State of Connecticut
Commission on Human Rights and Opportunities
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July 2, 2018

OPH/WBR No. 2016-316 Juanita Estrada v. CT Department of Public Health

FINAL DECISION
Dear Complainant/Respondent:

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

The decision is being sent via email to the complainant's attorney and respondent's attorney.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc.

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STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

Juanita Estrada,
Complainant

OPH/WBR 2016-316

v.

CT Department of Public Health,
Respondent

July 2, 2018

FINAL DECISION

On February 19, 2016, Juanita Estrada (hereinafter "Complainant") filed a Whistleblower Retaliation Complaint ("Complaint") with the Office of Public Hearings ("OPH") against the State of Connecticut, Department of Public Health ("DPH"). In the Complaint, the Complainant alleges that DPH retaliated against her for disclosing a violation of law. Complainant currently is employed by the DPH in the Office of Local Health Administration ("OLHR"). OLHR is a division in the DPH.

Complainant alleged that the Respondent retaliated against her because of two disclosures; her June 18, 2015 disclosure to Ellen Blaschinski that DPH violated General Statute §19a-200 in the approval of Ruonan Wang's ("Wang") appointment as Acting Director of Health for the City of Hartford (Wang did not have a graduate degree in Public Health as he claimed on his resume); and Complainant's February 19, 2016 Whistleblower complaint filed with the OPH alleging that DPH violated General Statute § 4-61dd in retaliating against Complainant for her disclosure regarding Wang.

The Respondent's post hearing brief arguments also incorporated its previous motion to dismiss arguments with a new Motion to Dismiss as part of their brief. The first Motion to Dismiss was denied. This Tribunal has jurisdiction to hear the instant case. The Respondent's post-hearing brief will not be

treated like a Motion to Dismiss, however some of the Respondent's arguments will be addressed as part of its post-hearing brief.

I

FACTS

1. The DPH is a public agency. Conn. Gen. Stat. § 19a-1a(a). The DPH is a public agency. Conn. Gen. Stat. § 19a-1a(a).
2. Complainant began working for the DPH on January 20, 1995 as an epidemiologist 1 in the occupational health program. Complainant was subsequently promoted to epidemiologist 2 in the Occupational Health Program and then to epidemiologist 3 in the DPH division of OLHA. She was then promoted to epidemiologist 4 in 2010 at OLHA. (Tr. 4).
3. OLHA is responsible for ensuring the delivery of public health services at the local level. The mission of OLHA is to work with local partners to fulfill Connecticut General Statutes and Regulations thereby providing essential public health services statewide. Connecticut's local public health infrastructure encompasses a mixture of municipal health departments and regional health districts. All health districts provide full-time public services to their communities. Connecticut's local public health system is decentralized. Local health agencies are autonomous and under the jurisdiction of the towns/municipality or health district served. Local health agency staff are hired and employed by their respective local health agency. The DPH Commissioner reviews the credentials of the director of health for the local health agency to assure minimum qualifications are met, pursuant to Connecticut General Statute (CGS) §19a-200 (municipal) and §19a-244 (district) (OLHA website) .
4. Ellen Blaschinski ("Blaschinski") is currently the Chief Operating Officer of the Department of Public Health. (Tr. p. 143:14-19). Prior to that, Blaschinski was Public Health Branch Chief. (Tr. 143).

5. During the time Blaschinski supervised the Complainant, Blaschinski directly supervised six individuals, three managers and three non-managers, including the Complainant. (Tr. 258-259).

6. Blaschinski's October 1, 2011-September 30, 2012 evaluation of Complainant stated, "In the past year, Juanita has continued to grow in her leadership of the Office of Local Health Administration. Her analytical skills have proved extremely valuable in the abilities related to updating the annual report for local health officials partnering with the local Connecticut Association of Directors of Health on a joint grant application with the Robert Wood Johnson Foundation and in the development of a statewide guidance development for local health officials on responding to suspicious substances in their communities." (Tr. 8; Exhibit C-23).

7. Complainant was reviewed again for October 1, 2012 - September 30, 2013. She received all excellent ratings. The evaluation of Complainant stated that "Juanita is very knowledgeable regarding local public health services. She has built and sustains collaborative relationships with DPH's local health partners." (Tr. 9, Exhibit C-24).

8. Blaschinski only rated one of the other non-managers she supervised as "excellent" and did not rate the other non-manager as "excellent" for the October 1, 2011 - September 30, 2012 evaluation. (Tr., 258-259).

9. Blaschinski evaluated Complainant for October 1, 2013- September 30, 2014. In the evaluation, Blaschinski rated Complainant as Excellent in four out of six categories and rated Complainant as Excellent overall. (Tr., 10; Exhibit C-25).

10. An Epidemiologist 4 is expected to operate at a full level of independence and has responsibility for setting priorities. (Tr. 307-308).

11. Blaschinski testified that she ultimately wanted to move OLHA in the direction of a regulatory agency rather than a service or advocacy one as identified in the OLHA's mission statement. (Tr., 195).

12. Blaschinski was on leave From November 2014- through January 2015. Susanne Blancaflor ("Blancaflor") was covering for her. (Tr., 15).

13. In January 2015 Complainant was scheduled to be on two calls at the same time. There was a staff member who refused to cover one of the calls; therefore she asked Blancaflor which one she should attend. Complainant was told to attend the preparedness meeting. Another staff member was on the call with local health departments. Id.

14. Later Complainant discussed the staff member who refused to attend the January call with Blaschinski who referred Complainant to human resources. There was also a several email exchanges regarding the incident. The staff member who refused to be on the call was eventually reprimanded. (Ex. 41, Tr., 17-18).

15. During Blancaflor's time substituting for Blaschinski approved vacation leave for the Complainant in February 2015. (Tr., 16).

16. On March 12, 2015, Blaschinski issued a Performance Improvement Plan ("PIP") to Complainant for the following issues: (1) Improving communication with local health department/districts; (2) development of policy to ensure delivery of public health services at the local level; (3) leadership in identifying barriers at the local level; (4) leadership in the act of supervision of staff. (Exhibit C-13, Tr., 53-54).

17. Complainant testified that Blaschinski did not discuss the PIP face to face after it was issued. They did meet bi-weekly on other matters and on July 15, 2015 Blaschinski issued a memorandum to Complainant regarding a PIP update. (Ex. C-34, Tr., 20).

18. After Blaschinski issued the March 2015 PIP, she did not provide Complainant with any assistance or training in the four issue areas covered in the PIP. (Ex. C-5, Tr., 1819, 113-114, 169-170;).

19. The PIP update memorandum was issued after the Wang credentials incident. The update reflects Blaschinski's displeasure over the handling of the matter. The memorandum also references that Complainant stated "it doesn't matter what I do, it will be wrong," (Ex. C-34).

20. From August 2011 through May 2017, Ms. Blaschinski did not provide Complainant with a work plan to address issues raised in the PIP. (Tr., 126-127).

21. A PIP is not disciplinary. It is meant to identify areas of performance that needs improvement, and to assist the employee in improving by providing specific information in that regard. (Tr., 310).

22. Complainant took it upon herself to attend Leadership training offered by the Greater Hartford Leadership Foundation. (Tr., 19).

23. Until September 2016, the Respondent did not have any policy or procedure in place to guide reviews of local health director's credentials. (Tr., 12, 22-23, 62, 141).

24. Prior to development of a policy in September 2016, the customary process within the OLHA was to review a letter from a municipality or a district board of health appointing an individual to a permanent or acting director of health. Once the OLHA received the appointment letter from a municipality or the district board of health the Complainant would review the appointed individual's resume to ensure that it stated that the individual had a graduate degree from an accredited school. (Tr., 12-13).

