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. 2013-211 Jody Rowell v. Office of Healthcare Advocate

Date: February 26, 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

Jody L. Rowell, Complainant

OPH/WBR No. 2013-211

v.

Office of Healthcare Advocate, Respondent

February 26, 2020

FEB 26, 2020

Ruling and Order on Respondent's Motion to Dismiss

Currently pending is a motion to dismiss the complaint, filed on November 3, 2017, by the respondent, Office of Healthcare Advocate (respondent), pursuant to Regulations of Connecticut State Agencies § 4-61dd-15 (c) [1] on the ground that the tribunal lacks subject matter jurisdiction of the complaint. On December 22, 2017, the complainant and Commission on Human Rights and Opportunities (commission or CHRO) filed separate responses in opposition to the motion. On January 12, 2018, the respondent filed a reply to the objections filed by the complainant and the commission in opposition to the motion. On January 24, 2020, the respondent filed a notice of supplemental authority relevant to the pending motion. For the following reasons, the motion to dismiss is granted.

Preliminary Statement

On January 9, 2013, the complainant, Jody L. Rowell, of 721 Center Street, Wallingford, Connecticut, a licensed clinical social worker and a state agency employee, filed a whistleblower retaliation complaint (complaint) with the Chief Human Rights Referee, alleging violations of General Statutes § 4-61dd, commonly known as the Connecticut Whistleblower Statute. The complaint alleges that the complainant engaged in whistleblowing throughout the summer of 2012 and again in November of 2012, when she reported at various times to various individuals, including a former supervisor, a member of the respondent's Human Resources Department, the respondent's general counsel, and the Healthcare Advocate, an abuse of overtime by a co-worker and an incident of workplace violence (Complaint ¶¶ 6.B and 6.C.) In her complaint, the complainant alleges that the respondent retaliated against her for whistleblowing when the respondent placed her on administrative leave with pay on December 27, 2012, pending an investigation. [2] In the statement of relief sought, the complainant requests job protection and "resolution of issues." (Complaint, ¶ 10). On February 7, 2013, the respondent filed an answer and special defenses.

The matter proceeded to be actively litigated until April 10, 2014, when the then presiding referee granted the joint motion of the parties to stay the prehearing conference and public hearing until after the conclusion of an arbitration under the terms of the complainant's collective bargaining contract, then

[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] See footnote 4, infra, and accompanying text.

underway. The arbitration, entitled *In the matter of the arbitration between State of Connecticut Office of the Healthcare Advocate and New England Healthcare Employees Union, District 1199, OLR No. 11-4971*, challenged the complainant's termination, effective May 8, 2013, after she was placed on administrative leave on December 27, 2012, pending the conclusion of an investigation into a situation that came to light on December 20, 2012 (Arbitration Decision). [3] The issues submitted to the arbitrator for decision were whether the respondent's dismissal of the complainant was for just cause, and if not, what the remedy should be. Arbitration Decision, p. 1. After four days of hearings and the presentation of evidence, on March 25, 2015, the arbitrator issued a binding arbitration decision wherein the arbitrator decided the grievance in the complainant's favor. The arbitrator found that there was no just cause to support the complainant's May 2013 dismissal and ordered as a remedy that the complainant be reinstated to her former position with seniority and be awarded full back pay and retroactive benefits. Arbitration Decision, p. 24.

On June 19, 2017, the present matter was reassigned to the undersigned as presiding referee. At a status conference held on October 3, 2017, the respondent stated its intention to file a dispositive motion with appropriate case law, and deadlines were established for such motion and responses to be filed.

The respondent moves to dismiss the complaint on the ground that this tribunal lacks subject matter jurisdiction because the complainant pursued her claim through the collective bargaining process and, pursuant to § 4-61dd (e) (3) (A), the two avenues of redress are mutually exclusive. The respondent also argues that the complainant has been reinstated to her former position and has been awarded full back pay and retroactive benefits pursuant to an arbitration award through the grievance process and, therefore, has been made whole, rendering her whistleblower retaliation complaint moot.

Legal Standard

"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

[3] A copy of the grievance arbitration award, dated March 25, 2015, is attached to the respondent's motion to dismiss as Exhibit A. The arbitration decision also is appended to the complainant's response to the respondent's motion. By order dated July 15, 2015, an order confirming the arbitration award was entered in the Superior Court. *New England Health Care Employees Union, District 1199 v. State of Connecticut Office of Healthcare Advocate*, Superior Court, judicial district of Hartford, Docket No. HHDCV 15 6060223 S, Order (July 15, 2015 (*Robaina, J.*) A copy of the court order confirming the arbitration award is appended to the complainant's response to the present motion to dismiss.

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).

