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KATZ, J., concurring. On appeal, the defendants, attorney general Richard Blumenthal and the state of Connecticut, proffer two reasons why the trial court improperly denied their motion to dismiss the claim of the plaintiff, former Superior Court Judge Robert C. Flanagan, seeking reimbursement for legal fees pursuant to General Statutes § 5-141d (c).[1] First, they contend that the trial court improperly determined that § 5-141d constitutes a waiver of the state's sovereign immunity. Second, they contend that, even if § 5-141d constitutes such a waiver, the plaintiff's claim is barred because it does not fall within the ambit of the statute, which requires that he be ''thereafter found to have acted . . . in the scope of his employment . . . .'' General Statutes § 5-141d (c). Conversely, the plaintiff claims that the trial court properly determined that his claim was not barred by the doctrine of sovereign immunity. The plaintiff further contends that the allegations in his complaint satisfy the statutory requirement of acting ''in the scope of his employment'' because he was required to defend a ''spurious employment discrimination case brought by a disgruntled employee of the [j]udicial [d]epartment.''[2]

I disagree with the majority's conclusion that the trial court improperly determined that § 5-141d constitutes a waiver of the state's sovereign immunity. I would conclude, however, that the defendants are entitled to prevail under their second claim, namely, that, even if § 5-141d constitutes such a waiver, the plaintiff has failed to satisfy the necessary statutory predicate that he be ''thereafter found to have acted . . . in the scope of his employment,'' because the claim brought against the plaintiff for which he seeks reimbursement arose as a result of a consensual sexual relationship. Therefore, I would conclude that the court had jurisdiction to consider the case, but that the plaintiff cannot satisfy the prerequisite to reimbursement under the statute as a matter of law.

I

In *St. George* v. *Gordon*, 264 Conn. 538, 547–53, 825 A.2d 90 (2003), this court recently considered whether the same statute at issue in the present case, § 5-141d, abrogated sovereign immunity so as to permit state employees to bring an action in Superior Court against the state for indemnification. I dissented in that case based on my disagreement with the majority's conclusion that § 5-141d does not abrogate sovereign immunity because, although § 5-141d provides an express waiver of immunity from liability, it neither expressly nor implicitly waives immunity from suit. See id., 551–53. I concluded therein that ''§ 5-141d, when viewed in light of the statutory language, its legislative history and the policy that the statute was intended to effectuate,

indicates the legislature's intent to abrogate sovereign immunity.'' Id., 565 (*Katz, J.*, dissenting). I see no reason to deviate from that recent determination. Therefore, predicated on the reasoning in my dissenting opinion in *St. George*, I would conclude in the present case that the trial court properly declined to dismiss the plaintiff's action based upon the defendants' claim of sovereign immunity.

II

Therefore, I next address the question of whether the plaintiff can satisfy, as a matter of law, the statutory prerequisite to reimbursement under § 5-141d. As a preliminary matter, I address the plaintiff's contention that we cannot review the issue of the statutory prerequisite. Specifically, the plaintiff contends that reviewing whether he had acted in the scope of his employment would require this court to resolve a factual dispute, and that such an exercise is improper when reviewing a trial court's denial of a motion to dismiss. See *Mahoney* v. *Lensink*, 213 Conn. 548, 567, 569 A.2d 518 (1990) (when reviewing motion to dismiss, this court is ''limited to the facts alleged in the plaintiff[s'] complaint'' [internal quotation marks omitted]); *Barde* v. *Board of Trustees*, 207 Conn. 59, 62, 539 A.2d 1000 (1988) (''motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone'' [internal quotation marks omitted]). As explained further herein, I disagree that review of this issue requires the resolution of a factual dispute.

Although most claims raising the issue of whether an employee had acted in the scope of his or her employment present a question of fact, necessitating a case-by-case inquiry, cases may arise ''in which an employee is so clearly within or without the scope of his employment that the question is one of law . . . .'' *King* v. *Board of Education*, 203 Conn. 324, 327, 524 A.2d 1131 (1987); accord *Tonelli* v. *United States*, 60 F.3d 492, 495 (8th Cir. 1995) (''[a]lthough usually a factual issue, determining whether the scope of employment includes an act that departs markedly from the employer's business may be a question of law''); *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, 216 Conn. 200, 207, 579 A.2d 69 (1990) (''occasional cases where a servant's digression from duty is so clear-cut that the disposition of the case becomes a matter of law'' [internal quotation marks omitted]). I would conclude that the present case is one of those instances in which the plaintiff, as a matter of law, cannot be found to have acted in the scope of his employment.

