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COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
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Caroline B. Howard,
Complainant

V

State of Connecticut, Department of Mental Health and Addiction Services,
Respondent

OPH/WBR NO. 2020-431

February 3, 2022

Decision following reconsideration

I

On February 14, 2020, Caroline B. Howard, the complainant, filed a complaint with the chief human rights referee pursuant to General Statutes Section 4-61dd (whistleblower statute). In her complaint, Ms. Howard alleged, in part, that the respondent, her employer, the State of Connecticut, Department Mental Health and Addiction Services (DMHAS) violated § 4-61dd by retaliating against her for her whistleblowing.

On November 12, 2021, her complaint was dismissed for failing to establish subject matter jurisdiction. On November 24, 2021, Ms. Howard filed a timely motion for reconsideration. The motion was granted on December 3, 2021, and, pursuant to General Statutes § 4-181a, further proceedings were ordered, specifically the parties were to file briefs addressing the issues of whether Ms. Howard's co-workers are qualifying persons under the whistleblower statute and whether the doctrine of equitable tolling applies because of the respondent's failure to post the provisions of § 4-61dd in conspicuous places as required by General Statute §4-61dd (i). The respondent filed its brief on January 7, 2022 and Ms. Howard filed her reply on January 24, 2022.

For the reasons set forth herein, and pursuant to General Statute § 4-181a (3), the final decision of December 3, 2021 is reversed. The matter is reinstated to the docket.

II

Prima facie case

The prima facie analysis has three elements. To fulfill the first element, the complainant must show that she engaged in a protected activity as defined by § 4-61dd by satisfying its statutory components. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (1995).

There are four statutory components to establish that one is engaged in an activity protected under § 4-61dd. First, the respondent must be a state department or agency, a quasi-public agency, a large state contractor or a probate court (covered entity). §§ 4-61dd (e) (1), 4-61dd (k) (2), 1-120. Second, the complainant must be an employee of the covered entity. § 4-61dd (e).

To establish the third statutory component of a protected activity, the complainant must have knowledge of: "(1) corruption, unethical practices, violations of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in a state department or agency, any quasi-public agency . . . or Probate Court," (2) knowledge of "corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in a large a large state contract" or (3) knowledge of "corruption by an entity receiving financial assistance pursuant to title 32 . . . ." § 4-61dd (a) (protected information)

This component does not protect an employee against all disclosures of information. It does not apply to an individual's "complaints about employment practices impacting the complainant's work environment . . . and behavior of particular supervisors and co-workers in the workplace. These simply are not the types of disclosures that 'serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures . . . generally evoked by the term whistleblowing . . . .' *Spruill v Merit Systems Protection Bd.*, [978 F.2d 679, 692 (Fed. Cir. 1992)]." *Booth v. Univ. of Connecticut*, OPH/WBR 2019-408, 5 (April 2, 2020). Connecticut's "whistleblower law is designed to protect employees from retaliation when they expose harm committed on the public." Id. "The legislative history of §4-61dd establishes that the statute was enacted in 1979 to protect state employees who blew the whistle on matters of direct interest to the public at large, such as serious government malfeasance, mismanagement, corruption, waste, fraud, abuse." *Harmon v State of Connecticut, Judicial Branch*, OPH/WBR 2015-311 (November 22, 2016) (2016 WL 8223960, 4). In discussing a similar whistleblower statute, General Statute § 31-51m, the court observed that the "known policy of this statute . . . is to protect employees from retaliation when they expose harm committed on the public." *Drauss v. Revera Health Systems Management, LLC,* Superior Court, judicial district of New Haven, Docket No. CV-14-6006945s) (November 8, 2014) (2014 WL 7495057, 5).

To satisfy the fourth statutory component of a protected activity, the complainant must have disclosed the protected information to an employee of (1) the Auditors of Public Accounts; (2) the Attorney General; (3) the state agency or quasi-public agency where the complainant is employed; (4) a state agency pursuant to a mandatory reporter statute; (5) the probate court

where the complainant is employed; or (5) the contracting state agency concerning a large state contractor with a large state contract (protected disclosure). § 4-61dd (e) (1).

