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November 22, 2013 (corrected version)

CHRO No. 1230423 - Commission on Human Rights and Opportunities, ex rel. Phillip Browne, Complainant v. State of CT, DOC, Respondent

Ruling and Order on Respondent's Motion to Dismiss

For the following reasons, with respect to the claims made pursuant to sections 46a-60(a)(1) and 46a-58(a), the respondent's motion to dismiss for failure to state a cause of action, filed pursuant to section 46a-54-88a(d)(2) of the Regulations of Conn. State Agencies ("Regulation"), on October 2, 2013, is denied. Regarding the section 46a-60(a)(4) claims, the complainant is ordered to file an amended complaint, on or before December 20, 2013.[1] If the complainant fails to comply with this order, the undersigned will dismiss the retaliation claims for failure to state a cause of action.

The affidavit of illegal discriminatory conduct ("affidavit" or "complaint") at dispute in this motion to dismiss was filed, pursuant to section 46a-82, to initiate an investigation by the commission. During the investigative stage, the commission and the parties exchange information to supplement the initial affidavit. The purpose of these communications is to clarify issues to resolve the dispute, and if possible to resolve the matter without referral to the office of public hearings ("OPH"). The affidavits are not filed to commence a hearing before a human rights referee pursuant to section 46a-84.

If the parties are unable to resolve the matter, the commission will send the complaint to OPH to commence a contested case (de novo) proceeding after (1) an investigator certifies it pursuant to section 46a-84 or (2) the commission's legal office determines that the matter should be sent directly to public hearing after conducting an early legal intervention (ELI) review, pursuant to section 46a-83(c)(2). The presiding referee assigned to the case only receives a copy of the initial affidavit, and any amended affidavits, that had been filed with the commission to commence the investigative process. No other information in the commission's possession is shared with the presiding referee.

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[1] In this matter, filed on or about May 2012, the complainant is a self-represented litigant because the commission, by letter dated May 16, 2013, deferred prosecution to him after its determination that doing so would not adversely affect the interests of the state. See section 46a-84(d). The letter informed the complainant that although the commission remains a party and will take any action it deems appropriate to protect the public interest, he is responsible to present the entire case in support of his complaint. In recognition of his pro se status, the presiding referee, at the initial hearing conference on June 12, 2013, and in a letter dated October 4, 2013, informed the complainant the he must become familiar with the statutes, regulations, and orders that govern these proceedings.

The laws that govern the public hearings recognize that an affidavit deemed adequate to initiate an investigation may be insufficient to withstand a challenge to its legal sufficiency once transmitted to OPH for public hearing. At this stage of the administrative process, a complainant is permitted to make reasonable amendments to his or her complaint if necessary to cure any defects in the pleading(s). Section 46a-84(g) and Regulation 46a-54-79a(e). Furthermore, the law also authorizes a presiding referee sua sponte, or upon motion by the respondent, to dismiss a complaint or a portion thereof if, inter alia, the complainant or the commission (1) fails to establish subject matter or personal jurisdiction or (2) fails to state a claim for which relief can be granted. Regulation 46a-54-88a(d).

The respondent's motion requests that "the instant action be dismissed for failure to state a claim upon which relief can be granted." The commission filed an objection to the motion on October 15, 2013. The complainant filed his objection on October 18, 2013. Both argue that the failure of a complainant to allege an essential element of a statutory cause of action does not deprive a tribunal of its subject matter jurisdiction over the matter.