''In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.''

Pamela B. v. *Ment*, 244 Conn. 296, 308, 709 A.2d 1089 (1998). In examining the facts alleged, I am mindful of certain guiding principles. Pleadings are to be read ''broadly and realistically rather than narrowly and technically.'' (Internal quotation marks omitted.) *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 795, 807 A.2d 467 (2002). Statutes in derogation of sovereign immunity, however, are to be construed narrowly. *Hunte* v. *Blumenthal*, 238 Conn. 146, 152, 680 A.2d 1231 (1996); *Spring* v. *Constantino*, 168 Conn. 563, 570, 362 A.2d 871 (1975). ''[A] party attempting to sue under the legislative exception [to sovereign immunity] must come clearly within its provisions, because [s]tatutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed . . . . *Berger, Lehman Associates, Inc.* v. *State*, 178 Conn. 352, 356, 422 A.2d 268 (1979).'' (Internal quotation marks omitted.) *Babes* v. *Bennett*, 247 Conn. 256, 262, 721 A.2d 511 (1998).

Whether the plaintiff's complaint alleges facts that, construed in the light most favorable to him, demonstrate that he ''is thereafter found to have acted . . . in the scope of his employment,'' within the meaning of § 5-141d (c), is a question of statutory interpretation. ''Statutory construction . . . presents a question of law over which our review is plenary. . . . [Therefore, in accordance with] our long-standing principles of statutory [interpretation], our fundamental objective is to ascertain and give effect to the intent of the legislature. . . . In determining the intent of a statute, we look 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.'' (Internal quotation marks omitted.) *State* v. *Vickers*, 260 Conn. 219, 223–24, 796 A.2d 502 (2002).

Section § 5-141d sets forth measures to protect state employees from personal liability and legal costs under certain circumstances. See footnote 1 of this concurring opinion; see also *Hunte* v. *Blumenthal*, supra, 238 Conn. 151, 153. Subsection (c) of that section, the reimbursement provision at issue in the present case, is triggered by the attorney general's denial of a state employee's request that the state provide for his or her defense, pursuant to § 5-141d (b). Section 5-141d (c) provides in relevant part that ''[l]egal fees and costs incurred as a result of the retention by any such . . . employee . . . of an attorney to defend his interests in any such civil action or proceeding shall be borne by the state only in those cases where . . . the . . . employee . . . *is thereafter found to have acted* in the discharge of his duties or *in the scope of his employment*, and not to have acted wantonly, recklessly or maliciously. . . .'' (Emphasis added.)

Section 5-141d does not define the phrase ''scope of employment.''[3] We have had numerous opportunities, however, to consider the meaning of that phrase; see, e.g., *State* v. *Casanova*, 255 Conn. 581, 596, 767 A.2d 1189 (2001) (in context of criminal charge); *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 500–503, 656 A.2d 1009 (1995) (in context of Connecticut Unfair Trade Practices Act); *Antinozzi* v. *A. Vincent Pepe Co.*, 117 Conn. 11, 13–14, 166 A. 392 (1933) (in context of tort claim); including in the context of indemnification. See *Gurliacci* v. *Mayer*, 218 Conn. 531, 550–54, 590 A.2d 914 (1991); *King* v. *Board of Education*, supra, 203 Conn. 332–40. To be considered as having acted in the scope of employment for purposes of indemnification, this court has stated that ''the legal injury must be incurred by an employee [covered by the statute] and that the legal injury *must be causally connected to that employment* . . . .'' (Emphasis added.) *King* v. *Board of Education*, supra, 337. Although the employee need not be working ''solely or only for the benefit of the employer,'' some tangible benefit must accrue to the employer for the employee's actions to be connected to the employment. Id., 336; see also 1 Restatement (Second), Agency § 228 (1958) (defining scope of employment in tort context).[4] The injury is not causally connected when the employee's action precipitating the injury is ''motivated by purely personal considerations entirely extraneous to [the] employer's interest.'' *Antinerella* v. *Rioux*, 229 Conn. 479, 499, 642 A.2d 699 (1994), overruled in part on other grounds, *Miller* v. *Egan*, 265 Conn. 301, 325, A.2d (2003); see *King* v. *Board of Education*, supra, 339–40 (superintendent's signing of agreement with board of education that personally benefited him causally connected to employment when agreement also benefited board and town).

