

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights and
Opportunities ex rel. Lynn Wilcox,
Complainant

v.

State of Connecticut, Department of Public
Health, Respondent

CHRO No. 1510393

OFFICE OF PUBLIC HEARINGS - CHRO
DATE 5-5-23
TIME 1:24 pm
RECEIVED BY KDM

May 5, 2023

Ruling on availability of emotional distress damages

On March 4, 2015, Lynn Wilcox filed her affidavit of illegal discriminatory practice (complaint) with the commission on human rights and opportunities (commission). In her complaint, she alleged that the respondent department of public health (department), her former employer, had violated General Statutes § 46a-60 (a) (1) and (4)¹ as well as Title VII and the Americans with Disabilities Act (ADA) as enforced by General Statute § 46a-58 (a). According to Ms. Wilcox, the department denied her a reasonable accommodation, denied her a raise, did not promote her, retaliated against her, and terminated her employment because of her physical disability.

The commission processed this matter through its early legal intervention program pursuant to General Statutes § 46a-83 (c) (2) and, on December 7, 2015, referred the case to the office of public hearings. On March 31, 2016, the department filed its answer denying the allegations of discrimination. On January 27, 2022, this matter was assigned to the undersigned.

¹ General Statutes § 46a-60 was amended by No. 17-118 of the 2017 Public Acts, which added a new subsection (a) and redesignated the existing subsections (a) and (b) as (b) and (c). Although the complaint referenced the earlier version of the statute, for clarity this ruling references the current redesignation of the statute.

On April 5, 2023, the department filed a brief (brief) as to whether emotional distress damages were available to Ms. Wilcox. The department's position is that such damages are not available. On May 2, 2023, the commission filed its response (response), arguing that such damages were available. The complainant did not file a response.

For the reasons set forth herein, it is determined that emotional distress damages are not available to Ms. Wilcox.

I

Prior to 2019, compensatory, or emotional distress, damages were not available under General Statutes § 46a-86 (b) for violations of § 46a-60. In 2019, the legislature amended § 46a-86 (b)², effective October 1, 2019, to permit the award that would "make the complainant whole", which would permit the award of emotional distress damages.

In its brief, the department argues that the 2019 amendment is not retroactive to Ms. Wilcox's 2015 complaint. In its response, the commission concedes that the 2019 public act is not retroactive.³

² Public Act 19-16, § 7.

³ Response, p. 3, n. 1.

II

Since at least 2004, emotional distress damages have been available under § 46a-86 for a violation of federal rights as enforced by § 46a-58 (a).⁴ The department, though, argues that no violation of federal law has occurred in the present case because there are no allegations falling within Title VII and because Connecticut's sovereign immunity has not been waived for ADA claims. The commission argues that as recently as *Connecticut Judicial Branch v. Gilbert*, 343 Conn. 90, 272 A.3d 603 (2022) courts have affirmed that § 46a-58 converts violations of federal law into violations of § 46a-58 (a) for which emotional distress damages are available.

A

In her complaint, Ms. Wilcox alleged a violation of Title VII. She alleged that the department took its action against her because of her physical disability. Title VII, though, does not include protections for discrimination based on disability. Further, allegations of disability discrimination cannot form the basis of a retaliation claim under Title VII.

"Title VII of the Civil Rights Act of 1965 provides that 'it shall be an unlawful employment practice for an employer--(1) to fail to hire or to discharge any individual ... because of such individual's race, color, religion, sex, or national origin[.]' 42 U.S.C. § 2000e-2(a)(1). Federal law also provides that '[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual ... for opposing any practice made an unlawful employment practice this title[.]' 42 U.S.C. § 2000e-3(a). 'Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin and retaliation against people who complain about discrimination.' *Mathirampuzha v. Potter*, 548 F.3d 70, 74 (2d Cir. 2008).

⁴ *Commission on Human Rights & Opportunities v. Board of Education*, 270 Conn. 665, 855 A.2d 212 (2004).

“Title VII, does not, however, include protections for discrimination on the basis of age or disability. Federal courts have repeatedly reached this conclusion.”

