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. 2019-408 Lindsay Booth v. University of CT, Department of Mechanical Engineering and Labor Relations

Date: April 2, 2020

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

cc.

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

Lindsay Booth, Complainant

OPH/WBR 2019-408

v.

University of Connecticut,
Department of Mechanical Engineering;
and Labor Relations, Respondents

April 2, 2020

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Ruling and Order on Respondents' Motion to Dismiss and/or Motion to Strike

Currently pending before the tribunal is a motion, filed by the respondents, University of Connecticut, Department of Mechanical Engineering; and Labor Relations (respondents) on August 14, 2019, to dismiss and/or strike the complaint pursuant to the Regulations of Connecticut State Agencies § 4-61dd-15 (c) [1] as to the motion to dismiss, and pursuant to § 4-61dd-15 (d) of the Regulations [2] as to the motion to strike. On October 11, 2019, the complainant filed a response in opposition to the respondents' motion.

Preliminary Statement

The complainant, Lindsay Booth, of 479B Bolton Road, Vernon, Connecticut, began working for the respondent, University of Connecticut (UConn), Department of Mechanical Engineering, on September 28, 2018, serving as an administrative assistant 3 during a working test period. See General Statutes §§ 5-230 and 5-197 (27). On May 15, 2019, she filed a whistleblower retaliation 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 respondents herein, retaliated against her for whistleblowing. In a typewritten narrative attached to her pro se complaint, the complainant makes a number of allegations against the respondents for personnel actions threatened or taken against her during the period from September 28, 2018, when she began working for the respondents during a working test period, and culminating on April 10, 2019, when the respondents terminated her probationary employment. Although the complainant's discursive and rambling style makes it difficult to extrapolate the bare assertions of her claim, the actions alleged include her removal on April 10, 2019, and the respondents' failure to respond to various workplace concerns or to provide her with sufficient training to succeed. The complainant alleges that she reported her complaints and concerns to various supervisors at the respondent Department of Mechanical Engineering; the complainant's union; the respondent Office of Labor Relations; UConn's Office of Institutional Equity; its Office of University Compliance; and its Office of Workplace Solutions. The information disclosed includes, inter alia, complaints that on the first

[1] Section 4-61dd-15 (c) of the Regulations 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) Fails to appear at a lawfully noticed conference or hearing without good cause; or (3) Fails to sustain his or her burden after presentation of evidence."

[2] Section 4-61dd-15 (d) of the Regulations provides in pertinent part: "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...."

day of the complainant's employment with the respondent, a co-worker asked her to share her computer password, and that in February of 2019, she learned that a co-worker had used the department's FedEx account for personal use. She also complained about being treated differently than other workers; her performance appraisal; parking validation concerns; not being provided with adequate training; feeling excluded and frustrated; and experiencing bullying and general hostility in the workplace. In her statement of damages on the whistleblower complaint form, she requests that her removal as a probationary employee during her working test be changed to a designation of a layoff.

Legal Standard

Motion to Dismiss

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.... A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction...." (Internal quotation marks omitted.) *Caruso v. Bridgeport*, 285 Conn. 618, 627 (2008); *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134 (2007). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it.... [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction.... The objection of want of jurisdiction may be made at any time ... [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention.... The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings...." (Citation omitted; internal quotation marks omitted.) *Broadnax v. New Haven*, 270 Conn. 133, 153 (2004).

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. *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-52, 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. *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).

Motion to Strike

A motion to strike is essentially a procedural motion that focuses on the pleadings. *Dlugokecki v. Vieira*, 98 Conn. App. 252, 256 (2006), 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, the role of the tribunal is to examine the complaint, construed in favor of the complainant, to determine whether the complainant has stated a legally sufficient cause of action. *Dodd v. Middlesex Mutual Assurance Co.*, 242 Conn. 375, 378 (1997).

"[F]or 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). 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). "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 he proves them, and unless the respondent in turn establishes certain other elements to offset matters established by the complainant." (Citations omitted.) *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)

Discussion

The issues addressed in this ruling are (1) whether any claims of whistleblower retaliation action alleged to have occurred prior to February 14, 2019, which is the earliest date in the ninety-day statutory limitations period immediately preceding the May 15, 2019, filing date of the complaint, are time-barred; and (2) whether the complaint alleges sufficient facts to establish a prima facie case of retaliation for whistleblowing.

