State of Connecticut
Commission on Human Rights and Opportunities
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MEMORANDUM

To: Adam Osmond
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From: Kimberly D. Morris, Secretary II, OPH

Re: OPH/WBR No. 2019414
Adam Osmond v. State of CT, Department of Children & Families

Date: June 10, 2020

Enclosed is the Presiding Human Rights Referee's Ruling on Respondent's Motion to Dismiss and/or Strike the Complaint.

cc.
Elissa T. Wright, Presiding Human Rights Referee

June 10, 2020

State of Connecticut
Commission on Human Rights and Opportunities
Office of Public Hearings

Adam H. Osmond, Complainant

OPH/WBR 2019-414

v.

Department of Children and Families, Respondent

June 10, 2020

Ruling and Order on Respondent's Motion to Dismiss and/or Strike the Complaint

This case is before the tribunal on the motion of the respondent filed on September 16, 2019, to dismiss and/or strike the complainant's June 15, 2019, whistleblower retaliation complaint. Accompanying the respondent's motion are a memorandum of law and evidentiary exhibits in support of the motion. The complainant has filed a brief response in opposition to the motion, along with an affidavit and other documents in support of the objection. The respondent has filed a reply to the complainant's objection.

The respondent moves to dismiss [1] the complaint on the grounds that the complainant does not allege any adverse personnel action that was causally related to the alleged whistleblowing, depriving the tribunal of subject matter jurisdiction since the claim therefore does not fall within the narrow waiver of sovereign immunity contained in General Statutes § 4-61dd. The respondent also argues that the complainant has elected to seek relief on the same claim through an employment discrimination complaint with the Commission on Human Rights and Opportunities (CHRO) and therefore is barred from seeking relief in this forum. In the alternative, the respondent moves to strike [2] the complaint because it fails to state a claim for which relief may be granted. In addition, the respondent argues that under the doctrine of res judicata the judgment in favor of the respondent herein in a previous employment discrimination lawsuit between the parties precludes relitigation of any issues of fact and law decided by the court as well as claims that were or could have been adjudicated in that civil action. The respondent also argues that the complaint does not claim any relief to which the complainant is entitled under the whistleblower retaliation statute. For the reasons set forth below, the motion to dismiss the complaint on jurisdictional grounds is denied, and the motion to strike the complainant in its entirety is granted.

Legal Standard

Motion to Dismiss

A motion to dismiss "essentially assert[s] that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the [tribunal] .... A motion to dismiss tests, inter alia, whether, on the face of

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[1] Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies in relevant part provides: "The presiding officer may, on his own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant: (1) Fails to establish subject matter jurisdiction or personal jurisdiction ...."

[2] Section 4-61dd-15 (d) of the Regulations of Connecticut State Agencies provides: "Whenever a respondent alleges that the complaint fails to state a claim for which relief can be granted, the respondent may file a motion to strike. The motion shall be accompanied by a memorandum of law citing the legal authorities relied on and shall distinctly specify the reason or reasons for the claimed insufficiency. Unless otherwise ordered by the presiding officer, the complainant shall file a response to the motion within fifteen days of the filing of the motion...."

the record, the [tribunal] is without jurisdiction ...." (citation omitted; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 650 (2009); *Caruso v. Bridgeport*, 285 Conn 608, 627 (2008); *Gurliacci v. Mayer*, 218 Conn. 531, 544-545 (1991). Claims that involve the doctrine of sovereign immunity implicate the tribunal's subject matter jurisdiction. *Miller v. Egan*, 265 Conn. 301, 313 (2003); *Manifold v. Ragaglia*, 94 Conn. App. 103, 114 (2006).

"Subject matter jurisdiction involves the authority of a court to hear and determine cases of the general class to which the proceedings in question belong." (internal quotation marks omitted.) *Esposito v. Specyalski*, 268 Conn. 336, 348 (2004). "A [tribunal] does not truly lack subject matter jurisdiction if it has competence to entertain the action before it .... Once it is determined that a tribunal has authority and competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action .... It is well established that, in determining whether a [tribunal] has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." *Amodio v. Amodio,* 247 Conn. 724, 727-728 (1999).

"When the subject matter jurisdiction of the adjudicatory body is challenged, cognizance of it must be taken and the matter passed on *before it can move one further step in the cause*; as any movement is necessarily the exercise of jurisdiction." *Federal Deposit Insurance Corp. v. Peabody N.E., Inc.,* 239 Conn. 93, 99 (1996) (internal citation omitted, emphasis in original); *Baldwin Piano and Organ Co. v. Blake*, 186 Conn. 295, 297 (1982); *Commission on Human Rights & Opportunities ex rel. Morales v. Trinity College*, 2013 WL 3380631, *2 (Ruling on motion to dismiss, February 4, 2013). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *York v. Association of Bar of City of New York*, 286 F.3d 122, 125 (2d Cir. 2002) (quoting *Schever v. Rhodes*, 416 U.S. 232, 236 (1974)." *Horn v. Department of Correction*, 2012 WL 1576049, *1, OPH/WBR No. 2011-156 (ruling on motion to dismiss, March 27, 2012).

The moving party bears a substantial burden to sustain a motion to dismiss. A motion to dismiss admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Manifold v. Ragaglia*, supra, 94 Conn. App. 116; *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-452, cert. denied, 241 Conn. 906 (1997). The complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant; every reasonable inference is to be drawn in his favor. *Conboy v. State,* supra, 292 Conn. 651; *May v. Coffey,* 291 Conn. 106, 108–09 (2009); *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998).

Motion to Strike

A motion to strike for failure to state a claim for which relief may be granted is essentially a procedural motion and presents a facial challenge to the sufficiency of the pleading. See *Dlugokecki v. Vieira*, 98 Conn. App. 252, 256, cert. denied, 280 Conn. 951 (2006). The purpose of a motion to strike is to challenge the legal sufficiency of the pleadings, not to speculate about the adequacy of potential evidence that may be presented at the hearing. Id. "In ruling on a motion to strike, "[t]he role of the trial court [is] to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action ... *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 378 (1997)" (internal quotation marks omitted). *Coe v. Board of Education,* 301 Conn. 112, 117 (2011). In determining the legal sufficiency of the complaint, all well-pleaded facts, and those facts necessarily implied from the allegations, are deemed to be admitted and they must be construed most favorably to the complainant. *Coppola Construction Company, Inc. v. Hoffmann Enterprises Limited Partnership, et al.,* 309 Conn. 342, 350-351 (2013); *Violano* v. *Fernandez*, 280 Conn. 310, 318 (2006); *Murillo v. Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 476 (2003); *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580 (1997). A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Background

On June 25, 2019, the complainant filed a whistleblower retaliation complaint with the chief human rights referee pursuant to General Statutes § 4-61dd [3] alleging that the State of Connecticut, Department of Children and Families, the respondent herein, retaliated against him for whistleblowing when he was "denied the position of Associate Accountant" on March 27, 2019. Complaint ¶ 8.B. On the complaint form, the complainant alleges that he is presently employed as an accountant at the Department of Housing. Complaint ¶ 6. He also alleges that his initial date of employment with the respondent was February 2004. Complaint ¶ 5. The protected information disclosed includes "fraudulent use of state gasoline credit card where employees used over $500,000 filling their cars with gas and personal shopping and other misuse" and "duplicate payments over $500,000 and cover up." Complaint ¶ 7.C. The complainant alleges that on June 25, 2013, he disclosed such information to Thomas J. Martin, an investigator at the Office of the Attorney General, and to the Auditors of Public Accounts. Complaint ¶ 7.B. In the statement of damages portion of the complaint, the complainant seeks "backpay and the position that was denied to me which is Associate Accountant which I highly qualified and held the position before." Complaint ¶ 10.

