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November 26, 2013 (corrected)

CHRO No. 1130416 - Commission on Human Rights and Opportunities, ex rel. Phillip Browne, Complainant v. State of CT, DOC, Respondent

Ruling and Order on Respondent's Motion to Dismiss

On October 2, 2013, the respondent filed a motion to dismiss the instant action on the grounds that the affidavit of discriminatory conduct ("affidavit" or "complaint") failed to state a cause of action, or in the alternative, was moot because the complainant is entitled to no remedy. On October 16, 2013, the complainant filed his opposition to the motion. In his brief, the complainant argues that the affidavit cannot be dismissed for lack of jurisdiction if it fails to allege an adverse employment action. He also argues that he is entitled to some unidentified damages. For the following reasons the motion to dismiss is denied.

A. Failure to State a Cause of Action

In the motion to dismiss, the respondent asserts that the complainant fails to allege an essential element of his discrimination claim, that is, the affidavit contains no allegation of facts indicating that he suffered an adverse employment action. The complainant misconstrues the respondent's motion to seek dismissal on the grounds that this tribunal lacks jurisdiction to hear the claim pursuant to section 46a-54-88a(d)(1) of the Regulations of Conn. State Agencies ("Regulation"). The respondent, however, is requesting that the complaint be stricken pursuant to Regulation 46a-54-88a(d)(2).¹ The standard of review for a motion to strike is discussed by the undersigned in his ruling and order, dated November 22, 2013, on a motion to dismiss, in CHRO case no. 1230423.² In deciding this motion, this tribunal will apply the principles identified in that ruling.

In his affidavit, the complainant claims that the respondent violated sections 46a-60(a)(1) and 46a-58(a), enforcing the substantive provisions of Title VII of the Civil Rights Act of 1964, as amended, and contains the following relevant allegations –

¹ Subsection (d) of Regulation 46a-54-88a states, "[t]he presiding officer may, on his or her own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant or the commission: (1) Fails to establish jurisdiction; (2) Fails to state a claim for which relief can be granted;(3) Fails to appear at a lawfully noticed conference or hearing without good cause; or(4) Fails to sustain his or her burden after presentation of the evidence.

² CHRO case no. 1230423 is a case that involves the same respondent and complainant as this matter. However, in that case the complainant is not represented by counsel and the commission, as in this case, deferred prosecution to him pursuant to section 46a-84(d).

- The complainant is a qualified, black Correction Officer (“C/O”), employed by the respondent. His normal assignment was the Connecticut Transportation Unit (“CTU”) in Cheshire, CT. Unnumbered introductory paragraphs and ¶¶ 1-4.
- On February 14, 2011, C/O Ryan Copega, white and Caucasian, opened a van door and twice slammed it into the complainant’s hand. ¶ 9.
- The complainant “immediately” filed page 1 of a workplace violence incident report with his supervisor, Lieutenant Billy Fowler. According to the respondent’s policy, the first employee who reports the incident is to complete page 1 of the incident report. ¶¶ 10-11.
- After returning from the hospital, where he had his injured hand examined, the complainant was informed (by an unspecified person) that C/O Copega had reported the incident first – not in writing but verbally. ¶ 13. For this reason, he was told (by an unspecified person) to fill out page 3 of the incident report ¶ 14.
- Lieutenant Todd Sturgeon told the complainant that Copega also claimed to be injured, thereby making it a “Class 1” workplace violence incident. Fowler witnessed this conversation. Sturgeon informed the complainant that he was relieved of duty for the day and to contact Captain James Shea. Fowler, Sturgeon, and Shea are each white and Caucasian males. ¶ 15.
- In lieu of his regular assignment with the CTU during the course of pending workplace violence investigation, the complainant was reassigned to the New Haven Correctional facility in a non-transport role. ¶ 16. He was offered a transport position but it was over one hour away from his home. ¶ 18.
- Copega was neither transferred nor disciplined for his alleged assault on the complainant. ¶¶ 16 and 23.
- A transport position is more desirable than a position in a correctional institution. ¶ 3.
- As of the date of the filing of the complaint, April 7, 2011, the complainant had not been returned to duty at CTU. ¶ 24.
- For one pay period in March of 2011, he did not receive his pay for overtime or his shift differential. ¶ 22.
- The complainant was never transferred to the York Correctional facility that was initially proposed by Shea; it was a non-transport position and was more than a one-hour drive from his home. ¶¶ 16-18.
- After the complainant protested the proposed change to his schedule that would have required him to work weekends, contrary to his normal CTU assignment, the respondent eliminated that condition, and the complainant was not required to work weekends. ¶¶ 20-21.
- The complaint resides in Meriden, CT.

