Caroline B. Howard, Complainant

v

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

Office of Public Hearings
Commission on Human Rights and Opportunities

OPH/WBR 2020-431

May 24, 2024

FINAL DECISION

PRELIMINARY STATEMENT

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

On July 16, 2020, DMHAS filed a motion to dismiss and/or strike. On August 25, 2020, the motion to dismiss was denied and the motion to strike was granted with Ms. Howard ordered to file and serve a revised complaint. She filed and served a revised complaint on October 14, 2020. She then filed and served a second revised complaint on November 30, 2020 (revised complaint) which served as the basis for the hearing and this decision.

On November 12, 2021, the revised complaint was dismissed for failing to establish subject matter jurisdiction. Ms. Howard's petition for reconsideration was granted on December 3, 2021 and further proceedings were ordered. The February 3, 2022 decision following reconsideration reversed the dismissal and the revised complaint was reinstated to the docket.

On March 16, 2022, DMHAS filed its answer and special defenses to the revised complaint.

The public hearing was held on December 12 and 13, 2023. By agreement of the parties, the hearing was conducted via zoom. The parties filed their briefs on March 19, 2024. Ms. Howard's attorney, Douglas Leonard, also filed a motion for attorney fees. A hearing was held on April 26, 2024 for DMHAS to examine Ms. Howard's attorney on the motion for attorney fees. Following the hearing, the respondent emailed a request for a date to file its opposition. The respondent filed its opposition on May 14, 2024.

For the reasons stated herein, it is found that Ms. Howard established by a preponderance of the evidence that DMHAS violated § 4-61dd when it retaliated against her for whistleblowing. Ms. Howard is awarded $70,000 in emotional distress damages and $23,334 in attorney fees.

I
PARTIES

The parties to this matter are Caroline B. Howard c/o Attorney Douglas C. Leonard, P. O. Box 76, Brooklyn, Connecticut; and the Department of Mental Health and Addiction Services, c/o Assistant Attorneys General Sarah T. Bold and Holly A. Wonneberger, 165 Capitol Avenue, Harford, Connecticut.

II
FINDINGS OF FACT

In evaluating the credibility of the witnesses, this tribunal considered their appearance and demeanor while testifying, the consistency or inconsistency of their testimony, their memory or lack thereof of certain events, their manner in responding to

questions, whether they were candid and forthright or evasive and incomplete, their personal interest or lack of personal interest in the case, and the consistency or inconsistency of their testimony in relation to other evidence, including exhibits in the case.

References to the transcript are designated by volume number[1] followed by the page number(s). References to exhibits are designated by C for Ms. Howard and R for DMHAS followed by the exhibit number.

Based upon an assessment of the credibility of the witnesses and a review of the pleadings, exhibits, and transcripts, the following facts relevant to this decision are found to have been proven by a fair preponderance of the evidence.

1. At the time relevant to this revised complaint, Ms. Howard was employed by DMHAS at Whiting Forensic Hospital. She worked third shift. C-3.
2. Third shift was from 10:30 PM to 6:30 AM. Vol. 1, 37.
3. Whiting Forensic Hospital provides inpatient services to individuals with mental health conditions who are involved in the criminal justice system. Vol. 2, 96; C-1.
4. Ms. Howard's job title was forensic treatment specialist. C-3.
5. Ms. Howard's job duties included providing and implementing direct care to patients. C-2; R-1. Such care included assisting patients with their meals,

[1] Volume 1 is the hearing held on December 12, 2023. Volume 2 is the hearing held on December 13, 2023. Volume 3 is the hearing on the motion for attorney fees held on April 26, 2024.

showers, and dressing. Duties also included assisting nursing staff with taking a patient's vital signs. Vol. 2, 10-11.

6. Ms. Howard's job duties also included 1:1 and 2:1 staff to patient ratio of constant observation of a patient. Vol. 1, 143, 146.

7. Constant observation of a patient can be ordered by a doctor when patients may have medical or psychiatric issues where they may want to hurt themselves or others. Vol. 1, 87; Vol. 2, 12-13.

8. Staff do not like assignments of constant observation. Vol. 1, 88.

9. Constant observation assignments can lead to management accusations of inattentiveness resulting in disciplinary action against the employee. Vol. 1, 88.

10. Constant observation assignments can also result in possible violence by patients against staff conducting constant observation. Vol. 1, 88.

11. Ms. Howard's job duties included census duty. Vol. 1, 88.

12. Census duty involves monitoring patients and staff. Vol. 1, 88-89.

13. Like constant observation duty, staff do not like census duty assignments. Vol. 1, 89.

14. Constant observation duty assignments impose liability and responsibility on the person assigned to census duty should anything go wrong on the shift. Vol. 1, 89.

15. DMHAS had a policy requiring employees to promptly report any known or suspected violations of laws, regulations, standards, polices, and procedures

that apply to DMHAS. This included reporting concerns of patient care. Vol. 1, 10; C-4. Reports were made on a form known as a MHAS-20. Vol. 1, 11.; C-5.

16. An employee would file the MHAS-20 form with a supervisor or manager who would then forward it through the DMHAS' administrative chain of command. Vol. 1, 11; C-5.

17. In addition to filing a MHAS-20 form, employees may file a working under protest form. This is a union document employees file with DMHAS when the employees claim issues such as unsafe working conditions, staffing shortages, or other concerns for which the employees believe they should not be held responsible if anything goes wrong. Vol. 2, 58-59.

18. In her October 1, 2013 to September 1, 2014 job performance review, Ms. Howard received ratings of excellent in the areas of knowledge of work, quantity of work, quality of work, cooperation in manner of handling work relationships, and judgement. She received a rating of good in attendance. C-3.

19. In her October 1, 2014 to September 1, 2015 job performance review, Ms. Howard received ratings of excellent in the areas of knowledge of work, quantity of work, and judgement. She received ratings of good in quality of work, cooperation in manner of handling work relationships, and attendance. C-3.

20. In her October 1, 2015 to September 1, 2016 job performance review, Ms. Howard received ratings of excellent in the areas of knowledge of work,

quantity of work, quality of work, cooperation in manner of handling work relationships, and judgement. She received a rating of fair in attendance. C-3; R-11.

21. In July 2017, Ms. Howard signed a stipulated agreement resolving disciplinary issues that had arisen earlier that year. The agreement provided in part that Ms. Howard waived any further legal action against DMHAS regarding those disciplinary issues and the stipulated agreement. Ms. Howard served an unpaid three-day suspension in November 2017. R-19.

22. In her October 1, 2016 to September 1, 2017 job performance review, Ms. Howard received ratings of excellent in the areas of knowledge of work, quantity of work, quality of work, cooperation in manner of handling work relationships, and judgement. She received a rating of good in the category of unspecified other elements. C-3; R-12.

23. In her October 1, 2017 to September 1, 2018 job performance review, Ms. Howard received ratings of good in the areas of knowledge of work, quantity of work, quality of work, cooperation in manner of handling work relationships, judgement, and unspecified other elements. C-3; R-14.

24. After signing the July 2017 stipulated agreement, Ms. Howard complained about care patients were receiving. These patient related complaints continued in 2018 and early 2019. Vol. 1, 13-14, 72.

