State of Connecticut
Commission on Human Rights and Opportunities
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MEMORANDUM

To: All Counsel

From: Kimberly D. Morris, Secretary II, OPH

Re: OPH/WBR No. 2019-409 Barbara Stoudmire v. State of CT, Department of Mental Health and Addiction Services

Date: January 23, 2020

Enclosed is the Presiding Human Rights Referee's Ruling on Respondent's Motion to Dismiss.

cc.

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

Barbara Stoudmire, Complainant

OPH/WBR 2019-409

v.

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

January 23, 2020

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

Currently pending is a motion to dismiss and/or strike the complaint, filed on August 19, 2019, by the respondent, Department of Mental Health and Addition Services (DMHAS), pursuant to the Regulations of Connecticut State Agencies § 4-61dd-15 (c) (1) as to the motion to dismiss, [1] and § 4-61dd-15 (d) as to the motion to strike. [2] The complainant has not filed an objection to the respondent's motion. Accordingly, the motion is deemed unopposed. For the following reasons, the motion to strike is granted.

Preliminary Statement

On June 3, 2019, the complainant, Barbara Stoudmire, of 1081 New Haven Road, Naugatuck, Connecticut, filed a complaint (complaint) with the Chief Human Rights Referee pursuant to General Statutes § 4-61dd, commonly known as the Connecticut Whistleblower Statute, alleging that her employer, the respondent herein, retaliated against her when a co-worker filed a grievance of reverse discrimination with the respondent's affirmative action office on or about March 29, 2019; a union employee stated that he would be setting up a meeting with her; a co-worker initiated a vote of no confidence against her on or about May 20, 2019; a co-worker filed a union grievance against her; and a co-worker sent a "threatening email" on or about May 21, 2019 (Complaint, ¶8 B). The whistleblower information disclosed, as set forth in the complaint, includes a co-worker's refusal to train the complainant and provide her with the tools necessary to do her job; denial of access to the staffing office; that aspects of her work were questioned in emails; that certain co-workers were abusing overtime; and that two co-workers were initiating a vote of no confidence in her work. The complainant does not identify when, or to whom in the respondent's administration, she made any of the alleged disclosures. No damages are alleged in the complaint. On

[1] Section 4-61dd-15 (c) of the Regulations provides in pertinent part: "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 provides as follows. "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. If the motion is granted by the presiding officer, the complainant shall, within the time ordered by the presiding officer, file a revised complaint complying with the ruling. Failure to file a revised complaint may result in the dismissal of the case."

August 19, 2019, the respondent filed an answer to the complaint and special defenses. On October 2, 2019, the complainant filed a pleading that purports to be a response to the respondent's answer.

Legal Standard

Motion to Dismiss

"A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action, essentially asserting that the plaintiff *cannot* as a matter of law and fact state a cause of action that should be heard by the [tribunal]." (Emphasis in original.) *Gurliacci v. Mayer,* 218 Conn. 531, 544-45 (1991). Section 4-61dd-15 (c) (1) of the Regulations of Connecticut State Agencies authorizes the presiding referee to dismiss a complaint for, among other reasons, lack of subject matter or personal jurisdiction.

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." (Citation omitted.) *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-52 (1997), cert. denied, 241 Conn. 906 (1997). In evaluating the motion, every presumption in favor of subject matter jurisdiction should be indulged. *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 266 (2001); *Kelly v. Albertsen*, 114 Conn. App. 600, 606 (2009). 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 her favor. *Cogswell v. American Transit Insurance Co.*, 282 Conn. 505, 516 (2007); *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998); *Banks v. Civil Service Commission*, 2006 WL 2965501, 1, OPH/WBR 2006-017 (Ruling on Motion to Dismiss, March 21, 2006).