To support their argument, both cite part of the decision rendered in Nsonsa Kisala v. Malecky, et al., CV13 5015760-S, Superior Court, October 13, 2013 (Prescot, J.) that addresses when a referee may dismiss a matter for lack of jurisdiction. Although complainant and the commission accurately recite that part of the Kisala decision, the court's analysis of the standards governing a motion to strike applies to the issues raised by respondent's motion.[2]

That court, after concluding that the presiding referee improperly dismissed the administrative proceeding for lack of subject matter jurisdiction, considered whether "the Referee could have properly striken the plaintiff's complaint if it had treated the motion to dismiss and/or strike as a motion to strike." Kisala, 10. In reaching its decision, it stated that –

> As explained previously, "[a] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings." (Internal quotation marks omitted.) Nazami v. Patrons Mutual Ins. Co., 280 Conn. 619, 624, 910 A.2d 209 (2006). "[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) "It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) (Internal quotation marks omitted.) Violano v. Fernandez, [280 Conn. 310, 318, 907 A.2d 1188 (2006)].

Kisala, 10-11.

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[2] The import of the Kisala court's analysis of the subject matter jurisdiction issue is that a tribunal's jurisdictional authority does not spring from the allegations in the complaint, so a failure to allege facts sufficient to state a cause of action does not deprive the tribunal of that authority.

"Conversely, a motion to strike is properly granted if the complainant alleges mere conclusory statements without supporting facts." Schwartz v. Eagan, 2009 WL 910180, *4 (OPH/WBR 2008-095, Ruling on Motion to Dismiss, March 17, 2009)(citations omitted). "Although it is difficult in the abstract to identify with precision the point at which allegations graduate from 'conclusory' to 'short and plain [statements of a plaintiff's claim,] ... a simple declaration that the defendant's conduct violated the ultimate legal standard at issue ... does not suffice. But it is enough to assert facts from which, construing the complaint liberally and in the plaintiff's favor, one could infer such a violation." Gregory v. Daly, 243 F.3d 687, 692 (2d Cir.2001).

The court in Kisala reviewed the complaint in that matter consistent with this reasoning and disagreed with the referee's conclusion that the complaint failed to plead that any personnel action had been threatened or taken against him.[3] Kisala, 11-12. It found that while the allegations in this regard were ambiguous, when "construed broadly and in the light ... most favorable to sustaining its legal sufficiency," the complaint easily met the applicable pleading standard for a violation of the state's whistleblower retaliation statutes. Id. 12.

Similarly, this reasoning properly guides this tribunal's determination of the instant motion to dismiss. Therefore, the undersigned will follow the practice of these courts in reviewing the complaint to determine whether it contains sufficient allegations to survive a motion to strike its respective claims.

The three-page affidavit of illegal discriminatory conduct form ("Form 103(1)") and a three-page attachment were filed with the commission's west central region office on May 23, 2011. In addition to identifying the respective parties' names and addresses, the form contains 3 sections with check off boxes that indicate in, a general manner, the claims asserted.

Under the "I was" section, the complainant checked boxes stating (1) "discriminated against in terms and conditions of employment continual to," (2) "harassed," and (3) "retaliated against continual through". In the "I believe that my ... was in part a factor in this action" section of the form, he checked the boxes next to (1) "race," and (2) "previously opposed discriminatory conduct". Lastly, on the Form 103(1), he indicated that he believed that the respondent violated section 46a-60(a)(1)[4], section 46a-60(a)(4)[5], and Title VII of the Civil Rights Act, by checking the boxes next to those provisions.[6]

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[3] The complaint alleged that "the Department of Public Health (DPH) threatened to terminate by employment at DPH, by giving me a bad performance evaluation (service rating.)" See Kisala, 12.

[4] 46a-60(a)(1) -- It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, ... to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, ... mental disability ...."

[5] 46a-60(a)(4) – "It shall be a discriminatory practice in violation of this section: ... (4) For any person [or] employer ... to discharge, expel or otherwise discriminate against any person because such person has

The last page of the Form 103(1) includes the following statement --"I request the Connecticut Commission on Human Rights and Opportunities investigate my complaint, secure for me my rights as guaranteed to me under the above cited laws and secure for me any remedy to which I may be entitled." Lastly, it contains the complainant's affirmation that having been "duly sworn, on oath, states ... that he has read the foregoing complaint and knows the content thereof; that the same is true of her/his own knowledge, except as to the matter[s] herein stated on information and belief and that as to these matters s/he believes the same to be true." No other relevant information, including a specific request for damages, is provided on this form regarding the alleged facts supporting the claims.