25. Ms. Howard frequently complained verbally and in writing about patients' inadequate clothing, supplies, food, and care, as well as lack of towels and bedding (patient-care complaints). Vol. 1, 59, 72-74, 78.

26. Ms. Howard was proactive in her support of patient rights. Vol. 1, 58.

27. Ms. Howard made her patient-care complaints to DMHAS' supervisory and management personnel. Vol. 1, 14-17, 76-78.

28. In one instance, Ms. Howard filed a patient-care complaint regarding a patient with a stomach tube whose mattress was put on the floor because he was a fall risk and Whiting Forensic Hospital did not have an appropriate bed. Vol. 1, 14-16, 72-73. She complained about the inadequate cleaning of this patient's room because he tended to urinate on himself. Vol. 1, 16.

29. Ms. Sanchez was the third-shift director of nursing. Vol. 2, 8.

30. Ms. Sanchez was one of the people to whom Ms. Howard submitted her patient-care complaints. Vol. 1, 77.

31. Following Ms. Howard's patient-care complaints, Ms. Sanchez accused Ms. Howard of not taking all her mandatory online training. Vol. 1, 91, 98-99; C-12.1. Ms. Howard had, however, been diligent in taking the required courses. Vol. 1, 98-99; C-12.2.

32. Following her patient-care complaints, Ms. Howard was repeatedly told that she had to have the heels of her shoes checked for compliance with DMHAS dress code requirements. No dress code violations were ever found. Vol. 1, 91-92.

33. Tasks are supposed to be equitably assigned. Vol. 2, 36. However, following her patient-care complaints, Ms. Howard was assigned extra constant observation and census duty assignments. Vol. 1, 89-90.

34. Non-whistleblowing staff members were not assigned extra constant observation and census duty assignments. Vol. 1, 89-90.

35. On January 11, 2019, Ms. Howard was assigned to constant observation of a patient. Staff observed her sleeping or being inattentive while observing the patient. Vol. 1, 142-143; Vol. 2, 16-17; R-21.

36. DMHAS referred the matter to the state's Office of Policy and Management Office of Labor Relations (OLR) for investigation. Vol. 1, 132, 140-144; R-21.

37. While the investigation was pending, DMHAS removed Ms. Howard from patient care. Vol. 1, 81.

38. DMHAS has removed other employees from patient care during an investigation of allegations of inattentiveness or sleeping while on constant observation. Vol. 2, 18, 78-79.

39. When removing an employee from direct patient care, DMHAS may place the employee on paid administrative leave, assign the employee to nonpatient care duties, place the employee in a different unit, or place the employee in the 'penalty box'. Vol. 2, 78-80.

40. DMHAS chose to place Ms. Howard in the penalty box rather than select one of the other options. Vol. 2, 15.

41. The penalty box is a term used by employees for their assignment to a 5 x 15-foot room. Vol. 1, 81. Employees are placed in that room for their entire shift. Vol. 2, 14.

42. While in the penalty box, employees may be assigned minor clerical work, do homework if taking a college course, read a book, or do a crossword puzzle. Frequently, however, there is no work for them to do. Vol. 2, 15.

43. DMHAS had a ninety-day policy on placement in the penalty box. Vol. 1, 18-19.

44. DMHAS was unable to articulate a reason for why it placed Ms. Howard in the penalty box rather than select one of the other options. Vol. 2, 15.

45. While Ms. Howard was in the penalty box, Ms. Sanchez would enter the room. Vol. 1, 95.

46. Ms. Sanchez would sit near Ms. Howard and stare at her. Vol. 1, 95-96.

47. Ms. Sanches would invade Ms. Howard's personal space. Vol. 1, 95-96.

48. Ms. Sanchez would appear to reach over Ms. Howard but physically touch Ms. Howard's body. Vol. 1, 95-96.

49. Ms. Sanchez would repeatedly bang the room's entry door into Ms. Howard's chair. Vol. 1, 95-96.

50. Ms. Howard remained in the penalty box from mid-January to mid-May. Vol. 1, 81.

51. Employees assigned to the penalty box receive their regular salary. They are not, however, eligible for overtime. Vol. 1, 20-21, 39; R-4, pp. 18-22.

52. Employees in the penalty box are visible to other employees who walk by. Vol. 1, 23.

53. Placement in the penalty box impacts an employee's relationships with co-workers. Some co-workers believe that the employee deserved to be in the penalty box because the employee had done something wrong. Co-workers avoid or distance themselves from the employee believing that the employee has a target on his or her back. Vol. 1, 27.

54. The OLR employees who conducted the investigation of Ms. Howard had no prior knowledge of her patient-care complaints to DMHAS. Vol. 1, 147; Vol. 2, 81.

55. OLR's investigation substantiated the allegation of Ms. Howard's inattentiveness. Vol. 1, 140-144, 148-155; Vol. 2, 75-77; R-21.

56. OLR recommended that Ms. Howard's employment be terminated. R-21.

57. Other DMHAS employees were disciplined, or would have been disciplined had they not retired, for not reporting Ms. Howard's inattentiveness. Vol. 1, 146; Vol. 2, 77.

58. Although OLR had recommended Ms. Howard's termination, she was not terminated as on or about May 10, 2019 she went on workers compensation. Vol. 1, 155; R-10.

59. Ms. Howard remained out of work on workers compensation until her retirement on October 1, 2022. Vol. 2, 84.

60. As a result of being in the penalty box for the extended time, Ms. Howard hated going to work. Vol. 1, 82.

61. As a result of being in the penalty box for the extended time, Ms. Howard developed problems with driving. Vol. 1, 65-66.

62. As a result of being in the penalty box for the extended time Ms. Howard's demeanor changed. Vol. 1, 67.

63. Ms. Howard was slow to move and slow to react in a conversation.

64. Ms. Howard had loss of appetite. Vol. 1, 67.

65. Ms. Howard had difficulty sleeping. Vol. 1, 67.

66. As a result of being in the penalty box for the extended time, Ms. Howard began experiencing back pain; problems with her attention, concentration, and memory; and chronic headaches. Vol. 1, 28, 30, 32, 66, 82-84.

67. As a result of being in the penalty box for the extended time, Ms. Howard isolated herself. She stopped associating with co-workers after work and was no longer a social person. Vol. 1, 32, 66, 83-84.

68. As a result of being in the penalty box for the extended time, Ms. Howard felt isolated and overwhelmed. Vol. 1, 60.

69. As a result of being in the penalty box for the extended time, Ms. Howard began losing weight. Vol. 1, 60.

70. As a result of being in the penalty box for the extended time, Ms. Howard's mental health appeared to be decompensating. Vol. 1, 60.

71. As a result of being in the penalty box for the extended time, Ms. Howard experienced anxiety, depression, and hopelessness. Vol. 1, 64.

72. As a result of being in the penalty box for the extended time, Ms. Howard felt the system failed her. Vol. 1, 64.

73. Ms. Howard continues to experience many of these same issues. Vol. 1, 63.

74. Ms. Howard continues to have headaches. Vol. 1, 84.

75. Ms. Howard is tired all the time. Vol. 1, 84. She continues to have difficulty sleeping. Vol. 1, 86.

76. Ms. Howard continues to be a difficult person with whom to have a conversation. She needs to have things explained to her. She has lost her sense of humor. Conversations with her are still like talking to oneself. Ms. Howard does not appear to be listening and is nonresponsive to conversation. Vol. 1, 108-109, 113-114.

