

**STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS**

Joseph Teal,
Complainant

OPH/WBR No.2008-077, 080

v..

Johnette Tolliver, Stephen Caliendo,
Department of Administrative Services,
And Smart Unit

December 16, 2008

Respondents

and

Department of Public Health, Commissioner
J. Robert Galvin and Catherine Kennelly

Respondents

Ruling on Motion to Dismiss

On June 11, 2008, Joseph Teal (hereinafter the “complainant”) filed a whistleblower retaliation complaint pursuant to General Statutes § 4-61dd (b) (3) (a) against J. Robert Galvin, in his official capacity as commissioner of public health, against Catherine Kennelly, in her official capacity as chief administrative officer of the department of public health (hereinafter “DPH”) and against the agency itself. Said complaint bears the docket # OPH/WBR#2008-077. On August 4, 2008, the complainant filed a separate whistleblower retaliation complaint against respondents Johnette Tolliver, Stephen Caliendo, and the department of administrative services (hereinafter “DAS”) and the department of administrative services smart unit (hereinafter “DAS Smart Unit”). Tolliver and Caliendo are employees and/or agents of DAS who investigated a complaint, at the

request of the DPH, against the complainant. The first action was filed by the complainant against his employer, DPH. The second action was filed against DAS and the individually named DAS employed defendants acting as the agents of DPH.

On August 26, 2008, these two actions were consolidated in this proceeding pursuant to an order of the undersigned human rights referee.

The DAS respondents have moved that the case against them be dismissed for failure to state a claim under General Statutes § 4-61dd. On November 14, 2008, the complainant filed his objection to respondent's motion to dismiss.

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). Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies authorizes the presiding referee to dismiss a complaint, for among other reasons, lack of jurisdiction. Section 4-61dd-12 (a) (2) of the regulations of Connecticut state agencies empowers the presiding officer, in a whistleblower retaliation complaint proceeding, with the power to "rule on requests and motions, including motions to dismiss for lack of jurisdiction."

A motion to dismiss admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corps.*, 44 Conn. App. 446, 451-452, 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. Every reasonable inference is to be drawn in his favor. *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998). See also *Lueder v. Southern CT State University*, 2006 WL 2965504 (OPH/WBR No. 2005-011, March 16, 2006); *Bagnaschi-Maher v. Torrington Housing Authority*, 2006 WL 4754593 (OPH/WBR No. 2005-013, March 3, 2006). After a thorough review of the motion to dismiss, the objection to the motion to dismiss, along with the cases, pleadings and other supporting materials referenced therein or attached thereto, I hereby GRANT the motion to dismiss for the reasons set forth below.

The relevant facts in the record to date are as follows:

1. At all times involved herein, the complainant was an employee of DPH, functioning as its equal employment opportunity manager. He was not a co-worker of the individually named respondents, nor an employee of the named respondent, DAS.
2. The complainant has filed this whistleblower retaliation complaint against the respondents, Johnette Tolliver, Stephen Caliendo, DAS and the DAS smart unit.
3. Tolliver and Caliendo are employees and/or agents of DAS who, at the request of DPH, investigated complaints of discrimination by complainant against other DPH agency employees.
4. The DAS respondents have filed this motion to dismiss alleging a failure to state a claim under General Statutes § 4-61dd.

5. The complainant, in Paragraph 8 of this whistleblower retaliation complaint, alleges that he disclosed the information described in Conn. Gen. Stat. § 4-61dd to his own agency manager, Commissioner J. Robert Galvin commissioner of DPH and Cathy Kennelly, the respondents in the DPH whistleblower retaliation case. The complainant also alleges in this action that he learned of the personnel action threatened or taken against him on August 4, 2008 and he attaches Tolliver's fact finding investigation report to his complaint.
6. That report recommended that the complainant take a refresher training course for affirmative action professionals. Tolliver also recommended that the Human Resource Division of DPH review her report to determine whether complainant should be disciplined for engaging in inappropriate and unprofessional conduct

I begin my analysis by examining § 4-61dd (b) (1) which states in pertinent part that "No state officer or employee . . . shall take any personnel action against any state . . . employee . . . in retaliation for such employee's disclosure of information to . . . (B) an employee of the state agency....where such state officer or employee is employed".

The complainant was clearly not an employee of DAS and did not report anything to an employee of DAS, but he did report something to the agency by which he was employed and has filed a separate complaint against DPH - the agency by which he is employed. Accordingly, the complainant cannot satisfy the requirements of the statute in order to confer subject matter jurisdiction on this tribunal. Complainant argues in its objection to the granting of the motion to dismiss that the course of conduct by both

agencies, DPH and DAS has created an agency relationship whereby DAS became the agent of DPH. Despite this rather creative argument, it finds no support in present Connecticut law. Complainant recites the example of the creation of an agency relationship between a referring state agency and the commission on human rights and opportunities and/or DAS. That relationship is specifically created in a discrimination complaint filing by or against the head of a state agency or by or against its affirmative action officer. See General statutes § 46a-68 (B) formerly Connecticut Public Act 0-7-181, § 1 (b) (5) (B).

By way of contrast, there is no Connecticut statute or case law creating an agency relationship vis-à-vis the whistleblower statute, the statute that applies to this complaint.

To the extent that there is even a shadow of doubt concerning the previous conclusion that there was no agency relationship created under the whistleblower statute sufficient to confer jurisdiction on this tribunal, this motion to dismiss nevertheless must be granted because the complainant has not suffered or been threatened with an adverse employment action by the named respondents who are the subjects of the motion to dismiss. Respondent DAS, which was not complainant's employer, had no authority over him nor could it or did it impose an adverse employment action on him. Furthermore, the DAS recommendations that complainant take a refresher course in affirmative action and that there be further inquiry by the DPH human relations department into the complainant's conduct do not qualify as adverse employment actions. An adverse employment action must create a "materially adverse" change in

the terms and conditions of employment - i.e.; a change; "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Galabya v. New York City Bd. of Ed.*, 202 F. 3d 636, 640 (2d Cir. 2000). Adverse personnel actions include, but are not limited to, a "decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities" *Kassner v. 2nd Ave. Delicatessan, Inc.*, 496 F 3d 229, 238 (2d Cir. 2007). Complainant has alleged no such losses or conduct by the Respondents in this case. In his complaint against these respondents he has failed to allege any personnel actions taken against him or threatened against him by these respondents. Accordingly, the complainant has failed to satisfy the statutory requirements for maintaining this action in an additional way to the previously cited reasons.

In light of the foregoing analysis and conclusions, the complaint is hereby dismissed as to the named respondents having filed this motion to dismiss.

Dated at Hartford, Connecticut this 16th day of December, 2008.

Jerome D. Levine
Human Rights Referee

cc.

Joseph Teal
Johnette Tolliver, DAS Smart Unit
Stephen Caliendo, DAS Smart Unit
Commissioner Robert Galvin/DPH
Catherine Kennelly/DPH
Antoria Howard, AAG- via fax only
Barbara Collins, Esq.-via fax only