Moreover, § 5-151d (c) further requires that the party seeking reimbursement is ''*thereafter found* to have acted . . . in the scope of his employment . . . .'' (Emphasis added.) This requirement thereby indicates that, in determining whether the employee is entitled to reimbursement, the appropriate focus is not on the *allegations* that gave rise to the claim for which the employee seeks reimbursement, but, instead, on a finding of fact made *after* the resolution of the claim. See *Hunte* v. *Blumenthal*, supra, 238 Conn. 167 n.18 (declining to address whether plaintiffs qualified for indemnification and defense under § 5-141d absent factual determination whether plaintiffs had acted in scope of employment). Indeed, reference to subsection (b) of § 5-141d bolster this interpretation. Subsection (b) sets forth the conditions for the provision of counsel by the state, whereas subsection (c) sets forth the conditions for reimbursement for legal costs should the state not represent the employee pursuant to subsection (b). It is noteworthy that subsection (b) only requires allegations of certain misconduct, whereas subsection (c)

instead requires that the employee is ''thereafter found to have acted . . . in the scope of his employment . . . .'' See *M. DeMatteo Construction Co.* v. *New London*, 236 Conn. 710, 717, 674 A.2d 845 (1996) (''[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed'' [internal quotation marks omitted]). Because the attorney general's decision whether to represent a state employee is made prior to judgment on the claim, it is self-evident in that context why allegations alone suffice. Indeed, this same temporal distinction is reflected in subsection (a) of § 5-141d, which requires both that the employee is alleged to have engaged in certain misconduct and is thereafter found to have acted within the scope of his employment. See footnote 1 of this concurring opinion. Accordingly, in order to obtain reimbursement for legal costs under § 5-141d (c), the employee must be found, in fact, to have been acting in the scope of his employment.

With this interpretation in mind, I now turn to the plaintiff's complaint to determine whether he has alleged facts, viewed in the light most favorable to him, establishing that he was acting in the scope of his employment. The plaintiff's complaint sets forth certain allegations that formed the basis of the civil action brought against the plaintiff by Penny Ross-Tackach, a former court reporter who had worked for the state judicial branch and with whom the plaintiff had engaged in a consensual sexual relationship. Specifically, his complaint sets forth Ross-Tackach's allegation that the plaintiff had ''subjected her to repeated sexual harassment . . . .'' The plaintiff's complaint further provides that Ross-Tackach's ''complaint clearly alleges that [the plaintiff had] acted within the scope of his employment between the hours of 9 a.m. and 5 p.m. on working days.''

It is well settled, in the context of sexual harassment claims, that a supervisor's sexual relationship with a subordinate generally is not considered to fall within the scope of the supervisor's employment.[5] See *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 756–57, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (''[A] supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer. . . . The harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer.'' [Citations omitted.]); *Ierardi* v. *Sisco*, 119 F.3d 183, 188 (2d Cir. 1997) (A correction officer's alleged sexual harassment of a prison teacher, if true, ''was prompted purely by personal reasons unrelated to the employer's interest. . . . Under such circumstances, the conduct—although occurring during the course of his employment—is outside the scope of [the officer's] employment.'' [Citation omitted; internal quotation marks omitted.]); *Harrison*

v. *Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir 1997) (''sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business'' [internal quotation marks omitted]). Moreover, merely because an employee's actions occur during work hours, those actions do not thereby necessarily constitute conduct within the scope of employment. ''A servant acts within the scope of employment while engaged in the service of the master, and it is not synonymous with the phrase during the period covered by his employment. *Levitz* v. *Jewish Home for the Aged, Inc.*, [156 Conn. 193, 198, 239 A.2d 490 (1968)].'' (Internal quotation marks omitted.) *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, supra, 216 Conn. 209–10. Accordingly, the mere fact that Ross-Tackach had alleged that the plaintiff's conduct occurred during his normal work hours does not transform those actions, which otherwise would fall outside the scope of his employment, into ones within that scope. Therefore, had Ross-Tackach's allegations been true, it is unlikely that the plaintiff could be ''thereafter found to have acted . . . in the scope of his employment'' as required by § 5-141d (c).