77. Ms. Howard continues is still not socially active. Vol. 1, 107-108, 113-114.

78. Ms. Howard continues to be anxious and depressed. Vol. 1, 111-113.

79. Ms. Howard has not regained her enthusiasm for life. Vol. 1, 115. She continues to see everything in black and white and towards the negative. She still does not see the color in life. Vol. 1, 114.

80. Ms. Howard continues to be a difficult passenger in a vehicle as she is hyper-alert to other vehicles. Vol. 1, 110-111.

81. Ms. Howard has been gaining weight. Vol. 1, 116.

82. Ms. Howard has lost her past enthusiasm for holidays. Vol. 1, 115.

83. Ms. Howard's experience in the penalty box has had a negative impact on her relationships with her family. Vol. 1, 107-109, 112-114, 118-126.

84. Although Ms. Howard last worked at Whiting Forensic Hospital in May 2019, as of the date of the hearing her family and friends have noticed little if any improvement in her demeanor and behavior. Vol. 1, 63, 113.

85. During the time Ms. Howard was making her patient-care complaints and incurring adverse personnel actions, DMHAS had not posted the notice of the provisions of § 4-61dd in a conspicuous place readily available to its employees. Vol. 1, 38, 99

86. DMHAS has an anti-retaliatory policy for employees who report alleged violations of DMHAS policies, procedures, regulations, or work rules. The employee is informed that DMHAS' agency compliance integrity officer will investigate complaints of retaliation against whistleblowers. C-4, section IV.

87. DMHAS' anti-retaliatory policy does not inform employees of their statutory right to file a whistleblower retaliation complaint with the chief human rights referee. C-4, section IV; C-5.

III
CAUSATION

The causation standard for employment cases under Connecticut law is the motivating factor test; that is, a complainant must prove only that illegal discrimination was **a** cause in the adverse actions taken by a respondent. *Wallace v Caring Solutions, LLC,* 213 Conn. App. 605, 278 A.3d 586 (2022) (Connecticut Fair Employment Practices Act, General Statute § 46a-58 et seq); *Weinstein v University of Connecticut*, Superior

Court, judicial district of Hartford, Docket No. HHD-CV-11-6027112-s, 2022 WL 2356067, *14 (June 30, 2022) (General Statutes § 31-51m retaliation); *Gonska v Highland View Manor, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-12-6030032-s, 2014 WL 3893100, *8 (June 26, 2014) (General Statutes § 19a-532 claims).

IV
APPLICABLE STATUTE

General Statutes § 4-61dd provides in relevant part that:

> (a) Any person having knowledge of any matter involving (1) 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, (2) 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, or (3) corruption by an entity receiving financial assistance pursuant to title 32 that has failed to meet its contractual obligations or has failed to satisfy any condition regarding such financial assistance, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. . . .
>
> * * *
>
> (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.

(2) (A) Not later than ninety 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 against the state agency, quasi-public agency, Probate Court, large state contractor or appointing authority concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. Such complaint may be amended if an additional incident giving rise to a claim under this subdivision occurs subsequent to the filing of the original complaint. 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. The human rights referee may order a state agency, quasi-public agency or Probate Court to produce (i) an employee of such agency, quasi-public agency or Probate Court to testify as a witness in any proceeding under this subdivision, or (ii) books, papers or other documents relevant to the complaint, without issuing a subpoena. If such agency, quasi-public agency or Probate Court fails to produce such witness, books, papers or documents, not later than thirty days after such order, the human rights referee may consider such failure as supporting evidence for the complainant. If, after the hearing, the human rights referee finds 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.

* * *

(4) In any proceeding under subdivision (2) or (3) 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 two years after the employee first transmits facts and information concerning a matter under subsection (a) of this section or discloses information under subdivision (1) of this subsection to the Auditors of Public Accounts, the Attorney General or an employee of a state agency, quasi-public agency or Probate Court, as applicable, 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 or subdivision (1) of this subsection.

V
CASELAW

A
Remedial purpose of § 4-61dd

"Our Supreme Court has long held that remedial statutes are to be interpreted broadly to effectuate their purpose." *Comm'r of Mental Health & Addiction Servs. v. Saeedi*, 143 Conn. App. 839, 860, 71 A.3d 619, 633 (2013).

> The legislature introduced and ultimately passed the initial version of § 4–61dd as House Bill No. 5421, "An Act Concerning Whistle Blowing by State Employees." During floor debates, Representative Patricia T. Hendel, addressing the House of Representatives, explained that "employees should not be afraid to point out waste and corruption when and if they see such things in our [s]tate's government." 22 H.R. Proc., Pt. 24, 1979 Sess., p. 8457. In support of the bill, Representative Richard J. Balducci echoed this sentiment in stating that the bill "allow[s] [a] [s]tate employee, without fear of retaliation or repercussions for his or her doing so, to report information ... to the [a]ttorney [g]eneral's office." Id., at p. 8461. This discussion reveals the overarching remedial purpose of § 4–61dd and its aim to protect whistle-blowing state employees from retribution or reprisal.

Comm'r of Mental Health & Addiction Servs. v. Saeedi, supra, 143 Conn. App. 860.

The statute "tries to create a more favorable environment whereby state workers and employees of large state contractors feel free to bring forth important information of waste, fraud, abuse and possible cases of corruption, in order to protect the public tax dollar and the proper running of our government." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2857. "It's [sic] intent is 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." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2887-88.

B
Parties' burdens of proof

Whistleblower retaliation cases brought under § 4-61dd are analyzed under the burden shifting framework articulated in *McDonnell Douglas Corp. v.* Green, 411 U.S. 792, 802 (1973). *Eagen v Commission on Human Rights and Opportunities*, 135 Conn. App. 563, 571, 42 A.3d 478 (2012); *Arone v* Enfield, 79 Conn. App. 501, 507, 831 A.2d 260, cert. denied, 266 Conn 932,837 A.2d 804 (2003). The three shifting evidentiary burdens are: (1) a complainant's burden in the presentation of her prima facie case; (2) a respondent's burden in the presentation of its non-retaliatory explanation for the adverse personnel action; and (3) a complainant's ultimate burden of proving that the respondent retaliated against her because of her whistleblowing. *Eagen v Commission on Human Rights and Opportunities*, supra, 135 Conn. App. 563 n. 5; *Irwin v. Lantz*, Office of Public Hearings, Docket No. OPH/WBR 2007-40-46, 51-56; 2008 WL 2311544, *5 (CT.Civ.Rts) (May 9, 2008). The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. *Irwin v. Lantz*, supra, 2008 WL 2311544, *5.