The Form 103(1) is not designed to offer details of the complaint. It merely provides to the person filing a complaint the opportunity to communicate limited information, by checking off prescribed boxes. It is intended to facilitate the filing of a complaint for investigation by the commission's regional office, so the information communicated is general in nature.

Therefore, in this case, the three-page attachment that was submitted by the complainant must be evaluated to determine whether well-pleaded facts necessary to withstand a dismissal under Regulation 46a-54-88a(d) are evident. Close scrutiny of that attachment reveals the following relevant information –

- On December 8, 2011, Lieutenant Jeff Sturgeon ("JS") accused the complainant of being late for a meeting at the Central Transportation Unit ("CTU"), in Cheshire, CT where the complainant is assigned, despite the fact that he arrived prior to his 6:45 a.m. report time. The complainant stated he did not see the roster that JS claimed was posted the day before because of some unidentified event that had occurred on December 7, 2011. Captain Paul Defelice told them to stop doing something not specified in the affidavit and they both complied. Affidavit Attachment ¶¶ 7, 8 and 28.
- JS's brother, Todd Sturgeon ("TS"), the Administrative Lieutenant at CTU, then retrieved the roster, showed it to the complainant, and asserted that it had been posted on December 7, 2011 at 1:30 p.m. The complainant reiterated that he had not seen the roster and was not aware of the meeting. The Captain directed TS and the complainant to stop some non-specified action and they complied. ¶¶ 9 and 10.

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opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84."

[6] To the extent that the substantive provisions of Title VII are enforceable, it is through section 46a-58(a). Section 46a-58(a) -- "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of this state or of the United States, on account of ... color, race, ... or physical disability." Although section subsection (d) of section 46a-58 establishes criminal penalties for a violation of that section, a presiding referee may only award damages for a violation of 46a-58(a) as set forth in subsections (a) and (c) of section 46a-86.

- Shortly after these incidents, that same morning, two minority correction officers ('C/O"), Medina and Martinez, arrived and were also told they were late. They, too, claimed that they were unaware of the meeting and had arrived before their 6:45 a.m. start time. JS stated something unspecified presumably to Martinez, although this is not specified, and Defelice directed both parties to stop doing something unspecified and they complied. ¶¶ 11-13.
- After the meeting, the complainant, and C/O Martinez and C/O Rodriguez met with the Defelice "to address the manner of how staff was addressed in front of our fellow peers." How they were addressed and by whom is not specified. Both Rodriquez and the complainant allegedly told Defelice that JS exhibited unspecified unprofessional behavior. The complaint allegedly also told Defelice that JS's behavior was "unethical." No more details of the content of this conversation were alleged. ¶¶ 14-16.
- JS, after overhearing the allegation that he was unethical, came down stairs and confronted the complainant, allegedly in an aggressive and hostile manner to cause physical harm to the complainant. Defelice allegedly restrained JS. The complainant believed that JS would have assaulted him. He froze and was scared for his safety. C/O Martinez and C/O Rodriquez witnessed this incident. ¶¶ 17, 18, 20, 21, and 22.
- There was an investigation into this incident; however, JS continued to supervise the complainant during this period. The investigation resulted in both Defelice and JS being transferred, on and unspecified date, permanently from CTU. The affidavit alleges that the investigation resulted in a finding that JS actions constituted an act of workplace violence and that Defelice had lied during the investigation. According to the complainant, except for being barred from working at CTU, neither JS nor Defelice received any other punishment. ¶¶ 23-26.
- The complainant filed a grievance on an unspecified date to determine why JS was not transferred while being investigated for workplace violence and continued to supervise him after the alleged attempted assault because the respondent transferred the complainant when he was under investigation for a workplace violence incident with a Caucasian C/O. ¶ 24.
- The complainant also claims that "[TS's] investigation for this incident shows defamation of character against me." ¶ 27.
- TS, JS's brother, remained employed at CTU, after JS was transferred. The complainant alleges, summarily, that this situation has resulted in a hostile work environment, however, no facts are plead to support this conclusory statement. ¶ 28.

