Lina Lorenzi, Esq.	: Office of Public Hearings
	:
v.	: OPH/WBR No. 2009-110
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Latino and Puerto Rican Affairs Commission (LPRAC), LPRAC Chairperson Ivette Servera, LPRAC Commissioner Sonia Ayala and LPRAC Acting Executive Director Werner Oyanadel	: April 26, 2011

Ruling re: the respondents' motion to amend case caption

I

On August 26, 2009, Lina Lorenzi, Esq., filed a whistleblower retaliation complaint with the chief human rights referee. In her complaint, she alleged that the "Latino and Puerto Rican Affairs Commission (LPRAC)", LPRAC "Chairperson Ivette Servera", "LPRAC Commissioner Sonia Ayala" and "LPRAC Acting Executive Director Werner Oyanadel" (the respondents) had violated General Statutes § 4-61dd[1] by retaliating against her for her disclosure of protected information, often referred to as "whistleblowing". On September 8, 2009, the respondents filed their answer and special defenses. In their answer, the respondents admit that Ms. Servera and Ms. Ayala are commissioners of LPRAC, that Mr. Oyanadel is the acting executive director of LPRAC, and that Ms. Servera, Ms. Ayala and Mr. Oyanadel are officers or employees of LPRAC. Answer, ¶¶ 5, 6.

On October 7, 2010, the respondents filed a "motion to amend case caption in accordance with the April 16, 2010 order to reflect that the State of Connecticut is the sole respondent". On October 14, 2010, Attorney Lorenzi filed a "response in opposition

to motion to amend case caption". On January 7, 2011, then-presiding human rights referee Jerome D. Levine had a telephonic status conference with the parties. On January 26, 2011, the respondents filed their "supplemental brief re: motion to amend case caption in accordance with the April 16, 2010 order" (supplemental brief). On January 27, 2011, Attorney Lorenzi filed her "supplemental brief re: motion to amend case caption and clarification of respondents' understanding of the April 16, 2010 order".

For the reasons set forth herein, the respondents' motion to amend the case caption is denied.

II

By way of background, on February 8, 2010, the respondents filed a "motion to dismiss the individual respondents". The respondents moved to dismiss the case against LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel as to them individually for lack of subject matter jurisdiction. The respondents contended that § 4-61dd does not permit individual liability. Attorney Lorenzi filed a response on March 8, 2010. Also on March 8, 2010, the respondents filed a reply to Attorney Lorenzi's response (reply).

In their reply, the respondents stated in part that: "So the plaintiff's long recitation about the statute does not apparently contest the respondent's motion to dismiss them individually. *They will remain as respondents in their official capacities which correctly states a claim against the state."* (Emphasis added.) Reply, p. 1. Further, "the motion to

dismiss the respondents individually should be granted *leaving them in the case in their official capacities*." (Emphasis added.) Reply, p. 3. In her March 16, 2010 response to the respondents' reply, Attorney Lorenzi represented that she "has not argued that the individual Respondents would be personally liable for monetary damages in this case, but that they must answer for any illegal acts that they committed in their official capacities. It appears that the position of the Respondents and of the Complainant are now in agreement and that the Respondents' attorney should withdraw his motion to dismiss rather than take up the court's time."

Thereafter, Referee Levine held a status conference with the parties on April 12, 2010 to discuss the motion to dismiss and other matters. According to Referee Levine's subsequent April 16, 2010 order regarding the conference, the respondents had, in their motion to dismiss, "alleged that the manner in which the complainant had prepared her complaint affidavit made it appear that she was seeking to hold the individuals personally liable and that such a result was not permissible under the Whistleblower statute, § 4-61dd. Thereafter, by her pleading dated March 6, 2010 and as a result of the status conference held on April 12, 2010, the parties have agreed and do so stipulate that complainant does not seek to hold the above-named individual respondents personally liable. Accordingly, the Motion to Dismiss is granted by agreement of the parties only as to any individual liability." Order, p. 1.

In his order of April 16, 2010, then, Referee Levine did not find that there could not be individual liability under § 4-61dd and he did not find that the State of Connecticut

was the sole respondent. Rather, he memorialized the agreement of the parties that the Attorney Lorenzi had filed a claim against LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel in their official capacities. As LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel remain respondents in this case, albeit in their official capacities, they may remain named in the case caption.