Discussion and Analysis

The Parallel CHRO Claim

The respondent argues that on June 24, 2019, the complainant filed an employment discrimination complaint against the respondent with the CHRO; *Adam H. Osmond v. Department of Children and Families*, CHRO Case No. 1910594 (Exhibit F, attached to respondent's motion); [4] and that the employment discrimination remedy sought under the Connecticut Fair Employment Practice Act (CFEPA) in that action preempts a separate whistleblower retaliation claim against the respondent based on the same nucleus of operative facts under the prior pending action doctrine. *Cumberland Farms, Inc. v. Groton*, 247 Conn. 196, 216 (1998); *BCBS Goshen Realty, Inc. v. Planning & Zoning,* 22 Conn. App. 407, 408 (1990). In the parallel CHRO complaint, the complainant alleges that the respondent failed to hire him because of his race (African American), color (Black), age, national origin (Somalia), prior criminal conviction (misdemeanor in 2010), and in retaliation for previous opposition to discriminatory conduct.

"... [A] complainant is precluded only from bringing claims of whistleblower retaliation complaints in multiple forums.... but [a] complainant is not precluded from filing a whistleblower retaliation complaint with the chief human rights referee while pursuing non-whistleblower retaliation claims in other forums, even if the whistleblower retaliation and non-retaliation claims arise from the same set of facts." (citation omitted.) *Walsh v. Department of Developmental Services*, 2011 WL 2196514 *3, OPH/WBR No. 2009-123 (April 20, 2011); *Saeedi v. Department of Mental Health & Addiction Services*, 2010 WL 5517188,*70, OPH/WBR No. 2008-090 (December 9, 2010), appeal dismissed sub nom. *Connecticut Department of Mental*

[3] Commonly known as the Connecticut Whistleblower Statute, General Statutes § 4-61dd protects state employees who report "any matter involving corruption, unethical practices, violations of state laws of regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department of agency ...." § 4-61dd (a). The statute makes it illegal for an employer covered by the statute to retaliate against an employee when the employee, in good faith, disclosed protected information (whistleblew) pursuant to §4-61dd (a).

[4] Judicial notice is taken of the employment discrimination complaint in *Adam H. Osmond v. Department of Children and Families*, CHRO No. 1910594, filed with the Commission on Human Rights and Opportunities on June 24, 2019.

Health & Addiction Services, v. Saeedi, Superior Court, judicial district of New Britain, Docket No. CV116008678S (February 7, 2012) (2012 WL 695512), aff'd in part, rev'd in part sub nom. *Commissioner of Mental Health & Addiction Services, v. Saeedi*, 143 Conn. App. 839 (2013).

The present complaint is predicated on a claim that the respondent failed to hire the complainant on March 27, 2019, in retaliation for an alleged disclosure of protected information under General Statutes § 4-61dd, the Connecticut Whistleblower Statute, which is designed to promote the integrity and efficiency of state government. The employment discrimination charge in the CHRO action is based on the respondent's failure to hire the complainant on March 27, 2019, because of his protected classes and characteristics in violation of the nondiscrimination protections provided under the CFEPA.

Although the same or a similar set of underlying facts is presented in each claim, the complainant's whistleblower retaliation claim and his parallel employment discrimination claims embrace separate causes of action, one created by General Statutes § 4-61dd and the other created by the CFEPA. Accordingly, the present whistleblower retaliation claim can be considered by this tribunal independently of the parallel employment discrimination claim. *Spiotti v. Town of Wolcott*, Superior Court, judicial district of Waterbury, Docket No. UWYCV 126016564 (November 23, 2015) (2015 WL 9242249), on reargument of *Spiotti v. Town of Wolcott*, Superior Court, judicial district of Waterbury, Docket No. CV 126016564 (June 25, 2015) (2015 WL 451062); *Harmon v. State of Connecticut Judicial Branch*, 2016 WL 8223960, *9-10, OPH/WBR 2015-311 (ruling on motion to dismiss, November 22, 2016).

Sovereign Immunity

The respondent challenges the tribunal's subject matter jurisdiction on the ground that the complainant does not allege essential elements of his cause of action and therefore sovereign immunity shields the respondent government officials from liability since the claim does not fall within the narrow waiver of sovereign immunity contained in § 4-61dd. The respondent does not contend that the present complaint is not on its face "of the general class to which the proceedings in question belong." *Esposito v. Specyalski*, 268 Conn. 336, 348 (2004). Here, the respondent invokes the principle of sovereign immunity and argues that jurisdiction under the whistleblower retaliation statute is to be tested by a showing that the complaint does not state a viable claim. "There is a significant difference between asserting that a plaintiff cannot state a cause of action and asserting that a plaintiff has not stated a cause of action, and therein lies the distinction between a motion to dismiss and a motion to strike." *Pecan v. Madigan*, 97 Conn. App. 617, 621 (2006), cert. denied, 281 Conn. 919; *Osmond v. Department of Economic and Community Development*, 2018 WL 8514036, *4, OPH/WBR 2018-370 (ruling and order on motion to dismiss and/or motion to strike, August 2, 2018).

Whether the tribunal is vested with the power to act is a different question from whether the complainant has alleged a legally sufficient cause of action. *Johnsrud v. Carter*, 620 F. 2d 29, 32-33 (3d Cir. 1980). "In determining whether a [tribunal] lacks subject matter jurisdiction, the inquiry usually does not extend to the merits of the case." *Lampasona v. Jacobs*, 209 Conn. 724, 728, cert. denied, 492 U.S. 919 (1989). The legal insufficiency of a claim generally does not eliminate the subject matter jurisdiction of a court. See *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and ... must be decided after and not before the court has assumed jurisdiction over the controversy.") Similarly, when a jurisdictional challenge hinges on factual issues, rather than solely on issues of law, "a case-by-case determination that must be made on the facts of the particular case. Accordingly, although such a matter may be appropriate for resolution on a motion to dismiss for failure to state a claim or on a motion for summary judgment, both of which go to the merits, it is not appropriate for resolution on a ... motion to dismiss for lack of subject matter jurisdiction." *Johnsrud v. Carter*, Id. at 31-32, citing *Bell v. Hood*, supra 32-33 ("The failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."); see also, *Hill v. City of New York*, 45 F. 3d 653, 660 (2d Cir. 2007) (cited with

approval in *Conboy v. State*, supra, 292 Conn. 653-654 n. 17); *Osmond v. Department of Economic and Community Development*, supra, 2018 WL 8514036, *4, OPH/WBR 2018-370.

