regulations

- 775 Ill. Comp. Stat. 5/1-103, 5/2-101, 5/2-102: Illinois Human Rights Act prohibiting employment discrimination on the basis of "actual" or "perceived" "sexual orientation," defined as including "gender-related identity,." Sexual orientation was added as a protected classification in 2006.

Cases

1212 Rest. Grp., LLC v. Alexander, 959 N.E.2d 155 (Ill. App. Ct. 2011)

- Affirming Chicago Commission on Human Relations' finding of hostile work environment on the basis of perceived sexual orientation, determining that it would be hard to imagine a workplace "more objectively offensive to an employee, more viciously permeated with anti-gay vitriol." *Id.* at 170-71. A heterosexual restauranteur's business partners had called him—on a nearly daily basis and in front of restaurant staff, contractors, and restaurant customers and via voicemail—a "fag," "faggot," "queer," "sissy," "homo," "dicksucker," "Marybeth," and "buttercup"; told him "you know you don't like girls, you know you just like to suck dick," "You've got to be taking it in the ass from [a local drag queen]," and "We don't want [to hire] any more gays, we've already got you, one dick sucker is enough"; and asked him if he was "going to go to the washroom now and blow [the openly gay restaurant host]." *Id.* at 159-61.

Lesiv v. Ill. Cent. R.R. Co., No. 1-19-0912, 2019 WL 7018903 (Ill. App. Ct. Dec. 18, 2019) (unpublished)

- Affirming summary judgment to employer on heterosexual employee's claim of hostile work environment based on perceived sexual orientation, determining that supervisors' comments were insufficiently severe because they were "not physically threatening, objectively not humiliating but a 'mere offensive utterance.'" *Id.* at *13 (citation omitted). Comments included including calling him gay, asking him if he was "going to the gay bars" and Boystown (LGBTQ-friendly neighborhood in Chicago), telling other employees not to "drop the soap" because he had entered the locker room, and telling him that he looked "like a gay Russian." *Id.* at *1-2, *12. The comments were also insufficiently pervasive because they were all made during incidents separated by one year, one month, five months, and less than one month. *Id.* at *12-13.

Martinez v. Nw. Univ., 173 F. Supp. 3d 777 (N.D. Ill. Mar. 29, 2016) (interpreting state law claims)

- Granting summary judgment to employer on lesbian police officer's claim of hostile work environment on the basis of sexual orientation because her supervisor's comments did not constitute "sexual advances," "requests for sexual favors," or "conduct of a sexual nature" as required by the Illinois Human Rights Act. *Id.* at 784-85. The supervisor's referring to offenders or

students as "fag," "faggot," "pussy," "cocksucker," and "sissy"; making comments to another gay officer concerning a sick day the lesbian police officer had taken; and falsely altering one of her timesheets did not create a hostile work environment. *Id.* at 784. The court said, however that Act "does not provide a cause of action for a hostile work environment based on sexual orientation harassment," alone and that its plain language requires harassment of a *sexual* nature for a hostile work environment determination. *Id.*

Massachusetts

Statutes and Regulations

- Mass. Gen. Laws ch. 151B, § 4 (West 2018): prohibiting discrimination on the basis of "sexual orientation" or "gender identity" even if "perceived" or "presumed," in employment and housing, among other areas, including refusal to allow an employee to "groom and dress consistent with the employee's gender identity or expression." Sexual orientation was added as a protected classification in 1989 and gender identity in 2012.

