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

Adam H. Osmond, Complainant — OPH/WBR 2018-370

v.

Department of Economic and Community Development, Respondent — August 2, 2018

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

Currently pending before the tribunal is a motion to dismiss and/or strike, filed by the respondent, Department of Economic and Community Development, 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.

Preliminary Statement

On March 6, 2018, the pro se complainant, Adam H. Osmond, 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 his employer, the respondent herein, retaliated against him for "fil[ing] [his] complaints through the State Auditors' website not to a person www.cga.ct.gov/apa on ... [December 8, 2016, April 8, 2017, and August 14, 2017.]" The complainant details concerns about the administration of certain loans granted and guaranteed by the Department of Economic and Community Development about which he filed online complaints through the website of the auditors of public accounts. The claims asserted mirror closely the protected disclosures alleged in a previous whistleblower retaliation action filed by the complainant against the current respondent on June 6, 2016; *Adam Osmond v. Department of Economic and Community Development*, OPH WBR 2016-325; which matter was dismissed with prejudice on January 3, 2018.

In the present action, the complainant alleges that the respondent took an adverse action against him in retaliation for his whistleblowing activity when, on December 6, 2017, the last day of his employment with the respondent, he received a service rating of satisfactory, which was lower than the rating of excellent he received in September of 2015.

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[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: "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."

In the statement of damages portion of complainant's whistleblower retaliation complaint form, the complainant states that he would like the respondent to revise his service rating dated December 6, 2017, from satisfactory to excellent in the categories of quality and quantity.

By motion filed on April 20, 2018, the respondent moves to dismiss and/or strike the complaint on the bases that the complainant fails to state a claim for which relief can be granted because:

(1) The complainant fails to identify any protected activity pursuant to General Statutes § 4-61dd;

(2) The complainant fails to identify any protected activity in which he engaged, or that the respondent was aware of the alleged transmittal of information to the public auditors (whistleblowing);

(3) The complainant fails to assert any causal connection between any alleged protected activity and any alleged adverse personnel action pursuant to § 4-61dd; and

(4) The complainant fails to allege any relief to which he is entitled.

At the initial hearing conference held on May 17, 2018 via telephone, the complainant was provided an opportunity to file a response to the motion to dismiss and/or strike on or before June 7, 2018. The complainant has not filed an objection to the motion to dismiss and/or strike.

The tribunal concludes that where, as here, the motion to dismiss and/or motion to strike challenges not jurisdiction but the legal sufficiency of the claim, the motion must be treated as a motion to strike. Regs., Conn. State Agencies § 4-61dd-15 (d).

Legal Standard

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.

Section 4-61dd-15 (d) of the Regulations of Connecticut State Agencies 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 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,* supra, 301 Conn. 117.

"[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). " 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). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action ... the complaint is not vulnerable to a motion to strike." *Bouchard v. People's Bank*, 219 Conn. 465, 471 (1991).

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); *Irwin v. Lantz*, OPH/WBR 2007-40 et seq., Final Decision, 11 (May 9, 2008) (2008 WL 2311544). 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. *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 11-12. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. Id., 11. *Irwin v. Lantz,* 2008 WL 2311544, *5 OPH/WBR Nos. 2—7-40, 41, 42, 44, 45, and 36; OPH/WBR Nos. 2007-51,52, 53, 54, 55, and 56 (May 9, 2008). *O'Sullivan v. Vartelas*, 2008 WL 5122194, *1-2, OPH/WBR No. 2008-186 (November 20, 2008) (Ruling on motion to dismiss).

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 (2d 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 (2012); *Arnone v. Town of Enfield,* 79 Conn. App. 501, 507 (2003) (Construing Connecticut's private whistleblower statute, § 31-51m); *Kisala v. Malecky,* Superior Court, judicial district of New Britain, Docket No. HHBCV 13 5015760S (October 7, 2013) (56 Conn. L. Rptr. 902) (2013 WL 5814792,*6).

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, when, as here, the complainant is an employee of a state department or agency, he must have knowledge 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" (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*, 2010 WL 750974, *8, 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 at New Britain, Docket No. HHB-CV10-6004333s (February 25, 2011) (2011 WL 1168499), aff'd 135 Conn. App. 563 (2012).

