ZARELLA, J., concurring. I agree with the majority opinion in all respects. I write separately because I find General Statutes § 31-51q inapplicable to any speech[1] made by a private sector employee in a private workplace, contrary to the reasoning in *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 738 A.2d 623 (1999). Because the parties in the present case have not asked us to reconsider this precedent, however, I express my view with the hope that this court will have the opportunity to reconsider the precedent established by *Cotto* when it is presented in a future case.

In *Cotto*, a majority of the court held that § 31-51q extends to protect speech made in the workplace by private sector employees.[2] See id., 16; id., 41 (*Katz*, *J.*, concurring and dissenting in part). This holding suffers from several analytical weaknesses and leads to problematic results. First, it fails to track the plain meaning of the statutory language, namely, the scope of the protection afforded under the statute. Second, by extending the protections of § 31-51q to the private workplace, *Cotto* forces the private sector employer to comply with conflicting statutory requirements, subjecting the employer to unavoidable liability under certain circumstances. Third, *Cotto* creates constitutional concerns by placing the employee's statutorily created free speech right in potential conflict with the employer's constitutional free speech right. Fourth, *Cotto*, and our related § 31-51q jurisprudence, requires courts to apply United States Supreme Court first amendment precedent regarding public employee speech to the private workplace; see part I of the majority opinion; raising serious conceptual problems.

I begin, as always, with the text of the statute.[3] General Statutes § 31-51q provides in relevant part: "Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge *on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state*, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. . . ." (Emphasis added.)

First, in simpler terms, § 31-51q imposes potential liability on any employer, public or private.[4] Second, the statute protects any employee who has been disciplined or discharged in violation of the statute, and

allows the employee to recover damages in that circumstance. Third, the statute provides an exception to employer liability if the activity for which the employee was disciplined or discharged interfered with the employee's job performance or employer relationship. The core of § 31-51q, however, is in the meaning of the language "the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state . . . ." As the following analysis makes clear, although this language extends certain protections to private employees, it does not create a new right of free speech in the private workplace.

"The first amendment of the United States constitution, stated generally, guarantees freedom of religion, freedom of speech, freedom of the press, and the rights of peaceable assembly and to petition the government for a redress of grievances. It is axiomatic that the first amendment, which applies to the states through the due process clause of the fourteenth amendment, guarantees those freedoms and rights only against governmental, and not private, action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 837–38, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982). Freedom of speech traditionally has content only in relation to state action—the state must be neutral as to all expression, and must not unreasonably restrain speech or expression. The right is to be free of state regulation . . . . *Redgrave* v. *Boston Symphony Orchestra, Inc.*, [855 F.2d 888, 904 (1st Cir. 1988), cert. denied, 448 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989)]. A necessary corollary of that fundamental constitutional principle is that the first amendment does not guarantee the conduct contemplated by those freedoms and rights where that conduct takes place on private property and is not restricted or coerced by state action in any way. *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 567, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972); *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 56–57, 469 A.2d 1201 (1984). It is also well established that §§ 3, 4 and 14, of article first of the state constitution, which, stated generally, guarantee freedom of religion, speech and the press, and the rights of peaceful assembly and to petition the government for redress of grievances, guarantee those freedoms and rights only against governmental, and not private, action. *Cologne* v. *Westfarms Associates*, supra, 61–63.

"Thus, when the legislature referred in § 31-51q to the exercise by the employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, that language strongly suggests that it was intended to have the same meaning in the statute that it has in its well established constitutional jurisprudence. That meaning plainly is limited to restriction by governmental action." (Internal quotation marks omitted.) *Cotto* v. *United Technologies Corp.*, supra, 251 Conn.

26–28 (*Borden*, *J.*, concurring and dissenting).

In more concrete terms, § 31-51q protects only private employee speech to the extent that that speech is otherwise constitutionally protected. If a private sector employee were "engaged in expressive activity on public property, such as participating in a peaceful demonstration on a town green against the war with Iraq, or [if] he refused to comply with a *governmental* demand that he display the American flag, whether on public or his own private property . . . his employer could not, consistent with § 31-51q . . . [discipline] or [discharge] him based on that activity, because he would [be] exercising rights guaranteed to him by the first amendment and article first." (Citation omitted; emphasis in original.) Id., 26 n.3 (*Borden*, *J.*, concurring and dissenting). Thus, the plain meaning of the statute merely serves to protect private sector employees from job-related repercussions for the otherwise lawful exercise of their constitutional rights. Indeed, if the legislature had intended to create a new right of free speech in the private workplace, it is unlikely that it would have referred to those rights already "guaranteed" by the United States constitution and the Connecticut constitution.

