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March 31, 2016

OPH/WBR No. 2012-200 Nsonsa Kisala v. Thomas Malecky, et al.

FINAL DECISION
Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by via by via email to the commission, complainant, respondent and/or counsel.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc.

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Michele C. Mount, Presiding Human Rights Referee

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Nsonsa Kisala,
Complainant

v.

Department of Public Health, T. Malecky,
B. Wallen, M. Carey, L. Davis & J. Mullen,
Respondents

OPH/WBR No.

March 31, 2016

MEMORANDUM OF DECISION

I.

PROCEDURAL HISTORY

On August 20, 2012, the complainant, Nsonsa Kisala (Kisala), filed a complaint sounding in whistleblower retaliation for violation of General Statute §4-61dd with the Office of Public Hearings against the respondents State of Connecticut, Department of Public Health (DPH) and the following DPH employees in their official capacities: Thomas Malecky, Bruce Wallen, Michael Carey, Lisa Davis, and Jewel Mullen. Kisala amended his complaint several times. In December of 2013 he amended his request for relief. In March of 2014, he added the allegation that his supervisor was continuing to retaliate against him by coming to his desk instead of putting all communications in writing. Kisala objected to talking to his supervisor because he smelled of smoke. Finally, in January of 2015 he alleged continuing retaliation when, during a heated exchange in a meeting, Aleana Johnson, a co-worker exclaimed,

"Something has to be done about you, you have to chill out." Kisala alleged that he felt threatened by her.

Kisala is employed as a Health Program Associate with the DPH. Kisala's duties include reviewing and completing fiscal information submitted by the DPH Health Program to the Contracts and Grants Management Section of DPH. Kisala alleges that he disclosed information to the Connecticut Auditors of Public Accounts from May of 2012 through August of 2012, involving conduct at the DPH that he claimed as mismanagement. Kisala alleges that, following these disclosures, "the DPH threatened to terminate my employment at DPH, by giving me a bad performance evaluation." Prior to Kisala's whistle-blowing activity he had a well-documented, history of performance issues in the areas of cooperation and judgment. DPH contends that it conducted a counseling session focused on conveying to Kisala ways to help him improve his behavior so that he would not receive an unsatisfactory performance review in the future. DPH maintain they never threatened of termination. I concluded the counseling session was intended to help Kisala avoid any negative ratings in the future.

DPH filed a "motion to dismiss and/or strike Kisala's complaint," which the tribunal treated as a motion to dismiss for failure to state an actionable claim. The tribunal dismissed the complaint, concluding that the Office of Public Hearings (OPH) lacked subject matter jurisdiction because Kisala failed to allege a prima facie case of whistleblower retaliation pursuant to § 4–61dd(d)(1). The complaint was dismissed without allowing Kisala to propound discovery or conducting an evidentiary hearing. "Specifically, the Referee concluded, after reviewing and interpreting Kisala's complaint and a lengthy and somewhat rambling written attachment thereto, that, at most, the DPH defendants had engaged in an employee counseling

session with Kisala but this counseling session did not qualify as an 'adverse employment action' sufficient to constitute retaliation under § 4–61dd(d)(1) . Following the Referee's denial of a motion for reconsideration, Kisala appealed the decision of the Referee to Superior Court pursuant to General Statutes § 4–183. Kisala v. Malecky, No. HHBCV135015760S, 2013 WL 5814792, (Conn. Super. Ct. Oct. 7, 2013) The Superior Court concluded that respondent's motion to dismiss was more properly decided as a Motion to Strike based on the recent Connecticut Supreme Court decision In re Jose B., 303 Conn. 569, 34 A.3d 975 (2012). Judge Preston held that the allegations taken in their most favorable light were sufficient to survive a motion to strike and required an evidentiary hearing. The court opined, "Whether he can actually prove this claim requires an evidentiary hearing. " Id. Following the Referee's denial of a motion for reconsideration, Kisala appealed the decision of the Referee to Superior Court pursuant to General Statutes § 4–183. *Kisala v. Malecky*, No. HHBCV135015760S, 2013 WL 5814792, (Conn. Super. Ct. Oct. 7, 2013.) The Superior Court concluded that the Motion to Dismiss was more properly decided as a Motion to Strike based on a recent Connecticut Supreme Court decision, *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012). Judge Preston held that allegations taken in their most favorable light were sufficient to survive a motion to strike, thus necessitating an evidentiary hearing. The court opined, "Whether he can actually prove this claim requires an evidentiary hearing. " Id.