Downey v. Monro, Inc., Docket No. 1:20-CV-1505 (TJM/ML), 2022 WL 17093421, *8 (N.D.N.Y. November 21, 2022).

Likewise, “Title VII does not prohibit discrimination or retaliation on the basis of a disability,’ *Laface v. E. Suffolk Boces*, 349 F. Supp. 3d 126, 152 (E.D.N.Y. 2018)” *Weekes v. JetBlue Airways Corp.*, No. 21-cv-1965, 2022 WL 4291371, n. 13 (E.D.N.Y. Sept. 16, 2022).

B

Ms. Wilcox alleged a violation of the ADA as enforced through §46a-58 (a) for which emotional distress damages are available. However, the courts have consistently held that the state has not waived sovereign immunity as to ADA claims.

The commission’s argument that *Gilbert* converted a violation of the ADA into a violation of § 46a-58 (a) is unavailing. “It is well established law that the state is immune from suit unless it consents to be sued by appropriate legislation waiving sovereign immunity in certain prescribed cases.” *White v. Burns*, 213 Conn. 307, 312, 567 A.2d 1195 (1990). The commission cites to no legislation that the state has clearly waived its sovereign immunity for ADA claims. Second, *Gilbert* was not an ADA case. Third, courts pre- and post-*Gilbert* have reaffirmed that the state has not waived its sovereign immunity for ADA claims. *Pacheco v Department of Correction*, Docket No. HHD-CV-22-6159916-s, 2023 WL 142346, n. 2 (Superior Court, judicial district of Hartford, January 5, 2023);

Scott v. State Department of Transportation, Docket No. CV-15-6060375-s, 2016 WL 3912470 (Superior Court, judicial district of Hartford June 13, 2016) (62 Conn. L. Rptr. 637, 641); *Paris-Purtle v. State*, Docket No. X10 UWY CV-146025212, 2015 WL 1500798 (Superior Court, judicial district of Waterbury March 11, 2015); *Kearns v State of Connecticut Judicial Dept.*, Docket No. CV-02-0515773s, 2003 WL 21771744 (Superior Court, judicial district of New Britain June 25, 2003); *Davis v. Mak*, Docket No. CV-96-329180s, 1997 WL 133410 (Superior Court March 7, 1997).

As the state has not waived immunity, no violation of the ADA can occur and, therefore, there is no violation of § 46a-58.

III

Because Title VII does not protect employees alleging disability discrimination, Ms. Wilcox's Title VII claim is dismissed.

Because Connecticut is entitled to sovereign immunity against ADA claims, Ms. Wilcox's ADA claim is dismissed.

Because Ms. Wilcox's Title VII and ADA claims have been dismissed, her § 46a-58 (a) claim is dismissed.

Connecticut is entitled to sovereign immunity against claims for prejudgment interest and post-judgment interest. *Connecticut Judicial Branch v. Gilbert*, 343 Conn. 90, 127, 272 A.3d 603 (2022).

Ms. Wilcox's remaining claims are allegations of disability discrimination and retaliation under § 46a-60, for which emotional distress damages are not available.

IV

As previously ordered,

1. On or before June 8, 2023, the parties shall file and serve their revised witness and exhibit lists if necessitated by the ruling on the respondent's motion.
- 2.. On or before June 29, 2023, the parties shall file and serve their objections to witnesses and exhibits that were not on the November 2022 witness and exhibit lists.
3. On or before August 3, 2023, parties shall file and serve their responses to objections.
4. A telephonic prehearing conference is scheduled for September 15, 2023 at 10:00 AM.
The parties are instructed to call 1.866.741.9936 and enter participant code 7022515 at the scheduled date and time.
5. The public hearing is scheduled for October 17, 18, and 19, 2023 commencing at 9:30 AM and recessing at approximately 4:30 PM.

It is so ordered this 5th day of May 2023.

/s/ Jon P. Fitzgerald
Hon. Jon P. Fitzgerald
Presiding Human Rights Referee

cc.

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