This conclusion finds additional support in an examination of problematic consequences that follow from the contrary reasoning in *Cotto*. To begin, construing the statute in accordance with *Cotto* places a private sector employer in a bind. An employer that fails to remedy discriminatory harassment against an employee will be liable to that employee, but an employer that disciplines an employee because of his speech may be liable to that employee under § 31-51q. The following two scenarios better illustrate this problem.

In the first scenario, a newly hired employee at a private company works alongside several coworkers who speak derogatory names and slurs based on sexual orientation. Although the speech is not targeted directly at the individual, it occurs in the employee's presence, behind his back while he is working. Immediately, the employee becomes frustrated, angered and humiliated by this harassment, but, because of his nonconfrontational nature, he does not initially approach his harassers or discuss it with his supervisors. After several years of enduring this, the employee complains to his supervisor, who tries to resolve the issue by arranging a meeting with the employee and his coworkers. The situation improves only temporarily. With the harassment continuing to escalate, the employee retains counsel, elevates his complaints to senior company management, and files a formal complaint with the commission on human rights and opportunities (commission). Responding to commission hearings, the company's management investigates the employee's complaints. Although the company fails to determine if harassment is occurring,

it holds a workplace harassment seminar to settle the complaint. Yet the harassment persists. After several additional complaints, the employee brings an action against the company, alleging a hostile work environment because of the harassment on the basis of the individual's sexual orientation and the company's concomitant failure to remedy the environment after learning of it.

Under the relevant antidiscrimination statutes, General Statutes §§ 46a-60 and 46a-81c, and the foregoing facts, the employee might have a cognizable and compensable cause of action against the employer, provided that the employee could prove that a hostile work environment existed and that the employer knew of this environment and failed to take reasonable steps to remediate it. Under these circumstances, the employee's claim, if proven, aligns with one of the purposes of the antidiscrimination statutes, namely, to reduce discrimination by holding employers liable for their failure to take reasonable steps to prevent harassment among coworkers.

Now, consider the second scenario, in which the same company from the preceding scenario hires another employee. Again, the new employee is the target of the same discriminatory harassment by coworkers, and, again, although the harassment does not affect the employee's job performance, he suffers emotionally. This time, however, when the employee complains to his supervisor, the company acts swiftly to remedy the situation, knowing that to do otherwise would subject it to potential liability. The company reasonably determines that the most appropriate remedy is a limited suspension without pay for the harassing coworkers. In response, the suspended coworkers bring an action against the company, alleging that their speech was protected speech under § 31-51q. The coworkers may indeed have a cognizable and compensable claim under *Cotto*. In these circumstances, the speech would not fall within the statute's exception. It did not interfere with the coworkers' job performance because they continued to perform their duties satisfactorily. Similarly, it did not affect the relationship between the coworkers and their employer because the harassment was not targeted at the employer, and the employer did not itself find the harassment offensive. If the coworkers adequately allege that their speech implicated a matter of public concern,[5] their claim would proceed to trial. If the coworkers succeed in proving all elements of their claim, their employer would be liable for all damages, including punitive damages, caused by their suspension, as well as fees and costs. At a minimum, an employer in this situation would be unable to know how to act to avoid liability under the antidiscrimination statutes while also avoiding liability under § 31-51q.

In addition to placing the employer in an untenable

position in situations arising between employees, the interpretation of § 31-51q in *Cotto* is constitutionally questionable. The creation of a statutory free speech right in the workplace puts the employee's speech in potential conflict with the employer's constitutional free speech right. "Both the United States Supreme Court and this court have held that a private property owner may exclude the public from entering the premises and expressing its views without the owner's consent. . . . If property owners may control the expression that occurs on their own land, it follows that they have the right, protected by the first amendment of the United States constitution, to express their own views on their property, free of government interference." (Citations omitted.) *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 53–54 (*McDonald*, *J.*, concurring); see also *Citizens United* v. *Federal Election Commission*, U.S. , 130 S. Ct. 876, 899, 175 L. Ed. 2d 753 (2010) ("[t]he [United States Supreme] Court has recognized that [f]irst [a]mendment protection extends to corporations"). Thus, "interpreting the statute to apply to private workplace conduct could . . . bring two competing sets of expressive rights into conflict, and therefore places the state, in the form of the courts, on one side of that contest. Such a construction raises serious constitutional issues. It is well established that we construe statutes to avoid, rather than to confront, such issues."[6] *Cotto* v. *United Technologies Corp.*, supra, 30 (*Borden*, *J.*, concurring and dissenting); see also *Citizens United* v. *Federal Election Commission*, supra, 899 ("[T]he [g]overnment may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the [g]overnment deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The [g]overnment may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.").