Kisala was a pro-se party originally. Prior to the public hearing, the Commission on Human Rights and Opportunity assigned two volunteer attorneys to take the lead in the prosecution of this case. The References to an exhibit are by party designation and number. The Commission's exhibits are denoted as "C" followed by the exhibit number and the

respondent's exhibits are denoted as "R" followed by the exhibit number. References to the transcript are designated as "Tr." followed by the page number. The record also includes the complaint, answer and amendments thereto; pleadings; motions; intermediate rulings and the parties' briefs. General Statutes § 4-177 (d); Regs., Conn. State Agencies § 4-61dd-21.**II.**

FINDINGS OF FACT

Parties

1. Kisala is employed by the respondent agency, DPH as a Health Program Associate. Tr. 155
2. DPH is a Connecticut Agency. General Statute §19a-1a(a)
3. Respondent, Dr. Jewel Mullen (Mullen), is the present Commissioner of DPH. Tr. 546
4. Respondent, Tom Malecky, (Malecky) serves as Human Resources Manager at DPH. Tr. 400
5. Respondent, Bruce Wallen (Wallen) is serves as the Chief of Contracts and Grants Management Units at DPH. Tr. 486
6. Respondent, Michael Carey (Carey) serves as the DPH Human Resources Administrator. Tr. 486
7. Respondent, Lisa Davis (Davis) was at all relevant times, Deputy Commissioner of DPH. Tr. 186

Kisala's Employment History Prior to Filing the above captioned complaint.

8. Kisala began working at DPH in 2005. Tr. 155

9. In 2005 on DPH's mid-working test period evaluation, Kisala received average scores in all categories except for Judgment and Interpersonal Skills, where he received below average scores. Ex R-30, Tr. 318
10. Kisala's poor judgment and interpersonal skills ratings were based on his use of inappropriate tone, sending inappropriate email, uncooperativeness and causing problems among the program staff. Tr. 707. Ex R-30
11. An addendum described Kisala as dependable and as an employee who took time to learn the program. However, it also showed that Kisala was aggressive and had difficulty communicating with the staff. Ex R-30
12. Test period evaluations are done once at the end of a probation period. Annual performance evaluations have different criteria and standards than the test period evaluations. The performance evaluation form is determined by the Union Contract. Tr. 773 of Exs. R-12, R-13
13. Kisala's judgment and cooperation was rated as good in 2009, 2010 and 2011. R Exs. 12, 13
14. The good characterization does not necessarily mean that a person is performing "good". Good was the only option to rate somebody as fair, but not unsatisfactory. An unsatisfactory rating affects promotions and salary. Tr. 719
15. Knowledge was not the reason for concern about Kisala's performance; it was poor interpersonal skills, a lack of cooperation, and bad judgment. Tr. 840, 871, see 899

16. A performance appraisal provides the DPH an option to work with the employee and explain where they want them to improve, but not mark someone as unsatisfactory. Tr. 720

17. Wallen was employed by DPH since 1995. Tr. 642. Wallen was Kisala's supervisor since 20005. Tr. 646-647

18. Wallen had ongoing problems with Kisala. Kisala often refused to do what he was asked. Wallen regularly had to have direct orders, put in writing, before Kisala would perform a task. Tr. 274, 705, 747, 788, EX R-14

19. In 2008, Kisala's job title was changed to Health Program Assistant as a settlement for his discrimination law suit. See Tr. 155

20. In Kisala's 2008 discrimination complaint, he stated that Wallen was incompetent and he disagreed with Wallen on the way things should be done. Tr. 732

21. In 2008 Kisala was a team leader and it was his responsibility to train a new employees. One of them was Desiree May (May). May become a team leader when Kisala's job title was changed. Tr. 835, 836

22. In 2009, Wallen had cooperation issues with Kisala regarding reports for two biomedical contracts as to whether there had to be written reports or electronic reports attached to the contracts. Tr .678-680

23. In 2009 Kisala was ordered by an email from Wallen to process payments, and suggested that he should communicate with the appropriate individual about any concerns he had. Ex R-11

24. Kisala was the only one to whom Wallen had to give direct written orders. Tr. 781, Ex R-22,

25. In 2009 Kisala would not include changes to contracts that had been required, per either the Attorney General's office or the Office of Policy and Management. Tr. 706

26. Kisala insisted Wallen put instructions in writing because he believed that the actions Wallen wanted him to perform "were not right." Tr. 179

27. Kisala knew that disobeying a supervisor was insubordination. Tr. 179.

28. In 2011 and 2012 Wallen assigned Kisala to contracts which required less contact with other staff members due to interpersonal conflicts. Tr. 776