If all four statutory components of a protected activity are met, the complainant has established the first element of a prima facie case.

Under the second element of a prima facie case, the complainant must show that she suffered or was threatened with an adverse personnel action by a covered entity after her protected disclosure. §4-61dd (e) (1); *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173. An adverse personnel action includes termination of employment, decrease in wages or salary or a material loss of benefits. *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2nd Cir. 2000); *Connecticut Commission on Human Rights & Opportunities v. City of New Britain,* Superior Court, judicial district of New Britain at New Britain, Docket No. CV-02-0514467s (July 17, 2003) (2003 WL 21771973, 5). Retaliatory personnel actions can also take the form of non-economic actions such as a less distinguished title, significantly diminished material responsibilities (*Galabya v. New York City Bd. of Educ.*,, supra, 202 F.3d 640; *Connecticut Commission on Human Rights & Opportunities v. City of New Britain*, supra, 2003 WL 21771973, 5, or the employer's creation of a hostile work environment (*Gregory v. Daly*, 243 F.3d 687, 701 (2d Cir. 2001). Essentially, an adverse personnel action is one that "would dissuade a reasonable person from whistle-blowing." *Eagen v Commission on Human Rights & Opportunities,* 135 Conn App. 563, 583 (2012).

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 her protected disclosure. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. The complainant can establish the inference of causation (1) "indirectly, by showing that the [protected disclosure] 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"; *Gordon v. New York City Board of Education*, 232 F.3d 111, 117 (2000); or (3) by the statutory two-year rebuttable presumption. § 4-61dd (e) (4).

In this case, construing the pleadings most favorably for the complainant and for retaining jurisdiction, Ms. Howard has, through a series of amendments to her complaint, alleged a prima facie case. As to the four components of the first element, first, the respondent is a state agency. Second, Ms. Howard is an employee of the respondent.

As to the third component, while most of Ms. Howard's disclosures are not protected information since they are complaints about her own working environment and that of her co-workers, she did allege that she disclosed allegations of improper patient care (see section B10b and B10e of the November 30, 2020 revised complaint). Allegations of improper patient care are matters of public interest and are protected disclosures.

As to the fourth component, these disclosures were made to DMHAS supervisory employees (see section B10f of the November 30, 2020 revised complaint).

With respect to the second element of a prima facie case, Ms. Howard has alleged that she was threatened with or has incurred adverse personnel actions.

With respect to the third element of a prima facie case, causation, General Statutes §4-61dd (e) (4) establishes a rebuttable presumption that adverse personnel actions occurring within two years of the disclosure of protected information are in retaliation for the disclosure.

As Ms. Howard has alleged a prima facie case, this tribunal has subject matter jurisdiction. It is important to note, though, that alleging the prima facie elements of a whistleblower retaliation complaint is not the same thing as proving these elements and of proving retaliation.[1]

III

Equitable tolling

Ms. Howard's original complaint was untimely filed. She argues that the statute of limitations should be tolled because of DMHAS' noncompliance with General Statute § 4-61dd (i) which states in relevant part:

> Each state agency or quasi-public agency shall post a notice of the provisions of this section relating to state employees and quasi-public agency employees in a conspicuous place that is readily available for viewing by employees of such agency or quasi-public agency. . . .

According to Ms. Howard, since DMHAS failed to post notice of the provisions of §4-61dd in a conspicuous place, the ninety-day filing requirement for a complaint was tolled until she obtained actual notice of her whistleblower rights from a conversation she had with an employee of the auditors of public accounts. For the following reasons, this tribunal agrees with Ms. Howard that DMHAS' failure to comply with §4-61dd (i) tolled the statute of limitations.

While the ninety-day filing time limit is not jurisdictional, it is mandatory. Failure to comply with the limit "warrants striking a complaint unless waiver, consent or other compelling

grounds for equitable tolling exist." *Cohen v Commission on Human Rights and Opportunities*, Superior Court, judicial district of New Britain at New Britain, HHB-CV-17-5018330 (January 11, 2019) (2019 WL 624405, 11) citing *Williams v Commission on Human Rights & Opportunities,* 257 Conn. 258, 283-85 (2001) *Commissioner of Mental Health and Addiction Services v Saeedi*, 143 Conn. App. 839, 848-852 (2013).