III

A

The respondents contend, inter alia, that § 4-61dd does not permit individual liability. Supplemental brief, pp. 2-4. The undersigned declines the respondents' invitation to establish a blanket construal of § 4-61dd that whistleblower retaliation complaints can never be brought against state employees or officials in their individual capacity. Instead, the undersigned adopts the analysis used by the courts in their interpretation of General Statute § 4-165.

Section 4-165 provides in relevant part that: "(a) No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. . . ." In determining whether a claim has been brought against a state employee in an individual or official capacity:

> "Our Supreme Court has set forth criteria to determine whether an action is against the state or against a defendant in an individual capacity. The four criteria for an action against the state are: (1) a state official has been

> sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal quotation marks omitted.) *Hultman v. Blumenthal*, 67 Conn. App. 613, 621, 787 A.2d 666, cert. denied, 259 Conn. 929, 793 A.2d 253 (2002). If all four of the criteria are met, then the action is brought against the state employee in his or her official capacity. "Because an action against state employees in their official capacities is, in effect, an action against the state . . . the only immunity that can apply is the immunity claimed by the state itself-sovereign immunity." (Citation omitted.) *Mercer v. Strange* supra, 96 Conn. App. at 128; see also *Hultman v. Blumenthal*, supra, at 620 ("[T]he immunity provided by § 4-165 does not apply if the doctrine of sovereign immunity does apply.").
>
> If any one of the four criteria is not met, however, then the action is brought against the state employee in his or her individual capacity.

Jeffries v. Mondell, Superior Court, judicial district of New Haven-Meriden at Meriden Docket No. NNI-CV-08-5002900s (October 21, 2010) (50 Conn. L. Rptr. 840) (2010 WL 4516680, 2). It should be noted that the fourth criteria permits a judgment against the state employee, though nominally against the state employee.

In this case, application of the four criteria is unnecessary as the respondents and Attorney Lorenzi have agreed that LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel are being sued in their official capacities.

General Statute § 5-141d then provides in relevant part that: "(a) The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, and any member of the Public Defender Services Commission from financial loss and

expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious." Assuming that a violation of § 4-61dd is found and monetary damages awarded, the decision whether to save harmless and indemnify LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel in this case, or any state officer or employee in any case, is not a decision to be made by the presiding human rights referee. Rather, that decision is a post-trial determination to be made by the state in accordance with § 5-141d and any other applicable statute or regulation.

B

In their supplemental brief, the respondents cite to and include a copy of a "motion to amend caption" filed in the matter of *Nationwide Mutual Life Insurance Co., as subrogee of Gary and Gina Greenalch v. Amphion Media Works, LTD., GBM Advanced Technology International, Inc., Best Buy Company Inc.*, United States District Court, Docket No. 3:07CV00947 (WWE) (D. Conn. May 8, 2008). In *Nationwide*, the court permitted the amendment of a case caption over the objection of the third-party defendant. As recited by Nationwide and Best Buy in their motion to amend their case caption, the "plaintiff, in the original summons and complaint, named Best Buy Company, Inc. a defendant. However, it has recently been determined that the

corporation that operated retail stores in Connecticut is 'Best Buy Stores, Limited Partnership.' Therefore, the plaintiff and the defendant agree that the mistake can be corrected by amending the case caption." In other words, Nationwide and Best Buy were correcting the original mis-identification of Best Buy's corporate status.

There is no similar mistake in this case. In her complaint, Attorney Lorenzi included the official job titles of LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel; and the respondents and Attorney Lorenzi have agreed that these individuals can remain as respondents in this case in their official capacities.

C

The respondents further contend that the "line of cases discussing 'stigma plus' allegations is equally applicable to the individual Respondents in this matter." Supplemental brief, p. 5. "'Stigma plus' refers to a claim brought for injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), *without adequate process*." (Emphasis added.) *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d. Cir. 2003). In this case, LPRAC Chairperson Servera, LPRAC Commissioner Ayala and LPRAC Acting Executive Director Oyanadel have an adequate process. Assuming that the parties do not settle the case on mutually agreeable terms, the respondents, as well as Attorney Lorenzi, are entitled to a hearing, currently scheduled for August 2011. At that hearing, the respondents may contest the allegations brought against them. They will have the opportunity "to respond, to cross-

examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved." General Statutes § 4-177c. See also General Statues § 4-178 and § 4-61dd-13 of the Regulations of Connecticut State Agencies.