25. Once the Complainant reviewed the appointment letter and resume, she would then draft a letter for Blaschinski's review stating that the DPH approved the appointment. After Blaschinski reviewed the letter she would send it onto the Commissioner of DPH for their review. Between 2011 and July 2015, the Complainant and Blaschinski undertook this process approximately ten times. (Tr., 13, 25).

26. Blaschinski had final responsibility for sending the drafted letter to the Commissioner of DPH. (Tr., 129).

27. Blaschinski did not do anything to review or verify an individual's credentials prior to sending the letters to the Commissioner of DPH Blaschinski never read the resumes of individuals who were nominated for the positions. (Tr., 155, 165-166).

28. The Respondent enacted a policy in September 2016 that does not require the DPH to undertake independent verification of the appointed individual's credentials; instead the local health department provides the OHLA with a copy of the appointed individual's transcript or diploma. (Tr., 129, 141).

29. Dr. Rual Pino ("Pino") became Commissioner of the Department of Public Health in February 2016. (Tr., 387).

30. Prior to that he was Deputy Commissioner, a position he assumed in June 2015. (Tr., 387-388).

31. Pino worked at DPH from 2007 to 2010. (Tr., 388).

32. Pino worked as the Assistant Director and then the Director of Health for the city of Hartford from 2010 to 2016. (Id).

33. On May 8, 2015, Pino, then Director of Health for the City of Hartford, submitted a letter requesting approval of Ruonan Wang as Acting Director of Health for the City of Hartford. At the time the letter was submitted, Wang was the Assistant to the Director of Health and Human Services. (Tr., 20-21, 225; Ex. C-21).

34. Pino's May 8, 2015 letter stated that "Mr. Wang graduated from the University of Connecticut in 2010 ... in addition to a Master of Public Health in 2013 from The Graduate School at UConn." (Exhibit C-21).

35. After receiving Pino's letter and Mr. Wang's resume, Complainant completed a form letter for Ms. Blaschinski's review and then for the signature of Dr. Jewell. Mullen's ("Mullen"), the then Commissioner of DPH. (Tr., 24-25, 68).

36. Complainant was following the customary practice of the department at that time. (Tr., 299).

37. Blaschinski had final responsibility for sending the drafted letter to the Commissioner of DPH. (Tr., 129).

38. On May 19, 2015, Dr. Mullen sent a letter to the Mayor of Hartford and Pino stating that, "Mr. Wang may also serve as the Interim Director of Health while the City is recruiting for a new Director of Health." (Exhibit C-22).

39. On June 17, 2015, Complainant was approached by a DPH employee who stated she had received a call from a City of Hartford employee that Mr. Wang ("Wang") did not have the qualifications to be appointed interim Director of Health for the City of Hartford. (Tr., 26).

40. Blaschinski was not in the office on that day. Complainant had her secretary, Noreen Hills, ("Hills") contact the University of Connecticut to confirm whether Wang had his Masters' degree in public health. (Tr., 26).

41. Blaschinski claimed that it was poor judgment for the Complainant to "direct a secretary [Hills] to conduct the first true degree verification performed by the Office of Local Health Administration ("OLPH")." (Exhibit C-7, p. 2)

42. Blaschinski also testified that as an Epidemiologist 4, she expected the Complainant to exercise independent judgment. Nonetheless, when the Complainant did so, she was penalized for this exercise of judgment. (Tr., 222).

43. Hills reported to Complainant that she verified that Wang did not have his Masters' degree in public health ("MPH"), the Complainant then completed the Complaint Intake/investigation form. (Ex. C-1 7; Ex. C-32).

44. No one at the City of Hartford reviewed Wang's credentials or qualifications prior to informing the state that he would be appointed as Acting Director of Health. (Tr., 395-396).

45. Pino found out that Wang did not have an MPH in July of 2015, after he already was at the DPH. (Tr., 396).

46. On June 18, 2015, Complainant met with Blaschinski the day after the disclosure as part of their biweekly meetings. Complainant told Ms. Blaschinski that Wang did not possess the proper credentials to be interim Director of Health, which violated General Statute §19a-200. The Complainant also sent Blaschinski a copy of the OLHA Complaint Intake/investigation Form. (Ex. C-16, Tr. 27).

47. Juan Figueroa, from the City of Hartford Health Department, called Blaschinski and told her that Wang was removed as interim Director of Health and someone else would be appointed in Wang's place. (Tr., 27-28).

48. Blaschinski never asked Figueroa whether the City of Hartford had vetted Wang prior to hiring him in his previous position of Assistant to the Director of Health and Human Services, (Tr., 158-159, 225).

49. Blaschinski also informed Pino, her supervisor that Wang did not possess the required degrees for the position and Pino was upset and shocked at this information. (Tr., 276, 397).

50. Pino spoke at least twice about the incident with Mr. Wang's credentials before the Complainant was issued a letter of reprimand by Blaschinski on July 7, 2015. (Tr., 397-400).

51. One paragraph of the July 7, 2015 reprimand also referred to an incident with the appointment of Mr. Richard Matheny as the Town of Monroe's Acting Director of Health, which had already been resolved by the Complainant. The Complainant had already independently verified Mr. Matheny's credentials as she found a written verification from Yale University, School of Public Health from 1976 and therefore it was unnecessary to do it again. (C-26).

52. Blaschinski also stated that "this reprimand addresses recent events involving the process used to confirm the credentials of local health directors." This reprimand was a form of discipline. (Ex. C-7, Tr., 28-30).

53. Complainant was disciplined for not re-verify information that was already known. (Ex. C-9).

54. On August 13, 2015, Complainant submitted a response to Blaschinski's reprimand. (Exhibit C-26).

55. Pino testified that he was the first person to tell then Commissioner, Mullen about the Wang incident and that Dr. Mullen was shocked. (Tr., 405).

56. Prior to the Wang incident, it was the customary procedure of OLPH that a "review of the credentials" was to check the resume of the candidate to see if they attended an accredited school, not to verify their attendance. (Tr., 12-13, 69-70).

57. Blaschinski testified that she informed Mullen that Wang did not possess the requisite degrees and the commissioner was "quite unhappy" with the information. Blaschinski told Mullen that it had been her understanding that the department reviewed transcripts or a copy of the degree. Blaschinski testified that she thought review meant "verified." However, she also testified that she does not really remember ever inquiring about the review policy or, if any, was in place. (Tr., 23, 29, 128, 145-147, 162).

58. Blaschinski did not review Wang's credentials and did not ask Complainant to contact the University of Connecticut to verify his degree. (Tr., 25, 157).

59. Blaschinski was not disciplined or put on a PIP for the incident regarding Wang's credentials. (Tr., 166).

60. Complainant stated in the letter she prepared for Blaschinski's approval that Wang's credentials were reviewed to ensure that candidates' degrees were obtained from an accredited school, not independently verified as to matriculation. (Ex. C-22, Tr., 267-268).

61. Blaschinski testified that Pino was embarrassed and upset by this mistake because he initially appointed Wang. (Tr., 164, 276,).

62. Pino testified that he was shocked that Wang was not qualified. (Tr. 414).

63. In September 2015, Blaschinski issued an Annual Service Rating for the Complainant for the period October 1, 2014-September 30, 2015. Blaschinski rated Complainant overall as "unsatisfactory" and

rated Complainant as "less than good" in four categories. This was the first negative evaluation of her in her over twenty years at DPH (Ex. C-8, Tr., 30-31).

64. In the September 2015 evaluation Ms. Blaschinski attached and incorporated the July 7, 2015 reprimand regarding the Wang incident. (Ex. C-8).

65. Blaschinski discussed the September 2015 evaluation with Pino. (Tr., 168).

66. On November 20, 2015, Blaschinski issued another letter of reprimand to Complainant, which stated that "[O]n June 26, 2015 you were issued a written reprimand regarding your poor judgment and inadequate performance in relation to the appointment of local health directors by the DPH Commissioner." (Exhibit C-9).