Preclusion Issues

The respondent argues that res judicata (claim preclusion) and/or collateral estoppel (issue preclusion) [5] prevent the complainant from pursuing any claims that were made or might have been made, and issues of fact or law that were litigated and decided, in an employment discrimination lawsuit filed by the complainant in Connecticut Superior Court against the respondent in 2011, *Adam Osmond v. Department of Children and Families*, Superior Court, judicial district of Hartford, Docket No. HHD-CV11-6020615 S (August 12, 2013) ORDER (*Vacchelli, J.*), appeal dismissed, Connecticut Appellate Court, AC 36060 (October 28, 2013). To put the present litigation in context, on March 5, 2010, the complainant filed a complaint with the Commission on Human Rights and Opportunities (CHRO No. 1010324), alleging discrimination in employment based on his previous conviction for a crime, mental disability (anxiety, depression, gambling addiction), race (African American), and color (Black). The complainant's 2010 CHRO complaint was released from the CHRO, and he filed a lawsuit against the respondent in the Superior Court. *Adam Osmond v. Department of Children and Families*, supra, Docket No. HHD-CV11-6020615-S. After a trial, the court determined that the complainant's separation from employment as a supervising accountant with the respondent pursuant to a stipulated agreement, effective February 18, 2010, was based on legitimate nondiscriminatory reasons and not due to intentional discrimination, and on August 12, 2013, the court entered judgment in favor of the respondent. *Adam Osmond v. Department of Children and Families*, supra, Docket No. HHC-CV11-6020615 S. [6]

In the complainant's first CHRO complaint and his Superior Court case against the respondent, he alleged that the separation of his employment with the respondent on February 18, 2010, was unlawful discrimination based on his protected classes and characteristics. In the present whistleblower retaliation action, he alleges that the respondent failed to hire him on March 27, 2019, in retaliation for engaging in protected conduct.

"With respect to both the claims of res judicata and collateral estoppel ... Practice Book § 10-50 requires that res judicata be pleaded as a special defense ... Res judicata and collateral estoppel are not properly considered by the court on a motion to dismiss ... or a motion to strike ... [B]ecause res judicata or collateral estoppel, if raised, may be dispositive of a claim, summary judgment [is] the appropriate method for resolving a claim of

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[5] Res judicata, or claim preclusion, precludes the assertion of a claim after a judgment on the merits in a prior suit by the parties based on the same cause of action. The doctrine bars litigation of all claims or defensed that were available to the parties in the previous litigation, regardless of whether they were asserted or determined in the prior proceeding. Collateral estoppel, or issue preclusion, is a subset of the general doctrine of res judicata and applies where a second action between the same parties is based on a different cause of action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on different cause of action involving a party to the first case. *Viro v. Lyons*, 209 Conn 297, 501 (1988); *State v. Ellis*, 197 Conn. 436, 464-465 (1985); *Commission on Human Rights & Opportunities, ex rel. Perreira v. Yale New Haven Hospital*, 2016 WL 9405663, * 4, CHRO No. 1430048 (Ruling on summary judgment, September 7, 2016).

[6] The CHRO complaint filed by the complainant in *Adam Osmond v. State of Connecticut Department of Children and Families*, CHRO No. 1010324 (filed March 5, 2010); the CHRO's release of jurisdiction in said complaint authorizing the complaint to commence a civil action in the Superior Court (January 11, 2011); and the court records in (October 28, 2013) are judicially noticed for their existence, content, and legal effect. *State v. Gaines*, 257 Conn. 695, 705 n.7 (2001); *Grant v. Commissioner of Corrections*, 87 Conn. App. 814, 817 (2005); see also Colin C. Tait & Eliot D. Prescott, Tait's Handbook of Connecticut Evidence § 2.3.4 (d) (4th Ed.2008).

res judicata." (citations omitted; internal quotation marks omitted.) [7] *Silano v. Verespy*, Superior Court, judicial district of Fairfield, Docket No. CV 186072543 S, (April 30, 2019) (*Bellis, J.);* see also *Lindsay v. Consolidated Hydro, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-97-0161210 (October 30, 1998) (*D'Andrea, J.*); *Forgione v. Commercial Credit Corp.*, Superior Court, judicial district of New Haven, Docket No. CV-98-0413901 (March 10, 1999) (*Moran, J.*); *Commission on Human Rights & Opportunities, ex rel. Perreira v. Yale New Haven Hospital*, supra, 2016 WL 9405663, *3.

In certain instances, res judicata may be raised by way of a motion to strike, for example when the motion is treated as a "speaking" motion in which by referring to extraneous material not in the complaint itself such as a prior judgment, the motion to strike becomes in effect a motion for summary judgment. See *Commission on Human Rights & Opportunities, ex. rel. Sperow v. Regional School District No. 7*, 2005 WL 5746430, *3, CHRO No. 0120607 (ruling on motion to dismiss, December 1, 2005), citing *Kaufman v. Somers Board of Education*, 368 F. Supp. 28, 32 (D. Conn. 1973). Nevertheless, I conclude that in order to provide the pro se complainant with a full opportunity to make an appropriate record and present materials pertinent to the motion, the issue of whether or not res judicata or collateral estoppel bars the complainant from reasserting claims or issues of fact and law that have been decided on the merits in previous litigation between the parties is more appropriately raised on a motion for summary judgment after the pleadings are closed.

The Complaint Fails to Allege a Legally Cognizable Claim of Whistleblower Retaliation

In its motion to strike, the respondent argues that none of the elements of the complainant's prima facie case of whistleblower retaliation can be established on the facts alleged and the complaint fails to state a legally sufficient cause of action for whistleblowing retaliation on its face.

Whistleblower retaliation cases brought under § 4-61dd are typically analyzed under the three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) and other federal and state case law interpreting antiretaliatory and antidiscrimination statutes. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990); *Irwin v. Lantz*, 2008 WL 2311544, *5, OPH/WBR Nos. 2007-40, 41, 42, 44, 45, and 36; OPH/WBR Nos. 2007-51, 52, 53, 54, 55, and 56 (May 9, 2008). The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of his 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 that the respondent retaliated against him because of his whistleblowing. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. *Irwin v. Lantz*, supra; *O'Sullivan v. Vartelas*, 2008 WL 5122194, *1-2, OPH/WBR No. 2008-186 (ruling on motion to dismiss, November 20, 2008).