Personnel Actions Occurring More than 90 Days Prior to the Date of this Complaint are Time-Barred

The respondents argue that any whistleblower retaliation claims arising from personnel actions threatened or taken by the respondents prior to February 14, 2019, are time-barred and must be dismissed. I agree. General Statutes § 4-61dd (e) (2) (A) requires that complaints must be filed within ninety days after an employee learns "of the specific incident giving rise to a claim that a personnel action has been threatened or occurred ..." The ninety-day filing requirement is not technically a jurisdictional prerequisite, but it is, in essence, a mandatory statute of limitations. Thus, an untimely complaint will be barred unless waiver, consent, estoppel, or some other compelling equitable tolling applies. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (filing deadline for Title VII discrimination claims with the EEOC); *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 264 (2001) (filing deadline for discrimination complaints pursuant to the Connecticut Fair Employment Practices Act); *Wilson v. University of Connecticut*, OPH/WBR 2016-314 (Ruling and order on motion to dismiss, February 2, 2017); *Samson v. State of Connecticut Department of Public Safety*, 2009 WL 2683294,*2, 5-6, OPH/WBR 2007-061 (Ruling on motion to dismiss, June 20, 2008); *Ballint v. UConn Managed Health Care*, 2010 WL 750975,*2, OPH/WBR 2010-126 (Memorandum on motion to dismiss, February 24, 2010). In the pending matter, the factors of consent, waiver, or equitable tolling have not been raised.

The complaint alleges that the complainant learned about various personnel action taken or threatened against her because of her alleged whistleblowing from "Day one 9/28/18 through [her] last day." (Complaint Form, ¶ 8 (a). In the narrative portion of the complaint, attached to the complaint form, the complainant includes the following statement: "The retaliation: June 29 – Present worst treatment after retaliation complaint in OCT [2018]. Last 2 weeks of October were the worst." (Complaint, p. 3).

Here, the complainant's whistleblower complaint was filed on May 15, 2019. The statute would only cover personnel actions the complainant learned about on or after February 14, 2019, and this tribunal only has authority to grant relief for adverse personnel actions occurring on or after that date, within the ninety-day look-back window. Therefore, any allegations of retaliatory personnel actions occurring before February 14, 2019, are time-barred and cannot be considered by this tribunal as they fall outside the purview of the statute and deprive the Office of Public Hearings of subject matter jurisdiction over such claims.

The Complaint Fails to Adequately Allege Sufficient Facts to Establish a Prima Facie Case of Retaliation Because of Whistleblowing

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 (whistle-blew) pursuant to § 4-61dd (a). 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.

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.

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*, supra, 135 Conn. App. at 579-81; *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.

The respondents argue that the complaint does not allege sufficient facts to satisfy the second prima facie prong that the complainant suffered an adverse employment action or that she was threatened with an adverse employment action. The respondents also argue that the complaint fails to state a legally cognizable claim for damages.

I first address the argument that the complainant's removal during her working test period was not an adverse action. Section 4-61dd prohibits personnel actions that "would dissuade a reasonable employee from whistleblowing." *Eagen v. Commission on Human Rights & Opportunities*, supra, Superior Court, judicial district of New Britain at New Britain, Docket No. HHB-CV10-6004333s; *Osmond v. Department of Economic and Community Development*, supra, 2018 WL 8514036, *5. Under the standard articulated in *Burlington Northern & Santa Fe Railway, Co. v. White*, 548 U.S. 53, 68-69 (2006), the complainant must show that a reasonable employee would have found the challenged action materially adverse, which in the whistleblower retaliation context means that the action well might have dissuaded a reasonable worker from being a whistleblower. *Kisala v. Malecky*, supra, 2016 WL 1719122, *9; *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); *Walsh v. Department of Developmental Services*, supra, 2011 WL 2196514.

"[R]etaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct ... such as hiring, firing, change in benefits, or reassignment. Again, the plaintiff must show that his employer's actions well might have dissuaded a reasonable worker from making or supporting a charge

of discrimination." (Citations omitted; internal quotation marks omitted.) *Kisala v. Malecky*, supra, 2016 WL 1719122,*9; *Farrar v. Stratford*, 537 F. Supp.2d 332, 355-56 (D. Conn. 2008); *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).