29. In 2011, Kisala after being given a direct order, in writing by his supervisor, emailed Commissioner Mullen requesting a private meeting to discuss the order. Commission Mullen asked him to meet with Deputy Commissioner Leonard Lee. Tr. 307, Ex R-16

30. Kisala met with Lee in October or November of 2011. Tr. 173

31. May was a Fiscal Administrator and Johnson was a Health Program Associate. Both functioned as team leaders in 2012. One or the other of them was Kisala's supervisor, depending on his assigned team. See Ex R-1

32. Kisala was switched in mid-2011 to move him back to Johnson's team as he wasn't being fully cooperative with May. Tr. 749

33. On November 3, 2011 Wallen issued a memorandum with a direct order to Kisala to make a specific change to a contract after he refused to do so when instructed by a team leader. Tr. 746, R 14

34. On that same contract Kisala was supposed to provide support to another newer co-worker, which he failed to do. Kisala was removed from that contract as a result of his lack of cooperation Tr. 782 -783, See Ex R-20
35. Customer service was an important part of Kisala's job. Tr. 772
36. Wallen was concerned about Kisala's lack of customer service and, his lack of cooperation. Tr. 772, Ex R-11
37. Kisala's job questionnaire had a list of duties, which included the phrase, "performs related duties as required." Tr. 759 See Exs. R-8, 9
38. Health Program Associate is a very broad job and it is unworkable to describe every activity that needs to be executed while performing functions of this job. Tr. 759
39. Kisala used his listed job duties questionnaire, which he authored, as the alpha and omega of his responsibilities. See Ex R-17
40. As a support unit DPH policy dictates that the staff does everything they can to support its programs. Especially, when a request comes from the Deputy Commissioner. Tr. 759
41. In 2012, Davis sent Kisala a request for some contract language. Ex R-17
42. Kisala sent a response email to Davis stating what his job duties were and what her job duties were as he interpreted them. Kisala attached his job duties to the email. Tr. 760
43. The email contained bold and underlined text and responded to Davis that it is not my job to provide contract language, that's your job. Kisala's supervisors thought this was an inappropriate response. Tr. 760 Ex R-17
44. While it was not inappropriate for Kisala to contact the Davis regarding a contract, it was inappropriate for Kisala to send a disrespectful email to the Davis. Tr. 735, 736 760

45. Mary Ann Hayward (Hayward) was hired as Chief Administrative Officer of DPH on June 29, 2012. Ex R -3

46. Davis forwarded the inappropriate email to Hayward, Wallen and Carey expressing her concern about Kisala's behavior. Tr. 588- 590

47. Hayward was very concerned about the email exchange. Tr. 590

48. On April 26, 2012 another direct order was issued to Kisala to make an amendment to a contract. Tr. 9-24, Ex R-15

49. A bio-medical contract that had been fully performed contained a clerical error. The main page of the contract hadn't been signed by the provider despite all the other pages being signed. Tr. 778, R-15

50. The contract went through the Office of the Attorney General and was approved without the error being noticed. An amendment was needed to correct that contract. Id

51. Kisala said that the signature had never been received on that contract and stated that DPH could not amend that contract and the contractor could not be paid. Id.

52. The contractor's services had been fully performed. Kisala is not an attorney. Tr. 778, 310

53. Everyone was working under the assumption they had a fully executed, valid contract. The initiative then was to correct the deficiency. Tr. 778

54. Wallen instructed May, to carry out the corrections and provide the pages that needed correction. Tr. 778

55. Kisala was unwilling to perform the corrections that were needed to incorporate the changes into the contract. Kisala refused to make the changes until he was ordered to do so in writing. Tr. 779

56. On July 16, 2012 Kisala emailed Marianne Horn (Horn), the Agency Legal Director, to explain the difference between a contract amendment and a contract renewal. Ex R -18

57. On several occasions Kisala had valid points to make regarding errors in contracts. See Tr. 122, 179, 191, 195, 199, See Ex C-6,7

58. Kisala resented any effort to socialize at work with his co-workers such as being invited to a birthday celebration at lunch. Tr. 273- 275, 787

59. In 2012, Kisala also filed a grievance to be promoted as an Associate Fiscal Administrative Officer and was denied a job reclassification in 2012.