The respondent challenges the subject matter jurisdiction of the tribunal on the ground that the complainant has not alleged either a protected whistleblower disclosure or an adverse action taken or threatened against her and has not claimed any relief by way of damages, thereby depriving the tribunal of jurisdiction to adjudicate the matter. In determining whether the complainant is entitled to administrative adjudication of the allegations in the complaint, the tribunal makes no determination regarding the merits. *Milford Power Co., LLC v. Alston Power, Inc.*, 263 Conn. 616, 626 (2003).

These proceedings were instituted by the complainant, an employee of a state department or agency, pursuant to General Statutes § 4-61dd, alleging that the respondent retaliated against her for engaging in a protected whistleblowing activity. As such, the whistleblower retaliation complaint falls within the general class of cases over which the Office of Public Hearings is authorized by the legislature to exercise jurisdiction under the Connecticut Whistleblower Statute.

Motion to Strike

In the alternative, the respondent moves to strike the complaint for failure to state a claim for which relief can be granted. A motion to strike is essentially a procedural motion that focuses on the pleadings. *Dlugokecki v. Vieira*, 98 Conn. App. 252, 256, cert. denied, 280 Conn. 951 (2006). The role of the tribunal in ruling on a motion to strike is to examine the complaint, construed in favor of the complainant, and to determine whether the pleading party has stated a legally sufficient cause of action. *Coe v. Board of Education,* 301 Conn. 112, 117 (2001); *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 378 (1997).

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 also under federal and state case law interpreting other anti-retaliatory and anti-discrimination statutes. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990); *Schwartz v. Eagen*, 2010 WL 750974, *7, 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, Docket No. HHB-CV10-6004333s, 2011 WL 1168499 (February 25, 2011), aff'd 135 Conn. App. 563 (2012); *Irwin v. Lantz*, 2008 WL 2311544 ,*5, OPH/WBR 2007-40 et seq., (May 9, 2008). The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of her prima facie case; (2) the respondents' burden in the presentation of their non-retaliatory explanation for the adverse personnel action; and (3) the complainant's ultimate burden of proving the respondents retaliated against her because of her whistleblowing. *Schwartz v. Eagen,* supra, OPH/WBR 2008-095, *7. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. Id., *6. For the reasons set forth below, I conclude that the allegations set forth in the complainant's whistleblower retaliation complaint are not sufficient to state a claim under General Statutes § 4-61dd.

A complainant's prima facie case of whistleblower retaliation has three elements: (1) the complainant must have engaged in a protected activity as defined by the applicable statute; (2) the 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. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2nd Cir. 1995). *Walsh v. Department of Developmental Services,* 2011 WL 2196514 *4 (OPH/WBR 2009-123) (Ruling on Motions to Dismiss, April 20, 2011); see also *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 579-81 (2012b); *Kisala v. Malecky,* Superior Court, judicial district of New Britain, Docket No. HHBCV 13 5015760S (October 7, 2013) (2013 WL 5814792, *6); *Schwartz v. Eagen,* supra, OPH/WBR 2008-095, *8.

As to the first prima facie element, the four statutory components of a protected activity as defined in § 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 of the regulated entity. Third, the complainant must have knowledge either 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" or of "corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in a large state contract" (protected information). And fourth, the complainant must have disclosed the information (whistleblowing) to an employee of (1) the auditors of public accounts; (2) the attorney general; (3) the state agency or quasi-public agency where he is employed; (4) a state agency pursuant to a mandatory reporter statute; or (5) the contracting state agency concerning a large state contractor. §§ 4-61dd (a) and (e) (1). *Schwartz v. Eagen,* supra, OPH/WBR 2008-095, *8.

For "purposes of a motion to strike, the only question is whether the complaint adequately alleges facts which, if proven, would establish a prima facie case ...." *Grof-Tisza v. Bridgeport Housing Authority*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. FBT-CV06-5003343s (December 14, 2010) (2010 WL 5610789, 3 n. 1). "While a complaint need not contain every element of the case to overcome a motion to strike, it must set forth a prima facie case consisting of certain key elements which are regarded as sufficient to entitle the complainant to recover, if she proves them, and unless the respondent in turn establishes certain other elements to offset matters established by the complainant." *Adam H. Osmond v. Department of Economic and Community Development*, 2018 WL 8514036, *4

(OPH/WBR 2018-370) (August 12, 2018) (Ruling and order on motion to dismiss and/or motion to strike deemed motion to strike).