The plaintiff contends, however, that, because the allegations of sexual harassment against him were *baseless*, his conduct per se falls within the scope of his employment. That conclusion is predicated on the plaintiff's contention that his status as a public official provided the sole basis for Ross-Tackach's complaint. The plaintiff contends, therefore, that ''if a public official is sued because of his or her status as a public officer, he or she is 'in the discharge of his duties or within the scope of his employment.' '' I disagree.

In the present case, the plaintiff's complaint alleges no employment-related conduct engaged in by him with respect to Ross-Tackach. Indeed, the plaintiff's complaint clearly alleges that, ''the *only* activity which took place, as set forth by the Judicial Review Council, was limited to a consensual sexual relationship . . . .'' (Emphasis added.) Therefore, the plaintiff's allegations regarding the consensual sexual relationship, supported by his testimony before the judicial review council, indicate that his relationship with Ross-Tackach gave rise to the injury for which he now seeks reimbursement of legal fees. There simply is no benefit to which the plaintiff can point, however, that would accrue to his employer from such purely personal conduct.[6] Accordingly, the plaintiff's complaint clearly alleges that he was not acting in the ''scope of his employment,'' within the meaning of § 5-141d (c).

Additionally, ''[f]actual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case. . . . *West Haven Sound Development Corp.* v. *West Haven*, 201 Conn. 305, 312, 514

A.2d 734 (1986); see *State* v. *Rodriguez*, 180 Conn. 382, 396, 429 A.2d 919 (1980) (noting that [t]he vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i.e. the prohibition of any further dispute of the fact by him, and any use of evidence to disprove or contradict it) . . . .'' (Citations omitted; internal quotation marks omitted.) *Ferreira* v. *Pringle*, 255 Conn. 330, 345, 766 A.2d 400 (2001). The plaintiff's allegation that he had a consensual sexual relationship with Ross-Tackach therefore constitutes a binding judicial admission as to that fact. Had Ross-Tackach's claim against the plaintiff proceeded to trial, the trier of fact could not have concluded that the plaintiff had acted in the scope of his employment. Therefore, the plaintiff, as a matter of law, could not be ''thereafter found to have acted . . . in the scope of his employment,'' within the meaning of § 5-141d (c).

Nevertheless, in support of his contention that a public official falsely accused of abusing his authority is entitled to reimbursement for defending against such an allegation, the plaintiff directs our attention to *Birmingham* v. *Wilkinson*, 239 Ala. 199, 194 So. 548 (1940). In *Wilkinson*, an attorney prevailed in a claim against the city of Birmingham to recover his fees for defending two associate city commissioners charged with fraud, corruption and graft after the charges were dismissed. Id., 201–202, 206. The principal issue before that court was whether the city properly could expend public funds to defend city employees charged with illegal conduct ''regardless of the truth or falsity of the charges . . . .'' Id., 203. In answering that question in the affirmative, the court explained: ''That members of the governing body cannot expend the public money for counsel to shield themselves from the consequences of their own unlawful and corrupt acts goes without saying. . . . But the power and duty of the city to defend the members of its governing body against unfounded and unsupported charges of corruption and fraud is quite another matter. The same policy which demands the holding of public officers to strict account in matters of public trust, also demands their protection against groundless assaults upon their integrity in the discharge of their public duty.'' (Citation omitted.) Id., 204.