60. The problem was not that Kisala attempted to point out errors, it was the way he went about doing so that was the crux of the problem. See Ex R-6

61. Within two (2) weeks of starting her employment at DPH, Hayward was notified of two instances of Kisala's insubordination. Tr. 761

62. Malecky had power to act as appointing authority, and to hire and fire people. Tr. 849

63. Wallen told Malecky that he was receiving complaints about Kisala's unprofessional interactions, with other employees at DPH prior to August 9, 2012. Tr. 888

64. Between November 3, 2011 and May 3, 2012, Wallen issued at least two direct orders to Kisala; both of those instances occurred before any alleged protected activity in this case. Tr. 9, 646, 746, Exs. R-14, R-15

Counseling Meeting

65. In July 2012, Hayward directed Wallen to counsel Kisala regarding his insubordination issues. Tr. 755

66. On August 9, 2012 Kisala was called into a counseling meeting with Wallen, and Malecky to address his need to improve his cooperation and judgment to avoid any negative impact on his service rating in the future. Tr. 683, 901

67. The counseling meeting was to clarify for Kisala what the concerns were with his performance of his job duties, to clarify that he understood what the expectations were with regards to his job duties. Tr. 902

68. The major purpose of Kisala's meeting was to "discuss ways for improvement and to solicit Kisala's commitment to work in a more cooperative manner as to facilitate the contracts and the grants management process with the Agency's external progress, particularly with respect to biomedical contracts. " Tr. 223

69. Kisala wanted a union representative there. It is not required for a formal counseling meeting. Union representation is not required at a pre-disciplinary meeting. Nevertheless, his union representative was permitted to attend as it sometimes facilitates having a cooperative and productive counseling meeting. Tr. 905

70. Mary Jan Mitchell (Mitchell), Kisala's union representative attended the formal counseling meeting. Mitchell credibly testified that she did not hear a threat Tr. 793

71. Union CBA provides that counseling is not discipline. TR 298, Ex C-11,

72. Kisala wanted to bring documents to the counseling meeting, and he was told it was not necessary and not to bring them. Tr. 902, Ex-R-7

73. Kisala did not cooperate and brought documents to the meeting despite being told not bring them. Tr. 793, 153

74. At the meeting Kisala was shown a seven (7) page report detailing his problematic behavior, with specific examples. Tr. 300, Ex R-6

75. The report provided specific examples of Kisala's uncooperative and inappropriate behavior including e-mails, a violation of a 2009 stipulation, and many instances where he refused to do what was asked of him. Ex R-6

76. Kisala was told he needed to improve or he may get an unsatisfactory review in the future. Tr. 803, 804, 901

77. Kisala was told that the counseling was to help him perform better in the future. Tr. 144, 149

78. Kisala received a written follow up letter to the meeting. R-Ex-5

79. The defendants never threatened to terminate Kisala's employment in the letter. Ex R -5

80. There was a 13-day gap between the counseling session and this letter. Malecky was in the hospital for a portion of that time which impeded getting the letter out sooner. Tr. 908

81. The formal counseling session was not a basis to issue an unsatisfactory service rating. If Kisala improved his behavior and cooperation he was in no danger of an unsatisfactory rating. Tr. 937

Post Counseling Employment Behavior

82. DPH hoped and anticipated that Kisala would be more cooperative and improve his performance in the future. Tr. 937

83. Kisala's behavior did not improve. Tr. 909

84. In 2012, 2013 and 2014 Kisala did not receive a performance review. Tr. 407, 253

85. The failure to get a service rating is equivalent to satisfactory rating for the relevant period. Tr. 508

86. Kisala did not suffer any loss in salary or reduction in job title due to being counseled on August 9, 2012. Tr. 909

87. In 2014, Kisala was upset when it was suggested that he be polite to his colleagues by saying please and to use a less aggressive tone. C-49

88. Further, in 2014 there was a situation involving Johnson and Kisala. They disagreed about retaining a contract. At one point in a meeting there was a heated exchange and Johnson exclaimed, "something has to be done about you, you have to chill," Kisala considered this a threatening remark. Tr. 787, Ex R-22

89. William Cipollone (Cipollene), was Kisala's direct supervisor in 2014. Tr. 789, Ex R-2

90. Cipollene would stop by Kisala's desk on occasion and ask him for updates on contract activities or ask him to perform a particular activity. Kisala would tell him not to come to his desk, he wanted all inquiries and requests in writing. Kisala didn't want to speak with him, because Cipollone was a smoker and Kisala didn't like the way Cipollone smelled of smoke. On several occasions, Kisala actually got up and walked away from his workstation when his supervisor, Cipollone came to see him. Tr. 789

91. Cipollone responded by putting things in writing even though he was opposed to doing that. Kisala would often respond that it was harassment because Cipollone came to his desk. Tr 789