Discussion and Conclusion

General Statutes § 4-61dd protects state employees who report "any matter involving 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 any state department or 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). *Schwartz v. Eagan*, supra, 2010 WL 750974, *8; *Harmon v. State of Connecticut, Judicial Branch*, 2016 WL 8223960, *4, 9, OPH/WB 2015-311 (November 22, 2016).

Ultimately, the complainant must prove that, among other things, she engaged in protected whistleblowing activity and therefore is within the class of individuals falling within the protections of the Connecticut Whistleblower Statute. Specifically, the complainant must allege that she has knowledge of "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 a state department or agency ....", and that she disclosed that information to a qualifying individual. *Schwarz v. Eagen*, supra, OPH/WBR 2008-095.

In the present matter, the complainant simply has not engaged in protected behavior as defined by § 4-61dd (a). The underlying protected information alleged in the complaint involves the complainant's disclosure to unnamed persons in the respondent's administration that a co-worker refused to train her; that three named co-workers allegedly were misusing overtime; that two co-workers were initiating a no-confidence vote in her work; and that aspects of her work had been questioned in unidentified emails. The alleged whistleblowing disclosures reflect the complainant's individual and personal concerns about her own workplace environment and experiences. The complainant's reports did not identify any corruption, unethical practices, violation of state laws of regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety – the disclosures that are enumerated in General Statutes § 4-61dd, As such, they do not disclose conduct within the agency that is against the public interest or is of direct interest to the public at large; *Harmon v. State of Connecticut, Judicial Branch*, supra, 2016 WL 8223960, *9; and therefore they are not whistleblowing under the state's whistleblower protection act. Accordingly, the complainant has failed to state a prima facie case of whistleblower retaliation.

In her complaint, the complainant has not alleged any damages. In fact she affirmatively states that she has suffered "no damages thus far." (Complaint, ¶ 10). As such, there is no practical relief that a hearing officer can provide even if the complainant were to prevail on liability and a public hearing in this matter will serve no practical function.

The respondent also argues that the complainant has not alleged a threatened or taken adverse personnel action that "would dissuade a reasonable employee from whistleblowing; *Eagen v. Commission on Human Rights & Opportunities*, supra, Superior Court, judicial district of New Britain, Docket No. HHB-CV10-6004333s, 2011 WL 1168499, *2); under the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68-69 (2006) regarding Title VII retaliation as applied to whistleblower retaliation claims. I decline to address this issue in light of my conclusion that the complainant has failed to state a prima facie case of whistleblower retaliation. Even if the complainant could show that she suffered a "materially adverse" personnel action in retaliation for filing an affirmative

action personnel grievance, under the standard articulated in the *Burlington Northern & Sante Fe Railway Co.* case, the complaint still suffers from the fatal defect that the underlying whistleblowing disclosure alleged in the complaint does not rise to the level of whistleblowing activity under the state whistleblower protection statute.

Construing the complaint broadly and in the manner most favorable to sustaining its legal sufficiency, taking as true the allegations of the complaint and underlying facts not specifically alleged, and giving a pro se complainant the utmost leniency and full benefit of the doubt, I conclude that the complainant has failed to allege sufficient facts to survive a motion to strike.

For the reasons given, because in her whistleblower retaliation complaint the complainant has not alleged a protected whistleblower disclosure or any damages, the complaint shall be stricken in its entirety for failure to state a claim upon which relief can be granted. No repleading can cure the legal deficiencies in the underlying whistleblower disclosure alleged in the complaint; *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.

It is so ordered this 23rd day of January 2020.

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

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