I concur with the complainant's assessment that his affidavit "is at times ambiguous," (Complainant's Opposition to the Motion to Dismiss, dated October 16, 2013, p.3 - hereinafter "Comp. Brief, #"), nonetheless I conclude that when construed broadly and in a manner most favorable to the complainant, the facts alleged, including those facts that are necessarily implied, are sufficient to survive a motion to strike the complainant's section 46a-58(a) and section 46a-60(a)(1) claims. The affidavit reasonably can be read to assert that the complainant was subjected to discriminatory terms and conditions of employment because of his race when his supervisors transferred him to a "less desirable" assignment (although no additional facts are alleged that explain how the work conditions specifically are less desirable), pending the results of a workplace violence investigation, and that the transfer occurred under circumstances giving rise to an inference of discrimination.

B. Damages – Section 46a-86

The affidavit of illegal discriminatory conduct, filed in this matter to initiate the investigation by the commission on human rights and opportunities ("commission" or "CHRO"), contains the complainant's request that the commission "secure for me my rights ... and any remedy to which I may be entitled." The complainant, beyond this, does not articulate explicitly the damages sought nor is there a requirement that he do so. However, the remedies available for violations of respective sections of the Connecticut fair employment practices act, section 46a-51, et seq. ("CFEPA"), are circumscribed by section 46a-86.³ During the public hearing, the complainant must provide sufficient evidence to support the award of damages requested.

³ Section 46a-86 states, in relevant part –

(a) If, upon all the evidence presented at the hearing conducted pursuant to section 46a-84, the presiding officer finds that a respondent has engaged in any discriminatory practice, the presiding officer shall state the presiding officer's findings of fact and shall issue and file with the commission and cause to be served on the respondent an order requiring the respondent to cease and desist from the discriminatory practice and further requiring the respondent to take such affirmative action as in the judgment of the presiding officer will effectuate the purpose of this chapter.

(b) In addition to any other action taken under this section, upon a finding of a discriminatory employment practice, the presiding officer may order the hiring or reinstatement of employees, with or without back pay, or restoration to membership in any respondent labor organization, provided, liability for back pay shall not accrue from a date more than two years prior to the filing or issuance of the complaint and, provided further, interim earnings, including unemployment compensation and welfare assistance or amounts which could have been earned with reasonable diligence on the part of the person to whom back pay is awarded shall be deducted from the amount of back pay to which such person is otherwise entitled. The amount of any such deduction for interim unemployment compensation or welfare assistance shall be paid by the respondent to the commission which shall transfer such amount to the appropriate state or local agency.

The respondent argues that the complainant's claim is rendered moot because there is no remedy available to the complainant. The respondent asserts that, on August 26, 2011, approximately six months after it temporarily transferred the complainant to the New Haven Correctional facility, it restored the complainant to his assignment at CTU Cheshire. The respondent's motion also states that, as of April 22, 2011, it completely reimbursed the complainant for any errors in compensation that occurred in 2011 as alleged in the affidavit. Respondent's Motion to Dismiss, p.2 (hereinafter "Resp. Motion, #"). The complainant agrees, stating that he "has been reassigned to the CTU and reimbursed for his shift differential and overtime pay" Comp. Brief, 2.

Therefore, it does not appear that the complainant has any damages available to him under subsection (b) of section 46a-86, if he were able to prove that the respondent violated section 46a-60(a)(1). However, because the claim is also viable pursuant to section 46a-58(a), the complainant, if he can prove that the respondent violated this provision, would be able to recover damages under subsection (c) of section 46a-86.

A violation of section 46a-58(a) affords a complainant damages not available for a violation of section 46a-60(a)(1).⁴ In relevant part, subsection (c) of section 46a-86 states that "[i]n addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section 46a-58, . . . the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, . . . other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs. The amount of attorney's fees allowed shall not be contingent upon the amount of damages requested by or awarded to the complainant."

The respondent argues that the complainant is entitled to no additional damages because he was made whole when he was returned to CTU and paid the overtime and a shift differential owed to him in 2011. Resp. Motion, 5-6. The complainant disagrees and states that "the respondent has not addressed the discrimination the complainant [has] suffered or his increased travel expenses incurred while transferred pending the outcome of the investigation." Comp. Brief, 2. The complainant has not specified the value of the additional travel expenses incurred because of his near six month transfer, but if a violation is found, such

(c) In addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section 46a-58, 46a-59, 46a-64, 46a-64c, 46a-81b, 46a-81d or 46a-81e, the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs. The amount of attorney's fees allowed shall not be contingent upon the amount of damages requested by or awarded to the complainant.

⁴ The complainant alleges that the respondent discriminated against him based on a protected classes specified therein and is seeking the enforcement of rights provided pursuant to section 46a-58(a) that are based on the substantive provisions of Title VII.


a calculation is not beyond estimation. Those damages certainly are available under subsection (c) of section 46a-86. So are attorney's fees and costs. It is not clear at this point in the proceedings what, if any, other allowable damages the complainant will seek.

Lastly, the respondent's motion fails to acknowledge the authority granted to a presiding referee pursuant to subsection (a) of section 46a-86. The relief available under subsection (a) is conditioned on a finding that the respondent engaged in any discriminatory practice; not on what damages the complainant is entitled to recover.

Order

The motion to dismiss is denied.

Dated this 26th day of November 2013.



Alvin R. Wilson, Jr.
Presiding Human Rights Referee

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