Section 46a-60(a)(1) and 46a-58(a) Claims

The affidavit alleges violations of section 46a-60(a)(1) and Title VII as enforced through section 46a-58(a). As noted above, the complainant checked the box on the Form 103(1) indicating that he was "discriminated against in terms and conditions of employment" and was "harassed," and that he believed that his race was in part a factor in this decision. The applicable test for a disparate treatment claim, brought under either section 46a-60(a)(1) or

section 46a-58(a) -- based on the substantive provisions of Title VII -- is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1983) and its progeny.

Under the McDonnell Douglas framework, the employee must satisfy his de minimus burden of establishing a prima facie case of discrimination.[7] Specifically, in the instant case, to satisfy this obligation on the race claims (violations of sections 46a-60(a)(1) and 46a-58(a)), the complainant must show that: (1) he belongs to a protected class; (2) he was qualified for the position held; (3) he suffered an adverse employment action; and (4) that adverse employment action occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class. This burden is minimal and is not the level of proof required to establish a violation of the law. Id. at 638 (citation omitted). "The burden of establishing a prima facie case is a burden of production, not of proof, and therefore involves no credibility assessment by the fact finder." Craine at 638 (citing Reeves at 142).

In the context of a motion to strike, this tribunal looks for allegations that allow it to reasonably conclude that the necessary elements of the prima facie case have been pleaded. The respondent does not assert that the complainant has failed to alleged facts that establish that he is a member of a protected class and that he is qualified. The respondent does, however, argue that the complainant has failed to allege facts sufficient to support that an adverse employment action has occurred under circumstances giving rise to an inference of discrimination based on his protected class. This review, therefore, will focus only on this issue.

The Second Circuit Court of Appeals has stated --

> A plaintiff sustains an adverse employment action if he or she endures a "materially adverse change" in the terms and conditions of employment. . . . To be "materially adverse" a change in working conditions must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." ... "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by decrease in wage or salary, a less

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[7] Next, under the framework, the employer must rebut that case by stating a legitimate, nondiscriminatory justification for the employment decision in question. Once the employer has done so, the employee must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." Craine v. Trinity College, 259 Conn. 625, 637 (citing McDonnell Douglas Corp., at 802-804). The complainant must prove by a preponderance of the evidence that the reason offered by the respondent is pretextual. Levy v. CHRO, 236 Conn. 96, 108 (1996). "This methodology is intended to provide guidance to fact finders who are faced with the difficult task of determining intent in complicated discrimination cases. It must not, however, cloud the fact that it is the [complainant's] ultimate burden to prove that the [respondent] intentionally discriminated against [him] ...." Id. (citations omitted). "The principal inquiry in a disparate treatment case is whether the plaintiff was subjected to different treatment because of his or her protected status." Levy, 236 Conn. at 104. The complainant "must produce sufficient evidence to remove the [fact finder's] function from the realm of speculation." Craine, 259 Conn. at 636 (citation omitted).

> distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation."

Galabya v New York City Board of Education, 202 F.3d 636, 640 (2d Cir.2000)(internal citations omitted).

A complainant may also establish that its employer has taken an adverse employment action by proving that the employer subjected him or her to a hostile work environment. Discriminatory treatment in the terms, conditions, or privileges of employment, inter alia, encompasses and renders actionable, an employer's requirement that an employee "work in a discriminatorily hostile or abusive environment," so long as the discriminatory conduct at issue is "severe or pervasive enough to create an objectively hostile or abusive work environment." Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)(citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). "And this is so notwithstanding the fact that the employer takes no 'tangible employment action ... [that] itself constitutes a change in the terms and conditions of employment' by formally altering a worker's employment status. Id. (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); and id. at 761-63, 118 S.Ct. 2257 (discussing tangible employment actions)).