Cases

Mass. Comm'n Against Discrimination v. Securitas Sec. Servs. USA, Inc., No. 13-BEM-01906, 2016 WL 4426971 (Mass. Comm'n Against Discrimination Aug. 9, 2016) (unpublished)

- Holding that supervisor of transgender male employee, who previously identified as a lesbian female, subjected him to a hostile work environment based on his gender identity and sexual orientation because he persistently made "very offensive comments" about the employee that were unwelcome and sufficiently "severe or persistent" to interfere with the employee's ability to do his job. *Id.* at *2-3, *8. The supervisor's comments included first that it is "wrong," "unclean," and "an abomination" for a woman to love another woman and that the employee was "going to hell"; and after the employee's transition, that he would "never be a real man," that if he wanted to be treated like a man, he should not take offense at things said in the office, that the transition he was undergoing was wrong, that his body would be filled with scar tissue after the hysterectomy, and that he was unclean and going to hell, and continued to refer to the employee as female and a "girl" in situations "where the reference could no longer be deemed accidental or unintentional," including nine times in an email written at least two years after the employee began publicly identifying as male. *Id.* at *3.

Messina v. Araserve, Inc., 906 F. Supp. 34 (D. Mass. 1995) (interpreting state law claims)

- Denying in part employer's motion for summary judgment regarding gay cook's claim of "hostile environment sexual harassment" and determining that head chef's comments and gestures to him were pervasive enough to affect the work performance of a reasonable gay man such as to present a triable issue of fact. *Id.* at 36-37. Comments and actions included calling him "Chucky Sucky"; responding, after cook asked for a "thing" (referring to a thermometer), "I've got your thing right here" and grabbing his crotch; telling him to "blow him"; asking him "Where have you been? Dropping a load in someone's mouth?"; and pretending to perform oral sex on kitchen tools. *Id.* at 35.

Salvi v. Suffolk Cty. Sheriff's Dep't, 855 N.E.2d 777 (Mass. App. Ct. 2006)

- Affirming jury verdict on hostile work environment claim brought by gay corrections officer who hid his sexual orientation at work, determining that his employer's actions and comments permitted the jury to find a recognizable "pattern of mistreatment" because of his sexual orientation. *Id.* at 786. Shortly after rumors of his sexual orientation surfaced and within a month of his coworker calling him a "fag" at a bar, the officer received an unidentified package containing children's block letters spelling out "FAG"; his coworkers also snickered at him and called him a "sissy" when his name was called during rollcall and shunned him in the cafeteria; and he was reassigned to the "female unit" and the solitary confinement area. *Id.* at 784-86.

Minnesota

Statutes and Regulations

- Minn. Stat. § 363A.03, 08 (2019): Minnesota Human Rights Act prohibiting employment discrimination on the basis of "sexual orientation," including "self-image or identity not traditionally associated with one's biological maleness or femaleness," whether actual or perceived. Sexual orientation was added as a protected classification in 1993.

Cases

Goins v. West Grp., 635 N.W.2d 717 (Minn. 2001)

- Reinstating summary judgment to employer on transgender employee's claim of discrimination on the basis of sexual orientation (specifically, transgender status) and hostile work environment, concluding that employer's policy of designating restroom use according to "biological gender" rather than "self-image of gender" was not sexual orientation discrimination and that the conduct of female coworkers, including complaining about the plaintiff's using the same restroom as them, gossiping about her, and staring and glaring, was not severe or pervasive harassment. *Id.* at 723, 725-26. On the matter of gender-inclusive restroom facilities, the court said that "the traditional and accepted practice in the employment setting is to provide restroom facilities that *reflect the cultural preference for restroom designation* based on biological gender [and] [t]o conclude that the [Minnesota Human Rights Act] contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely *restrain employer discretion* in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature" that would intrude upon its "policy-making function." *Id.* at 723 (emphasis added).

Hunter v. United Parcel Serv., Inc., 697 F.3d 697 (8th Cir. 2012) (interpreting state law claims)

- Affirming summary judgment to employer on transgender employee's claim of discrimination based on transgender status, determining that the employer did not know or perceive that the employee was transgender when it denied the employee a job. *Id.* at 703-04. Even though the employee used his female birth name and wore a binder, men's clothing, and short hair to the interview, the court said that his appearance could be attributed to fashion trends and was not enough to prove discriminatory motive under the Minnesota Human Rights Act. *Id.*

Thomas v. Coleman Enters., No. C6-99-1327, 2000 WL 385479 (Minn. Ct. App. Apr. 18, 2000) (unpublished)

- Affirming summary judgment to employer on lesbian employee's claims of sexual orientation discrimination and harassment, determining that her supervisor's anti-lesbian comments were insufficiently severe because they were either made outside of

work (comment that lesbians were "freaks") or not directed at her personally (comment referring to a third party who had been sexually harassed as a "lesbian" and "freak" who "probably [didn't] like to sleep with men") and because there was no evidence that the supervisor was aware that she was a lesbian. *Id.* at *1-2, *4-5.