Discussion and Conclusion

The respondent's motion to dismiss asserts that the complainant's submission of the personnel action underlying the present complaint to a labor arbitration pursuant to the collective bargaining agreement precludes the tribunal from adjudicating the complaint. In support of its motion to dismiss, the respondent relies on General Statutes § 4-61dd (e) (3) (A), which states in pertinent part:

> **As an alternative** to the provisions of subdivision (2) of this subsection [i.e., a hearing before a Human Rights Referee at the Office of Public Hearings] ... A state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than ninety days after learning of the specific incident giving rise to such claim with the Employees' Review Board ..., or, **in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract** ... (Emphasis added).

The statute offers a whistleblower retaliation complainant a clear choice of either filing a grievance or bringing a whistleblower retaliation claim, but not both. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra textual evidence of the meaning of the statute shall not be considered." General Statutes § 1-2z. Here, the statute is clear.

In *Matthews v. Commissioner John Danaher, et al*, 2008 WL 916969, *2, OPH/WBR No. 2007-062, (February 20, 2008) (Ruling on motion to dismiss), Presiding Human Rights Referee Jon P. Fitzgerald concluded, "[t]he statute is clear that an employee has an election of mutually exclusive alternative forums in which to challenge the consequences of a specific incident, regardless of the myriad of legal claims that may arise from the incident ... In the case of the complainant, a state employee who is covered by a collective bargaining agreement, his alternatives are filing a complaint with the human rights referee or filing a grievance in accordance with the procedure provided in his collective bargaining agreement..... Pursuant to the clear statutory language, the complainant cannot simultaneously pursue claims arising from this specific incident by both a grievance through his collective bargaining agreement and also a whistleblower retaliation complaint with the chief human rights referee." (Emphasis added.) Accord, *Lombard v. State of Connecticut Department of Public Health*, OPH/WBR 2019-419 (Ruling and Order on motion to dismiss) (December 10, 2019) "The statute ... offers the complainant a clear choice of either filing a grievance or bringing [a whistleblower retaliation] case, but not both."); *Wilson v. University of Connecticut*, OPH/WBR 2016-314 (Ruling and order on motion to dismiss, February 2, 2017) ("One alternative for employees alleging retaliation for whistleblowing is the retaliation complaint process available through the Chief Human Rights Referee as set forth in § 4-61dd (e) (2) (A). Other alternatives include an appeal to the Employee Review Board or utilizing the collective bargaining procedure. § 4-61dd (e) (3) ..."); *Coggins v. Department of Correction*, 2010 WL 1348259, *2 (OPH/WBR No. 2010-127) (March 3, 2010) (Ruling on motion to dismiss) (employee has an election of mutually exclusive alternate forums under whistleblower retaliation statute); *Teal v. Department of Public Health*, 2009 WL 910177, *4, OPH/WBR No. 2008-097 (March 5, 2009) (Ruling on motion to dismiss) (same); *Torres v. Department of*

Environmental Protection, 2009 WL 5207459, *2, OPH/WBR No. 08-87 (April 14, 2009) (Ruling on motion to dismiss) (same); *Wilson v. Judicial Department*, 2009 WL 3699105, *2, OPH No. 2008-098 (October 16, 2009 (Ruling on motion to amend) (same); *Jones v. State of Connecticut Judicial Branch, et al.*, 2006 WL 4753477, *1, OPH/WBR No. 2006-032 (November 9, 2006) (Ruling on motion to dismiss and motion to stay) (the language of the statute unquestionably establishes that the prior avenues of redress remain as mutually exclusive alternatives).

The State of Connecticut Superior Court, recently released an administrative appeal decision, sustaining an appeal brought by the State of Connecticut Department of Public Health, finding in part that "CHRO and OPH lacked jurisdiction to hear and decide this [whistleblower retaliation] matter because the complainant had already adjudicated the propriety of the personnel actions at issue through the grievance procedure of her collective bargaining agreement and the applicable statute provides a mutually exclusive choice of forum." *Department of Public Health v. Estrada, et al.*, Superior Court, judicial district of New Britain, Docket No HHB-CV-6047018, at 27-28 (January 14, 2020) (*Cordani, J.)*

The respondent argues, and the complainant and commission do not dispute, that pursuant to the collective bargaining agreement between the respondent and the complainant, the complainant, through her collective bargaining unit, initiated a grievance arbitration against the respondent in April of 2013, contesting her dismissal, effective May 8, 2013, after being placed on administrative leave with pay on or about December 27, 2012. The present complaint charges that, on December 27, 2012, the respondent improperly placed the complainant on administrative leave with pay, pending investigation, in retaliation for whistleblowing. According to the respondent, the same incidents gave rise to the claims raised both in the complainant's grievance arbitration and in her whistleblower retaliation case. I agree.

The commission in its objection unsuccessfully argues that the whistleblower retaliation complaint alleges personnel actions separate and distinct from the complainant's dismissal, which she grieved via her collective bargaining agreement. The commission contends that the whistleblower retaliation action is not jurisdictionally barred because the complainant experienced other personnel actions in retaliation for whistleblowing, including a higher workload, intensified scrutiny, removal of job-related responsibilities, harassment, and placement on administrative leave with pay, and that these allegations were not addressed in the grievance arbitration award. [4] (CHRO Objection, pp.3-4).