The Court of Appeals then stated that –

> [H]arms suffered in the workplace are cognizable under Title VII, even when they are not the result of "tangible employment actions," if they arise from conduct (1) that is "objectively" severe or pervasive - that is, if it creates "an environment that a reasonable person would find hostile or abusive" [the "objective" requirement], Harris, 510 U.S. at 21, 114 S.Ct. 367, (2) that the plaintiff "subjectively perceive[s]" as hostile or abusive [the "subjective" requirement], id., and (3) that creates such an environment because of plaintiff's sex (or other characteristic protected by Title VII) [the "prohibited causal factor" requirement], see Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (emphasizing that Title VII does not prohibit all workplace harassment, but only that which involves statutorily proscribed forms of discrimination).3 See generally id. at 78-81, 118 S.Ct. 998; Cruz v. Coach Stores, Inc., 202 F.3d 560, 570-72 (2d Cir.2000).

Gregory v. Daly, 243 F.3d 687, 691-92 (2d Cir. 2001). Since Connecticut tribunals look to federal case law for guidance in enforcing claims brought under its Fair Employment Practices Act ("FEPA"), this reasoning applies equally to claims alleged in the affidavit of illegal discriminatory conduct at issue here. See Brittell v. Dept. of Correction, 247 Conn. 148, 164 (1998); Levy v. CHRO, 236 Conn. 96, 103 (1996).

The affidavit alleges that (1) JS, on December 8, 2012, approached the complainant in a hostile manner and the complainant perceived this to be an attempted assault and (2) the respondent allowed JS to continue to supervise the complainant during the investigation into the

attempted assault. Additionally, the affidavit alleges that the complainant was subjected to different terms and conditions of employment based on race because he was involuntarily transferred while he was being investigated for a workplace violence incident, but JS was not transferred pending the results of the respondent's investigation of his actions. [8] In their respective filings in opposition to the motion to dismiss, both the complainant and the commission cite to these incidents as evidence of an adverse employment action occurring under circumstance giving rise to an inference of discrimination.[9]

Neither, however, analyses the complainant's allegations consistent with existing jurisprudence regarding a motion to strike. Nevertheless, I conclude that, when construed broadly and in a manner most favorable to the complainant, these allegations are sufficient for the purposes of surviving a motion to strike (dismiss) the claims of discriminatory treatment in terms and conditions of employment.

The undersigned emphasizes that my conclusion does not reflect an opinion on the merits of the claims. That judgment is reserved until a thorough review of all of the evidence adduced during the hearing and an assessment of the argument to be made by the parties. At that time, if a violation is found, the undersigned will determine the appropriate award consistent with the authority granted pursuant to any applicable subsections of 46a-86.

Section 46a-60(a)(4) claim

According to section 46a-60(a)(4), it is unlawful "[f]or any person [or] employer ... to discharge, expel or otherwise discriminate against any person because he has opposed any discriminatory employment practice ...." A retaliation claim under section 46a-60(a)(4) is analyzed consistent with the applicable variant of the burden shifting framework originally set forth in McDonnell Douglas v. Green, 411 U.S. 792, 802-804 (1973). (See, e.g., Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1038-39 (2d Cir. 1993), CHRO ex rel. Nobili v David E. Purdy & Company, LLC., et al., CHRO No. 0120389 (2004) and CHRO ex rel. Shea v. Spruance, et al., CHRO No. 9640243 (1999)). First, the complainant must satisfy the burden of proving her prima facie case. Tomka v. Seiler Corp, 66 F.3d 1295, 1308 (2d Cir. 1995); Newtown v. Shell Oil Co., 52 F.Supp.2d 366, 373 (1999). This burden is de minimus. CHRO ex rel. Nobili, CHRO No. 0120389 (2004).