67. The November 20, 2015, reprimand also involved a reappointment of a Director of Health in the City of Bridgeport. The current mayor of Bridgeport was not running for re-election and Complainant was never told that understanding the politics surrounding an appointment was part of her job duties. (Ex. C-18, R-1).

68. Blaschinski testified that the form letter forwarded to for the Commissioner's signature was for a reappointment of a Director of Health in the City of Bridgeport. Complainant failed to disclose that the Mayor in Bridgeport was not going to be running for reelection. Blaschinski wrote to Complainant, "I think that should have been discussed with me. Not just send the letter up, here get this signed by the Commissioner, but give me that background information, let's have a discussion about it." (Tr., 239-242).

69. The November 2015 letter of reprimand also threatened Complainant that "additional incidents of this kind will be cause for more severe disciplinary action, up to and including, suspension and dismissal. This may be reflected in a less than good evaluation with specific reference to 'Judgment', 'Quality of Work', and 'Knowledge of Work'." (Ex. C-9).

70. The reprimand was incorporated into Complainant's unsatisfactory service rating. (Tr., 169).

71. Blaschinski also issued the Complainant two additional performance evaluations. See below.

72. The service rating dated October 1, 2015 to May 16, 2016 was an interim service rating. (Exs. R-15, R-16, Tr., 245, 322).

73. Blaschinski wanted to do an interim rating. Regulations indicate that receipt of two consecutive unsatisfactory service ratings is just cause for discipline. (Tr., 323).

74. In November 2015, Complainant was reprimanded by Blaschinski for being unable to locate a former manager's file. (Ex. C-18).

75. On December 22, 2015, Complainant submitted a response to the November 20, 2015 reprimand. (Exhibit C-18).

76. The Complainant's job description does not include maintaining files for the program. Complainant was disciplined for a job duty again not articulated in any documents provided to her. (Ex. C-18, R-1).

77. Blaschinski issued an interim service rating of Complainant for the October 2015 - May 2016, time period. In the evaluation Complainant was rated "less than good" in three categories and she rated Complainant overall as "unsatisfactory." Copies of the letters of reprimand were placed in the Complainant's personnel file. (Exs. C-7, C-9, C-10).

78. Complainant received her annual increment (raise) in January 2016 that was approved by Human Resources not Blaschinski. (Tr., 17-21, 319).

79. On February 19, 2016, Complainant filed a whistleblower retaliation complaint with the Chief Referee of the Office of Public Hearings because she felt that there was continuing retaliation against her for exposing that Wang did not possess the required credentials to be the Director of Health for the City of Hartford. (Ex. C-1, Tr., 36-37).

80. Michael Carey ("Carey"), Director of Human Resources was aware of the Complainant's whistleblower complaint. (Tr., 366).

81. The Complainant received an unsatisfactory service rating for the period of May 17, 2016 through September 30, 2016. (Tr. 106).

82. In the October 2016 evaluation, Blaschinski again cited the June 2015 incident with Mr. Wang. (Ex. R-16).

83. In October 2016, Blaschinski issued an interim service rating of Complainant for the October 1, 2015 — September 30, 2016 time period. In the evaluation Complainant was rated "less than good" in three categories and she rated overall as "unsatisfactory." (Ex. C-3).

84. Complainant was aware that the third "unsatisfactory" overall rating for her interim service ratings was sufficient for the DPH to terminate or demote her. (Tr., 44, 326).

85. Complainant submitted a rebuttal to the second interim service rating on October 26, 2016 where she stated "I cannot be successful because of the practices of my supervisor. These no-win situations create an environment that is very intimidating and stressful." (Ex. C-6).

86. In May 2016 Complainant was given another negative Interim Service Rating. Blaschinski incorporated the November 2015 reprimand into the May 2016 interim service rating. (Ex., C-10).

87. On April 26, 2017, Complainant was informed by letter that she was being demoted from Epidemiologist 4 to Epidemiologist 3 because of "two successive unsatisfactory service ratings filed within two years of each other." (Ex. C-37 Tr., 48-49).

88. Blaschinski sought and received permission from then Commissioner Pino to demote the Complainant. (Tr., 177).

89. Blaschinski agreed with and accepted Carey's recommendation that she was not required to demote the Complainant. (Tr., 183).

90. The demotion to Epidemiologist 3 removed Complainant's responsibilities for approving time sheets and leave requests. (Tr., 5).

91. Blaschinski stated that another reason given for demotion was that Complainant was resistant to change the direction of the focus of the OLHA from service to regulatory. There was nothing in the PIP or the narrative portion of the 2013 or 2014 evaluations of the Complainant that described either a desire to move the OLHA into a regulatory direction or Complainant's purported resistance to this move into a regulatory direction. (Tr., 264-266).

Complainant's Damages

92. When Complainant was demoted to Epidemiologist 3, her pay reduced by $3.25 an hour or approximately $6,000 per year. (Ex. C-38, Tr., 50).

93. Because of the "unsatisfactory" ratings on her evaluations and reprimands Complainant has had difficulty sleeping. (Tr., 52).

94. After receiving negative evaluations Complainant has had to increase her antidepressant medication and has been prescribed high blood pressure medication after suffering from shortness of breath. (Tr., 52).

II.

LAW AND ANALYSIS

The Respondent filed a Motion to Dismiss on June 14, 2017 and it was denied by this tribunal on July 27, 2017. The Respondent's Post hearing brief attempts to incorporate their previous Motion to Dismiss and its arguments. Nothing has changed since the denial of Respondent's first Motion to Dismiss, however this ruling will briefly discuss the issues the Respondent is rearguing.

A. Election of Remedies and Jurisdiction

Complainant filed a Union grievance, which did not allege whistleblower retaliation and not relevant to this proceeding. When a defendant challenges a complaint on the ground that a plaintiff has

elected an exclusive remedy, the issue is properly raised by a special defense and not a motion to dismiss since "[I]t is both rational and fair to place the burden of pleading and proving an election of remedies on the party asserting the claim ..." *Grant v. Bassman*, 221 Conn. 465, 604 A.2d 814 (1992). The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. *Practice Book 164.*

"The claim that a plaintiff has elected an exclusive remedy relies on facts outside those alleged in the complaint that operate to negate what may once have been a valid cause of action. *1 E. Stephenson, Connecticut Civil Procedure* (2d Ed.) 127, p. 519. It is therefore both rational and fair, to place the burden of pleading and proving an election of remedies on the party asserting the claim, usually the defendant. 'It is sufficient to require the plaintiff to allege facts showing that at one time, at least, he had a cause of action. It would be an undue burden to require him to negate the occurrence of any and all subsequent events that could operate to destroy his cause of action.' Id." *Grant v. Bassman*, 221 Conn. 465–73, 604 A.2d 814 (1992).

In the present case, the defendant is asserting, in a second motion to dismiss, that regardless of the truth of the allegations in the plaintiff's complaint, she cannot maintain her whistle-blower action. This question is similar to *Levasseur v. Town of Bethany* 2012 WL 1435239 (Conn.Super.), where the respondent filed a motion to dismiss a common-law action arguing that the plaintiff had elected workers' compensation as her exclusive remedy. *Id.* The court concluded that a special defense, and not a motion to dismiss, is the proper procedural vehicle for the Respondent's challenge to the plaintiff's complaint. *Id.*

"In its [Connecticut] 2002 session, the legislature enacted P.A. 02-91, introduced as H. B. 5487. In their discussion of the proposed bill, the legislators made clear that the "only changes we're making to the existing whistleblower statute in this bill is creating a rebuttable presumption if the job action took place within one year of a whistleblower stepping forward. And the second thing we're doing here to the

underlying law is creating a new alternative avenue for a person to bring the complaint as an alternative to the existing avenues that are in the law as we speak." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2881. The "new route that this bill before us creates is with the Attorney General and the Chief Human Rights Referee. The existing routes than at employee can take today are to file with the employee review board or they can grieve under the provisions of their state contract, if their state contract includes such a provision or three they can bring a civil action in court." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2882." *Mehdi M. Saeedi v. Department of Mental Health and Addiction Services, et al.* 2010 WL 55171. Further, a complainant is precluded only from bringing claims of whistleblower retaliation complaints in multiple forums.