A complainant's prima facie case of whistleblower retaliation has the following elements: (1) the complainant must have engaged in a protected activity as defined by the statute; (2) he 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. See *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995); *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 579-81 (2012); *Arnone v. Town of Enfield*, 79 Conn. App. 501, 507 (2003) (construing Connecticut's private whistleblower statute, § 31-51m); *Drauss v. Revera Health1 Systems Management, LLC,* Superior Court, judicial district of New Haven, Docket No. CV 14006006945 S (granting motion to strike complaint, November 8, 2014)

[7] Although the Connecticut Practice Book does not govern administrative hearings such as these contested case proceedings, it can provide guidance in such matters. *Commission on Human Rights & Opportunities, ex rel. Mayo v. Bauer, Inc.*, 2013 WL 1409347, *2, CHRO No. 0830166 (Ruling on motion to dismiss and judgment for respondent, May 25, 2013).

(*Fischer, J.*) (204 WL 7495057, *9) (stating prima facie elements under § 31-51m); *Kisala v. Malecky*, Superior Court, judicial district of New Britain, Docket No. HHBCV 13 5015760S (October 7, 2013) (56 Conn. L. Rptr. 902) (2013 WL 5814792,*6); *Connecticut Department of Mental Health & Addiction Services, v. Saeedi*, Superior Court, judicial district of New Britain, Docket No. CV116008678S (February 7, 2012) (2012 WL 695512, *13), aff'd in part, rev'd in part sub nom. *Commissioner of Mental Health & Addiction Services, v. Saeedi*, 143 Conn. App. 839 (2013); *Walsh v. Department of Developmental Services*, supra, 2011 WL 2196514 *4.

As to the first prima facie element, the four components of a protected activity under § 4-61dd are as follows. First, the respondent must be a state department or agency, a quasi-public agency, a large state contractor or an employee thereof (regulated entity). Second, the complainant must be an employee [8] of the regulated entity. Third, the complainant must have knowledge of "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 or a quasi-public agency" (protected information). General Statutes § 4-61dd (a). And, fourth, the complainant must have disclosed the protected information (whistleblowing) to an employee of (1) the auditors of public accounts; (2) the attorney general; [or] (3) the state agency where he is employed. *Schwartz v. Eagen*, 2010 WL 750974, *8, OPH/WBR 2008-095 (February 18, 2010), aff'd sub nom. *Eagen v Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain at New Britain, Docket No. HHB-CV10- 6004333s (February 25, 2011) (2011 WL 1168499), aff'd 135 Conn. App. 563 (2012).

With respect to the third and fourth statutory components of a protected activity, the complainant also must show that his disclosure of protected information was known to the respondent employer, or at least that his employer had "general corporate knowledge that he has engaged in a protected activity." (internal quotation marks omitted.) *Pappas v. Watson Wyatt & Co.*, 2008 WL 793597, *7, United States District Court, No. 3:04-CV-304 (EBB) (D. Conn. March 20, 2008); *O'Sullivan v. Vartelas*, supra, 2008 WL 5122194,*2. Although a complainant need not establish that the conduct he reported actually violated § 4-61dd (a), he must show that he had a reasonable, good faith belief that the reported conduct was unlawful. *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 176; *Pappas v. Watson Wyatt & Co.*, supra, 2008 WL 793597,*4-6; *O'Sullivan v. Vartelas*, supra, 2008 WL 5122194, *2; *Irwin v. Lantz*, supra, 2008 WL 2311544, *6. "The reasonableness of the [complainant's]] belief is to be assessed in light of the totality of the circumstances." (citations omitted.) *Pappas v. Watson Wyatt & Co.*, supra.

The complainant has supplemented the allegations set forth in the whistleblower complaint form with additional facts through supporting documents attached to the complaint. Although extraneous information outside the pleadings generally is not considered in adjudicating a motion to strike for failure to state a claim, the tribunal may look beyond the four corners of the complaint and consider documents when they are attached to the complaint or incorporated in the complaint by reference. *Tracy v. New Milford Public Schools,* 101 Conn. App. 560, 566 (2007) (when reviewing a complaint on a motion to strike "[the] complaint includes all exhibits attached thereto"); *Murphy v. Day Publishing Co.*, Superior Court, judicial district of new London, Docket No. CV 126013939 (June 5, 2013) (Devine, J.) (2013 WL 3215172, *4) (same); see also, *Sidik v. Royal Sovereign International, Inc.*, 348 F. Supp. 3d 206, 210-213 (E.D.N.Y. 2018); *In re Sprint Corp. Securities*

[8] The antiretaliation provisions of our employment discrimination and whistleblower protection statutes have been read broadly to encompass former employees. Thus, both current and former employees can raise retaliation claims. *Eagen v. Commission on Human Rights & Opportunities*, supra, 135 Conn. App. 563, 583-84 (2012); *Commission on Human Rights & Opportunities, ex rel. Demmerle v. New England Stair Co.* 2019 WL 2408893, *4-5, CHRO No. 1730020 (ruling on motion to dismiss, January 3, 2019), quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-346 (1997).

Litigation, 232 F. Supp. 2d 1193, 1210-1211 (D. Kan. 2002); Practice Book § 10-29 (a).[9] The tribunal also may take judicial notice of court documents in prior civil litigation between the parties. See Colin C. Tait & Eliot D. Prescott, Tait's Handbook of Connecticut Evidence § 2.3.4 (d) (4th Ed. 2008). Accordingly, in reaching this decision, I have examined the complaint and have considered all supplementary documents attached to the complaint in support of the allegations set forth in the complaint. I also have taken judicial notice of court records in the civil action brought by the complainant against the respondent in the Superior Court in 2011 upon the CHRO's release of jurisdiction of the complainant's 2010 employment discrimination complaint. [10]

Protected Activity

The complainant claims that he engaged in a protected activity by filing a complaint with the state auditors and Thomas J. Martin, an investigator with the Office of the Attorney General, on June 25, 2013, reporting misuse of state-issued gas cards and an alleged loss of $500,000 due to such misuse. (Complaint ¶ 7 A.; Copies of email correspondence, dated May 19, 2014, and June 18, 2014, to the complainant from Thomas J. Martin, investigator with the Office of the Attorney General, in response to the complainant's June 15, 2013, disclosure and which are attached to the present whistleblower retaliation complaint).

Applying the standard on consideration of a motion to strike, the following pleaded facts, and facts necessarily implied from the allegations, construed most favorably to the complainant, are deemed to be admitted solely for purposes of determining the legal sufficiency of the present complaint to state a claim upon which relief can be granted.