The plaintiff relies on the *Wilkinson* court's discussion of groundless actions, however, without ever taking note of the factual context in which that case arose. The officials' conduct therein giving rise to the action against them was the performance of acts that one would expect of such officials conducting official city business: passing a resolution appropriating salaries; repealing a city ordinance requiring an excise tax in favor of one imposing a licensing tax; and proposing a city budget. Id., 202. Accordingly, the plaintiff's reliance on *Wilkinson* is misplaced. Likewise, several hypothetical situations suggested by the plaintiff in support of

his position suffer from the same defect.[7]

In the present case, the only conduct the plaintiff alleges that gave rise to Ross-Tackach's action was a consensual sexual relationship. Accordingly, the action precipitating the injury for which the plaintiff seeks reimbursement was ''motivated by purely personal considerations entirely extraneous to his employer's interest.'' *Antinerella* v. *Rioux*, supra, 229 Conn. 499. I, therefore, would reverse the trial court's judgment on the basis of my conclusion that, as a matter of law, the plaintiff was not acting ''in the scope of his employment,'' within the meaning of § 5-141d (c).

[1] General Statutes § 5-141d provides: ''(a) The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, and any member of the Public Defender Services Commission from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious.

''(b) The state, through the Attorney General, shall provide for the defense of any such state officer, employee or member in any civil action or proceeding in any state or federal court arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the officer, employee or member was acting in the discharge of his duties or in the scope of his employment, except that the state shall not be required to provide for such a defense whenever the Attorney General, based on his investigation of the facts and circumstances of the case, determines that it would be inappropriate to do so and he so notifies the officer, employee or member in writing.

''(c) Legal fees and costs incurred as a result of the retention by any such officer, employee or member of an attorney to defend his interests in any such civil action or proceeding shall be borne by the state only in those cases where (1) the Attorney General has stated in writing to the officer, employee or member, pursuant to subsection (b), that the state will not provide an attorney to defend the interests of the officer, employee or member, and (2) the officer, employee or member is thereafter found to have acted in the discharge of his duties or in the scope of his employment, and not to have acted wantonly, recklessly or maliciously. Such legal fees and costs incurred by a state officer or employee shall be paid to the officer or employee only after the final disposition of the suit, claim or demand and only in such amounts as shall be determined by the Attorney General to be reasonable. In determining whether such amounts are reasonable the Attorney General may consider whether it was appropriate for a group of officers, employees or members to be represented by the same counsel.

''(d) The provisions of this section shall not be applicable to any state officer or employee to the extent he has a right to indemnification under any other section of the general statutes.''

[2] The plaintiff, citing *Dillon* v. *Bailey*, United States District Court, Docket No. 3:98CV1576 (JBA) (December 1, 1998), also claims in his brief that because, in the past, the defendants have indemnified a public official after a jury expressly had found that the official had acted wilfully and maliciously, contrary to the statutory requirement under § 5-141d; see footnote 1 of this concurring opinion; the defendants are bound to reimburse him. Because I would conclude, as I state herein, that the plaintiff has failed to satisfy another predicate to reimbursement, that is, that he was acting in the scope of his employment, I would not reach this issue. *Briggs* v. *McWeeny*, 260 Conn. 296, 316 n.14, 796 A.2d 516 (2002) (court need not reach issue unnecessary to resolution of case); *Duni* v. *United Technologies Corp.*, 239 Conn. 19, 23 n.5, 682 A.2d 99 (1996) (same). If, however, as the plaintiff claims occurred in *Dillon*, ''the [court] insisted, in writing that the office of the Attorney General, under oath file a 'Declaration of Promise' stating that the Attorney General promised to indemnify the [official],'' it is unclear how the satisfaction of such an order by the court would constitute an admission that subsequently would bind the defendants.

[3] Indeed, although many other indemnification provisions impose a ''scope

of employment'' requirement; see, e.g., General Statutes §§ 1-125, 4-16a, 4-165, 7-273h, 7-308, 7-465, 10a-109s, 22a-134*ll*, 32-47 and 32-206; only one provision, General Statutes § 4-165, includes any definition of the phrase, and that definition, by its express terms, is not all-inclusive. Section 4-165 provides in relevant part: ''For the purposes of this section 'scope of employment' shall include, but not be limited to, representation by an attorney appointed by the Public Defender Services Commission as a public defender, assistant public defender or deputy assistant public defender or an attorney appointed by the court as a special assistant public defender of an indigent accused or of a child on a petition of delinquency, representation by such other attorneys, referred to in section 4-141, of state officers and employees, in actions brought against such officers and employees in their official and individual capacities, the discharge of duties as a trustee of the state employees retirement system, the discharge of duties of a commissioner of Superior Court hearing small claims matters or acting as a fact-finder, arbitrator or magistrate or acting in any other quasi-judicial position, and the discharge of duties of a person appointed to a committee established by law for the purpose of rendering services to the Judicial Department including, but not limited to, the Legal Specialization Screening Committee, the State-Wide Grievance Committee, the Client Security Fund Committee and the State Bar Examining Committee; provided such actions arise out of the discharge of the duties or within the scope of employment of such officers or employees. . . .''