A complainant is not precluded from filing a whistleblower retaliation complaint with the chief human rights referee while pursuing non-whistleblower retaliation claims in other forums, even if the whistleblower retaliation and non-retaliation claims arise from the same set of facts. *Saeedi v. Dep't of Mental Health & Addiction Services,* Docket No. 2008-090, Final Decision, p. 74-75 (December 9, 2010) (2010 WL 5517188). "The statutory language of § 4-61dd when viewed in its entirely, its legislative history and the grievance process ... reveal, however, that § 4-61dd does not require a state employee to abandon the grievance of non-whistleblower claims, even if those claims evolve from the same personnel action giving rise to his whistleblower retaliation claim. ... Instead, the statute should and reasonably can be construed as allowing an employee to pursue both grievances alleging non-whistleblower contractual violations and also whistleblower retaliation complaints alleging retaliatory animus arising from the same personnel action. ...In this case, there is no evidence that [Complainant] filed a complaint with the employees' review board or filed a grievance through a collective bargaining agreement alleging that the respondents had retaliated against him for his whistleblowing. Therefore, he is not precluded from filing a whistleblower retaliation complaint with the chief human rights referee." *Christopher P. Walsh v. Department of Developmental Services, et al.,* 2011 WL 2196514, at 388. The Respondent has not

produced evidence that the complainant has pursued a claim of whistleblower retaliation in any other venue. The Complaint was properly brought in this forum and this tribunal has subject matter jurisdiction.

The Complainant's action was qualifying under General Statute §4-61dd as she made a protected disclosure as analyzed herein below and the filed a complaint with the Chief Human Rights referee pursuant to said statute. Therefore, Respondent's argument's that this Tribunal does not have jurisdiction and violates sovereign immunity is without merit; as was previously determined in this tribunal's denial of respondent's Motion to Dismiss.

B. **General Statute §4-61dd**

Connecticut General Statutes §4-61dd provides protection to state employees who report "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 or agency or any quasi-public agency, as defined in section 1-120, or ... violation of state or federal laws or regulations." General Statute §4-61dd(a). Relevant sections of General Statute 4-61dd further provide that:

> "(a) Any person having knowledge of any matter 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 or agency, any quasi-public agency, as defined in section 1-120, or any Probate Court or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of

the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation.

(e) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for (A) such employee's or contractor's disclosure of information to (i) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (ii) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (iii) an employee of a state agency pursuant to a mandated reporter statute or pursuant to subsection (b) of section 17a-28; (iv) an employee of the Probate Court where such employee is employed; or (v) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract; or (B) such employee's testimony or assistance in any proceeding under this section."

Additionally, the Whistleblower statute provides that when the adverse personnel action occurs "not later than two years after the employee first transmits facts and information concerning a matter in accordance with subsection §461dd(a).... there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section. General Statute §461dd(d)(4). General Statute § 4-61dd is a remedial statute and is to be interpreted broadly to effectuate their purpose." *Commissioner of Mental Health and Addiction Services v. Saeedi*, 71 A.3d 619, 633, 143 Conn.App. 839, 860 (Conn.App., 2013).

By using such broadly defined words as "abuse" and "mismanagement", the legislature intended to protect employees who disclose a wide array of transgressions under CONN. GEN. STAT. § 4-61dd. Principles of statutory construction support this conclusion, as CONN. GEN. STAT. § 4-61dd is a remedial statute; *Saeedi,* 143 Conn. App. at 851-52; and "a remedial statute...is to be construed liberally in favor of those whom it is intended to protect, namely, victims of prohibited... [retaliation]." *Thames Talent*, 265 Conn. 265 Conn. 127, 137 (2003).

C. McDonnell Douglas Test

Whistleblower retaliation cases brought under § 4-61dd are typically analyzed under the three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) and also under federal and state case law interpreting other anti-retaliatory and anti-discrimination statutes. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990); *Irwin v. Lantz*, OPH/WBR 2007-40 et seq., Final Decision, 11 (May 9, 2008) (2008 WL 2311544). *Mary K. O'Sullivan v. Helene Vartelas, et al*, 2008 WL 5122194, at 1.

In *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the United States Supreme Court set forth the basic allocation of burdens and order of presentation of proof in cases involving claims of employment discrimination. The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. Id., 802, 93 S.Ct. at 1824. In order to meet this burden, the plaintiff must present evidence that gives rise to an inference of unlawful discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252–53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). If the plaintiff meets this initial burden, the burden then *54 shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas Corporation v. Green,* supra. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Department of Community Affairs v. Burdine,* supra, 450 U.S. at, 255, 101 S.Ct. at, 1094–95. The plaintiff then must satisfy her burden of persuading the factfinder [by]... either directly by persuading the court [or jury] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id., at 256, 101 S.Ct. at, 1095; (Internal quotations omitted) see *McDonnell Douglas Corporation v. Green,* supra, 411 U.S. at, 804–805, 93 S.Ct. at, 1825. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.,* 216 Conn. 40, 53–54, 578 A.2d 1054, 1060–61 (1990).

Nevertheless, if "[t]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and ... upon such rejection, [n]o additional proof of discrimination is required...." (Citation omitted; internal quotation marks omitted.) *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). *Jackson v. Water Pollution Control Auth. of City of Bridgeport,* 278 Conn. 692, 705-06, 900 A.2d 498, 508 (2006).

"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. " *Nsonsa Kisala, Complainant v. Department of Public Health, T. Malecky, B. Wallen, M. Carey, L. Davis & J. Mullen, Respondents,* 2016 WL 1719122, at 10.

Unlike the *McDonnell Douglas* analysis that is applied when the complainant's evidence is limited to indirect evidence of pretext, the analytical framework differs when the complainant has established his prima facie case either through overt evidence of retaliatory animus motivating the respondent's actions or through the statutory rebuttable presumption. If the complainant "can provide direct evidence of retaliatory animus, he need not provide indirect evidence of a causal connection by showing that the protected activity closely followed the adverse action. Indeed, the McDonnell Douglas test itself is inappropriate in cases where there is direct evidence that retaliation played a part in the employment decision..... Instead, the court would apply the test set forth in *Price Waterhouse v. Hopkins* ... whereby the relevant inquiry is whether retaliation was a substantial or motivating factor in the decision making

process. In showing retaliation to be a substantial or motivating factor, plaintiffs need not show the retaliation to be the determinative or deciding factor, or that defendants' decision would have been different, absent this factor..... The burden then shifts to the employer to show that it would have subjected the employee to the same adverse conduct even if retaliation had not been considered in its decision." (Citations omitted; internal quotation marks omitted.) *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, 204-05 (1991); *Irwin v. Lantz, supra,* 16-17.