1. The complainant began work as an accountant for the respondent in February of 2004. (Complaint ¶ 5; The complainant's annual service ratings for the initial probationary period February 5, 2004 – May 31, 2004 and for February 6, 2004 – September 30, 3004, attached to the complaint.)

2. The complainant continued to work for the respondent as an associate accountant from October 1, 2005 – August 31, 2007; and as a supervising accountant from September 1, 2007 – August 31, 2008 (Complainant's annual service ratings for such periods, attached to the complaint.)

3. In January of 2008, while employed as a supervisory accountant with the respondent agency, the complainant issued usage reports to area managers concerning misuse of state-issued gas cards by employees of the respondent up to the period prior to December of 2007. (Correspondence to the complainant from Thomas J. Martin, investigator with the Office of the Attorney General, dated May 19, 2014, and June 18, 2014, attached to the complaint.) (Hereinafter, Martin correspondence dated May 19, 2014, and June 18, 2014.)

4. After the complainant issued the reports to the area managers in 2008 about the gas card misuse, "many new controls and improvements" were instituted "to prevent fraud in vehicle refueling" and "the fraudulent activity dropped significantly." (Martin correspondence dated May 19, 2014, and June 18, 2014.)

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[9] Under the rules governing these proceedings, § 4-61dd-15 (d) of the Regulations of State Agencies sets out the general provisions to test the legal sufficiency of a pleading and permits a motion to strike for failure to state a claim for which relief can be granted. Section 4-61-15 (d) mirrors, and is the functional equivalent of, Practice Book § 10-39 and Rule 12 (b) (6) of the Federal Rules of Civil Procedure.

[10] See footnote 6 earlier in this ruling.

5. On February 18, 2010, the respondent terminated the complainant (Complaint of the present complainant, dated April 8, 2011, return date May 10, 2011, at ¶ 19, in civil action filed by the complainant against the respondent in *Adam Osmond v. Department of Children and Families*, supra, Superior Court, judicial district of Hartford, Docket No. HHD-CV11-6020615 S (August 12, 2013) ORDER (*Vacchelli, J.*)

6. By complaint dated April 8, 2011, return date May 10, 2011, the complainant filed a civil suit in Superior Court; Id.: alleging that the separation of his employment with the respondent on February 18, 2010, was unlawful discrimination based on his protected classes and characteristics.

7. On June 25, 2013, the complainant filed a complaint with the state auditors and with Thomas J. Martin, an investigator with the Office of the Attorney General, concerning misuse of state-issued gas cards by employees of the respondent that had occurred prior to December of 2007. (Complaint, ¶ 7. B.; Martin correspondence dated May 19, 2014, and June 18, 2014.)

8. By order issued on August 12, 2013, Judge Robert F. Vacchelli entered judgment in favor of the defendant, State of Connecticut, Department of Children and Family Services, the respondent herein, and against the plaintiff, the complainant herein. *Adam Osmond v. Department of Children and Families*, supra, Superior Court, judicial district of Hartford, Docket No. HHD-CV11-6020615 S (August 12, 2013) ORDER (*Vacchelli, J.*)

9. By email dated May 19, 2014, Thomas J. Martin informed the complainant that the Auditors of Public Accounts had reviewed his complaint of June 25, 2013, and determined that it was likely that employees of the Department of Children and Families had been misusing state-issued gas cards up to the period prior to December of 2007, but that gas-card misuse had dropped substantially thereafter in response to usage reports issued by the complainant to area managers in January of 2008. The state auditor determined that the complainant's report of unauthorized purchases in the amount of $500,000 due to the alleged misuse was not substantiated. (Martin correspondence dated May 19, 2014.)

10. By email to the complainant, dated June 18, 2014, Thomas J. Martin again stated that the complainant's June 25, 2013, disclosure related to transactions prior to 2007 that had been "for the most part ... substantiated" and that by 2008 the problem had been resolved after the complainant had shed light on that wrongdoing in January of 2008. Martin stated that the auditor had determined "an investigation of transactions prior to 2007 would not be practical due to the passage of time." (Martin correspondence dated June 18, 2014.)

Viewing the complaint in conjunction with the documents attached to it, it is reasonable to conclude that in his complaint to the state auditors and the Office of the Attorney General on June 25, 2013, the complainant simply couched as a new whistleblowing disclosure the same information regarding misuse of state-issued gas cards prior to December of 2007 that he had conveyed to his managers in his role as a supervising accountant with the respondent in January of 2008. It also is reasonable to conclude that at the intake level, when the auditor first determines whether submitted whistleblower information falls within the statutory realm of § 4-61dd, the auditor rejected the complainant's 2013 complaint as untimely and as having long since been resolved. [11] What stands out clearly from the complaint allegations is that the complainant was in a unique position to know that the credit card misuse, which he reported in 2013, had occurred prior to December 2007, had been rectified in 2008 after the complainant himself shed light on the problem in January of 2008, and was no longer an issue.

[11] The whistleblower statute at § 4-61dd (b) (1) specifically allows the auditors to "reject any complaint ... if ... [t]he complaint is not timely or is too long delayed to justify further investigation ...."

The purpose of the Connecticut's public whistleblower law is to promote the integrity and efficiency of government "by creating a climate where employees [feel] secure in bringing problems to the attention of officials who [can] solve them." *Harmon v. State of Connecticut Judicial Branch*, supra, 2016 WL 8223960, *4, quoting Connecticut's Whistleblower Law, December 2009, Legislative Program Review and Investigations Committee, Connecticut General Assembly, p. 5. When the statute was amended in 2002, Representative James O'Rourke commented on the statute's underlying purpose to protect state employees from retaliation when they "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, remarks of Representative James O'Rourke, quoted in *Harmon v. State of Connecticut Judicial Branch*, supra, *5-6; see also *Hartford City Sheriffs Department Communities Charities Association v. Blumenthal*, 47 Conn. Supp. 447, 459 (Super. Ct. 2001) (purpose of whistleblower protection statute is "to root out waste and corruption in government."); *Saeedi v. Department of Mental Health & Addiction Services*, supra, 2010 WL 5517188, *29.

There is little chance that a statute whose purpose is to protect whistleblowers as an instrument with which to combat government waste, corruption, mismanagement, and abuse is effectuated by a disclosure of past wrongdoing based on submitted information that the state auditor determined does not fall within the statutory scope of the whistleblower statute due to the passage of time and because the problem had long ago been reported and rectified in 2008 as a result of the complainant's efforts in discovering the problem and bringing it to the attention of his agency manager in the course of his duties in 2007. In short, the complainant has not pleaded sufficient plausible facts in the complaint and materials attached to it to satisfy the minimal and de minimis prima facie burden that he engaged in protected whistleblowing activity.