92. As an accommodation for Kisala's dislike of Cipollone's smoke smell it was suggested that, he could perhaps have direct communication with Cipollone by meeting with him at a table. The parties would be some distance away from each other so the odor of the tobacco would not be as much of an issue as when he was standing directly at Kisala's desk. That arrangement was unacceptable to Kisala. Tr. 893

93. Cipollone did not purposely smell of smoke and insist on meeting with Kisala as an act of retaliation.

94. On at least two occasions at work, Kisala responded to a request from Wallen by stating, "I know everything about you," and continued to be uncooperative. Tr. 349,947

95. In emails to supervisors and co-workers Kisala repeatedly stated , "you're harassing the wrong man at the wrong time in the wrong way," Tr. 351, 912, 913 Exs., R-31-3

96. Kisala was told that this phrase was threating and to stop using it. Kisala persisted with using the "wrong man," phrase. Exs. R- 26, 33

97. On November 3, 2014, Kisala was put on paid administrative leave pending a fitness-for-duty investigation for his continuing use of the "wrong man" phrase after being informed that his language was construed as threatening and the language was upsetting to other employees. Tr. 446, Exs. R-26, 33

98. When Kisala was called into the meeting regarding his paid administrative leave, he was asked to put his briefcase aside. Kisala responded by asking the group whether they thought he had a gun or weapon. Tr. 912

99. Carey felt uncomfortable by Kisala's weapon question. Tr. 610

100. As of the date of the last day of public hearing Kisala remained on administrative leave.

101. Kisala's protected activity occurred within two years of his August 2012 counseling session.

Protected Activity

102. Logan Johnson (Johnson), an auditor for the Connecticut Auditor of Public Accounts first recalled meeting Kisala for certain on July 17, 2012 when a routine SAS interview was conducted. Tr. 115

103. SAS stands for Statement of Auditing Standards. Tr. 126

104. After Johnson's recollection was refreshed, he remembered meeting Kisala on or about May 3, 2012. Tr. 122

105. Each time an audit occurs, the auditors pick samples of contracts that they want to review. There are certain groups they typically review and they also pick others at random. Tr. 810

106. There were frequent conversations among Kisala, auditors, and many other DPH employees. Conversations among staff and auditors are a routine function and occurrence at the DPH. Tr. 816

107. Kisala made statements, some of which Logan considered to qualify as whistleblower disclosures, between May 12, 2012 and August 12, 2012. Tr. 59

108. Kisala had a confidential interview with Logan on July 11, 2012 as part of the standard annual audit. Tr . 59

109. The July 11, 2012 interview was regarding sexually transmitted diseases (STD) tuberculosis (TB), and stem cell contracts. Tr. 59, 62, 66,

110. DPH employees were generally cooperative and helpful with the auditors. Tr. 124

111. Johnson had contact with Wallen as part of the standard audit procedures. Tr. 74

112. Johnson spoke to Wallen several times although he could not remember the exact dates or the conversation topics. Tr. 75

113. As part of their duties, employees at DPH had to help auditors and give them information. Tr. 72, 105, 84

114. STD and TB contracts were brought directly to Johnson by Kisala. Tr. 74

115. Johnson also spoke to several DPH employees regarding STD, TB, and Matloff contracts. See Tr. 78-79

116. Johnson went to Kisala to inquire about the Matloff contract. Tr. 82-84

117. It is a standard question for auditors to ask the interviewee if they had any knowledge of fraud or mismanagement. Tr. 100-101

118. It is common for auditors to review large contracts like the $44 million dollar stem cell contract. Tr. 112

119. The auditors did not tell anyone of the information Kisala was giving them. Tr. 114, 116

120. The auditors are circumspect with regard to people's identify and take active measures to keep their interviews with employees confidential and private. Tr. 124, 126

121. Johnson never spoke to anyone at DPH regarding Kisala's disclosures. Tr. 284

122. No one at DPH was informed of Kisala's whistle-blowing activities. Tr. 284, 290, 768

123. The first knowledge respondents had of any protected activity was when they were served with the complaint in the above captioned case in September of 2012. Tr. 587

III

LAW

Kisala has alleged a violation of General Statute §4-61dd (See footnote 1, herein above), whistle-blower retaliation. In interpreting our antidiscrimination and anti-retaliation statutes, we look to federal law for certain guidance. "In drafting and modifying the Connecticut Fair Employment Practices Act ... our legislature modeled that act on its federal counterpart, Title VII ... and it has sought to keep our state law consistent with federal law in this area. See, e.g., *Commission on Human Rights & Opportunities v. Savin Rock Condominium Assn., Inc.,* [273 Conn. 373, 385, 870 A.2d 457 (2005)] ('[w]ith the intent of creating a state antidiscrimination housing statute consistent with its federal counterpart, the legislature adopted [General Statutes] § 46a–64c and related *580 provisions'). Accordingly, in matters involving the interpretation of the scope of our antidiscrimination statutes, our courts consistently have looked to federal precedent for guidance. *Brittell v. Dept. of Correction,* 247 Conn. 148, 164, 717 A.2d 1254 (1998) ('[i]n defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII ... the federal statutory counterpart to § 46a–60'); *Malasky v. Metal Products Corp.,* 44

