STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Nsonsa Kisala, Complainant

OPH/WBR No. 2012-200

v.

T. Malecky, B. Wallen, DPH, Respondents

February 27, 2014

RULING ON RESPONDENTS' RENEWED MOTION TO DISMISS INDIVIDUAL RESPONDENTS

I.

PRELIMINARY STATEMENT

In November of 2012, respondent moved to dismiss the above captioned case based on lack of subject matter arguing that complainant had not been subjected to an adverse personnel action as required by General Statute §4-61dd to sustain a prime facie case. Respondents also argued that this tribunal lacked subject matter over the individually named respondents. This tribunal granted the Motion to Dismiss based on a finding that complainant had not been subject to an adverse personnel action and this tribunal lacked jurisdiction under the statute based on the absence of a required element. This tribunal did not determine the dismissal with regard to the individually named respondents.

The complainant filed an administrative appeal and the Superior Court (Prescott, J.) (Court) determined that based on Supreme Court decision, In re Jose B., 303 Conn. 569 (2012), which was decided subsequent to this tribunal's ruling, that the respondent's Motion to Dismiss should have been analyzed as a Motion to Strike. The

Court held that mere allegations of an adverse personnel action was sufficient to survive a Motion to Strike and remanded the case to this referee for an evidentiary hearing. The remand allows for presentation of evidence and testimony by both parties. The respondents' instant Motion to Dismiss argues that there is a lack of jurisdiction over the individually named parties pursuant to General Statutes §4-61dd. The respondent argues that the Court did not determine this issue. This tribunal agrees, the Court did not determine the issue of whether there was jurisdiction over the individually named parties; this ruling addresses that issue.

II.

STANDARD

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State,* 190 Conn. 622 (1983). In considering a motion to dismiss, facts are to be construed in the light most favorable to the non-moving party, in this case, the Complainant. Every reasonable inference is to be drawn in the Complainant's favor. *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998); *Pamela B. v. Ment,* 244 Conn. 296, 308 (1998). The moving party bears a substantial burden to sustain a motion to dismiss. During evaluation, there should be "presumption in favor of subject matter jurisdiction." *Williams v. Comm'n on Human Rights & Opportunities,* 257 Conn. 258, 266, 777 A.2d 645, 651 (2001). See also *Kelly v. Albertsen,* 114 Conn. App. 600, 606, 970 A. 2d 787, 790 (2009) (stating that "every presumption favoring jurisdiction should be indulged.")

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. 1 Restatement (Second), Judgments § 11. *Craig v. Bronson,* 202 Conn. 93, 101, 520 A.2d 155 (1987). Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong. *Henry F. Raab Connecticut, Inc. v. J.W. Fisher Co.,* 183 Conn. 108, 111-12, 438 A.2d 834 (1981); *E.M. Loew's Enterprises, Inc. v. International Alliance of Theatrical Stage Employees,* 127 Conn. 415, 420, 17 A.2d 525 (1941); *Case v. Bush,* 93 Conn. 550, 552, 106 A. 822 (1919); *People v. Western Tire Auto Stores, Inc.*, 32 Ill.2d 527, 530, 207 N.E.2d 474 (1965). "A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. *Monroe v. Monroe,* 177 Conn. 173, 185, 413 A.2d 819, appeal dismissed, 444 U.S. 801, 100 S.Ct. 20, 62 L.Ed.2d 14 (1979); *Meinket v. Levinson*, 193 Conn. 110, 115, 474 A.2d 454 (1984); *Henry F. Raab Connecticut, Inc. v. J.W. Fisher Co*., 183 Conn. at 112, 438 A.2d 834 (1981)." (Internal quotations missing) (Italics added)

III.

ANALYSIS

Aggrieved employees claiming retaliation in violation of General Statute §4-61dd, as amended by Public Act 11-48, may file their complaints against "[a] state agency, quasi-public agency, large contractor or appointing authority," pursuant to 4-61dd (d) (2) (A). Prior to amendment, there was no such enumeration of entities.[1]

[1] Prior to P.A. 11-48 the relevant provision of General Statute §4-61dd (b) (3) (A) simply stated that the aggrieved employee or their attorney may, "file a complaint concerning such personnel action."