Based on careful review of the whistleblower retaliation complaint, including supporting materials attached to the complaint, and drawing all inferences in the complainant's favor, I conclude that the pleading fails to allege sufficient facts to satisfy the prima facie requirement that the complainant, in good faith, engaged in a protected activity (whistleblew) pursuant to § 4-61dd (a).

Adverse Action

In an attempt to provide protection for whistleblowers, § 4-61dd (b) (1) mandates that "[n]o state officer or employee... shall take or threaten to take any personnel action [12] against any state ... employee ... in retaliation for such employee's ... disclosure of information to ...an employee of the Auditors of Public Accounts or the Attorney General ... [or]... an employee of the state agency ... where such state officer or employee is employed ... " By the plain language of the statute, in order to prevail, the complainant must allege and prove that he suffered an adverse personnel action or that he was threatened with an adverse personnel action in retaliation for protected activity.

To establish that he suffered an adverse employment action a complainant must show that "a reasonable employee would have found the challenged action materially adverse" which in the context of a whistleblower retaliation case means that the action might well have dissuaded a reasonable employee from being a whistleblower. See *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006); *Farrar v. Stratford*, 537 F. Supp. 2d 332, 355-56 (D. Conn. 2008); *Perez v. State Judicial Department*, Superior Court, judicial district of Windham, Docket number WWMCV 156009136 (January 16, 2018) (2018 WL 793980, *23);

[12] There is no distinction between the terms "personnel action" in § 4-61dd and the term "employment action" as used in our antidiscrimination statutes that prohibit adverse employment actions. *Eagen v. Commission on Human Rights & Opportunities*, supra, 135 Conn. App. 579-582.

Eagen v. Commission on Human Rights & Opportunities, Superior Court, judicial district of New Britain at New Britain, Docket No. HHB-CV10-6004333s (February 23, 2011) (2011 WL 1168499, *2), aff'd, 135 Conn. App. 563 (2012); *Kisala v. Malecky*, 2016 WL 1719122, *9, OPH/WBR No. 2012-200 (March 31, 2016); *Connecticut Department of Mental Health & Addiction Services. v. Saeedi*, No. CV116008678S, 2012 WL 695512, at 13 (Conn. Super. Ct. Feb. 7, 2012) aff'd in part, rev'd in part sub nom. *Commissioner of Mental Health & Addiction Services. v. Saeedi*, 143 Conn. App. 839 (2013); *Tosado v. State of Connecticut Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, *5-6); *Walsh v. Department of Developmental Services*, supra, 2011 WL 2196514.

Applying this standard, denial of employment is an action that affects the terms and conditions of employment [13] and is inherently adverse. The allegation that the respondent refused to hire the complainant as an associate accountant, if proved, could, therefore, support a finding that the complainant incurred a personnel action that was materially adverse.

The respondent claims, however, that the framework to satisfy the adverse personnel action prong of a retaliatory failure-to-hire claim under § 4-61dd has its own pleading requirements and argues that the complaint in this action does not meet those additional pleading requirements. The respondent rests its argument on *Rich v. Associated Brands, Inc.*, 559 F. App'x 67, 68 (2d Cir. 2014) in which the court held that a former employee alleging a discriminatory failure to rehire him has the initial burden of establishing a prima facie case by demonstrating, inter alia, that "'... [ ]he *applied and was qualified for a job for which the employer was seeking applicants*'" (emphasis in original.) Id., quoting and relying on *Williams v. R.H. Donnelley, Corp.*, 368 F. 3d 123, 126 (2d Cir. 2004). [14] The *Rich* case involved a claim of discrimination based on a failure to rehire a former employee where the employer had an alleged duty under an oral agreement the rehire him for the position. The decision in *Williams v. R.H. Donnelly, Corp.*, which is quoted in the *Rich* decision, included this standard among the elements needed to make a prima facie case of a discriminatory failure to promote. See also, e.g., *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973) (same prima facie elements to establish viable claim of discrimination based on employer's refusal to rehire); *Dawson v. New York City Transit Authority*, 624 F. App'x 763 (2d Cir. 2015) (same, discriminatory failure to reinstate); *Hannah v. Wal-Mart Stores, Inc.*, (D. Conn. 2016) not reported in F. Supp., 2016 WL 554771, *9 (same, discriminatory failure to rehire); *Farrar v. Stratford*, supra, 537 F. Supp. 2d 345 (same, discriminatory failure to promote); *Lanyon v. University of Delaware*, 544 F. Supp. 1262, 1273 (D. Del. 1982), aff'd 709 F. 2d. 1493 (3d Cir. 1983) (same, discriminatory failure to be recalled); *Ann Howard's Apricots Restaurant, Inc., v. Commission on Human Rights & Opportunities*, 237 Conn. 209, 225 (1996) (same, claim of discriminatory failure to reinstate following leave of absence).

But the instant case is markedly different. The prima facie elements of an employment discrimination claim alleging a failure to rehire, recall, or promote under Title VII of the Civil Rights Act of 1964 or under the CFEPA

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[13] Under General Statutes § 46a-60 (b) (1) it is unlawful for an employer "to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness or status as a veteran." Similarly, under Title VII, 42 U.S.C. § 2000e-2(a), it is unlawful, inter alia, "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."

[14] The prima facie element that the respondent advocates really embodies three distinct concepts and requires the complainant in a discriminatory failure to rehire, promote, or recall must show (1) that he applied for a position (2) which was vacant and (3) for which he was qualified.

are not necessarily the same as the essential prima facie elements to state a cause of action for retaliation for filing a complaint about workplace discrimination or to state a viable cause of action alleging retaliation for whistleblowing pursuant to § 4-61dd. Our Supreme Court has noted, "[An] argument, which presumes that the plaintiff's discrimination and retaliation claims are identical, misapprehends the applicable law. As the First Circuit Court of Appeals has aptly stated: 'The majority of cases are not cut from this seamless cloth. Even when retaliation is derivative of a particular act of harassment, it normally does not stem from the same animus. Most often, retaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat by complaining about an unlawful employment practice.' *Noviello v. Boston,* 398 F.3d 76, 87 (1st Cir.2005)." *Jackson v. Water Pollution Control Authority of City of Bridgeport*, 278 Conn. 692, 708 (2006).

The Second Circuit Court of Appeals elaborated on the distinction between a plaintiff's discrimination and retaliation claims under Title VII, stating the antiretaliatory provisions of "Title VII makes it unlawful for an employer to discriminate against an employee 'because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'42 U.S.C. § 2000e–3(a). Title VII is violated when 'a retaliatory motive plays a part in adverse employment actions toward an employee, whether or not it was the sole cause.' *Cosgrove v. Sears, Roebuck & Co.,* 9 F.3d 1033, 1039 (2d Cir.1993)."*Terry v. Ashcroft*, 336 F. 3d 128, 140-141 (2d Cir. 2003).