1
The complainant's prima facie burden of proof

With respect to the first evidentiary burden, a complainant's prima facie case of whistleblower retaliation has three elements: (1) a complainant must have engaged in a protected activity as defined by the applicable statute; (2) a complainant must have

incurred or been threatened with an adverse personnel action; and (3) there must be a causal connection between the actual or threatened personnel action and the protected activity. *Arone v* Enfield, supra, 79 Conn. App. 507; *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995); *Irwin v. Lantz*, supra, 2008 WL 2311544, *5-7; *Stacy v. Dept. of Correction*, Office of Public Hearings, Docket No. OPH/WBR 2003-002, 2004 WL 5380919, *2-3 (CT.Civ.Rts) (March 1, 2004).

a

A protected activity, the first prima facie element, consists of four statutory components.

First, a respondent must be a state department or agency, a quasi-public agency, a large state contractor, or probate court (regulated entity). §§ 4-61dd (a) (1), 4-61dd (e) (2) (A); General Statutes §§ 1-120, 4-141.

Second, a complainant must be an employee of the regulated entity. § 4-61dd (e) (2) (A).

Third, a complainant must have knowledge of (1) “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 a quasi-public agency” or of (2) “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” or of (3) “corruption by an entity receiving financial assistance pursuant to title 32 that has failed to meet its contractual obligations or has failed to satisfy any condition regarding such financial assistance” (protected information). § 4-61dd (a).

As to this third statutory component, a complainant need not show that the conduct she reported violated § 4-61dd (a), but only that she had a reasonable, good faith belief that the reported conduct was a violation. § 4-61dd (j).

Fourth, a 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 she is employed; (4) a state agency pursuant to a mandatory reporter statute; (4) the probate court where such employee is employed; or (5) the contracting state agency concerning a large state contractor (whistleblowing). § 4-61dd (e) (1).

b

To satisfy the second element of her prima facie case of whistleblower retaliation, a complainant must show that she suffered or was threatened with an adverse personnel action by a regulated entity after her whistleblowing. §4-61dd (e) (1).

An adverse personnel action is "an action that would dissuade a reasonable person from whistle-blowing." *Eagen v. Comm'n on Hum. Rts. & Opportunities*, supra, 135 Conn. App. 583.

The

> United States Supreme Court concluded that "the antiretaliation provision [of Title VII] does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

Id., 583–84.

c

The third element of a prima facie case requires a complainant to introduce sufficient evidence to establish an inference of a causal connection between the whistleblowing and the personnel action threatened or taken.

A 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; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondent or (3) by operation of a statutory rebuttable presumption. *Irwin v. Lantz*, supra, 2008 WL 2311544, *7; *Stacy v Dept. of Correction*, supra, 2004 WL 5380919, *3; § 4-61dd (*l*) (4).

2

The respondent's burden of proof under *McDonnell Douglas*

If a complainant establishes a prima facie case through indirect evidence, the analysis proceeds to the second burden-shifting step. Here, a respondent must produce a legitimate, non-retaliatory reason for its actions; *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53-54 (1990); which, if taken as true, would permit the conclusion that there was a non-retaliatory reason for the respondent's actions; *Arone v* Enfield, supra, 79 Conn. App. 507. If the respondent does not produce a legitimate, non-retaliatory reason, the complainant prevails. If the respondent does produce a reason, the analysis proceeds to the third burden-shifting step.

3

The complainant's subsequent burden of proof under *McDonnell Douglas*

In the third burden-shifting step, a complainant must prove by a preponderance of the evidence that she was retaliated against because of her whistleblowing. A complainant

> then must satisfy her burden of persuading the factfinder that she was the victim of discrimination 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.

(Internal quotation marks omitted.) *Ford v. Blue Cross & Blue Shield of Connecticut, Inc*., supra, 216 Conn. 54.

A complainant "must offer some significantly probative evidence showing that the [respondent's] proffered reason is pretextual and that a retaliatory intention resulted" in the adverse personnel action. *Arnone v Enfield*, supra, 79 Conn. App. 507. "Pretext may be demonstrated either by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, or by reliance on the evidence comprising the prima facie case, without more . . . ." (Internal quotations omitted.) *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174.

To satisfy this burden, a complainant "need not prove that the defendant's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, United States District Court, Docket No. 3:04-CV-304 (EBB), 2008 WL 793597, *8 (D. Conn. March 20, 2008).

4

The respondent's burden of proof when the complainant has direct evidence of retaliatory animus

The analytical framework differs when a complainant has established her prima facie case by direct evidence that a retaliatory animus motivating the respondent's actions.

If a 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.) *Farrar v. Stratford*, supra, 537 F. Sup.2d 354-55; *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, 204-05 (1991).

(Internal quotation marks omitted.) *Irwin v. Lantz*, supra, 2008 WL 2311544, *8.

5

The respondent's burden of proof with a statutory presumption

Likewise, the analytical framework differs from the *McDonnel Douglas* analysis when a complainant has established her prima facie case through a rebuttable statutory presumption.

Section 4-61dd differs from Connecticut's other anti-retaliation statutes and therefore deviates from a typical *McDonnell Douglas* analysis because of its statutory

presumption. Section 4-61dd (*l*) (4) provides that when an adverse personnel action occurs within two years of an employee's whistleblowing "there shall be a rebuttable presumption that the personnel action is in retaliation" for the whistleblowing. This rebuttable presumption changes a respondent's burden of proof from one of articulation or production to one of persuasion.

> "A rebuttable presumption is equivalent to prima facie proof of a fact and can be rebutted only by the opposing party's production of sufficient and persuasive contradictory evidence that disproves the fact that is the subject of the presumption ... A presumption requires that a particular fact be deemed true until such time as the proponent of the invalidity of the fact has, by the particular quantum of proof required by the case, shown by sufficient contradictory evidence, that the presumption has been rebutted." *Fish v. Fish,* 285 Conn. 24, 46 n.21, 939 A.2d 1040 (2008). (Citation omitted; Internal quotation marks omitted.).

Aguiar v. Between-the-Bridges, LLC, Superior Court, judicial district of Hartford, Docket No. CV-17-6079250S, 2020 WL 853610, *3 (Jan. 23, 2020), aff'd, 209 Conn. App. 902, 263 A.3d 1012 (2021).

> A [statutory] presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. 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, 798 A. 2d 481, cert. denied, 261 Conn. 919, 806 A.2d 1055 (2002).

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 omitted.) *Salmeri v. Dept. of Public Safety*, supra, 70 Conn. App. 339-40; *Irwin v. Lantz*, supra, 2008 WL 2311544, *8.

> To rebut a statutory presumption the opponent's evidence must do more than raise a mere theoretical possibility that the presumed fact does not exist . . . . Otherwise, the use of a presumption to shift the burden of going forward with certain evidence would be meaningless. Since a rebuttable presumption already assumes that the presumed fact will not be true in all cases, it is not rebutted simply by recognizing the possibility that it can be rebutted. To fairly put the presumed fact in issue, specific evidence is required to show that the presumed fact was not true in the particular case, given its actual underlying facts and circumstances.

(Internal citation omitted; internal quotation marks omitted.) *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, 402 n. 12, 710 A.2d 807, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998).

VI
ANALYSIS

A
Equitable tolling

1

In the decision following reconsideration, this tribunal concluded that although Ms. Howard's complaint had been untimely filed, the doctrine of equitable tolling applied to preserve her claim. Equitable tolling was found in part because of DMHAS' failure to comply with § 4-61dd (i). Section 4-61dd (i) provides in relevant part that:

> Each state agency or quasi-public agency shall post a notice of the provisions of this section [§ 4-61dd] 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. . . .