"Retaliation may be established even when a retaliatory motive is not the sole cause of the adverse employment action or when there were other objectively valid grounds for the adverse action. A retaliatory motive must be, however, at least a substantial or motivating factor behind the adverse action. A plaintiff may prove that retaliation was a substantial or motivating factor behind an adverse employment action either (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Saeedi v.Department of Mental Health and Addiction Services, et al.,* WBR/OPH No. 2008-090, at 104 (December 9, 2010, Referee Hon. Jon P. Fitzgerald) (internal citations omitted). "[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 [Whistleblowing]." (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). In *Wood v. Dalton*, 2000 WL 1174988, at 1 (D.D.C. July 7, 2000), the court found that, it would certainly appear that a unique deviation from a standard procedure is probative of an intention to retaliate. An accumulation of

differences in the manner in which the defendant was treated, although petty in themselves, may nevertheless permit the inference that these differences were so irrational and unjustified that the inference can be drawn that they were done in retaliation for filing a Title VII claim." *Wood v. Dalton,* No. CIV. A. 99-1 (JMF), 2000 WL 1174988, at 1 (D.D.C. July 7, 2000).

D. Prima Facie Case

To prevail on her retaliation claim, the Complainant first must prove each of the following three prima facie essential elements: (1) that he is a whistle-blower engaged in protected activity pursuant to Conn. Gen. Stat. §4-61dd, (2) that he was subjected to an adverse personnel action, and (3) that there is a causal connection between the protected whistleblower activity and the adverse personnel action. *Eagen v. Comm'n on Human Rights & Opportunities*, 135 Conn. App. 563, 577 (2012). Once the Complainant has made a prima facie showing of retaliatory adverse personnel action, the Respondent "is obligated to produce evidence that, if taken as true, would permit the conclusion that there was a nonretaliatory reason for the" adverse personnel actions. *Arnone v. Town of Enfield*, 79 Conn. App. 501, 507 (2003). Further, there is a presumption of retaliation based on the two year temporal proximity of the whistle blowing activity.

1. Protected Activity

General Statutes §19a-1a et. seq. establishes that the Respondent, the Connecticut Department of Public Health is a state agency and the complainant continues to be an employee. The Respondents argue that because Complainant received her initial tip regarding Wang's credentials from someone outside the agency that her report to her supervisor was a non-qualifying disclosure. How Complainant discovered the violation of General Statute §19a-200, which she reported to Blaschinski, is immaterial. Complainant independently investigated the tip from the outside person, and verified the information regarding Wang's lack of a degree was received was correct and reported the violation of law to her

supervisor. Further, an employee needs only a good faith belief that the conduct was a violation of state laws or other qualifying conduct under General Statute §4-61dd. *Saeedi v.Department of Mental Health and Addiction Services, et al.*, WBR/OPH No. 2008-090, at 104 (December 9, 2010, Referee Hon. Jon P. Fitzgerald). Respondent's argument that the Complainant was not reporting anything about a state agency is not accurate. Complainant reported a violation of law General Statute §19a-200[1], which required a City health director possesses the required degrees. General Statute § 19a-2a[2] confers broad

[1] The relevant portion of General Statute § 19a-200. City, borough and town directors of health. Sanitarians. Authorized agents provides:
(a) The mayor of each city, the warden of each borough, and the chief executive officer of each town shall, unless the charter of such city, town or borough otherwise provides, nominate some person to be director of health for such city, town or borough, which nomination shall be confirmed or rejected by the board of selectmen, if there be such a board, otherwise by the legislative body of such city or town or by the burgesses of such borough within thirty days thereafter. Notwithstanding the charter provisions of any city, town or borough with respect to the qualifications of the director of health, on and after October 1, 2010, any person nominated to be a director of health shall (1) be a licensed physician and hold a degree in public health from an accredited school, college, university or institution, or (2) hold a graduate degree in public health from an accredited school, college or institution. The educational requirements of this section shall not apply to any director of health nominated or otherwise appointed as director of health prior to October 1, 2010. In cities, towns or boroughs with a population of forty thousand or more for five consecutive years, according to the estimated population figures authorized pursuant to subsection (b) of section 8-159a, such director of health shall serve in a full-time capacity, except where a town has designated such director as the chief medical advisor for its public schools under section 10-205, and shall not, during such director's term of office, have any financial interest in or engage in any employment, transaction or professional activity that is in substantial conflict with the proper discharge of the duties required of directors of health by the general statutes or the Public Health Code or specified by the appointing authority of the city, town or borough in its written agreement with such director.

[2] The relevant portion of General Statute §19a-2a provides: The commissioner shall assist and advise local directors of health and district directors of health in the performance of their duties, and may require the enforcement of any law, regulation or ordinance relating to public health. In the event the commissioner reasonably suspects impropriety on the part of a local director of health or district director of health, or employee of such director, in the performance of his or her duties, the commissioner shall provide notification and any evidence of such impropriety to the appropriate governing authority of the municipal health authority, established pursuant to section 19a-200, or the district department of health, established pursuant to section 19a-244, for purposes of reviewing and assessing a director's or an employee's compliance with such duties. Such governing authority shall provide a written report of its findings from the review and assessment to the commissioner not later than ninety days after such review and assessment. When requested by local directors of health or district directors of health, the commissioner shall consult with them and investigate and advise concerning any condition affecting public health within their jurisdiction. The commissioner shall investigate nuisances and conditions affecting, or that he or she has reason to suspect may affect, the security of life and health in any locality and, for that purpose, the commissioner, or any person authorized by the commissioner, may enter and examine any ground, vehicle, apartment, building or place, and any person designated by the commissioner shall have the authority conferred by law upon constables. Whenever the commissioner determines that any provision of the general statutes or regulation of the Public Health Code is not being enforced effectively by a local health department or health district, he or she shall forthwith take such measures, including the performance of any act required of the local

powers to the Commission of Public Health to administer all laws under the jurisdiction of the DPH, which includes oversight of compliance with General Statue §19a-200. The OLHA is charged with reviewing resumes to determine if the schools attended by the applicant were properly accredited; OLHA is part of the DPH. This is clearly reporting a violation of law under the jurisdiction of the agency; and falls squarely within a qualifying disclosure.

On February 19, 2016 Complainant filed a Whistleblower Complaint and General Statute §4-61dd, prohibits retaliation for such filing.[3] Pursuant to General Statute §4-61dd, a prerequisite to filing a retaliation claim is that impermissible retaliatory conduct, in response to a qualifying disclosure, must have occurred. In this instance any additional retaliation after the filing of a whistleblower retaliation claim, which is also a protected activity, would be a continuation of the previous alleged retaliation. It is also a clear indication, in addition to Complainant's responses on her reprimands, that the agency had notice that she reported alleged retaliatory actions after her disclosure regarding Wang. Further, as we are guided by other cases of retaliation, see *LaFond v. General Physics Services Corp.,* supra 50 F.3d 173 retaliation for filing a whistleblower claim is also a protected activity under General § 4-61dd.

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health department or health district, to ensure enforcement of such statute or regulation and shall inform the local health department or health district of such measures. In September of each year the commissioner shall certify to the Secretary of the Office of Policy and Management the population of each municipality. The commissioner may solicit and accept for use any gift of money or property made by will or otherwise, and any grant of or contract for money, services or property from the federal government, the state, any political subdivision thereof, any other state or any private source, and do all things necessary to cooperate with the federal government or any of its agencies in making an application for any grant or contract. The commissioner may establish state-wide and regional advisory councils. For purposes of this section, "employee of such director" means an employee of, a consultant employed or retained by or an independent contractor retained by a local director of health, a district director of health, a local health department or a health district.). Conn. Gen. Stat. Ann. § 19a-2a (West). (Emphasis added).

[3] See *Setkoski v. Univ. of Connecticut Health* ctr., No. HHDCVI 06012794, 2012 WL 2044802, at 4 (Conn. super. Ct. May 10, 2012), Sans-Syzmonik v. Hartford Pub. Sch., No. HHDCV146051355S, 2014 WL 7156776, at *5 (Conn. Super. Ct. Nov. 7, 2014) ("Whether an act is retaliatory deals more with the intent of the actor and the proposed effect of the act on the subject of the retaliation.")