Finally, serious conceptual complications arise by applying to the private workplace United States Supreme Court first amendment case law, which concerns solely public sector employees. In resolving first amendment issues between a public employer and its employee, the court balances the government's role as an employer with the first amendment prohibition on government interference with speech. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . . At the same time, the [c]ourt has recognized that a citizen who works for the government is nonetheless a citizen. The [f]irst [a]mendment limits the ability of a public employer to leverage the employment relationship to

restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." (Citation omitted.) *Garcetti* v. *Ceballos*, 547 U.S. 410, 418–19, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). This balancing involves additional considerations as well. "[T]he [f]irst [a]mendment interests at stake extend beyond the individual speaker. The [c]ourt has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. . . . The [c]ourt's approach [has] acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed." (Citations omitted.) Id., 419.

Significantly, none of these considerations carries over in equal force, if at all, to a private sector employee's speech in the workplace. A nongovernmental employee does not have, under the United States constitution or the constitution of this state, a freestanding right to speak in the workplace. In other words, the interpretation of § 31-51q in *Cotto* applies United States Supreme Court first amendment precedent to speech in the private workplace, even though this precedent is based on considerations inapplicable to private sector employers and employees.[7]

The foregoing illuminates the critical weaknesses in our § 31-51q jurisprudence that result from the holding in *Cotto*. Reexamining the statutory language reveals that *Cotto* extends § 31-51q beyond its intended purpose and scope. Accordingly, when presented with the appropriate case, I would overrule *Cotto* and instead follow Justice Borden's concurrence and dissent in *Cotto*. A proper reading of § 31-51q extends protections to private sector employees only from discipline or discharge as a result of the exercise of their constitutionally guaranteed free speech rights outside of the workplace. It does not protect a private sector employee's speech in the private workplace, regardless of whether that speech was a matter of public concern or made pursuant to his or her job duties.[8]

[1] In this concurring opinion, I refer to protected "speech" for conciseness, although I recognize that § 31-51q, and its related jurisprudence, is not limited to speech but, rather, extends to any protected activity under the first amendment of the United States constitution and article first, §§ 3, 4 and 14, of the constitution of Connecticut.

[2] *Cotto* comprises four separate opinions. The opinion announcing the judgment was authored by Justice Peters and joined by Justice Palmer. That opinion, referred to in this concurring opinion and relied on as precedent by the majority in the present case, held that § 31-51q extended its protections to the private sector workplace but upheld the dismissal of the plaintiff's complaint for failing to allege adequately that the plaintiff's speech was otherwise protected speech under the United States constitution or the Connecticut constitution. *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 16, 20. Three justices, in two separate opinions, concurred in the result that the majority reached but disagreed with the majority's conclusion that § 31-51q extended to the private workplace. Id., 20–21 (*Borden, J.*, with whom *Callahan, C. J.*, joined, concurring and dissenting); id., 53 (*McDonald, J.*, concurring). Lastly, in a concurring and dissenting opinion, Justice Katz,

joined by Justice Berdon, agreed with Justice Peters that § 31-51q extended to the private workplace but reasoned instead that the plaintiff's complaint should survive a motion to strike. Id., 41 (*Katz*, *J.*, concurring and dissenting in part).