Conn.App. 446, 454, 689 A.2d 1145 ('[a]lthough the [federal precedent] was concerned primarily with [Equal Employment Opportunity Commission] filing requirements, the same rationale applies to the requirements of the [commission]'), cert. denied, 241 Conn. 906, 695 A.2d 539 (1997)." *Ware v. State,* 118 Conn.App. 65, 82, 983 A.2d 853 (2009). We conclude that federal law is an appropriate guide in this retaliation case." *Eagen v. Comm'n on Human Rights & Opportunities*, 135 Conn. App. 563, 579-80, 42 A.3d 478, 489 (2012)

To determine liability in whistle-blower retaliation we are guided by the burden shifting analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 729, 802-03 (1973). "The McDonnell Douglas analysis uses a three-step burden shifting analytical framework." *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995). The three shifting evidentiary burdens are: (1) the complainant's burden of proving his prima facie case; (2) the respondents' burden of production of their legitimate business reason for the adverse personnel action; and (3) the complainant's ultimate burden of proving by a preponderance of the evidence that the respondents retaliated against him because of his whistle blowing. *Id.* "The requirements of proof under McDonnell Douglas "must be tailored to the particular facts of each case." *Miko v. Commission on Human Rights & Opportunities, 220 Conn. 192, 204 (1991).*" *Daniel Schwartz, Complainant v. Attorney Michael Eagan, Respondent*, 2009 WL 910180, at *8

"A complainant's prima facie case of whistleblower retaliation has three elements: (1) the complainant must have engaged in a protected activity as defined by the applicable statute; (2) the complainant must have incurred or been threatened with an adverse personnel action; and (3) there must be a causal connection between the actual or threatened personnel action and the protected activity. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir.

1995)." *Christopher P. Walsh v. Department of Developmental Services*, et al., 2011 WL 2196514, at *4

"To satisfy the second element of his prima facie case, the complainant must show that he suffered or was threatened with an adverse personnel action by a regulated entity subsequent to his whistle blowing. § 4-61dd (b) (1). The standard articulated in *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 68, 16 S.Ct. 2405, 165 L.Ed.2d 345 (2006) is used to determine liability. The complainant must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from being a whistleblower. *Connecticut Dep't of Mental Health & Addiction Servs. v. Saeedi,* No. CV116008678S, 2012 WL 695512, at 13 (Conn. Super. Ct. Feb. 7, 2012) aff'd in part, rev'd in part sub nom. *Comm'r of Mental Health & Addiction Servs. v. Saeedi, 143 Conn. App. 839, 71 A.3d 619 (2013).* [R]etaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct ... such as hiring, firing, change in benefits, or reassignment ..... Again, the plaintiff must show that his employer's actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford,* 537 F. Sup.2d 332, 355-56 (D. Conn. 2008); *Tosado v. State of Connecticut, Judicial Branch,* Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6).

"Many courts have recognized that perceived slights, such as changes in supervisors, increased supervision, and general reprimands, do not constitute an adverse personnel action

under the objective 'materially adverse standard of Burlington Northern, supra.' *Moses v. City of New York*, 2007 W.L.2600859* (S.D.N.Y. 2007); Scott v. Cellco Partnership, 2007 W.L.1051687* (S.D.N.Y. 2007)." *Andrea L. Wilson, Complainant v. State of Connecticut Judicial Branch, Respondent,* 2011 WL 2662230, at *10.

Being placed on a "Performance Improvement Plan" is not an adverse employment action. *See, Brown v. Am. Golf Corp.* 99 F. App'x 341, 343 (2d Cir. 2004) (The Brown employee was placed on a Performance Improvement Plan was instructed to attend several seminars, read certain materials, implement ways to reward his co-workers, review and follow a business plan, conduct weekly staff meetings, and implement certain planning and scheduling mechanisms.)