As discussed in the decision following reconsideration:

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.

Decision following reconsideration, 7-9 (February 3, 2022).

2

Testimony during the public hearing was mixed as to whether DMHAS had posted the requisite notice in conspicuous places. Mr. Hempstead, a co-worker and supervisor of Ms. Howard, testified that DMHAS had not. Vol. 1, 8-9, 38. Ms. Howard testified that DMHAS had not. Vol. 1, 99. Ms. Maldonado, also a co-worker of Ms. Howard, testified that DMHAS had. Vol. 1,57-58, 68.

I find Ms. Howard and Mr. Hempstead more credible on this issue for two reasons. First, both Ms. Howard and Mr. Hempstead left employment with DMHAS in 2019. Ms. Howard went out on workers' compensation in May 2019. Mr. Hempstead retired in December 2019. Vol. 1, 9. Ms. Maldonado, though, did not retire until 2021. Vol. 1, 57. Because Ms. Maldonado did not testify as to when she saw the notices posted, DMHAS may well have posted them after Ms. Howard and Mr. Hempstead left employment.

Second, although DMHAS has an anti-retaliatory policy for those who report alleged violations of DMHAS policies, procedures, regulation, or work rules, the policy does not advise employees of their right to file a whistleblower retaliation complaint with the chief human rights referee. Rather, the employee is informed that DMHAS' own agency compliance integrity officer will investigate the complaints. If DMHAS had been informing its employees of their § 4-61dd whistleblower retaliation rights, one would expect to find such information in its policy statements.

B
Ms. Howard's prima facie case

Ms. Howard established a prima facie case.

As to the first element of a prima facie case, Ms. Howard satisfied the four statutory components of a protected activity. DMHAS is a state agency. Ms. Howard was an employee of DMHAS. She had knowledge of unethical practices, violations of state laws and/or danger to public safety - patients' inadequate clothing, supplies, food, care,

bedding and lack of towels. Finally, Ms. Howard frequently disclosed this knowledge verbally and in writing to DMHAS management and supervisory personnel.[2]

As to the second element of a prima facie case, Ms. Howard incurred three adverse personnel actions: removal from patient care which resulted in loss of overtime income, placement in the 5 x 15-foot penalty box, and the nearly four months she spent in the penalty box. All these occurred after her whistleblowing and all of these individually or collectively would dissuade a reasonable person from whistleblowing.

As to the third element of a prima facie case, Ms. Howard established the inference of causation between the adverse personnel actions and her whistleblowing. Ms. Howard's whistleblowing occurred in late 2017 through 2018, and the adverse personnel actions began in January 2019. As the adverse personnel actions occurred within two years of Ms. Howard's whistleblowing, she established an inference of causation by operation of statute.

C
DMHAS' burdens of production and persuasion

Because the adverse actions occurred within two years of Ms. Howard's whistleblowing, a statutory presumption of retaliation arises and a burden of persuasion

[2] In November 2017, Ms. Howard signed a stipulated agreement regarding alleged disciplinary violations. The stipulated agreement provided, in part, that all claims regarding the disciplinary incidents that occurred on June 19, 2017 and July 28, 2017 were resolved. R-16, R-17, R-19. To the extent that Ms. Howard's revised complaint references pre-November 2017 whistleblowing and retaliatory incidents, such incidents were not considered in this decision. Ms. Howard's patient-care complaints continued after November 2017 to at least December 2018. Vol. 1, 13-14, 72.

Ms. Howard's revised complaint further includes nonpatient-care complaints that would not be protected disclosures. Those complaints likewise were not considered in this decision.

shifts to DMHAS to establish that non-retaliatory reasons more probably than not motivated the adverse personnel actions.

1

With respect to Ms. Howard's whistleblowing, DMHAS did not meet its burden of persuasion that Ms. Howard had not made protected disclosures. In her revised complaint and testimony, Ms. Howard identified numerous management employees to whom she made her patient-care complaints. Vol. 1, 75-78. The only current or former DMHAS management employee produced as a witness by DMHAS, though, was Ms. Sanchez. Vol. 2, 6-55. I did not find Ms. Sanchez' testimony credible regarding Ms. Howard.

As the director of nursing, Ms. Sanchez was responsible for overseeing and managing nursing staff. Vol. 2, 8-9. She was involved in the January 2019 investigation of Ms. Howard for inattentiveness. Vol. 2, 16. Yet, she could not remember why Ms. Howard had been placed in the penalty box. Vol. 2, 15. She could not recall what happened to Ms. Howard after she wrote up Ms. Howard for inattentiveness. Vol. 2, 17-18. She could not recall if she had been part of the decision to remove Ms. Howard from patient care. Vol. 2, 18.

Her responses regarding Ms. Howard's whistleblowing were similarly vague. She could not recall Ms. Howard making any complaints using working under protest forms. Vol. 2, 24. She could not follow DMHAS' attorney's question about whether she was aware of Ms. Howard making any patient-care complaints to anyone in her chain of command. Vol. 2, 25. She could not recall Ms. Howard making any patient-care complaints to her. Vol. 2, 32. This testimony conflicts with the credible testimony of Mr.

Hempstead, Ms. Maldonado, and Ms. Howard that Ms. Howard was proactive in her support of patient rights and frequently made patient-care complaints both verbally and through working under protest forms to DMHAS supervisors and management.

Ms. Sanchez's testified that Ms. Howard did not have high quality of work, did not have a reputation as a good worker, and was uncooperative or negative with her co-workers. Vol. 2, 11-12. This testimony, however, is contradicted by Ms. Howard's five performance ratings from 2014-2018 in which she received excellent or good ratings in knowledge and quality of work and also in cooperation in handling work relationships. One evaluation specifically noted that Ms. Howard was "a very reliable team member. She demonstrates thoroughness and effectiveness in her work." C-3.

2

With respect to DMHAS's decision to remove Ms. Howard from patient care, DMHAS met its burden of persuasion. The allegations of Ms. Howard's inattentiveness were investigated by people outside of DMHAS who had no prior knowledge of her whistleblowing. The allegations were verified by other DMHAS employees as well as a video recording. Other employees were disciplined or would have been disciplined for not reporting her inattentiveness. Also, DMHAS had previously removed other employees from patient care during investigations for alleged inattentiveness.

3

DMHAS did not, however, meet its burden of persuasion or even articulation in its decision to place Ms. Howard in the penalty box. When removing an employee from direct patient care, DMHAS may place the employee on paid administrative leave, assign the

employee to nonpatient care duties, place the employee in a different unit, or place the employee in the penalty box. Although OLR employees testified as to why one option might be chosen over another, DMHAS, not OLR, made the decision to place Ms. Howard in the penalty box, and DMHAS personnel did not articulate a reason why that option was chosen rather than one of the other less onerous options.

4

Likewise, DMHAS also did not meet its burden of persuasion or articulation as to why it left Ms. Howard in the penalty box as long as it did. DMHAS' policy is to place employees in the penalty box for ninety days. Ms. Howard, though, was in the penalty box for approximately four months. DMHAS did not articulate an explanation for Ms. Howard's extended placement. Although OLR not DMHAS was responsible for conducting the investigation, it was DMHAS' decision to leave Ms. Howard in the penalty box for the excessive time rather than choose one of the other options available for employees removed from patient care.