The court then set forth the pleading requirements to allege a retaliation claim under Title VII as follows. "To establish a *prima facie* case of retaliation, an employee must show [1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action." (citations omitted; internal quotation marks omitted.) Id; see also, e.g., *Hannah v. Walmart Stores, Inc.*, 803 Fed. App'x 417, 420 (2d Cir. 2020); *Schiano v. Quality Payroll Systems, Inc.,* 445 F. 3d 597, 608 (2d. Cir 2006); *Reed v. A.W. Lawrence & Co., Inc.*, 95 F. 3d 1170, 1177-1178 (2d Cir. 1996); *Morgan v. Department of Motor* Vehicles, (D. Conn. 2018) not reported in F. Supp., 2018 WL 5793787, *4; *Dieterle v. Pharmacy*, (D. Conn. 2016) not reported in F. Supp., 2016 WL 4744122, *4; *Hannah v. Wal-Mart Stores, Inc.,* supra, (D. Conn. 2016), 2016 WL 554771, *17; *Farrar v. Town of Stratford*, supra, 537 F. Supp. 2d, 353; *Zboray v. Wal-Mart Stores East, L.P.*, 650 F. Supp. 2d 174, 179 (D. Conn. 2009); *Douglas v. City of Waterbury*, 494 F. Supp. 2d 112, 123 (D. Conn. 2007).

Thus, the substantive elements under the antiretaliatory protections against discrimination in the workplace under Title VII and the CFEPA that a complainant must allege in order to demonstrate a prima facie right of relief if he proves them are that he engaged in a protected activity known to the employer and suffered an adverse employment action that was causally related to the protected conduct. Substantively, these are the same prima facie elements required for a complainant to state a claim of retaliation for whistleblowing under § 4-61dd. See discussion at pages 6-7 earlier in this ruling.

Focusing on the second prima facie element, the adverse personnel action element, the tribunal has found no Connecticut decision, and the parties have cited none, holding that the adverse personnel action prong of a prima facie whistleblower retaliation case based on a denial of employment requires the complaining party to satisfy all of the separate pleading requirements for establishing a prima facie case of discrimination based on a failure to rehire, including a showing at the prima facie stage that the complaining party applied for and was qualified for a position for which the employer was seeking applicants.

In the absence of precedent from the controlling jurisdiction, I look to the decision of the Second Circuit Court of Appeals in *Terry v. Ashcroft,* supra, as persuasive guidance. [15] On appeal from the granting of summary

[15] Although this case is based solely on Connecticut law, we review federal precedent for guidance. *Levy v. Commission on Human Rights & Opportunities,* 236 Conn. 96 103 (1996).

judgment for the defendant, the court found that the plaintiff had fully established a prima facie case of retaliation for engaging in a protected activity under Title VII and the Age Discrimination in Employment Act (ADEA), thereby shifting the burden during the second step of the *McDonnell Douglas* burden-shifting analysis to the defendant employer to articulate a legitimate, nondiscriminatory reason for the adverse action(s). *Texas Department of Community Affairs v. Burdine*, 450 U.S. 253, 254 (1981). The employer articulated a number of nondiscriminatory reasons for not promoting the plaintiff who had engaged in protected activity, including that other candidates were better qualified for the position, and the presumption of retaliation then disappeared. In reversing the granting of summary judgment for the defendant, the court held that a genuine issue of material fact existed as to whether the employer's proffered reason for the refusal to promote, namely inter alia that other applicants for the position were better qualified, was a pretext for illegal retaliation, and therefore the granting of summary judgment for the employer was in error. [16] *Terry v. Ashcroft,* supra, 336 F. 3d, 141-142; see also, *Reed v. A. W. Lawrence & Co., Inc.*, supra, 95 F. 3d at 1182.

In a retaliatory failure to hire context, it stands to reason that a plaintiff's qualifications must be demonstrably sufficient for the position he seeks. However, as I read the *Terry v. Ashcroft* decision, it is not necessary for the plaintiff to allege that he was qualified and applied for an available position to state a cause of action for retaliation under Title VII. The court in *Terry v. Ashcroft* construed the allocation of the elements as imposing on the complainant the evidentiary burden to satisfactorily rebut as being pretextual the employer's showing of a nonretaliatory reason for its failure to promote him based on a lack of qualifications in the third step of the *McDonnell Douglas* framework. [17]

Although the respondent raises an important question, in the absence of specific guidance expressly incorporating the prima facie elements of a discriminatory failure to rehire case among the elements required to make a prima facie case of whistleblower retaliation, and in light of persuasive authority to the contrary in decisions of the Second Circuit Court of Appeals construing the antiretaliatory protections under our employment discrimination laws, I conclude as a matter of first impression that the prima facie burden that the complainant alleging a retaliatory refusal to hire must satisfy to state a cause of action under General

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[16] I observe that some courts have held that a plaintiff alleging retaliation under Title VII and the ADEA must establish the traditional qualification element required to make a prima facie claim of discrimination. See, e.g., *Velez v. Jannsen Ortho LLC*, 467 F. 3d 802, 809 (1st Cir. 2006) (Rejected job applicant failed to establish a prima facie case of retaliatory failure to hire; plaintiff did not show that she applied for a specific position; a letter expressing general interest is not enough.); *Holtzclaw v. DSC Communications Corp.*, 255 F. 3d 254, 260 (5th Cir. 2001) ("We have never expressly made qualification a prima facie element of an ADEA retaliation claim, but today we decide that such an element is necessary."); *Wooten v. McDonald Transit Associates, Inc.*, 775 F. 3d 689 (5th Cir., 2015)(Requiring for a plaintiff alleging a denial of re-employment additional prima facie showings under *Holtzclaw* decision, but questioning these factors at footnote 2 of the decision). However, in discrimination cases alleging retaliation for engaging in protected activity, the Court of Appeals for the Second Circuit, and the United States District Court for the District of Connecticut, in which the tribunal is located, omit the requirement that to establish a prima facie case of retaliatory failure to rehire, promote, or recall, a rejected job applicant must show that he applied and was qualified for a specific position. In order to preserve the stability and predictability in the law, where the federal Court of Appeals the federal District Court for the jurisdiction in which the tribunal is located, have decided a closely related issue, those decisional holdings are persuasive authority.

[17] Once the respondent has stated its reason for the adverse action, the presumption that arises in the complainant's favor under *McDonnell Douglas* disappears. The burden of persuasion remains with the complainant and is carried with evidence that the complainant's protected activity and the alleged retaliatory hiring practice were related and that the respondent's employment decision was motivated by a retaliatory animus. *Cosgrove v. Sears, Roebuck & Co.*, supra, 9 F.3d 1039; *Ayantola v. Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539-540 (2014).