Regarding the acts of retaliation, time limits and presumption we are guided by tolling principles. "In its modern formation, we have held that in order [t]o support a finding of continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such wrong.... Where we have upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act." (Internal quotation marks omitted.) Id. To "establish a continuous course of conduct, the defendant must have: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) *Bednarz v. Eye Physicians of Central Connecticut, P.C.,* 287 Conn. 158 (2008).The "application of the continuing course of conduct doctrine [is] conspicuously fact-bound." (Internal quotation marks omitted.) *Sherwood v. Danbury Hospital,* 252 Conn. 193, 210 (2000). Under "the continuing course of conduct doctrine, the plaintiff's cause of action is not limited to the damages that flow from the continuing conduct. Rather, the statute [of limitations] does not begin to run until [the] course of conduct is completed.... The use of the continuing course of conduct doctrine in the employment context is a reasonable application of the doctrine and its policy. ...The application of the continuing course of conduct doctrine is, therefore, also consistent with the remedial purposes of the whistleblower retaliation statute and the stated legislative policy to protect the proper running of our government;" 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2857; and to stop retaliatory actions; 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2877-78. *Mehdi M. Saeedi v. Department of Mental Health and Addiction Services, et al.,* 2010 WL 5517188, at 30. (Internal quotation marks omitted). The Respondent had a duty, pursuant to General Statute §4-61dd, not to retaliate or harass an employee who made a protected disclosure. In the present case, Respondent's negative, retaliatory, course of

conduct culminated in the Complainant's demotion. There are many instances of negative reviews, reprimands and a demotion, which flowed from the Complainant's disclosure regarding Wang's credentials. Respondent engaged in retaliatory actions that stemmed from the Wang disclosure. Therefore, none of the allegations in the complaint are time barred and the two year presumptive time period applies to all acts of retaliation.

2. Adverse Personnel Action

"To satisfy the second element of his prima facie case, the complainant must show that she suffered or was threatened with an adverse personnel action by a regulated entity subsequent to his whistle blowing. ... 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 Services 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. *Commission of Mental Health & Addiction Services v. Saeedi,* 143 Conn. App. 839, 71 A.3d 619 (2013). (The withholding of a former employee's personal belongings after termination was a retaliatory act). "Most often, retaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat ...." (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority,* 278 Conn. 692, 708 (2006).

"[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). In the present action Complainant received several reprimands and a demotion. The demotion resulted in a loss of pay and responsibilities; these actions would dissuade a reasonable employee from whistle blowing.

3. Causation

The third element of a prima facie case requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and his whistle blowing. *LaFond v. General Physics Services Corp.,* supra 50 F.3d 173. "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.

In *Wood v. Dalton*, 2000 WL 1174988, at 1 (D.D.C. July 7, 2000), the court found that, it would certainly appear that a unique deviation from a standard procedure is probative of an intention to retaliate. An accumulation of differences in the manner in which the defendant was treated, although petty in themselves, may nevertheless permit the inference that these differences were so irrational and

unjustified that the inference can be drawn that they were done in retaliation for filing a Title VII claim." Wood v. Dalton, No. CIV. A. 99-1 (JMF), 2000 WL 1174988, at 1 (D.D.C. July 7, 2000).

General Statute 4-61dd provides, that when the adverse personnel action occurs "not later than two years after the employee first transmits facts and information concerning a matter in accordance with subsection §461dd(a).... there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section. §461dd (d)(4). When the statute was amended in 2002 to include the rebuttable presumption, a legislator commented that the purpose of the amendment was "to protect people who have found some wrong doing in a state agency, a quasi-public agency or a large state contracting entity. And then they get in trouble for it, they get fired for it, they get punished for it. That's something that we have to stop." (Emphasis added.) 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2877-78. "Statements of legislators often provide strong indication of legislative intent." *Hatt v. Burlington Coat Factory,* 263 Conn. 279, 308 (2003). If the personnel action occurred within [two years] of the complainant's whistleblowing, then, because of the statutory rebuttable presumption, the respondents' burden is one of both production and persuasion. *Malchik v. Division of Criminal Justice*, 266 Conn. 728, 738 (2003). "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.) *Id.* "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. Dept. of Public Safety*, 70 Conn. App. 321, 339, cert. denied, 261 Conn. 919 (2002). The evidence presented by the respondents 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 omitted.) *Shawn Irwin v. Theresa Lantz and Dan Callahan, Shawn Irwin v. Theresa Lantz, Dan Callahan and Department of Correction,* 2008 WL 2311544, at 7–8.

Complainant experienced a continuing course of retaliatory conduct. The retaliation commenced less than a month after she disclosed Mr. Wang's lack of qualifications, on July 7, 2015. On the heels of the Wang incident Blaschinski followed that reprimand with a negative and unsatisfactory evaluation in Complainant's September 2015 evaluation. Blaschinski rated Complainant overall as "unsatisfactory" and rated Complainant as "less than good" in four categories." Complainant was reprimanded again in November 23, 2015. On February 19, 2016, after Complainant filed a formal complaint of whistleblower retaliation with OPH, Blaschinski continued to issue negative and unsatisfactory evaluations in May 2016 and September 2016. Ultimately the negative evaluations were followed by a demotion of the Complainant on April 26, 2017. The adverse actions occurred within a two year time span, from Complainant's first disclosure regarding Wang's lack of qualifications through the filing of the whistleblower retaliatory action and then to the demotion.

The statutory presumption is enough to satisfy the causation element at the prima facie stage of analysis. Furthermore, the Respondent stated within several reprimands that the cause of the reprimands was Complainant's protect disclosure regarding Mr. Wang's credentials. That is direct evidence that a substantial reason for the adverse actions against Complainant emanated directly from the protected Wang disclosure, which continued from the initial disclosure, up through the filing of the complaint to the demotion. Additionally, the ultimate adverse personnel action of demotion came one year from filing whistleblower retaliation claim. Complainant disclosed that she filed a Whistleblower Complaint in a July 18, 2016 in a memo to Michael Carey ("Carey") and Blaschinski when Complainant was rebutting her interim service rating. The proffered non retaliatory reasons for the adverse actions are not sufficiently credible to rebut this presumption, as discussed below.

Additionally, on several occasions Blaschinski wrote, essentially, that Complainant was punished for the Wang incident. While the reprimands are couched in the language of being "poor judgment" for not verifying credentials, or "lack of knowledge regarding job duties," the fact remains that verifying

credentials never was, and is still not the policy of the agency. This is direct evidence that the Blaschinski was reprimanding Complainant for the disclosure, no matter how it is stated. Therefore, the complainant has established her Prima facia case.

There is strong evidence, if not actually direct evidence that the adverse personnel actions emanated from the protected disclosure. Respondent's reasons for punishment contained in the reprimands fall just short of stating the Complainant is being punished because of this disclosure. Instead Respondent states that she is being reprimanded because she didn't verify the Wang's credentials with the University listed on his resume, which in turn caused the embarrassing situation of Wang being approved. Complainant's punishments were exacted despite the fact that Wang's approval was done in the same customary manner, in accordance with the relevant statutes.

4. Offering of Non Retaliation Business Reasons

Arguendo, that the written reprimands and evaluations noting the Wang incident are not direct evidence of retaliation, and the Respondent had other reasons for the negative reviews and demotion; "[r]etaliation may be established even when a retaliatory motive is not the sole cause of the adverse employment action or when there were other objectively valid grounds for the adverse action. A retaliatory motive must be, however, at least a substantial or motivating factor behind the adverse action. A plaintiff may prove that retaliation was a substantial or motivating factor behind an adverse employment action either (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Saeedi v. Department of Mental Health and Addiction Services, et al.,* WBR/OPH No. 2008-090, at 104 (December 9, 2010, Referee Hon. Jon P. Fitzgerald) (internal citations removed). See also *Sumner v. U.S. Postal Service,* 899 F.2d 203, 209 (2d Cir. 1990).