D

Ms. Howard's subsequent burden of proof under *McDonnell Douglas*

Even if *McDonnell Douglas* applies and a burden of persuasion shifts back to Ms. Howard, she established by a preponderance of evidence that retaliation for her whistleblowing was a motive in the adverse personnel actions taken by DMHAS.

DMHAS offered no explanations for its decision to place Ms. Howard in the penalty box rather than utilize one of the other less punitive options it had available or its decision to leave Ms. Howard in the penalty box for an extended time. In the absence of articulated

non-retaliatory reasons, Ms. Howard prevails and the analysis does not proceed to the third *McDonnell Douglas* burden shifting step.

To the extent that the analysis does proceed to the third burden shifting step and Ms. Howard is still required to offer evidence of pretext, she provided probative evidence demonstrating a retaliatory motive:

First, although tasks are supposed to be equitably assigned, following her patient-care complaints, Ms. Howard credibly testified that she was assigned a higher number of constant observation and census duty assignments than were assigned to other staff members. Despite DMHAS' claims of staff shortages, there is no evidence that non-whistleblower forensic treatment specialists had similar increases in their number of constant observation and census duty assignments. The lack of evidence that similarly situated employees also received increases in such assignments is evidence of pretext and a retaliatory motive.

Second, following her patient-care complaints, Ms. Howard was repeatedly harassed about the heels of her shoes. She frequently had to have them checked for compliance with DMHAS requirements, despite having worn the same type of shoe for three years. There was no evidence that she was ever found to be non-compliant with DMHAS' shoes and dress code. The lack of evidence that similarly situated forensic treatment specialists were similarly repeatedly sent to the office for shoe compliance is evidence of pretext and retaliation.

Third, following her patient-care complaints, Ms. Howard was accused of not taking all her mandatory online training. She had, however, been diligent in taking the required courses.

Fourth, while Ms. Howard was in the penalty box, Ms. Sanchez, who was the director of nursing and one of the people to whom Ms. Howard had submitted patient-care complaints, would enter the room. Ms. Sanchez would sit near Ms. Howard and stare at her. She would invade Ms. Howard's personal space. She would appear to reach over Ms. Howard but physically touch Ms. Howard's body. She would repeatedly bang the entry door into Ms. Howard's chair.

Fifth, further evidence of a retaliatory motive is DMHAS's decision to place Ms. Howard in the penalty box, particularly for the entire investigatory period, rather than use other options available for placement of employees removed from patient care is.

Sixth, the extended length of time Ms. Howard spent in the penalty box was well beyond the typical 90 days of DMHAS' policy.

This harassing and vindictive behavior by DMHAS establishes by a preponderance of evidence that retaliation for whistleblowing was a motivating factor in the adverse personnel actions taken by DMHAS against Ms. Howard.

VII
DAMAGES

A
Applicable statute

General Statutes § 4-61dd (e) (2) (A) provides in part that:

> If, after the hearing, the human rights referee finds 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.

B
Caselaw

1
Economic

> It is axiomatic that a plaintiff has a duty to make reasonable efforts to mitigate damages. . . . An employer seeking to reduce or avoid a back pay award 'bears the burden of demonstrating that a plaintiff has failed to satisfy the duty to mitigate.' . . . The employer must therefore demonstrate that 'suitable work existed, and that the employee did not make reasonable efforts to obtain it.' . . .
>
> Whether a plaintiff made a reasonable effort to mitigate her damages under the circumstances of a particular case is a question of fact.

(Internal citations omitted; internal quotation marks omitted). *Rossova v. Charter Communications, LLC*, 211 Conn. App. 676, 703-704, 273 A.3d 697 (2022).

2
Emotional distress

a

In its post-hearing brief, DMHAS argued that the language "and any other damages" in § 4-61dd (e) (2) (A) does not constitute a waiver by the state of its sovereign immunity with respect to emotional distress damages. It is useful, though, to compare the statutory language of damages available in a whistleblower retaliation complaint filed pursuant to § 4-61dd with that of Connecticut's other whistleblower statute, General Statutes § 31-51m.

The remedies available to a prevailing whistleblower employee under § 31-51m (c) are:

> reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if such violation had not occurred. An employee's recovery from any such action **shall be limited to such items**, provided the court may allow to the prevailing party his costs, together with reasonable attorney's fees to be taxed by the court.

(Emphasis added.)

Unlike § 4-61dd, these § 31-51m remedies are specific and clearly limited by statute. The legislature clearly could have but did not so limit the remedies available under § 4-61dd to those itemized in § 31-51m.

Also, emotional distress awards have been upheld in such whistleblower retaliation cases as *Eagen v. Comm'n on Hum. Rts. & Opportunities*, supra, 135 Conn. App. 563 and *Comm'r of Mental Health & Addiction Servs. v. Saeedi*, supra, 143 Conn. App. 839.

b

In assessing damages for emotional distress, this tribunal utilizes what has become known as the *Harrison* analysis.

> Under the *Harrison* analysis, the most important factor of such damages is the subjective internal emotional reaction of the complainants to the discriminatory experience which they have undergone and whether the reaction was intense, prolonged and understandable. ... Second, is whether the discrimination occurred in front of other people. ... For this, the court must consider if the discriminatory act was in public and in view or earshot of other persons which would cause a more intense feeling of humiliation and embarrassment. ... The third and final factor is the degree of the offensiveness of the discrimination and the impact on the complainant. ... In other words, was the act egregious and was it done with the intention and effect of producing the maximum pain, embarrassment and humiliation.

(Internal quotation marks omitted.) *Comm'n on Hum. Rts. & Opportunities v. Cantillon*, 207 Conn. App. 668, 680, 263 A.3d 887, 895–96 (2021), aff'd, 347 Conn. 58, 295 A.3d 919 (2023).

> A complainant need not present expert medical testimony to establish his or her internal, emotional response to the harassment; his or her own testimony, or that of friends or family members, may suffice. *Busche v. Burke,* 649 F.2d 509, 519 n. 12 (7th Cir. 1981); see also, *Marable v. Walker, supra.* However, medical testimony may strengthen a case. *Id.* As the Supreme Court stated in *Carey v. Piphus,* "[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others." *Carey v. Piphus,* 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042 (1978).

Commission on Human Rights & Opportunities v Sullivan Associates, Superior Court, judicial district of New Haven, Docket CV-94-4031061s, CV-95-4031060s, 2011 WL 3211150, *4 (June 6, 2011).

3
Attorney fees

> The amount of attorneys fees to be awarded rests within the sound discretion of the trial judge. *Fontaine v. Ebtec Corp.,* 415 Mass. 309, 324, 613 N.E.2d 881 (1993). The party seeking attorneys fees, expenses and costs carries the burden of convincing a single justice that his request is reasonable. *Society of Jesus of New England v. Boston Landmark Commission,* 411 Mass. 754, 759, 585 N.E.2d 326 (1992); *see Stowe v. Bologna,* 417 Mass. 199, 204, 629 N.E.2d 304 (1994). The basic measure of reasonable attorneys fees is a "fair market rate for the time reasonably spent preparing and litigating the case." *Id.* at 203, 629 N.E.2d 304. In evaluating the appropriateness of attorneys fees, a judge should consider the amount of time that should have been reasonably expended on the case as well as the amount of a reasonable hourly rate. *Id.*

Domestic Loan & Inv. v. Ernst, Superior Court, Docket No. CA961274B, 1999 WL 33224365, *1 (July 28, 1999).