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[8] The instant complaint contains no additional allegations of any other acts taken by the respondent, or any of its employees, against the complainant that could rationally be construed, even broadly, as an adverse employment action. It is worth noting, that the statement that TS's continuing to work at the Cheshire CTU location subjects the complainant to a hostile work environment is a legal conclusion, not an allegation of fact. The affidavit contains no factual allegation to support this assertion, so this tribunal could not reasonable conclude that the mere presence of TS constitutes a hostile work environment.

[9] The complainant's objection to the motion to dismiss contains new allegations of fact were not included in the affidavit filed in this matter and in dispute in the motion to dismiss. However, in deciding the motion to dismiss for failure to state a cause of action, the undersigned cannot consider these addition allegations. As previously discussed, the complainant is free to amend his complaint.

To make out a prima facie case of retaliation, an employee must show that (1) he participated in a statutorily protected activity;[10] (2) the employer was aware that the employee participated in such activity; (3) an adverse employment action was taken by the employer that disadvantaged the employee; and (4) a causal connection existed between the participation in the protected activity and the adverse action. Ray v. Henderson, 271 F.3d 1234, 1240 (9th Cir.2000). An adverse employment action has been found to include "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." Ray, 217 F.3d at 1243.

As discussed previously, a motion to strike requires that the affidavit be evaluated to determine whether the alleged facts reviewed broadly and in the light most favorable to the complainant would satisfy his prima facie case of retaliation.[11] In this regard, although the Form 103(1) filed in this matter indicates that the complainant has "previously opposed discriminatory conduct," noticeably absent from the pleading is any allegation of fact specifying the nature of that opposition.

The complainant and the commission argue that the allegation that JS almost assaulted the complainant and then was permitted to supervise him while the department conducted an investigation constituted an adverse employment action. However, upon close inspection, the complaint contains no allegation that either the near assault or the subsequent supervision occurred in retaliation for him engaging in activities protected by section 46a-60(a)(4). The allegation is that JS attempted to assault him after the complainant told Defelice that JS was unprofessional and unethical. The affidavit fails to elucidate what, if anything, was communicated that could support the conclusion that the attempted assault was in retaliation for the complainant opposing illegal discriminatory conduct.

The complainant also alleges that, on an unspecified date after the near assault, he filed a grievance, seeking an explanation for respondent's disparate handling of the respective allegations of workplace violence made against JS and against the complainant. For the purposes of a motion to strike, the filing of this grievance may be construed broadly as notice to the respondent of his opposition to discriminatory conduct. However, there is no allegation

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[10] The complainant is not required to establish that the conduct he opposed actually violated a state law prohibiting employment discrimination to prove that she was engaged in a protected activity. He need only have a "good faith reasonable belief that the underlying challenged actions of the employer [or other person] violated the law." Reed, 95 F.3d at 1178 (citing Manoharan 842 F.2d at 593); Malizia v. Thames Talent, Ltd., CHRO No. 9820039 (2000).

[11] The complainant's objection to the motion to dismiss contains new allegations of fact were not included in the affidavit filed in this matter and that is in dispute in the motion to dismiss. However, in deciding the motion to dismiss for failure to state a cause of action, the undersigned cannot consider these additional allegations. The appropriate means to modify the allegations is to amend the complaint.

that the respondent took any retaliatory action against the complainant after the grievance was filed.

The complaint contains a conclusory statement that the continued presence of JS's brother, Lieutenant Todd Sturgeon ("TS"), at the Cheshire CTU base, subjects the complainant to a hostile work environment. The complaint includes only one allegation of any action committed by TS -- he retrieved the roster and showed it to the complainant. This act does not support a finding of any adverse employment action and cannot support a retaliation claim.

Order

The complainant is ordered to file an amended complaint with the respondent and the office of public hearings with respect to the retaliation claim, on or before December 20, 2013. If the complainant fails to comply with this order, the undersigned will dismiss that claim in accordance with the authority granted pursuant to Regulation 46a-54-88a(d)(2).

Dated this 22nd day of November 2013.

Alvin R. Wilson, Jr.
Presiding Human Rights Referee

c:
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