[4] The Restatement (Second), supra, § 228, provides in relevant part: ''(1) Conduct of a servant is within the scope of employment if, but only if:

''(a) it is of the kind he is employed to perform;

''(b) it occurs substantially within the authorized time and space limits;

''(c) it is actuated, at least in part, by a purpose to serve the master . . . .

''(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.''

[5] I note that the inquiry regarding whether an employee has acted within the scope of his or her employment when sexually harassing another employee may be distinct from the inquiry as to whether the *employer* may be liable for such conduct. See *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 758, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). In *Ellerth*, the United States Supreme Court analyzed the scope of employment question under traditional agency law principles, which require that the agent is motivated, in part, by a motive to serve the principal. Id., 755–57. Accordingly, the court concluded that sexual harassment generally is not within the scope of employment, although it noted that ''[t]here are instances . . . where a supervisor engages in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer.'' Id., 757, citing *Sims* v. *Montgomery County Commission*, 766 F. Sup. 1052, 1075 (M.D. Ala. 1990) (supervisor acting in scope of employment when employer had policy of discouraging women from seeking advancement and ''sexual harassment was simply a way of furthering that policy''). The court further explained that scope of employment is not the sole basis for employer liability in sexual harassment claims. *Burlington Industries, Inc.* v. *Ellerth*, supra, 758. ''An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'' Id., 765.

[6] In *In re Flanagan*, 240 Conn. 157, 191, 690 A.2d 865 (1997), this court affirmed the decision of the judicial review council that the plaintiff's conduct ''was not purely personal . . . because it took place with a person with whom [the plaintiff] had an ongoing, daily professional relationship'' and because ''the risk of injury to public confidence in the integrity of the judiciary is substantially heightened in this instance as opposed to a case where the affair was with a person unconnected with his daily activities as a judge of the Superior Court.'' The conclusion I reach herein, that the plaintiff's conduct was purely personal, may be reconciled with our earlier statement when reviewing the plaintiff's appeal from the judicial review council's decision. The court's focus in *In re Flanagan*, supra, 191, in

determining whether the judicial review council properly concluded that the plaintiff's conduct had violated the canons of the Code of Judicial Conduct, is substantively different than the analysis we apply to determine whether the plaintiff had acted in the scope of his employment. In the scope of employment inquiry, it is proper to consider whether some benefit accrued to the plaintiff's employer from his conduct; see *King* v. *Board of Education*, supra, 203 Conn. 336; whereas in considering whether the Code of Judicial Conduct has been violated, it is appropriate to consider whether the judge's conduct has impaired the public's confidence in the judiciary. See *In re Flanagan*, supra, 188–91. Indeed, for example, if a judge were to strike a party's counsel during an ex parte hearing, such conduct may well violate the Code of Judicial Conduct, but clearly would not be in the scope of the judge's employment.

[7] For example, the plaintiff supposes situations in which a judge reassigns a court clerk to a duty the clerk deems less desirable or initiates a disciplinary action against the clerk. Thereafter, the clerk files an employment discrimination action, falsely alleging that the judge had sexually harassed the clerk. The plaintiff also supposes a situation in which a judge renders judgment against a claimant, which thereafter leads the claimant falsely to accuse the judge of taking a bribe. We presume, in the absence of facts to the contrary, that the judge's position normally entails such conduct and the judge is acting in good faith. Under these circumstances, it readily is apparent that the judge's conduct that gave rise to the clerks' false accusations, as in *Wilkinson*, was within the scope of the judge's employment. Accordingly, contrary to the view urged by the plaintiff in the present case, it was not solely the judge's status that brought his or her actions within the scope of employment in each instance, but, rather, the judge's legitimate exercise of authority in discharging his or her duties.