"[C]lerical or secretarial tasks ought not to be billed at lawyers' rates, even if a lawyer performs them". (Internal quotation marks omitted.) Id., *2.

> [T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . The court may then adjust this lodestar calculation by other factors [outlined in *Johnson* v. *Georgia Highway*

> *Express, Inc*., 488 F.2d 714, 717–19 (5th Cir. 1974)]. . . . The *Johnson* court set forth twelve factors for determining the reasonableness of an attorney's fee award, and they are: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the 'undesirability' of the case; the nature and length of the professional relationship with the client; and awards in similar cases. . . . Although courts often describe the *Johnson-Steiger* factors as the basis for an "adjustment" of the lodestar, as a practical matter, most of these factors "usually are subsumed within the initial calculation of hours reasonably expended, at a reasonable hourly rate. . . .
>
> In applying the *Johnson-Steiger* factors, the court should bear in mind the public policy underlying the statute that provides for the fee award at issue.

(Internal citations omitted; internal quotation marks omitted.) *Freeman v A Betty Way Wholesale Autos, Inc.* 191 Conn App. 110, 116-117, 213 A.3d 542 (2019).

4
Interest

Pre-and post-judgment interest are not available against a state agency. *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 127, 272 A.3d 603 (2022).

C
Analysis

1
Ms. Howard's economic damages

While in the penalty box from mid-January to mid-May 2019, Ms. Howard received her regular salary. She did not, however, receive overtime. Awarding overtime for this period, though, would be without a basis as overtime was not granted to employees removed from patient care during an investigation. Further, even if OLR had completed its investigation sooner, it had recommended her termination.

Ms. Howard is not awarded economic damages for post-May 2019 because she was out of work on workers compensation until her retirement on October 1, 2022. She currently receives a pension.

2
Ms. Howard's emotional distress

With respect to the first factor of the *Harrison* analysis, Ms. Howard established by credible persuasive evidence that the negative subject internal emotional reaction she experienced due to her placement in the penalty and the extended time there has been intense, prolonged, and understandable. In addition to her own testimony as to the negative emotional impact, credible persuasive testimony was also provided by former coworkers, her sister, and her son.

As a result of being in the penalty box for the extended time:

- Ms. Howard hated going to work.
- She developed problems with driving.
- Her demeanor changed. She was slow to move, slow to react in a conversation.
- She had loss of appetite and difficulty sleeping.
- Ms. Howard began experiencing back pain; problems with her attention, concentration, and memory; and chronic headaches.
- Ms. Howard stopped associating with co-workers after work and was no longer a social person.
- Ms. Howard felt isolated and overwhelmed.
- Ms. Howard began losing weight.

- Her mental health appeared to be decompensating.
- She experienced anxiety, depression, and hopelessness.
- Ms. Howard felt abandoned by the system.

Additionally, Ms. Howard continues to experience many of these same issues:

- She continues to have headaches.
- She is tired all the time. She continues to have problems sleeping.
- Ms. Howard continues to be a difficult person with whom to have a conversation. She needs to have things explained to her. She has lost her sense of humor. Conversations with her are like talking to oneself as she does not appear to be listening and is nonresponsive to conversation.
- Ms. Howard continues to be socially inactive.
- Ms. Howard continues to be anxious and depressed.
- She is a difficult passenger in a vehicle as she is hyper-sensitive to the presence of other vehicles.
- Ms. Howard continues to have an apparent loss of enthusiasm for life. She continues to see everything in black and white and towards the negative. She continues not to see the color in life.
- Ms. Howard has not recovered her past enthusiasm for holidays.
- Ms. Howard has been gaining weight.
- Ms. Howard's experience in the penalty box has had a negative impact on her relationships with her family.

Although Ms. Howard last worked at Whiting Forensic Hospital in May 2019, as of the date of the hearing her family and friends still have noticed little if any improvement in her demeanor and behavior.

From the credible and persuasive testimony of family and former colleagues, Ms. Howard is not the person she was before her time in the penalty box.

As to the second *Harrison* factor, Ms. Howard's placement in the penalty box was public as it was visible to other employees passing by or entering the room.

As to the third *Harrison* factor, Ms. Howard's treatment in the penalty box was egregious and done with the intention and effect of producing the maximum pain, embarrassment, and humiliation.

While Ms. Howard was in the penalty box, Ms. Sanchez, who was the director of nursing and one of the people to whom Ms. Howard has filed her patient-care complaints, would enter the room. Ms. Sanchez would sit near Ms. Howard and stare at her. She would invade Ms. Howard's personal space. She would appear to reach over Ms. Howard but physically touch Ms. Howard's body. She would repeatedly bang the entry door into Ms. Howard's chair. Ms. Sanchez' behavior was clearly intended to embarrass and humiliate.

Ms. Howard's committal to the penalty box clearly had the effect of producing embarrassment, humiliation, and emotional distress. The extended time spent in near isolation in the penalty box, when other options were available, is itself clearly intended to produce embarrassment, pain, and humiliation.

Applying the *Harrison* analysis to the facts of this case, Ms. Howard is awarded $70,000 in emotional distress damages.[3]

3

Attorney Leonard's attorney fees

In the motion for attorney fees, Ms. Howard's attorney seeks $130,500 for 435 hours at $300 per hour. Attorney Leonard does not employ any clerical staff. His time sheet includes some clerical work, but he estimates that 90% of the time claimed was for attorney work. Vol. 3, 12-13.

a

Applying the *Johnson* factors to this case,

- the time and labor required: Attorney Leonard represented that he spent approximately 435 hours on this matter. He represented in his motion that his time sheet is a good faith effort to determine time spent.

  However, he did not keep contemporaneous time records. He estimated his time based on his recollection as of March 2024 when he prepared his time sheet for work going back to 2020. The dates that are listed on his time sheet do not represent the dates the work was done but rather the dates the work was completed or filed. Vol. 3, 10-12, 16, 18-19, 23-25; Motion for attorney fees, exhibit B.

[3] Although in her post-hearing brief Ms. Howard sought $3,000,000 in emotional distress damages, in her October 14, 2020 revised complaint she sought "Approx. $70,000 for emotional abuse and mental anguish . . . ." (Page 10, ¶ 5.). A $70,000 award is within the range for emotional distress damages that lack supporting medical testimony. It is also in a range that does not shock the judicial conscience. *Comm'n on Hum. Rts. & Opportunities v. Cantillon*, 347 Conn. 58, 66, 295 A.3d 919 (2023); *Patino* v. *Birken Mfg. Co*., 304 Conn. 679, 708, 41 A.3d 1013 (2012). An award of $70,000 is also consistent with the credible persuasive evidence in this case.

Also, he did not provide dates for the 20 hours spent on reviewing the case file or the 20 hours spent on interviewing Ms. Howard.

