

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Andrew Schreyer
Complainant

: OPH/WBR No. 2009-099

v.

Waterfront Enterprises,
Respondent

:
: May 4, 2009

Ruling on Motion to Dismiss

The complainant filed a complaint pursuant to General Statutes § 4-61dd with the Chief Human Rights Referee on January 14, 2009 alleging retaliatory treatment as a consequence of the respondent believing the complainant was a “whistleblower.”

On January 19, 2009, the respondent filed a motion to dismiss, arguing that the complainant has not and cannot satisfy the jurisdictional predicates for bringing and maintaining a whistleblower retaliation case. Specifically, the respondent proffers that the complainant’s complaint was not timely, that the respondent is not an entity that is covered by § 4-61dd despite the complainant indicating that it is a “large state contractor,” and that the complainant has failed to allege any facts indicating that he disclosed information to an employee of a covered entity or made the requisite disclosure to the proper entity or entities.

On January 26, 2009, the complainant filed his objection to respondent’s motion to dismiss. This objection briefly addresses the timeliness of the complaint by stating that while it is true the complainant was terminated from his employment with the

respondent on October 17, 2008, it wasn't until December 13, 2008, that he learned his termination was purportedly due to respondent's belief that he was a whistleblower. The objection, however, failed to address the issue of whether the respondent is an entity that would qualify the complainant for protection under § 4-61dd, these being a state agency, quasi-public agency or a large state contractor.

On February 10, 2009, the initial conference was held at which time the complainant's counsel, after having been questioned on his position regarding whether the respondent was in fact a large state contractor as defined under § 4-61dd (h) (1) and (2), responded that he chose the category large state contractor on the whistleblower retaliation complaint form but would have preferred the category of "other", were it available. This category was not included on the complaint form. Presumably, that was due to the statute being precise as to what entities can qualify its employee's for protection for whistleblower activities. Counsel for the complainant requested and was granted until March 4, 2009, to file a responsive pleading to the pending motion. This deadline was subsequently extended to April 4, 2009, pursuant to an order issued by the undersigned. No such response has been received.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the

allegations of the complaint in their most favorable light. . . . In this regard, 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 [complainant].” (Citations omitted; internal quotation marks omitted.) *Cox v. Aiken*, 278 Conn. 204, 211 (2006). “The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . Where, however, as here, the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint.” (Citations omitted; internal quotation marks omitted.) *Ferreira v. Pringle*, 255 Conn. 330, 346-47 (2001).

I conclude that the respondent is not a large state contractor as defined by statute for the following reasons: (1) the complainant’s failure to address the issue of the respondent being a large state contractor; (2) complainant counsel’s apparent concession that in fact the respondent is not a large state contractor (having stated he would have chosen “other” if given that choice); and (3) the respondent’s accompanying affidavit from its vice president attesting to the fact that the respondent does not have a contract with any state agency or any quasi-public agency having value of five million dollars or more.

The complainant having failed to respond to respondents’ motion to dismiss or provide the most minimal of facts that would support the conclusion when viewed in the light

most favorable to the complainant that the respondent is a large state contractor leaves me to conclude that this tribunal is without jurisdiction to adjudicate this matter. I therefore GRANT the respondent's motion to dismiss.

It is so ordered the 4th day of May 2009.

Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.

Andrew Schreyer
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Chris DeMarco, Esq.