The third element of a prima facie case is causation. "Complainant can establish the inference of causation by three methods: (1) indirectly, for example, by showing that the whistleblowing was followed closely in time by discriminatory treatment or through other circumstantial evidence such as disparate treatment of similarly situated co-workers; *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2000), *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondent; *Gordon v. New York City Bd. of Educ.,* supra, 232 F.3d 117; *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; or (3) by operation of statute as a rebuttable presumption; § 4-61dd (b) (5). Stacy v. Dept. of Correction, supra, OPH/WBR No. 2003-002, 6 - 7." *Shawn Irwin v. Theresa Lantz and Dan Callahan, Shawn Irwin v. Theresa Lantz, Dan Callahan and Department of Correction*, 2008 WL 2311544, at *7

5517188, at *45

General Statute § 4-61dd creates a statutory rebuttable presumption of causation if the personnel action occurred within [two] years of the complainant's transmittal of information to the auditors or to the Attorney General. Then, because of the presumption, the respondent's burden to production and persuasion of an existence of a legitimate business reason. "The presumptions created by those statutes may be rebutted by sufficient and persuasive evidence to the contrary. These rebuttable presumptions apply only to the question of causation. ..." (Internal citations omitted.) *Malchik v. Division of Criminal Justice*, 266 Conn. 728, 738 (2003). "A [statutory] presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. A presumption in favor of one party shifts the burden of persuasion to the proponent of the invalidity of the presumed fact. That burden is met when it is more probable than not that the fact presumed is not true. *Salmeri v. Department of Public Safety*, 70 Conn. App. 321, 339 (2002), cert. denied 261 Conn. 919 (2002). If the respondent is successful, the analysis proceeds to the third step. See *Malchik v. Division of Criminal Justice,* 266 Conn. 728, 738 (2003). The evidence presented by a respondent must be sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Insubstantial or suspect evidence cannot perform the same function." (Internal quotations marks omitted.) *Daniel Schwartz v. Attorney Michael Eagen,* 2010 WL 750974, at *11. For the respondents to be successful they must overcome the presumption by the preponderance of the evidence that there is legitimate business reason for the adverse action.

IV

ANALYSIS

To establish the first element of his prima facie case, Kisala must prove that he was an employee who worked at the state agency and engaged in protected activity. These facts have been established on the record. Kisala, is an employee of the State Agency, DPH. There was testimony by an auditor of public accounts; Johnson, who testified that some of the information transmitted by Kisala would be classified as protected activity. Therefore, the first prong is met and we move on to the second element.

The second element requires Kisala prove that he was subjected to an adverse personnel action. While the legal standard is whether the action would dissuade a reasonable employee from engaging in protected activity, it is not an entirely subjective standard. The law also states actions such as increased supervision, and general reprimands, do not constitute an adverse personnel action under the objective materially adverse standard.

A counseling session is defined as a non-disciplinary action under Kisala's Collective Bargaining agreement. The union representative testified that there were no verbal threats at the meeting and the follow up letter does not contain a threat of termination. To say that any action that the employee does not like is an adverse personnel action is an unworkable definition. Kisala testified that he was threatened with getting an unsatisfactory service rating in the future, if he did not improve his cooperation and judgment. However, he was shown many examples of his lack of cooperation and poor judgment in the past. He was told that the object of the counseling meeting was to help avoid a negative service rating. This counseling session did not put Kisala on a "Performance improvement plan," (PIP). A PIP would have been

the usual step in attempting to correct or improve an employee's improvement. An employee that is placed (*See, Brown* supra) on a PIP cannot claim it is an adverse action and this counseling meeting did not even rise to the level of a PIP. Therefore, Kisala failed to prove an adverse action took place. Ordinarily this would end the analysis as Kisala failed to prove element two of his prima facie case. Nevertheless, a further discussion is warranted, as this standard may be considered as more subjective.

The rebuttable presumption of causation creates a burden of production and persuasion for the respondent. Kisala spent a considerable amount of time trying to prove that his under lying whistle-blower allegations were true relying on a report of the State Auditors issued in October of 2013. This case is not about whether underlying whistleblower allegations are true, but rather it is about whether Kisala can establish a cause of action under General Statute § 4-61dd.

The facts as listed herein above illustrate that Kisala was a very knowledgeable in his subject area and his ultimate work product was classified as excellent on two occasions. However, the facts also tell a story of an employee who had difficulty cooperating, communicating with others in an acceptable work manner and using common-sense judgment. Kisala had a right to ask questions and to point out potential problems to his superiors; however, he did not have the right to do so in a belligerent and/or threatening manner. There is a rebuttable temporal presumption that causation exists. DPH has presented sufficient persuasive evidence to overcome that presumption. The evidence supports the conclusion that is more likely than not it had a legitimate business reason for counseling Kisala.