Analysis

The Complaint Fails to Adequately Allege Sufficient Facts Concerning Disclosures Reported to the State Auditor

I address first the sufficiency of the pleading concerning the protected disclosures. The respondent argues that the complaint does not allege sufficient facts to satisfy all of the elements necessary for a prima facie case. In particular, the respondent asserts that the complainant has failed to allege protected conduct of any kind under the statute because the complainant does not specifically identify what information was disclosed through the public auditors' website, and on what dates, or whether such information was

disclosed anonymously, which is an option on the state auditors' website. Since in his whistleblower retaliation complaint, the complainant admits that he did not file his complaints with any actual auditors, or any employee of the auditors of public accounts, it is unclear whether a qualifying person, or persons, ever received the complainant's online complaints or had any communication with the complainant following the complaint submissions through the state auditors' website. The respondent asserts that simply alleging that complaints were filed through a website, without identifying what specific information was disclosed and to whom, and whether the online submissions were actually received by an employee of the state auditors, is insufficient to satisfy a statutory component of a protected activity as defined in the applicable statute. The tribunal agrees.

In order make out a prima facie case that the complainant engaged in protected activity as defined by the statute, the complaint must allege that the complainant disclosed the information (whistleblew) to an employee of the auditors of public accounts. Section 4-61dd (e) (1) of the General Statutes prohibits retaliation or threatened retaliation against a state officer or employee from such employee's disclosure of protected information to (i) *an employee of the auditors of public accounts.* [3] In order to assert a substantive whistleblower retaliation claim pursuant to General Statutes § 4-61dd, a complainant has to state his claim on a specific pre-existing form, the Whistleblower Retaliation Complaint Form. By the plain terms of the whistleblower complaint form, an allegation stating "the *name and position of the qualifying person(s)* to whom you disclosed [the underlying whistleblower disclosure] and the *date of such disclosure*" is required in order to state a cause of action under the statute. (Emphasis added). Whistleblower Retaliation Complaint Form, Statement 7.B.e. The complainant has made neither of these required allegations. While the complainant has alleged that his complaints were filed "through the State Auditors website" on three different dates, he does not identify the name and position of the qualifying person(s) to whom the each of the disclosures were made, nor does the complaint identify which disclosures were made on which dates, and to whom each such disclosure was made.

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. See *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) discussing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

The present complaint does not meet that standard. The complaint does not allege sufficient facts concerning the disclosures to the state auditors to satisfy required elements for a prima facie case. The complainant's failure to identify the persons within the office of the auditors of public accounts to whom the complaints were made, and on what dates such complaints were made, leaves open-ended the question as to whom such persons might be; what protected information, if any, was received, by whom and on what dates. The failure of the complainant to allege the name(s) and position(s) of the qualifying

[3] General Statutes § 4-61dd (e) (1) provides in pertinent part: "No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for (A) such employee's or contractor's disclosure of information to (i*) an employee of the Auditors of Public Accounts* ...."

person(s) to whom such disclosures were made is fatal to the complainant's claim of whistleblower retaliation.

The Alleged Personnel Action is Minimally Sufficient to State a Prima Facie Case

The respondent contends that the complainant cannot meet the "adverse personnel action" element of a prima facie case [4] with regard to certain actions alleged in the complaint, namely that on the final day of his employment with the respondent agency, he received a service rating of satisfactory, which was lower than the rating of excellent which he had received two years earlier. According to the respondent, such action is not an adverse personnel action for the reason that they did not involve actions materially affecting the complainant's employment.

Section 4-61dd prohibits personnel actions that "would dissuade a reasonable employee from whistleblowing." *Eagen v. Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain at New Britain, Docket No. HHB-CV10-6004333s (February 23, 2011) (2011 WL 1168499, *2), aff'd, 135 Conn. App. 563 (2012). 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*, 2016 WL 1719122, *9, OPH/WBR No. 2012-200 (March 31, 2016); *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).

It is true that the complainant's allegation concerning the receipt of a service rating that was lower than the rating he received two years earlier but which was still satisfactory may not rise to the level of materially adverse action that would have dissuaded a reasonable worker from whistleblowing. *See Moy v. Perez*, 712 F. Appx 38, 41 (2d Cir. 2017; *Byrne v. Telesector Resources group, Inc.*, 339 Fed. Appx. 13, 17 (2009); *Gooden v. Department of Correction*, Superior Court, judicial district of Hartford, Docket No. CV020813590 (June 23, 2018) (2008 WL 2746002,*5-6). But construed broadly and in the light and manner most favorable to sustaining the legal sufficiency of the claim, it cannot be said, as a matter of law, that such action could not dissuade a reasonable worker from engaging in protected activities. Whether the complainant can actually prove this claim requires an evidentiary hearing.

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[4] To satisfy the second element of his prima facie case of whistleblower retaliation, the complainant must show that he suffered or was threatened with an adverse personnel action by a regulated entity subsequent to the whistleblowing. § 4-61dd (e) (1).

