

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Mitchell R. Ribeiro,
Complainant : OPH/WBR No. 2008-066
v.

Correctional Officer King and Osborn
Correctional Institute,
Respondents : April 7, 2008

Memorandum of Decision

Re: Respondent's Motion to Dismiss

The complainant on January 3, 2008 filed a complaint pursuant to General Statute § 4-61dd with the Chief Human Rights Referee alleging retaliatory treatment by the Department of Correction ("DOC") and more particularly Correctional Officer King (C/O King) and Osborne Correctional Institution. The respondents on March 7, 2008 filed a motion to dismiss, arguing that this tribunal lacks subject matter jurisdiction to hear this matter as the complainant is not an employee of the DOC or any sub-unit of the DOC and was in fact an inmate incarcerated at the Osborne Facility.¹ The complainant has not responded to the pending motion.

I. Background

The complainant alleges that while being held at the Osborne Correctional Facility he was assaulted by C/O King. The assault is described as C/O King pushing the complainant causing him to fall over a chair and hitting his neck on a bunk. Minutes

¹ The complainant is currently being held at the Corrigan-Radgowski Correctional Center.

after the incident Lt. Hebert appeared and was informed by the complainant of the assault. Lt. Hebert responded by telling the complainant he was going to segregation. Several hours later while still in his cell the complainant was served a Class A ticket for tampering with safety and security. The complainant that evening began to experience severe neck pain that required him to verbally request emergency medical attention. All such requests were denied. He was informed he must put his request in writing which would take 3 days. That evening as a consequence of the complainant being in such severe pain he passed out causing his head to hit the toilet. As a result of this occurrence the complainant informed Captain Capelton of his desire to file an inmate voluntary incident statement. Captain Capelton's denied the request. As a consequence of the alleged assault and the denial of immediate medical treatment the complainant argues that the respondents have failed to provide him with a safe and secure environment in violation of the DOC mission statement.

The respondents' motion proffers that a person seeking to avail themselves of the protection provided under General Statute § 4-61dd must be a covered employee employed by the state or quasi-public agency or a large state contractor.² In this instance the respondents argue that the complainant is not an employee but in fact an inmate. The complainant being unable to meet the necessary statutory qualification to bring this complaint, it must be dismissed.

² CGS 4-61dd (b) (1) No state officer or employee, as defined in § 4-141, no quasi public agency employee or any employee of a large state contractor shall take or threaten to take any personnel action against any state ... in retaliation for such employee's disclosure (emphasis added)

II. Discussion

A. Standard

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622, 624 (1983). The motion admits all facts well pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-52, cert. denied. 241 Conn. 906 (1997). In evaluating the motion, the complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant and every reasonable inference is to be drawn in his favor; *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998); and "[e]very presumption favoring jurisdiction shall be indulged." *Conn. Light & Power Co. v. Costle*, 179 Conn. 415, 421 (1980).

Dismissal is appropriate when it "appears beyond doubt that [the complainant] can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Calderon and Sarton v. State of Connecticut, Department of Corrections, et al.* 3:04 DV 1562 (JCH) (quoting *Davis v. Monroe County Board of Education*, 526 U.S. 629, 654 (1999)). For a matter to survive a motion to dismiss the complaint must allege facts which, when assumed true, confer a judicially recognizable right of action. "The issue is not whether a [complainant] will ultimately prevail but whether the [complainant] is entitled to offer evidence to support the claims." *York v. Association of Bar of City of*

New York, 286 F.3d 122, 125 (2nd Cir. 2002) (quoting *Schever v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. Whistleblower

This state's whistleblower protection statute protects employees of the state, quasi-public agencies, or large state contractors who have knowledge and have disclosed information involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority, or danger to the public safety occurring in any state department, agency, quasi agency or large state contract. The issue raised by the respondents is whether an incarcerated individual who is not an employee of the state or any entity that would qualify its employees for protection under § 4-61dd can initiate and maintain a whistleblower retaliation action.

In the pending matter the complainant removes any speculation as to his employment status when he responds to paragraph 7 of the complaint form (initial date of employment with state department or agency...) by stating N/A and paragraph 10 (present employment status) N/A inmate at Osborn Correctional Facility. This being the case, and construing the allegations in the light most favorable to the complainant and allowing every reasonable inference to be drawn in his favor, he cannot qualify as a protected "whistleblower" under 4-61dd as he is not an employee of any entity.

Having failed to satisfy the initial prerequisite for bringing a whistleblower complaint before this tribunal I conclude that subject matter jurisdiction does not exist and I must and hereby do grant the respondent's motion to dismiss.

It is so ordered this 7th day of April 2008.

Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.

Mitchell Ribiero
James P. Ball, Esq.