In addition to the statutory presumption of causation,[4] on July 7, 2015 Complainant was issued a written reprimand by Blaschinski, which stated that "this reprimand addresses recent events involving the process used to confirm the credentials of local health directors." Blaschinski failed to admit her own lack of knowledge to her supervisors and lay the blame on the Complainant. The blame resulted in retaliatory, adverse personnel actions taken against Complainant. Again on November 20, 2015, Blaschinski issued a letter of reprimand to Complainant which stated that "[On] June 26, 2015, you were issued a written reprimand regarding your poor judgment and inadequate performance in relation to the appointment of local health directors by the DPH Commissioner." The reprimand further provided that: "additional incidents of this kind will be cause for more severe disciplinary action, up to and including, suspension and dismissal. This may be reflected in a less than good evaluation with specific reference to 'Judgment', 'Quality of Work', and 'Knowledge of Work'." The reprimand was incorporated into Complainant's service rating, which ultimately led to her demotion.

Complainant was being held responsible for falling to do something that was not in her job duties, not a policy within the agency, or past customary practice. She made a disclosure that was upsetting and embarrassing to the agency, which is the nature of the majority of whistleblower revelations. Pino testified that it was the responsibility of the City to perform the verification of an appointee's credentials. Blaschinski had no knowledge of and made no inquiry into the process of reviewing credentials. Blaschinski testified that she thought reviewed meant verify, although this contradicts other testimony Blaschinski gave that she never inquired about the hiring process, never asked for a transcript and simply passed on the appointment letter to the Commissioner of DPH for signature. A strong suspicion of mendacity is raised by the Respondent's blaming and reprimanding Complainant for failing to do

[4] "[N]ot later than two years after the employee first transmits facts and information concerning a matter in accordance with subsection §461dd(a).... there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section. General Statute §461dd(d)(4).

something that was not customary, not required by policy, statutes or regulations that caused embarrassment to the agency. It is more than reasonable to infer that the negative reviews and reprimand were in retaliation for her protected disclosure rather than poor judgment, performance, or knowledge. This is an employee of long standing who was previously, consistently rated excellent on all categories and overall in performance reviews. Further, in September 2016, a policy was put in place that formally confirmed the past customary practice, which provided that municipalities were responsible for credential verification.

It is also true that prior to the Wang incident Complainant was put on a PIP, which is normally not considered an adverse personnel action and in this instance occurred prior to the whistle blowing event. Nonetheless, it is telling that the Wang credentials incident was the listed as part of the reason for the two reprimands, which did not contain one mention of the PIP. Further, in addition to Blaschinski's failure to disclose that she also did not verify transcripts to Pino or Mullen, she stated that it was her understanding that Complainant's department was responsible for verifying degrees. It is difficult to see why Blaschinski would have any understanding of who was responsible for what, as she stated that she did not have personal knowledge of the customary procedure, or whether there was even a policy in place about reviewing credential. Moreover, she never inquired what the past practice of such reviews was when she was hired to oversee Complainant's department.

Blaschinski stated that Complainant showed poor judgment and lack of knowledge of her job in handling of the Wang incident, without having complete knowledge of Complainants duties. In addition to the Wang incident, Complainant was again blamed for something that was also not part of her job description and never told to do; the failure to report a political issue. A health director was up for reappointment in the City of Bridgeport and Complainant followed the normal procedure regarding reappointments. Nonetheless Blaschinski was angry with Complainant for not informing her that the mayor who reappointed this health director was not running for re-election. Complainant is a civil servant;

it would be unseemly if Complainant, or the Agency for that matter, was concerned over the political effects of reappointing a health director when there are clear statutory procedures regarding such appointments.

Respondents also argue that Complainant showed lack of judgment by not verifying a temporary appointment of an acting health director's PHD's credentials. That temporary candidate was a retired Health Director of long standing, who came out of retirement to fill in temporarily for another town. Even if there was a policy in place at the time regarding verification, which there was not, a further verification was unnecessary as the Health Director and been previously approved in his last position before he was retained. Complainant had in had a verification of the Acting Director's credentials from Yale in her files. Therefore, the Respondent's arguments regarding other reasons for reprimanding the Complainant do not pass the credibility test.

Respondent argues that Complainant 's failure to address issues on her PIP : (1) Improving communication with local health department/districts; (2) development of policy to ensure delivery of public health services at the local level; (3) leadership in identifying barriers at the local level; (4) leadership in the act of supervision of staff, were the reasons for her termination.[5] However, the reprimands focused on the Wang credentials incident, the political issue and the reappointment issue. Prior to the PIP complainant was always rated as excellent and Complainant was not given guidance or direction on what specifically was required of her to improve. The complainant took it upon herself to attend leadership training to improve her performance. Blaschinski could not recall what guidance she allegedly offered the Complainant regarding the PIP when she met with Complainant in a bi-weekly meeting.

[5] It is not immaterial that Blaschinski's reasons for issuing a PIP also appeared suspect or misguided based on testimony regarding the incidents that led to the PIP. This could be indicative of a negative attitude towards the Complainant.

Moreover, it is not required that the retaliatory actions be the only cause for the adverse personnel actions. The constant referral back to the Wang incident in later reprimands and evaluations indicates that the disclosure regarding Wang was a substantial reason for such punishment. Further, the alteration to Complainant's job duties when she was demoted was the removal of responsibilities for approval of timesheets and leaves. Such responsibilities have little to do with Complainant's alleged deficiencies or with the incidents that catalyzed the reprimands and negative evaluations. The reprimands and evaluations based on the Wang disclosure papered the way to a demotion.

The Complainant testified credibility and was consistent in her positions throughout the litigation process. Blaschinski, who was the instigator of the adverse personnel actions taken by the Respondent was not consistent in her testimony and made statements that impinged her credibility. It is clear that this situation caused embarrassment and distress to the agency. However, it is not acceptable to "kill the messenger," nor scapegoat the messenger. To take punitive action over an alleged failure that was not described in Complainant's job description, past practice or requirements, which at best were vague and ambiguous over the use of the word review verses verified, is unreasonable. Retaliatory animus for Complainant's disclosure of the agency's failure to comport with a statutory requirement is evident throughout the reprimanding process.

III.

CONCLUSION

Respondent's proffered non-retaliatory reasons for the actions taken against Complainant are not sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Moreover, written, direct evidence shows Complainant was demoted and reprimanded and rated unsatisfactory, which most referenced the Wang incident. Nevertheless, arguendo there was no direct evidence of Respondent's retaliatory animus, and the burden of proof did

not remain with the Respondent, the Complainant by the preponderance of the evidenced proved that any of Respondent's proffered reasons were pretexts. Some of Respondent's reasons included bad judgment and performance regarding the Wang incident, failing to verify previously verified credentials, and the lack of communication regarding an irrelevant political situation. Moreover, even if performance and judgment and other issues figured into the reasons for demotion, retaliation for the Wang incident was a substantial, motivating reason.

The Respondent's testimony, Blaschinski's in particular, as to the non-retaliatory reasons is not as credible as the Complainant's. Further, there were inconsistencies in the Respondent's witnesses' testimony, several written statements that referenced the Wang incident throughout the disciplinary process, and illogical or petty reprimands that raises a suspicion of mendacity. Those above mentioned reasons for demotion are not convincing or credible that they were the primary reasons for the negative reviews, reprimands and demoting the Complainant. Again arguendo, there were also other reasons for the discipline, negative reviews, and demotion, the Complainant proved by the preponderance of the evidence that those reasons were a pretext or were not the substantially motivating cause of the adverse actions.