Attorney Leonard reported spending 4 hours preparing and filing his appearance, 40 hours preparing and filing the answer to DMHAS' motion to dismiss/strike, 40 hours preparing a petition for reconsideration, 40 hours preparing and filing a response to supplemental memorandum, 4 hours reviewing the decision following reconsideration, 4 hours reviewing the scheduling order, 4 hours reviewing the answer, 8 hours preparing and filing a document request, 4 hours preparing and filing a motion to amend document request, 4 hours responding to a letter regarding production, 4 hours reviewing public hearing procedure, 20 hours spent preparing and filing Ms. Howard's written response as to whether she had documents responsive to DMHAS' request for production of documents and 20 hours spent preparing and serving the documents Ms. Howard submitted to DMHAS in response to its production request.

While certainly some time would have been spent on each of these activities, the amount of time claimed appears excessive.

The twenty hours spent on "C Production of Docs" dated 220616 was primarily clerical work. Vol. 3, 20-22.

- the novelty and difficulty of the questions the skill requisite to perform the legal services properly: Pleadings in this case were routine for this type of action. They included a motion to dismiss; petition for reconsideration; requests for production of documents; partial motion to dismiss/ motion for summary judgment; filing of

witness lists, exhibit lists, and exhibits; a two-day trial with ten witnesses; and the filing of briefs. Attorney Leonard was successful in having an order of dismissal reconsidered, reversed, and the revised complaint restored to the docket.

- the preclusion of other employment by the attorney due to acceptance of the case: This case did not preclude Attorney Leonard from the acceptance of other employment. Attorney Leonard has been virtually retired since 2018 and has provided sporadic, limited services only to a few clients. Vol. 3, 13-14.
- the customary fee and the awards in similar cases: A review of attorney fees sought and/or awarded in comparable employment discrimination cases filed with the commission on human rights and opportunities that went to public hearing over the past two years shows hourly rates ranging from $200 to $625.[4]
- whether the fee is fixed or contingent: Attorney Leonard has a written contingent fee agreement with Ms. Howard. Vol. 3, 6-8. Following the hearing on attorney fees, Attorney Leonard served and filed a copy of the agreement.

  The agreement provided in part that: "In the event that [Ms. Howard] receives monies as damages or attorney's fees in the Proceedings ("Award"), then, and only in such event, [Ms. Howard] shall pay to Attorney [Leonard], as his entire fee in the matter for such representation, the following amounts: thirty-three and one-third per cent of the first three hundred thousand dollars of the Award . . . ."

[4] Perakos v Hartford Public Schools, 1910069; Nolan v SunPower Corp., 19100454; Pele v JFA Management, 2050120; Provencher v Southern Auto, 2140089; Phan v Hartford, 1210181; Rotella v Waterbury, 1930420; Clary-Butler v New Haven, 1730248; Bello v Globex, 1830005; and Lombardi v Westport, 1820325.

Based on an award of $70,000, Attorney Leonard's contingent fee would be $23,334.

- time limitations imposed by the client or the circumstances: By the time of trial, Ms. Howard had taken a disability retirement.
- the amount involved and the results obtained: DMHAS was found to have retaliated against Ms. Howard for her whistleblowing and she was awarded damages.
- the experience, reputation, and ability of the attorney: Attorney Leonard has been practicing law since 1973. Vol. 3, 9. There was no evidence that he has ever been subject to any professional discipline. Attorney Leonard has never been a litigator. Vol. 3, 9-10. He has spent most of his career as in-house general counsel for various businesses. Vol. 3, 9. He has no specific training or education in litigating employment discrimination or retaliation claims. Vol. 3, 10.
- the 'undesirability' of the case: Of the approximately twenty-five § 4-61dd complaints assigned to the undersigned in the past two years, only 4 have had attorneys. This suggests that such cases are undesirable for attorneys to accept. The result being that virtually all the pro se complaints were dismissed for failing to object to a pre-trial motion to dismiss.
- the nature and length of the professional relationship with the client: At the time of the hearing, Attorney Leonard had been representing Ms. Howard for approximately 3.5 years in this matter. He had no previous professional relationship with her. Vol. 3, 5.

b

Attorney Leonard is awarded his agreed upon one-third contingency fee in the amount of $23,334.

First, it is not clear that the lodestar method is applicable to this case given the contingent fee agreement. The fee agreement could have, but did not, provided for an hourly rate. Alternatively, it could have been a hybrid fee agreement with a contingency fee if the case settled and then an hourly rate if the case went to public hearing. Here, however, the specific and unambiguous language in this agreement is that Attorney Leonard's fee would be paid only if Ms. Howard received an award and that his entire fee in this matter would be thirty-three and one-third percent of the first $300,000.

Second, even if the lodestar calculation did apply, several factors would warrant a downward adjustment from Attorney Leonard's request for $130,500. As previously discussed, the absence of contemporaneous time records, the excessive amounts of time attributed to routine matters, and the billing for indeterminate clerical work are problematic.

VIII
CONCLUSIONS OF LAW

1. DMHAS is a state agency.

2. Ms. Howard was an employee of DMHAS.

3. Ms. Howard had knowledge of corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring at DMHAS. Specifically, she had knowledge

of patients' inadequate clothing, supplies, food, and care, as well as lack of towels and bedding.

4. Ms. Howard disclosed the information to supervisory and management employees of DMHAS.
5. Following her disclosure of information, Ms. Howard suffered three adverse personnel actions: removal from patient care for allegations of inattentiveness, placement in the penalty box, and placement in the penalty box for approximately four months.
6. Ms. Howard established a prima facie case of retaliation for whistleblowing in violation of § 4-61dd.
7. The adverse personnel actions occurred within two years of Ms. Howard's disclosure of information.
8. Because the adverse personnel actions occurred within two years of Ms. Howard's disclosure of information, DMHAS bears a burden of persuasion that the adverse personnel actions that it took against Ms. Howard were not retaliatory.
9. DMHAS met its burden of persuasion that Ms. Howard's removal from patient care was not retaliatory.
10. DMHAS did not meet its burden of persuasion that Ms. Howard's placement in the penalty box was not retaliatory.
11. DMHAS did not meet its burden of persuasion that the extended length of time Ms. Howard was in the penalty box was not retaliatory.

12. Even if the burden of persuasion did not shift to DMHAS, Ms. Howard established by a preponderance of the evidence that retaliation for her whistleblowing was a motivating factor in DMHAS' decisions to place her in the penalty box and to commit her there for an extended period.

13. Confinement in a 5 x 15-foot penalty box in near isolation for eight hours a day for nearly four months would dissuade a reasonable person from whistleblowing.

14. Ms. Howard established by a preponderance of the evidence that DMHAS violated § 4-61dd when it retaliated against her for whistleblowing.

15. Ms. Howard presented sufficient, credible evidence for the award of emotional distress damages and attorney fees.

16. Ms. Howard did not present sufficient evidence for an award of back- or front-pay.

IX
ORDER

1. Ms. Howard is awarded $70,000 in emotional distress damages.

2. Ms. Howard is awarded attorney fees of $23,334 pursuant to the fee agreement between herself and Attorney Leonard.

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