State of Connecticut
Commission on Human Rights and Opportunities
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MEMORANDUM

To: Ruth Krems
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From: Kimberly D. Morris, Secretary II, OPH

Re: OPH/WBR No. 2019- 412
Ruth S. Krems v. Capitol Community College

Date: August 6, 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

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

August 5, 2020

Ruth Krems, Complainant

OPH/WBR 2019-405

v.

State of Connecticut
Capital Community College, Respondent

August 5, 2020

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

Before the tribunal is a motion filed by the respondent on August 14, 2019, to dismiss and/or strike the complainant's May 7, 2019, whistleblower retaliation complaint. The respondent's motion includes a memorandum of law. On September 27, 2019, the complainant filed a response in opposition to the motion. On October 24, 2019, the respondent filed a reply to the complainant's objection. For the following reasons, the motion to dismiss is granted.

Preliminary Statement

On June 10, 2019, the complainant, who is employed as a coordinator of nurse aide certification, 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, respondent herein, retaliated against her for disclosing, in September 2018, to the respondent's CEO and to an official with the Connecticut Department of Health that she received an "illegal directive" from her supervisor, Linda Guzzo (Guzzo), to "withhold the certificates of students who completed the CNA program unless students completed a cover letter and resume." (Complaint, ¶ 7 ((B) and (C)) The complainant alleges that the respondent retaliated against her for whistleblowing in the following ways: on February 27, 2019, her reporting structure changed; on May 13, 2019, her office was relocated; and on May 14, 2019, she was called into a meeting to discuss her job performance. (Complaint, ¶ 8 (B)) The complainant further alleges that she filed a union grievance and two complaints with the Connecticut Board of Labor Relations to dispute the change to her reporting structure, office relocation, and retaliation. (Complaint, ¶ 9) The individual grievance and the complaints filed with the Board of Labor Relations are attached to the complaint. On April 14, 2019, the respondent filed an answer to the complaint with special defenses. [1]

[1] The respondent asserts in its fifth special defense that the complaint fails because the complainant elected to pursue her remedies through the grievance process.

The respondent moves to dismiss the complaint pursuant to the Regulations of Connecticut State Agencies § 4-61dd-15 (c), [2] and/or to strike the complaint pursuant to § 4-61dd-15 (d) of the regulations [3] on the following bases:

(1) Pursuant to General Statutes § 4-61dd (e) (3) (A), the tribunal lacks jurisdiction to hear the whistleblower retaliation claim for any of the complainant's alleged adverse personnel actions for which she has filed a grievance under her collective bargaining contract for personnel actions she now alleges form some of the basis of this claim, because the two remedies are mutually exclusive "regardless of the myriad of legal claims that may arise from the incident." *Matthews v. Commissioner John Danaher, III*, 2008 WL 91960, *2, OPH/WBR No. 2007-062 (Ruling on motion to dismiss, February 20, 2008).

(2) The action is time-barred as to any adverse actions alleged to have occurred prior to March 12 2019, which is the earliest date in the ninety-day statutory limitations period immediately preceding the June 10 2019, filing date of the complaint. See General Statutes § 4-61dd (e) (2) (A).

(3) The complainant has failed to allege a prima facie case of whistleblower retaliation.

(4) The complainant cannot recover noneconomic damages/equitable relief under General Statutes § 4-61dd.

For the following reasons, the motion to dismiss is granted.

Discussion and Conclusion

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]." *Gurliacci v. Mayer,* 218 Conn. 531, 544-45 (1991) (Emphasis in original; citations omitted; internal quotations omitted); *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622 (1983). Section 4-61dd-15 (c) of the Regulations of State Agencies authorizes the presiding referee to dismiss a complaint for, among other reasons, lack of subject matter or personal jurisdiction.

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[2] 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."

[3] Section 4-61dd-15 (d) of the Regulations 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. 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."

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 (CT. Civ. Rts.), OPH/WBR 2006-017 (March 21, 2006).

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).

Complainant's Submission of the Adverse Personnel Actions to the Grievance Process Precludes Consideration of the Whistleblower Claim in this Forum

The respondent's motion to dismiss asserts that the complainant elected to challenge the personnel actions that form the basis of the present whistleblower claim through the mutually exclusive alternative of utilizing the grievance procedures of her collective bargaining agreement, and, therefore, the claim does not fall within the statute's limited waiver of sovereign immunity, depriving the tribunal of subject matter jurisdiction in the matter. In support of its motion, 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 invoking the grievance procedures under her collective bargaining agreement 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, III, et al.*, 2008 WL 916960, *2, OPH/WBR No. 2007-062, (Ruling on motion to dismiss, February 20, 2008), 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.)