IV.

DAMAGES

General Statute Section 4-61dd provides in relevant part:

> "If the human rights referee finds such a violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and establishment of any employee benefits for which the employee would otherwise have been eligible if such violation had not occurred, reasonable attorneys' fees, and any other damages."

The plain language of the statute thus makes clear that damages are not limited to those specifically listed, but include other damages suffered by the complainant. Emotional distress is an element of damages suffered. *Mehdi M. Saeedi v. Department of Mental Health and Addiction Services, et al.*, 2010 WL 5517188, at 59.

A. Back Pay

After being demoted effective May 12, 2017, Complainant suffered a loss of wages of $3.25 an hour, approximately $6,000 a year. As Complainant works 35 hours a week, her weekly lost wages are $113.75. As of the date of this decision, Sixty-three weeks have elapsed since her demotion, bringing Complainant's total lost wages to $7,166.25

A. Pre and post judgment interest

"[B]ecause it would be contrary to the fundamental purpose of our laws against workplace discrimination to deprive a person victimized by such discrimination of the true value of the money to which he or she lawfully is entitled, we conclude that prejudgment interest is a proper component of an award of back pay under § 46a-86(b)." *Thames Talent Ltd, v. Commission on Human Rights and Opportunities,* 265 Conn. 127, 143 (2003). See also *Saeedi v. Department of Mental Health and Addiction Services, et al.* WBR/OPH No. 2008-090, at *148-49 (December 9, 2010, Referee Hon. Jon P. FitzGerald) (awarding prejudgment interest).

Post judgment interest is also proper. "We see no reason why an employee who has been harmed economically by an employer's discriminatory practices necessarily should bear the costs resulting from the loss of the use of the money that he or she is awarded from the time of the award until the award is paid in full, Post judgment interest is permissible under § 46a-86(b)." Thames Talent, Ltd., supra at 14445 See also *Saeedi v. Department of Mental Health and Addiction Services, et al.* WBR/OPH No. 2008-090, at 148-49 (December 9, 2010, Referee Hon. Jon P. FitzGerald) (awarding post judgment interest). Further,

in order to make the Complainant whole for loss of back pay, the interest award should be compounded annually. "Given that the purpose of back pay is to make the plaintiff whole it can only be achieved if interest is compounded." *Saulpaugh v. Monroe Community Hospital,* 62 FEP Cases 1315, 1323 (2d. Cir. 1993).

B. Removal of Negative Performance Appraisals and Restoration to Epidemiologist

The Referee has the authority to issue an order to Respondent for 1) a revised or removed performance appraisal; and 2) reinstatement of Complainant to her previous position of Epidemiologist 4. As discussed, above, Respondent issued three retaliatory performance appraisals: September 2015 Annual Performance Appraisal (CITE); May 2016 Interim Performance Appraisal (CITE); September 2016 Interim Performance Appraisal. All three of these appraisals relied on the retaliatory July 7, 2015 and November 23, 2015 reprimands regarding the Wang incident. In order that the Complainant be restored to her previous position of Epidemiologist 4. See *Commission of Mental Health & Addiction Services, v, Saeedi,* 143 Conn. App. 839, 863 (2013) ("Reinstating Saeedi to the untarnished position he held prior to the retaliation, as plainly authorized by § 4—61dd required that the referee order a revision of Saeedi's performance appraisal.").

C. Emotional Distress

Any argument by the Respondent that Saeedi prevents the awarding of emotional distress damages is incorrect. See *Commissioner of Mental Health and Addiction Services, et al, v. Saeedi* 143 Conn.App. 839, 864 (2013) (Court upheld the award of $12,000 in emotional distress damages awarded by referee, stating that, "[t]he judgment **is reversed only as to the order for professional ethics training, [t]he judgment is affirmed in all other respects.**"); *Eagen v. Commission on Human Rights & Opportunities,* 135 Conn, App. 563, 571, 42 A.3d 478, 484 (2012) (emphasis added) (Affirming Referee's

award of $5,000 in emotional distress damages). Therefore the Tribunal has the authority to award Complainant compensatory damages for emotional distress.

The award for emotional distress damages must be limited to compensatory rather than punitive amounts. *Chestnut Realty, Inc. v. Commission on Human Rights & Opportunities*, 201 Conn. 350, 366 (1986). "That such compensatory damages may be incapable of precise mathematical computation and necessarily uncertain does not, however, prevent them from being awarded. 'That damages may be difficult to assess is, in itself, insufficient reason for refusing them once the right to damages has been established.' *Griffin v. Nationwide Moving & Storage Co., 187 Conn.* 405, 420 (1982). Commission on Human Rights & Opportunities ex rel. *Cohen v. Menillo, CHRO* Case No. 9420047, Memorandum of Decision, 12-13 (June 21, 1995).

Criteria to be considered when awarding damages for emotional distress include: the complainant's subjective internal emotional reaction to the respondents' actions; the public nature of the respondents' actions; the degree of offensiveness of those actions; and the impact of those actions on the complainant. *Commission on Human Rights & Opportunities ex rel. Peoples v. Belinsky*, supra, 1988 WL 492460; Commission *on Human Rights & Opportunities ex rel. Aguiar v. Frenzilli*, CHRO No. 9850105, pp. 9-15 (January 14, 2000). Complainant sought damages for garden-variety type of emotional distress. In garden-variety emotional distress claims the evidence of suffering comes mainly from the testimony of the witness. *Patino v. Birken Manufacturing Co.*, 304 Conn. 679 (2012).

Complainant testified that as a result of the retaliation by the Respondent she has had to increase her anti-depressant medication and has been prescribed high blood pressure medication. Complainant has also had difficulty sleeping and began second guessing her judgment to the point of seeking medical evaluation. Further, her demotion was very public which caused unnecessary humiliation and continued

stressful working conditions. Complainant's previous long standing excellent work history was tarnished, which is subjectively offensive.

D. Attorney's Fees

General Statute §4-61dd provides for an awarded attorney's fees and costs. Complainant must submit a calculation of attorney's fees and costs based on the lodestar method. *Saeedi v. Department of Mental Health and Addiction Services,* et al. WBR/OPH No. 2008-090, at 143-45 (December 9, 2010, Referee Hon. Jon P. FitzGerald).

V

Order

Respondent shall forthwith:

a. Pay lost wages in the amount of $7,166.25.

b. Pay Pre and post judgment interest, which shall accrue on the unpaid balance at the rate of 10% per annum from the date payment is due.

c. Pay Emotional distress damages in the amount of $15,000.

d. Pay Attorney's fees and costs after Complainant submits a calculation of attorney's fees and costs based on the lodestar method.

e. Restore Complainant to her previous position of Epidemiologist 4, including restoring her pension amount to the level it would have been if the demotion had not occurred.

f. Respondents shall issue Complainant a revised performance appraisal for the period ending in October 2016.

g. The respondents shall not consider any reprimands involving the Wang disclosure or any rating of "unsatisfactory" when considering future personnel action involving Complainant including, but not limited to, demotion, dismissal, disciplinary action, promotion, performance appraisals, building assignments or annual salary increase.

h. The respondents shall purge all references to the Wang incident regarding Complainants disclosure including but not limited to, interim and regular reviews and reprimands from official personnel file and any unofficial personnel files.

i. Respondents shall not threaten or undertake any adverse action against Complainant or any person who participated as a witness in the hearing.

j. Respondents shall restore to Complainant any vacation or personal leave time she may have used to attend any proceeding before a human rights referee.

It is so ordered this 2nd day of July 2018.

Michele C. Mount
Presiding Human Rights Referee

cc.

Todd Steigman, Esq. – via email only
Claire Howard, Esq. – via email only
Jennifer Bennett, Esq. – via email only