New York

Statutes and Regulations

- N.Y. Exec. Law §§ 291, 292, 296 (McKinney 2020): New York State Human Rights Law prohibiting discrimination on the basis of "sexual orientation, gender identity or expression," whether "actual or perceived," in, among other areas, employment, education, public accommodations, and housing and leasing. Sexual orientation was added as a protected classification in 2002 and gender identity in February 2019.
- Executive Order No. 187, Ensuring Diversity and Inclusion and Combating Harassment and Discrimination in the Workplace (2018): prohibits sexual orientation and gender identity discrimination by state agencies.

Cases

Cole v. Sears, Roebuck & Co., 994 N.Y.S.2d 62 (App. Div. 2014)

- Affirming denial of employer's motion for summary judgment, finding that an employee had been subjected to "constant bombardment of anti-gay remarks and . . . insulting and offensive remarks about other . . . employees who were thought to be gay; crude anti-gay humor and graphic sexual images disseminated by text and email; and anti-gay hate speech made repeatedly and openly by an operations manager in the presence of [the employee] and others," which raised sufficient evidence to support a finding of hostile work environment and retaliation. *Id.* at 63. The court reasoned that this was particularly because company management became aware of the employee's sexual orientation after he had made a formal written complaint about the "anti-gay harassment" and subsequently terminated him two months thereafter. *Id.* (Author's note: the opinion does not specifically state the plaintiff's sexual orientation, but the defendants' brief says he was "homosexual.")

Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (App. Div. 2005) (note: predates the enactment of gender identity as a protected classification)

- Reversing denial of motion to dismiss nonprofit organization's claim of sex and gender discrimination, holding that its landlord could prohibit its transgender female clients from using the women's restroom because the landlord required all tenants in the building to use the restroom matching their "biological sex" and the restroom designations were made on the basis of "biological sex" rather than "biological self-image." *Id.* at 46-47 (citation omitted). *But see Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 391-92, 396 (Sup. Ct. 1995) (denying employer's motion to dismiss, finding that derogatory comments made regarding the "immoral" nature of a "transsexual" employee's "sex reassignment surgery" violated New York City's prohibition against sex-based discrimination).

Rohn Padmore, Inc. v. LC Play Inc., 679 F. Supp. 2d 454 (S.D.N.Y. 2010) (interpreting state law claims)

- Denying in part employer's motion for summary judgment and finding that employee, who stated that he was not gay, established prima facie case of discrimination because he provided evidence that he was terminated based on his perceived sexual orientation. *Id.* at 460-62. The evidence was an e-mail from the owner of the business that stated: "The reason for your termination was because of the image of my company. The models and other people had questions about your sexuality and my company can't afford to [be] attached to no gay shit." *Id.* at 457-58.

Salemi v. Gloria's Tribeca, Inc., 982 N.Y.S.2d 458 (App. Div. 2014)

- Upholding jury verdict, finding that a lesbian manager had introduced "extensive evidence of . . . discriminatory conduct" by her employer on the basis of her sexual orientation. *Id.* at 459-60. The employer repeatedly stated in quasi-mandatory weekly prayer meetings that homosexuality was "a sin" and that "gay people" were "going to hell" and constructively discharged the manager after she objected to such comments, chose not to attend prayer meetings, and refused to fire another employee because of his sexual orientation. *Id.*

Sandiford v. N.Y.C. Dep't of Educ., 943 N.Y.S.2d 48 (App. Div. 2012), *aff'd*, 22 N.Y.3d 914 (Ct. App. 2013)