In complainant's response he notes that the current statutory language includes "appointing authority." The definition of "appointing authority " under the State Personnel Act General Statute § 5-196 provides that an "'appointing authority' means a board, commission, *officer*, commissioner, *person* or group of persons having the power to make appointments by virtue of a statute or by lawfully delegated authority." That provision would suggest that an individual, as an appointing authority, may be named as a respondent. Moreover, there is strong president that states that individuals, maybe named in their official capacity; and in some rare instances where an individual named in their official capacity maybe liable.

General Statute 4-61dd (d) (1)[2] provides that:

> "**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; or (iv) 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." (Emphasis added)

Once again the term "appointing authority" is used, as well as the term no state officer or **employees of qualifying entities**, when referring to the prohibited retaliatory action.

The Construction of general words and phrases in statutes is governed by General Statute § 1-1, which, provides in relevant t part that "(a) In the construction of

[2] General Statutes §4-61dd et seq. will collectively be referred as the Whistleblower Statues.

the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly. Further, General Statute § 1-2z, the plain meaning rule, states that, "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra textual evidence of the meaning of the statute shall not be considered."

The Whistle-blower statutes prohibit certain actors from retaliating against employees who report qualified wrong doings. It would be illogical and unworkable for a statute to ban certain actors from such prohibited conduct, and not provide a method to determine their liability. Additionally, looking at all the provisions within the statute, it would be inconsistent with the general purpose of the Public Act 11- 48, which expands protection for whistle-blowers. [3] Individuals are additionally referenced in General Statutes §4-61dd (d) (1), which looks to General Statute §4-141[4] for the definition of a "state officer or employee."[5]

[3] The legislative summary for P.A. 11-48 states, 'The act restructures the process for investigating whistleblower complaints, expands existing whistleblower protections, and establishes new ones."

[4] The relevant portion of General Statute §4-141 provides that, "'state officers and employees' includes every person elected or appointed to or employed in any office, position or post in the state government, whatever such person's title, classification or function and whether such person serves with or without remuneration or compensation, including judges of probate courts, employees of such courts and special limited conservators appointed by such courts pursuant to section 17a-543a."

[5] 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

The liability of the "state officer or employee" is addressed in General Statute §5-141d (a) which also references General Statute § 1-141. The relevant part of § 5-141(d) provides that "the state shall save harmless and indemnify **any state officer or employee, as defined in section 4-141** …." (Emphasis added)

The Whistler-blower statute provides that individual employees are prohibited from qualifying retaliatory acts, and indemnifies them if they are acting in their official capacity. Indemnification would not be necessary if there was a prohibition against naming individuals. A forti, individuals are proper respondents **when they are named in their official capacity**. No individual labiality will attach absent a showing of wanton, reckless or malicious act or omission pursuant to General Statute §5-141d (a); or if individuals acted as appointing authorities. In either case, no individual will be liable absent a finding pursuant to General Statutes § 5-141d (a) which is a separate issue to be determined at a later time if respondents are found to have liability in this case.

IV.

CONCLUSION

The respondent's argument that pursuant to General Statutes §4-61dd individuals cannot be named as a party is unavailing. **This tribunal finds that individuals named in this complaint were sued in their official capacity. No individual labiality attaches absent a showing of wanton, reckless or malicious**

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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." See also *Eagan v CHRO*, 2011 WL 1168499 (February 25, 2011).

act or omission pursuant to General Statute §5-141d. However, even if the respondents were named individually, outside their official capacities, the proper relief would be to allow for an amended complaint removing the individually named respondents, not a dismissal. See *Andover Ltd. Partnership v. Board of Tax Review of West Hartford,* 232 Conn. 392, 400-01 (1995)

For these reasons, this tribunal finds that the individual respondents are named in their official capacity and the respondents' Motion to Dismiss is hereby ordered **DENIED.**

It is so ordered this 27th day of February 2014.

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Michele C. Mount
Presiding Human Rights Referee

Cc

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