The Office of Public Hearings has a long track record of acknowledging that a whistleblower retaliation complainant who initially chooses to address similar claims through the grievance procedures of a collective bargaining agreement cannot also pursue the claims in this forum. See, e.g., *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, (Ruling on motion to dismiss, March 3, 2010) (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 (Ruling on motion to dismiss, March 5, 2009) (same); *Torres v. Department of Environmental Protection*, 2009 WL 5207459, *2, OPH/WBR No. 08-87 (Ruling on motion to dismiss, April 14, 2009) (same); *Wilson v. Judicial Department*, 2009 WL 3699105, *2, OPH No. 2008-098 (Ruling on motion to amend, October 16, 2009) (same); *Matthews v. Commissioner John Danaher, III, et al.*, supra, 2008 WL 916960; *Jones v. State of Connecticut Judicial Branch, et al.*, 2006 WL 4753477, *1, OPH/WBR No. 2006-032, (Ruling on motion to dismiss and motion to stay, November 9, 2006) (the language of the statute unquestionably establishes that the prior avenues of redress remain as mutually exclusive alternatives).

In an administrative appeal decision released earlier this year, the State of Connecticut Superior Court sustained 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.)* (2020 WL 74880, *11).

By her own admission in the complaint, the complainant chose to utilize the grievance procedures of her collective bargaining contract to address the propriety of the personnel actions at issue in her whistleblower retaliation claim. As set forth in the complaint, the complainant filed an individual grievance on May 28, 2019, and complaints with the Connecticut Board of Labor Relations on April 17, 2019, and

June 3, 2010, contesting the change in her reporting structure on February 27, 2019; the relocation of her office from the third floor to the eighth floor on May 13, 2019; the counseling meeting to discuss her job performance on or about May 14, 2019; [4] and retaliation. (Complaint, ¶ 9 and attachments to the complaint.) [5]

A careful review of the complaint, including the attachments thereto, reveals that the retaliatory personnel actions alleged in the present matter also are encompassed within the "myriad of legal claims" [6] challenged through the grievances the complainant filed in accordance with grievance procedures provided in her collective bargaining agreement. (Complaint, ¶ 8 (B), Complaint, ¶ 9 and grievances attached to the complaint.) "Even though grievances may involve contractual claims while a [whistleblower] complaint may involve statutory claims of retaliation and even though remedies may differ between grievances and complaints, a complainant cannot file both a grievance and a complaint challenging the same specific personnel action." *Coggins v. Department of Correction*, supra, 2010 WL 1348259, *2.

In sum, the complainant elected to adjudicate the claim raised in her whistleblower complaint by challenging the same personnel actions in a mutually exclusive forum through the grievance procedures of her collective bargaining agreement. Because the complainant has contested the propriety of the personnel actions at issue through the grievance procedures of her collective bargaining agreement, the present claim falls outside the purview of the whistleblower statute, depriving the Office of Public Hearings of subject matter jurisdiction to hear and decide this matter. Accordingly, the whistleblower retaliation complaint is dismissed in its entirety.

The conclusion I reach in addressing the argument that the complainant's grievances bar this claim is dispositive of the action, and I decline to address the remaining arguments put forth by the respondent in its motion.

For the reasons given, this tribunal lacks jurisdiction over the complaint. The respondent's motion to dismiss the complaint in its entirety is **GRANTED** and the matter is hereby **DISMISSED**.

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[4] In her second complaint to the Board of Labor Relations the complainant states "I was called into a meeting on 5/13/19 with Dean Linda Guzzo, CEO Duncan Harris and AFSCME representative Stephanie Calhoun to discuss my performance expectations ...."

[5] The complaint specifically states that all three grievances regarding the personnel actions at issue are pending. (Complaint, ¶ 9)

[6] *Matthews v. Commissioner John Danaher, III, et al.*, supra, 2008 WL 916960, *2, OPH/WBR No. 2007-062 (February 20, 2008).

It is so ordered this 5th day of August 2020.

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Presiding Human Rights Referee

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