Whether the Complainant Must Affirmatively Plead that the Alleged Disclosure to State Auditors was Known to Respondent

The respondent argues that complainant's failure to specifically allege that the respondent was aware of any protected conduct, or any causal connection between any alleged protected activity and any alleged adverse personnel action pursuant to § 4-61dd, is fatal and the complaint therefore should be stricken as a matter of law.

A prima facie case of whistleblower retaliation consists of all of the following elements: (1) the complainant engaged in protected activity as defined by the applicable statute; (2) he subsequently incurred or was threatened with an adverse personnel action; and (3) there was a causal connection between his participation in the protected activity and his actual or threatened personnel action. *LaFond v. General Physics Services Corp.,* supra, 50 F.3d 173; *Karagozian v. Luxottica Retail North America*, 147 F. Supp. 3d 23, 32 (D. Conn. 2015) (Interpreting Connecticut's private whistleblower statute, § 31-51m).

In the case of an employee of a state department or agency, the statute protects the complainant from retaliation if he has made the requisite disclosures either to the auditors or attorney general under the provisions of § 4-61dd (a); or to "an employee of the state agency ... where [he] is employed, under the provisions of § 4-61dd (e) (1). In the present matter, the complainant alleges that he filed online complaints through the website of the auditors of public accounts, but there is no specific allegation that the respondent was aware of the disclosures and thus of the protected activity.

In the whistleblower context, the complainant "need only establish general corporate knowledge that the [complainant] has engaged in a protected activity." *Irwin v. Lantz,* supra, 2008 WL 2311544, *5.

The respondent's lack of knowledge, or the lack of knowledge on the part of individual agents, is relevant and admissible as some evidence of a lack of a causal connection between adverse personnel action that was taken or threatened, and the protected activity. *Gordon v. New York City Board of Education*, 232 F. 3d 111, 117 (2000), citing *Alston v. New York City Transit Authority,* 14 F. Supp. 2d 308, 312–13 (S.D.N.Y. 1998).

In order for the complainant in the present matter to prove a causal connection between the personnel action taken against him and the protected activity, he may well need to establish the respondent's "general corporate knowledge" that he engaged in a protected activity. Nevertheless, the tribunal is not persuaded that the burden is on the complainant to allege this knowledge element at the pleading stage. Whether the complainant has evidence that the respondent was aware of the alleged whistleblower disclosures, or other evidence of a causal connection between the personnel action and the alleged protected activity, would require an evidentiary hearing.

Whether the Complaint Fails to Allege Any Damages

Finally, the respondent also moves to strike the complaint because it fails to allege any damages that could be awarded. Section 4-61dd (e) (2) (A) of the General Statutes provides in pertinent part that "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." In the present matter, the remedy that the complainant seeks is revision of the service ratings that he received on December 6, 2017, to reflect an increase from the rating of satisfactory to the level of excellent. A close reading of *Commissioner of*

Mental Health and Addiction Services v. Saeedi, supra, 143 Conn. App. 839, supports the general type of remedy that the present complainant seeks in whistleblower retaliation matters before the Office of Public Hearings. In *Saeedi*, revision of an employee's performance appraisal scores to levels he had prior to the respondent department's retaliation for the employee's whistleblower activities was held to be authorized by the text of the whistleblower retaliation statute which provides for "reinstatement to the employee's former position." Id., 863-64; General Statutes §4-61dd (e) (2) (A).

Conclusion

In light of the foregoing, as to the respondent's claim that the complaint does not allege sufficient facts concerning the disclosures to the state auditors to satisfy required elements for a prima facie case, the **motion to strike is GRANTED**, and the undersigned shall strike the complaint in its entirety, unless a revised complaint, signed under oath by the complainant Adam H. Osmond, is filed and served on or before August 16, 2018, specifying the employee, or employees, of the auditors of public accounts to whom the complainant disclosed protected information, as well as the specific information that was disclosed to whom and on what date or dates. Failure to file a revised complaint may result in the dismissal of the case in accordance with § 4-61dd-15 (d) of the regulations

The respondent's **motion to strike is DENIED** as to the respondent's claims that the complaint fails to allege (1) that the respondent was aware of the alleged whistleblowing; (2) any causal connection between the alleged protected activity and the alleged adverse personnel action; or (3) any relief to which the complainant is entitled.

It is so ordered this 2nd day of August 2018.

Hon. Elissa T. Wright
Presiding Human Rights Referee

cc.
Adam Osmond – via email only
Colleen Valentine, Esq. – via email only
Leonard Auster – via email only