Statutes § 4-61dd does not require the complainant to demonstrate at the pleading stage, and prior to the respondent's furnishing a nonretaliatory justification for the adverse personnel action, that he applied and was qualified for a position for which the employer was seeking applicants. Rather than import further elements into the adverse personnel action prong of the present complainant's prima facie claim of whistleblower retaliation in the respondent's hiring decision, the lines of battle over the complainant's qualifications and whether or not he applied for a job for which the respondent was seeking applicants may be drawn if the complainant otherwise states a prima facie case and the respondent employer then articulates such factors as legitimate, nonretaliatory reasons for its hiring decision.

Viewing the pleadings liberally and in the manner most favorable to sustaining their legal sufficiency, and accepting the facts alleged as true, I conclude that the facts pleaded, and necessarily implied from the allegations, are minimally sufficient to meet the complainant's prima facie burden of establishing, initially, that he suffered an adverse personnel action.

Causal Link

The complainant bases his whistleblower retaliation claim on an alleged connection between respondent's failure to hire him on March 27, 2019, and his disclosure to Thomas J. Martin, investigator with the Office of the Attorney General, and to the Auditors of Public Accounts on or about June 25, 2013, in which he reported past misuse of state-issued gas cards by employees of the respondent up to the period prior to 2007 and an alleged $500,000 loss due to such misuse. (Complaint ¶ 7 A.)

Assuming arguendo that the complainant had disclosed protected information to state auditors in 2013, which the undersigned has determined not to be the case, the complaining party in a whistleblower retaliation case under § 4-61dd also must plead sufficient facts to establish an inference of a causal connection between the protected conduct and an adverse personnel action. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. "The 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 [the adverse action]; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondent; or (3) by operation of statute as a rebuttable presumption pursuant to § 4-61dd [(e) (4)]." [18] (citations omitted). *Irwin v. Lantz*, supra, 2008 WL 2311544, *13.

In the absence of the statutory presumption, which is not available in the present matter, or of direct evidence, which has not been alleged, a complainant can satisfy the causal connection factor by showing that the respondent's adverse action took place within temporal proximity of the protected activity, giving rise to an inference that retaliation was a contributing factor to the adverse action. However, to establish causation, the complainant must do more than allege a mere sequential relationship between engaging in protected activity and an adverse personnel action. Where timing is the only evidence of retaliation, the "temporal proximity must be very close." *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001).

The relevant dates to resolving the issue of whether there is sufficient temporal proximity to establish a causal link between the protected conduct and the adverse action are: June 25, 2013, the date the complainant filed his complaint with the Auditors of Public Accounts and with an investigator with the Office of the Attorney General; and March 27, 2019, when respondent did not hire the complainant as an associate accountant.

[18] Under our whistleblower statute, General Statutes § 4-61dd (e) (4), there is a statutory rebuttable presumption of causation if the personnel action occurs within "two years after the employee first transmits facts and information concerning a matter" to the Auditors of Public Accounts, the Attorney General, or an employee of a state agency.

A review of cases from the Second Circuit Court of Appeals, which Connecticut looks to, [19] indicates that a period of five years and nine months between the protected activity and the adverse personnel action is too great to allow for any inference of a causal connection. While the court has not defined the outer limits beyond which a temporal relationship is too attenuated to establish causality, it has "generally held that causation can only be inferred after the passage of a few weeks or months, and ... that a delay of more than a year is fatal to a showing of causation." *D'Andrea v. Nielsen*, 765 Fed. App'x 602, 605-606 (2d Cir. 2019), citing *Gorman-Bakos v. Cornell Coop. Extension of Schenectady City,* 252 F. 3d 545, 554 (2d Cir. 2001) (collecting cases), see., e.g., *Cortes v. MTA New York City Transit*, 802 F. 3d 226, 233 (2d Cir. 2015) (fourteen-month lag between protected activity and adverse action not sufficient to justify inference of causation); *McIntyre v. Longwood Central School District*, 2012 WL 400651 (2d Cir. 2012) (same based on a delay of more than a year); *Chang v. Safe Horizons*, 254 Fed. App'x. 838, 839 (2d Cir. 2007)(no causal nexus where termination occurred almost one year after complaint of discrimination); *Burkybile v. Board of Education of the Hastings-On-Hudson Union Free School District*, 411 F. 3d 306, 314 (2d Cir. 2005 (no causal nexus where delay of more than one year between protected activity and adverse action); *Douglas v. City of Waterbury*, 494 F. Supp. 2d 112, 125 (D. Conn. 2007)("In the Second Circuit and district courts within the Second Circuit, time periods greater than one year have been found, in general, to be insufficient to establish this temporal relationship.").

Taking the facts alleged, and those necessarily implied from the complaint, as true, and interpreting them in the light most favorable to the pleader, a substantial delay of five years and nine months between the protected activity and the alleged adverse action is far too great, standing alone, to establish a causal connection between the protected conduct and the adverse personnel action, particularly in the absence of any allegation that the respondent was aware, or had any general corporate knowledge, of the alleged whistleblowing disclosure. *Pappas v. Watson Wyatt & Co.*, supra, 2008 WL 793597, *7; *O'Sullivan v. Vartelas*, supra, 2008 WL 5122194, *2. Although the tribunal has recognized that the inquiry into whether causation has been established is inherently factual in nature; *Ayantola v. Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 533-34 (2014); the complainant has not pleaded, and cannot establish, any plausible causal connection linking any alleged whistleblowing to the adverse personnel action alleged to have occurred more than five years later.

In conclusion, without the prima facie elements of any protected conduct or of causation, the complainant has failed to adequately allege sufficient facts, which if proven, would give rise to a legally sufficient cause of action under General Statutes § 4-61dd, and the respondent's motion to strike the complaint in its entirety is granted.

Conclusion and Order

Accordingly, consistent with the foregoing discussion of the tribunal's jurisdiction of the subject matter of the complaint, the respondent's motion to dismiss the complaint on jurisdictional grounds is DENIED. In light of the complainant's failure to establish a prima facie case of whistleblower retaliation, the respondent's motion to strike the complaint for failure to state a claim for which relief can be granted is GRANTED, and the complaint shall be stricken in its entirety. No repleading can cure the legal deficiencies with regard to claim that the complainant engaged in a protected activity that was causally connected to an adverse personnel action; see *Cohen v. Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain, Docket No. HHBCV 175018330S (January 11, 2019) (2019 WL 624405, *7); and the complaint is hereby dismissed.

[19] This tribunal often looks to cases interpreting other anti-retaliatory statutes and to the federal law for guidance. *Gorsky v. Department of Environmental Protection, et al.*, 2009 WL 10677917, *4, OPH/WBR No. 2007-001 (January 23, 2009).

It is so ordered this 10th day of June, 2020.

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

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