Construed broadly and in the light and manner most favorable to the pleader, it cannot be said, as a matter of law, that the complainant's allegation concerning her removal from employment during her working test period is legally insufficient to satisfy the prima facie element that she was threatened with, or sustained, an adverse personnel action. [3]

Nevertheless, in order to make a prima facie case of whistleblower retaliation under the statute, the complainant must establish that she engaged in protected activity as defined by the statute, and she also must show a causal connection between a protected activity and any adverse personnel action taken by the respondents within the ninety day look-back window. In other words, in the case at hand, she must show that the respondents' non-renewal of the complainant during her working test period was in retaliation for whistleblowing.

First, an exhaustive review of the complaint has disclosed no protected disclosure in state government "involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority, or danger to the public safety" as provided in § 4-61dd. Any alleged disclosures in the present case rest solely on individual complaints about employment policies and practices impacting the complainant's work environment (e.g. computer passwords, parking validation procedures, job training, and evaluation procedures), and behavior of particular supervisors and co-workers in the workplace. These simply are not the types of disclosures that "serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures ... generally evoked by the term 'whistleblowing' ... *Spruill v. Merit Systems Protection Board*, [978 F. 2d. 679, 692 (Fed. Cir. 1992)]." *Harmon v. State of Connecticut Judicial Branch*, 2016 WL 8223960, *6, OPH/WBR No. 2015-311 (Ruling on motion to dismiss, November 22, 2016). As discussed at length in the *Harmon* ruling, Connecticut's whistleblower law is designed to protect employees from retaliation when they expose harm committed on the public. The whistleblower law is not designed to protect an employee's right to complain about workplace policies and practices that she does not like and for which other administrative and judicial remedies are available. Id.; *Wilson v. University of Connecticut*, 2017 WL 11508426, *1, OPH/WBR 2016-314 (Ruling on request for reconsideration, March 10, 2017); *Wilson v. University of Connecticut*, OPH/WBR 2016-314 (Ruling and order on motion to dismiss, February 2, 2017).

However, even if any of her complaints about workplace practices and procedures did rise to the level of whistleblowing under § 4-61dd, which is not the case, the complainant must also plead sufficient facts to show, as an initial matter, that the respondents terminated her probationary employment *because of* her disclosure of protected information, rather than for some other reason such as poor performance. This the complainant has not done. The fact that the complainant was removed during her working test period to determine whether she merited permanent appointment is not, in itself, prima facie evidence that the respondent retaliated against her for whistleblowing.

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[3] Applying this standard, allegations that the respondents' failure to provide her with adequate training or to adequately respond to various workplace concerns (e.g., alleged bullying, general hostility in the workplace, parking validation issues) do not rise to level of materially adverse actions that would have dissuaded a reasonable worker from engaging in protected activities, and as such, are legally insufficient as a matter of law to satisfy the prima facie element that the complainant was threatened with, or suffered, an adverse employment action.

In sum, the complainant simply has not alleged sufficient facts to make out a prima facie case that her termination during her working test was based on retaliation for her disclosing any protected information. 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 key elements to offset matters established by the complainant. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Corbett v. Napolitano*, 897 F. Supp. 2d 96, 111 (E.D. N.Y. 2010); *Quinones v. Kohler Mix Specialties*, LLC, 2010 WL 1782030, *3, No. 3:08-CV-1979 (JCH) (D. Conn. April 30, 2010). The present complaint does not meet that standard.

Having found that the complaint fails to adequately allege facts which would establish a prima facie case and warrants dismissal, I need not address the additional argument proffered by the respondents that the complaint does not claim any relief to which the complainant is entitled under the whistleblower retaliation statute.

Conclusion and Order

This tribunal's jurisdiction over the present whistleblower retaliation charge is limited by § 4-61dd to claims of adverse personnel actions threatened or taken by the respondent in retaliation for whistleblowing occurring within the ninety-day look back window, in this case February 14, 2019. All claims based on adverse actions occurring prior to February 14, 2019, therefore are untimely. As to all remaining claims, the complaint fails to allege sufficient facts to satisfy all of the elements necessary for a prima facie case.

For the reasons set forth herein, the respondents' motion to dismiss on jurisdictional grounds all whistleblower retaliation claims based on adverse actions beyond the ninety-day look-back window is **GRANTED**, and all claims based on personnel actions that occurred prior to February 14, 2019, are hereby **DISMISSED**.

As to all remaining claims, the respondents' motion to strike the complaint for failure to state a claim upon which relief can be granted hereby is **GRANTED**. No repleading can cure the legal deficiencies in the underlying whistleblower retaliation claims 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 **DISMISSED**.

It is so ordered this 2nd day of April 2020.

Elissa T. Wright

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Presiding Human Rights Referee

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