Contrary to the commission's argument, these incidents were raised in the arbitration proceedings. In the arbitration decision, the arbitrator describes a number of disagreements between the complainant and the respondent during the period from July to December 2012, including complaints that complainant was carrying a heavier caseload than a co-worker; that her performance was subject to increased scrutiny

[4] In her whistleblower retaliation complaint, the complainant states the claimed personnel action as her placement on administrative leave with pay on December 27, 2020 (Complaint ¶ 7.A.). In the narrative portion of the complaint, the complainant states that the retaliation began when she first complained about the abuse of overtime hours by a colleague commencing in the summer of 2012, and escalated overtime culminating with her placement on administrative leave (Complaint ¶ 7.B.) She states that during this period, she "experienced an increasingly higher work load than my colleagues ..., intensified scrutiny of casework ..., removal from job related responsibilities ..., harassment, and documented isolation from colleagues ...." Id. However, the complaint provides no dates to establish the timelines of these allegations, other than that the retaliatory responses began when the complainant first complained about the alleged abuse of overtime by a co-worker during the summer of 2012. Id. Any remedies available through a whistleblower retaliation complaint for actions occurring more than ninety days after the complainant learns of the alleged incident are untimely. General Statutes § 4-61dd (e) (2) (A).

and criticism; and other allegations. Arbitration Decision, pp. 4-5. The arbitrator also addresses the respondent's decision to place the complainant on administrative leave on December 27, 2012, including the events earlier in December 2012 that triggered that decision, as well as the investigation that ensued after the complainant was placed on administrative leave, and the bases for the complainant's dismissal after the investigators submitted their findings. Arbitration Decision, pp. 6-10. The commission's argument that the claim submitted to arbitration did not encompass the personnel actions alleged in the whistleblower retaliation charge is unpersuasive.

General Statutes § 4-61dd (e) (2) (A) provides in part that "... [A whistleblower retaliation] 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 complainant challenged her placement on administrative leave through a whistleblower retaliation complaint in the present forum first. The complainant then pursued a labor arbitration through her employees union based on her dismissal. The complainant could have elected to amend the whistleblower retaliation complaint to challenge her subsequent dismissal as an additional incident giving rise to the whistleblower retaliation claim, but she did not. The complainant chose instead to pursue the grievance arbitration process provided under her collective bargaining contract as the avenue of redress. "The statute ... offers the complainant a clear choice of either filing a grievance or bringing a [whistleblower retaliation] case, but not both." *Lombard v. State of Connecticut Department of Public Health*, supra, OPH/WBR 2019-419 (December 10, 2019).

Upon review of the labor arbitration decision, I conclude that the arbitration of the grievance filed in April 2013 on behalf of the complainant via the New England Healthcare Employees Union, District 1199, engages the same personnel actions at issue in this whistleblower retaliation case regarding the placement of the complainant on administrative leave, which, after investigation, culminated in her subsequent dismissal. Accordingly, the complainant cannot challenge the same incidents through both the grievance arbitration and this complaint when the applicable statute provides a mutually exclusive choice of forum.

In addition, the arbitration award made the complaint whole. In the damages portion of the whistleblower retaliation complaint, the complainant seeks job protection. [5] Pursuant to the arbitration award, the complainant has been reinstated to her former position and has been made whole for her lost wages and benefits for the back pay period. Arbitration Decision, p. 2. In the statement of damages portion of the whistleblower retaliation complaint, no emotional distress damages, attorney's fees, or any other non-economic damages are claimed. As the complainant has been reinstated to her former position as a licensed clinical social worker and has been awarded full back pay and retroactive benefits pursuant to the arbitration award, the complainant has received the full extent of the relief that she requested and would be entitled to under General Statutes § 4-61dd. The present action therefore is moot.

In conclusion, the grievance arbitration award under the complainant's collective bargaining agreement and the present whistleblower retaliation complaint both challenge the same act, namely the complainant's placement on administrative leave with pay, which, after investigation, culminated in her

[5] In her request for damages, the complainant also seeks "resolution of issues." Without more specificity, this claim for damages falls outside the extent of relief to which the complainant is entitled under General Statutes § 4-61dd (e) (2) (A). The statutes provides in pertinent part, "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."

eventual dismissal. Pursuant to General Statutes § 4-61dd (e) (3) (A), the tribunal lacks jurisdiction over the complainant's whistleblower retaliation claim because she pursued her claim through the collective bargaining process and, pursuant to § 4-61dd (e) (3) (A), the two avenues of redress are mutually exclusive. In addition, the arbitration decision included an award to the complainant of the damages claimed in the present action, and the complainant therefore has been made whole, rendering her whistleblower retaliation complaint moot.

For the reasons given, the tribunal lacks subject matter jurisdiction over the complainant's whistleblower retaliation complaint and the matter is hereby dismissed.

It is so ordered this 26th day of February 2020.

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

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