- Modifying grant of summary judgment in favor of a lesbian woman's former employer, finding that her supervisor's repeated derogatory remarks regarding gays and lesbians and other staff members' taunting her with notes and "lewd comments" were sufficient to raise a question of fact as to a claim of discrimination and retaliation because of her sexual orientation. *Id.* at 50-51. Her supervisor made comments that "God would judge . . . whatever two men [are] doing behind closed door[s]," that "his church can change people like us for the better," and, while acting out an "obscene walk," that "this is how faggots walk," as well as admonished students who used the word "lesbian." *Id.* at 50.

Torres v. City of New York, No. 18 Civ. 3644 (LGS), 2019 WL 1765223 (S.D.N.Y. Apr. 22, 2019)) (interpreting state law claims)

- Granting motion to dismiss sexual orientation-based discrimination and hostile work environment claims brought by lesbian police officer who was given unfavorable shifts and denied overtime and participation in community events. *Id.* at *1. The plaintiff had filed an administrative complaint with the NYPD Office of Equal Employment Opportunity after her coworker told the plaintiff's female domestic partner that "you should have used the men's bathroom, bitch," called the plaintiff a "filthy animal," and told her to "go eat pussy, you lesbian bitch." *Id.* The court ruled that the complaint failed to allege that the adverse employment actions occurred because of her sexual orientation rather than her filing an administrative complaint or that her employer did nothing about the comments, and that her coworker's comments were too isolated to satisfy the pervasiveness standard. *Id.* at *3-4.

Zimmer v. Warner Bros. Pictures, Inc., 63 N.Y.S.3d 307 (Sup. Ct. 2016) (unpublished table decision)

- Denying summary judgment to employer in claim of sexual orientation-based harassment and holding that remarks to gay employee that a coat was "too gay" and "so gay" are "derogatory and degrading, based on sexual orientation, and subjectively intolerable to a homosexual person." *Id.* at *1, *3-4. The court said that such remarks "signal[ed] a view about the desirability and acceptability of gay attributes in the work place and the propriety of a work environment that denigrates gay attributes." *Id.* at *3.

New Jersey

Statutes and Regulations

- N.J. Stat. Ann. §§ 10:5-4, -5, -12 (West 2020): New Jersey Law Against Discrimination prohibiting discrimination on the basis of "affectional or sexual orientation" or "gender identity or expression," even if "perceived" or "presumed," in employment, education, public accommodations, and housing and leasing, among other areas, including refusal to allow an employee to "groom and dress consistent with the employee's gender identity or expression." Sexual orientation was added as a protected classification in 1992 and gender identity in 2007.

Cases

Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999), *rev'd on other grounds*, 530 U.S. 640 (2000)

- Affirming reversal of summary judgment to Boy Scouts of America and concluding that the expulsion of an openly gay Boy Scouts leader after a newspaper disclosed his sexual orientation constituted discrimination against him on the basis of sexual orientation. *Id.* at 1204-05, 1218-19. The court determined that the Boy Scouts was a place of public accommodation covered under New Jersey's Law Against Discrimination. *Id.* at 1218.

Enriquez v. W. Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001) (note: predates the enactment of gender identity as a protected classification)

- Reversing summary judgment to employer on sex discrimination claim brought by transgender doctor after her supervisors confronted her for making them uncomfortable for presenting as female, told her to "stop all this and go back to your previous appearance!," asked her to not notify her patients of her transition, and ultimately terminated her. *Id.* at 367-69. The court concluded that "sex discrimination . . . includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman" because "[i]t is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but *would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder*." *Id.* at 373 (emphasis added).