According to Ms. Howard in her revised complaint dated October 14, 2020, she did not become aware that she could file a complaint with the chief human rights referee until December 30, 2019 when she received an email from the auditors of public accounts informing her of this option. Clearly, though, a "lack of awareness of the law and procedure does not in itself constitute an extraordinary circumstance warranting equitable tolling even for those acting pro-se and claiming ignorance of the law or lack of understanding of pro se procedures." *Taylor v. Office of Public Hearings for the Commission on Human Rights and Opportunities*, Superior Court, judicial district of New Britain at New Britain, Docket No. CV-09-4019897 (October 6, 2009) (2009 WL 5777929, 1). Ms. Howard, however, cites to *Asp v Milardo Photography, Inc.*, 573 F.Sup.2d 677 (D. Conn.) (2008) for the proposition that DMHAS' failure to post a notice of whistleblower notice constitutes an extraordinary circumstance warranting equitable tolling.

In *Asp*, the "issue before the Court is whether the failure [of the employer] to post wage and hour posters constitutes an extraordinary circumstance such that the Plaintiffs were prevented from exercising their rights under [the Federal Fair Labor Standards Act (FLSA)] and [the Connecticut Minimum Wage Act (CMWA)]." Id., 697. The court observed that "the trend regarding the failure to post FLSA notices is more flexible and permits equitable tolling where the

plaintiff did not consult with counsel during his employment and the employer's failure to post notice is not in dispute." Id., 698. The court concluded that because there was no evidence that the plaintiffs had consulted with an attorney, it was undisputed that the defendant had failed to post the FLSA notice and there was no evidence to show that the plaintiffs had actual or constructive knowledge of their rights, they were entitled to the equitable tolling of their unpaid overtime wage claims. Id., 698.

In evaluating whether failure to comply with §4-61dd (i) constitutes extraordinary circumstances justifying equitable tolling, this tribunal is aware of "the overarching remedial purpose of § 4–61dd and its aim to protect whistle-blowing state employees from retribution or reprisal. Our Supreme Court has long held that remedial statutes are to be interpreted broadly to effectuate their purpose. See, e.g., *Pizzuto v. Commissioner of Mental Retardation*, 283 Conn. 257, 265, 927 A.2d 811 (2007) ('act indisputably is a remedial statute that should be construed generously to accomplish its purpose' [internal quotation marks omitted]); *Dysart Corp. v. Seaboard Surety Co.*, 240 Conn. 10, 18, 688 A.2d 306 (1997) ('remedial statutes should be construed liberally in favor of those whom the law is intended to protect')." *Commissioner of Mental Health and Addiction Services v. Saeedi*, supra, 143 Conn. App. 860.

Therefore, given that the statute imposes an affirmative duty on state agencies and given the deference given to remedial statutes, the failure of a state agency, a quasi-public agency, a probate court or a large state contractor to post a notice of the provisions of § 4-61dd in a conspicuous place that is readily available for viewing by its employees can justify equitable tolling.

Further, given that there was no evidence that Ms. Howard had consulted with an attorney, because there is no evidence that DMHAS posted the required whistleblower notice and because there was no evidence to show that the Ms. Howard had actual or constructive knowledge of her rights, she is entitled to the equitable tolling of her whistleblower claim.

IV

A telephonic status conference will be held on **February 25, 2022 at 10:00 AM** to schedule dates for further proceedings. The parties are instructed to call 1.866.741.9936 and enter participant code 7022515 at the scheduled date and time.

It is so ordered this 3rd day of February 2022.

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

c.

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[1] Whistleblower retaliation cases brought under § 4-61dd are 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 case law interpreting other anti-retaliatory statutes. *Stacy v. Department of Correction*, OPH/WBR No. 2003-002 (March 1, 2004). The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. Id., 4. Under *McDonnell Douglas,* the three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of her prima facie case, (2) the respondent's burden in the presentation of its non-retaliatory explanation for the adverse personnel action, and (3) the complainant's ultimate burden of proving the respondent retaliated against her because of his disclosure of protected information. Id.