Thus, four members of the court—Justices Peters, Palmer, Katz and Berdon—concluded that § 31-51q provided a new right that protected employee speech in the private workplace. Id., 16; id., 41 (*Katz*, *J.*, concurring and dissenting in part). Three members of the court—Chief Justice Callahan and Justices Borden and McDonald—reasoned that § 31-51q only provided to private employees a cause of action against their employers if the employee engaged in what would otherwise be considered a constitutionally protected activity, and not that the statute extended to employee speech in the private workplace. Id., 21 (*Borden*, *J.*, concurring and dissenting); id., 53–54 (*McDonald*, *J.*, conurring). The principal point of disagreement between the two sides concerned the meaning of the statutory language "on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state . . . ." General Statutes § 31-51q. Neither Justice Peters nor Justice Katz analyzed the meaning of this phrase, and, instead, they appear to have treated it as shorthand for the legislature's intent to extend into the private workplace what previously were only protections against government interference with speech. Justice Borden rejected this reasoning and interpreted the plain meaning of the statute as it appeared from the statutory text. He concluded that private sector employers cannot interfere with an employee's right to be free from government interference with speech but may interfere with the employee's unprotected speech in the private workplace. Id., 26–28 (*Borden*, *J.*, concurring and dissenting).

[3] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[4] This is clear from its plain language, as Justice Peters' opinion in *Cotto* accurately notes. "Read literally, the language employed by the legislature unconditionally includes private employers as well as public employers within the terms of the statute. The phraseology of expressly 'including' governmental employers is not readily transmuted into the manifestation of an intention of impliedly 'excluding' private employers. The use of the word 'any' at the outset of the statutory language reenforces its natural reading to encompass rights at a private workplace. Had the legislature meant to confine the statute to the conduct of governmental actors . . . the legislature presumably could have done so directly, by adding 'public' or 'governmental' before 'employer.' To read the statute as limited to governmental actors requires either the deletion of words that the statute contains or the addition of a word that it does not contain. That is not a preferred method of statutory analysis." *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 7.

[5] As the majority aptly notes, "[a]n employee's speech addresses a matter of public concern when the speech can be fairly considered as relating to any matter of political, social, or other concern to the community . . . ." (Internal quotation marks omitted.) In the scenarios presented in this concurring opinion, then, the coworkers' speech might be considered a matter of public concern if it were grounded in a larger, ongoing discussion of the appropriateness of legalizing same sex marriage. See *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 174–227, 957 A.2d 407 (2008) (noting history and significance of society's acceptance of gay persons). Indeed, even if the coworkers' speech was not in the form of slurs at all, such a discussion might nevertheless create a hostile work environment for a gay employee.

More to the point, the determination of what constitutes a matter of public concern is one made by a trial judge and subject to de novo review on appeal. See *DiMartino* v. *Richens*, 263 Conn. 639, 661–63, 822 A.2d 205 (2003). This standard is too nebulous for a private sector employer to know whether, under the interpretation of § 31-51q in *Cotto*, an employee's workplace speech is protected.

[6] Justice Borden provides an example of this potential conflict: "Assume that a private employee, whose workstation is an isolated cubicle, displays in his cubicle in such a way that only he can see it, a swastika, or perhaps a bumper sticker favoring a Ku Klux Klan candidate for public office. Assume

further that it does not interfere with his job performance, and that for all practical purposes he works alone, so that there is no viable claim that the display will interfere with his relationship with his employer. Nonetheless, his employer demands that he remove it, solely because the employer does not want that kind of expression anywhere on his property, and when the employee refuses, the employer discharges him. Applying the statute . . . [to the private workplace] could require us to force the employer to have his property bear an expression that he does not want, thereby favoring the employee's right of expression over that of the employer. At the least, this would raise serious constitutional concerns, and at the most, it would be a clear violation of the employer's right of expression." *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 32–33 n.6 (*Borden*, *J.*, concurring and dissenting).

[7] To the extent that a private sector employee's *workplace* speech may be relevant to matters of public concern—for example, internal corporate practices dangerous to community safety or the environment—this speech is already adequately protected by various statutes. See *Cotto* v. *United Technologies Corp.*, supra, 251 Conn. 13–15 (listing statutes). Moreover, under the interpretation of § 31-51q advanced by Justice Borden in his concurrence and dissent in *Cotto*, an employee also would be protected under that statute if, for example, he lobbied the legislature to adopt laws targeted at preventing dangerous corporate practices.

[8] If this reasoning were applied to the present case, I would conclude that the claims by the plaintiff, G. Berry Schumann, under § 31-51q must fail because his speech occurred at a private sector employer's workplace. Thus, his speech was not protected under our free speech jurisprudence and, therefore, was not within the scope of § 31-51q.