IV

The telephonic status conference scheduled by Referee Kerr for May 25, 2011 is cancelled. The scheduling order issued by Referee Levine on January 10, 2011 remains in effect: the prehearing conference remains scheduled for July 12, 2011 at 10:00 AM and the public hearing remains scheduled for August 9 – 11, 22 and 24, 2011 commencing at 10:00 AM.

/s/ Jon P. FitzGerald _____
Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Lina Lorenzi, Esq.
Nancy A. Brouillet, Esq.

[1] General Statutes § 4-61dd provides:

> (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 or any quasi-public agency, as defined in section 1-120, 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. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary, for the purpose of an investigation pursuant to this section or for the purpose of investigating a suspected violation of subsection (a) of section 17b-301b until such time as the Attorney General files a civil action pursuant to section 17b-301c. Upon the conclusion of the investigation, the Attorney General shall where necessary, report any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section or sections 17b-301c to 17b-301g, inclusive, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation.

(b) (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 such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute or pursuant to subsection (b) of section 17a-28; or (D) in

the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract.

(2) If a state or quasi-public agency employee or an employee of a large state contractor alleges that a personnel action has been threatened or taken in violation of subdivision (1) of this subsection, the employee may notify the Attorney General, who shall investigate pursuant to subsection (a) of this section.

(3) (A) Not later than thirty days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section. 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 reestablishment 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. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person who was a party at such hearing, in accordance with the provisions of section 4-183.

(B) The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and noticing and conducting hearings under subparagraph (A) of this subdivision.

(4) As an alternative to the provisions of subdivisions (2) and (3) of this subsection: (A) A state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than thirty days after learning of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, or, in

the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract; or (B) an employee of a large state contractor alleging that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with the provisions of subsection (c) of section 31-51m.

(5) In any proceeding under subdivision (2), (3) or (4) of this subsection concerning a personnel action taken or threatened against any state or quasi-public agency employee or any employee of a large state contractor, which personnel action occurs not later than one year after the employee first transmits facts and information concerning a matter under subsection (a) of this section to the Auditors of Public Accounts or the Attorney General, 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.

(6) If a state officer or employee, as defined in section 4-141, a quasi-public agency officer or employee, an officer or employee of a large state contractor or an appointing authority takes or threatens to take any action to impede, fail to renew or cancel a contract between a state agency and a large state contractor, or between a large state contractor and its subcontractor, in retaliation for the disclosure of information pursuant to subsection (a) of this section to any agency listed in subdivision (1) of this subsection, such affected agency, contractor or subcontractor may, not later than ninety days after learning of such action, threat or failure to renew, bring a civil action in the superior court for the judicial district of Hartford to recover damages, attorney's fees and costs.

(c) Any employee of a state or quasi-public agency or large state contractor, who is found to have knowingly and maliciously made false charges under subsection (a) of this section, shall be subject to disciplinary action by such employee's appointing authority up to and including dismissal. In the case of a state or quasi-public agency employee, such action shall be subject to appeal to the Employees' Review Board in accordance with section 5-202, or in the case of state or quasi-public agency employees included in collective bargaining contracts, the procedure provided by such contracts.

(d) On or before September first, annually, the Auditors of Public

Accounts shall submit to the clerk of each house of the General Assembly a report indicating the number of matters for which facts and information were transmitted to the auditors pursuant to this section during the preceding state fiscal year and the disposition of each such matter.

(e) Each contract between a state or quasi-public agency and a large state contractor shall provide that, if an officer, employee or appointing authority of a large state contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for such employee's disclosure of information to any employee of the contracting state or quasi-public agency or the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section, the contractor shall be liable for a civil penalty of not more than five thousand dollars for each offense, up to a maximum of twenty per cent of the value of the contract. Each violation shall be a separate and distinct offense and in the case of a continuing violation each calendar day's continuance of the violation shall be deemed to be a separate and distinct offense. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the superior court for the judicial district of Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this section relating to large state contractors in a conspicuous place which is readily available for viewing by the employees of the contractor.

(g) No person who, in good faith, discloses information to the Auditors of Public Accounts or the Attorney General in accordance with this section shall be liable for any civil damages resulting from such good faith disclosure.

(h) As used in this section:

(1) "Large state contract" means a contract between an entity and a state or quasi-public agency, having a value of five million dollars or more; and

(2) "Large state contractor" means an entity that has entered into a large state contract with a state or quasi-public agency.