Kisala argued that all the circumstantial evidence, i.e. several communications he had with the auditors regarding contracts that were his responsibility, proves that the respondent knew of the retaliation, and as a result held the counseling meeting. Kisala ignores the fact there is direct evidence of concern over his poor judgment and insubordination prior to the alleged whistle-blowing activity. This well documented history of inappropriate conduct strongly supports the respondent's legitimate reasons for the counseling session. There is direct evidence of Kisala sending hostile emails, refusing to perform his job, requiring any requests to him be in writing, and a history of conflicts with fellow employees. This documentation is persuasive evidence that it is more likely than not the counseling session was motivated by Kisala's behavior over the course of his employment since 2005.

Further, there is no direct evidence that DPH knew of protected activity. Federal and State law require this knowledge of the activity as element of establishing a prima facie case of discrimination retaliation. *See Eagen v. Comm'n on Human Rights & Opportunities,* 135 Conn. App. 563, 579-80, 42 A.3d 478, 489 (2012). Given the strong reliance on federal law and discrimination law for guidance in whistle-blower retaliation cases, a discussion of this element is appropriate. It was part of Kisala's normal job duties to meet with auditors and answer their questions regarding certain agency contracts. Wallen and Horn directed the auditors to speak to Kisala to obtain information on several occasions. Establishing the fact that employees knew Kisala was speaking to the auditors does not equate to knowing that Kisala was engaging in whistleblower activity. Trying to bootstrap this argument by arguing that the Auditors found several errors in the agency process, therefore, they knew the information came from Kisala is ineffectual; the report wasn't made public until October of 2013, over a year after the alleged

retaliation. If an employer did not know that protected activity occurred, it is illogical to conclude that an employer retaliated against the employee regarding something they did not know. In a discrimination retaliation case, that fourth element of a prima facie case, requiring that the employer knew of the protected activity, is not present in the instant case. Once again, while it is not often listed as an element in whistle-blower retaliation cases; an employer's lack of knowledge is persuasive evidence supporting the employer's proof that there was a non-retaliatory reason for the counseling meeting.

In Kisala's amended complainant, he furthered argued that his supervisor, Cipollone, retaliated against him by requiring Kisala to have face-to-face interaction with him because Cipollone smelled of smoke. Cipollone was not smoking in the building; it was the lingering smoke smell that offended Kisala. Personal interaction between supervisors and their subordinates is part of the ordinary course of business at the DPH, as it is in most agencies. It is unreasonable for employers to cease personal communication with an employee because of smells that are unpleasant to co-workers on a subjective basis. Further, it is unworkable to set a precedent that someone's odor is an actionable act of retaliation. It would open the door to claims of retaliation for not liking someone's perfume, cleaning products, plants, food, soap, and lotion odors. A supervisor's odor is not an adverse personnel action. To be actionable an alleged adverse action must be in retaliation for whistleblowing. Cipollone did not purposely smell of smoke and insist on meeting face-to-face with Kisala as an act of retaliation.

Another amended complaint included an allegation that complainant was retaliated against when another co-worker raised her voice at a meeting and after a heated exchange stated, "something has to be done about you, you have to chill." Once again it is more

probable than not that this statement was made in the context of a disagreement at a meeting, not motivated by retaliatory animus.

Lastly, Kisala's placement on paid administrative leave is also not retaliation. The exhibits provide examples of email where Kisala used threatening language, he was informed that this behavior was indeed threatening to others and to stop immediately, nevertheless, Kisala continued to use the same threatening language. An employer must be able to take action when an employee refuses to stop a threatening behavior. Workplace violence is all too common in the current workplace climate. While it does not factor in the determination of this case, it should also be noted that Kisala did not lose any pay and he did not offer credible evidence of emotional distress.

V

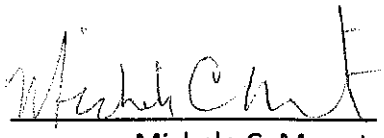
Conclusions of law

Kisala failed to prove that he was subject of any adverse personnel actions by DPH. DPH did not threaten Kisala with an adverse personnel action. The activities alleged to be actions by the DPH did not meet the legal standard of adverse personnel actions.

Moreover, there is no causal connection between the counseling meeting, Cipollone's actions and his co-worker shouting during a disagreement in a meeting with the transmittal of information to the auditors. The DPH produced, and met the burden of persuasion that a legitimate, non-retaliatory reason existed for any alleged actions even they could be construed as adverse.

The complaint is dismissed.

It is so ordered this 31ST day of March 2016.



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