Kwiatkowski v. Merrill Lynch, No. A-2270-06T1, 2008 WL 3875417 (N.J. Super. Ct. App. Div. Aug. 13, 2008) (unpublished)

- Reversing summary judgment to employer on gay employee's claim of harassment based on sexual orientation, concluding that his supervisor's conduct gave the employee a "genuine reason to question [his supervisor] every time she criticized his

work and evaluated his performance, and to wonder whether the criticism was valid or instead was generated by her bias against gay men." *Id.* at *16. The plaintiff's supervisor called him a "stupid fag" under her breath while passing him in the hallway. *Id.* at *4. The court said that even though she denied knowing he was gay and he had told very few people that he was gay, amounted to "patently offensive" and "instantaneous" injury made by "someone who should be protecting the employee from such conduct in the workplace," which "ma[de] him question his identity and his decision to identify himself as a gay man in a straight world." *Id.* at *2-4, *16.

L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 886 A.2d 1090 (N.J. Super. Ct. App. Div. 2005), *aff'd as modified*, 915 A.2d 535 (N.J. 2007)

- In case of school-based bullying and peer harassment, affirming New Jersey Division of Civil Rights' administrative determination of discrimination and harassment on the basis of sexual orientation and concluding that "a reasonable person in [the complaining male student's] protected class would believe that the school environment was hostile and threatening" on the basis of his perceived sexual orientation. *Id.* at 1104-05. Of note, the court determined that the principles for evaluating classmate harassment based on sexual orientation were substantially the same as those employed to evaluate whether sexual harassment created a hostile work environment. *Id.* at 1102. The student alleged that other students, from fourth grade all the way through high school, called him "gay," "homo," "faggot," and "butt boy" on a nearly daily basis; used homophobic slurs against him in the lunch line and then grabbed his genitals and "humped" him; and left a note in his locker reading "You're a dancer, you're gay, you're a faggot, you don't belong in our school, get out." *Id.* at 1096-98.

Zalewski v. Overlook Hosp., 692 A.2d 131 (N.J. Super. Ct. Law Div. 1996)

- Denying employer's motion for summary judgment and concluding that heterosexual employee had produced sufficient evidence to demonstrate same-sex sexual harassment based on sexual orientation. *Id.* at 135-36. The employee's coworkers harassed him for their perception that he was a virgin and effeminate, including by using terms like "whack'o" and "jerk-off" to insinuate that he masturbated in lieu of having sex with women and placing pictures on his desk and in his locker with captions referencing his lack of sex with women, such as an altered photo depicting him viewing a *Penthouse* magazine and stating "Wow! Is this what it looks like? How gross. I'll never touch anything like that. Ughhhh!" *Id.* at 131-32.

Pennsylvania

Statutes and Regulations

- Although discrimination based on sexual orientation or gender identity are not expressly prohibited by statute, effective August 2018, the Pennsylvania Human Relations Commission interprets sex discrimination, prohibited by 43 Pa. Cons. Stat. § 953, to include sexual orientation and gender identity and expression.
- Executive Order No. 2016-04, Equal Employment Opportunity (Apr. 7, 2016), and Executive Order No. 2016-05, Contract Compliance (Apr. 7, 2016), also prohibit sexual orientation and gender identity discrimination by state agencies and private employers that contract with the state or receive state grants.

Cases

Bonson v. Hanover Foods Corp., No. 1:19-CV-54, 2020 WL 1550590 (M.D. Pa. Apr. 1, 2020)

- Denying summary judgment to employer on employee's federal and state law claims of hostile work environment based on "stereotypical perception of his sexuality" and "perceived gender identification that did not comport with . . . stereotypical norms." *Id.* at *1, *5. The court determined that his supervisors' telling people that he was gay because he has "good hygiene, combed his hair, and smelled good" and referring to his car as "something a queer would drive" were motivated by a belief that he did not conform to gender stereotypes and that their calling him derogatory names such as "freezer fairy," "fag," and "queer" several times per week and asking his mother how her "gay son" was doing amounted to severe and pervasive conduct. *Id.* at *5-6. The court also held that the employer's terminating him for failure to show up to work was pretext, as apart from the plaintiff's evidence of harassment, he also presented sufficient evidence that the employer did not terminate other employees who had not shown up to work. *Id.* at *7-8.