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Commission on Human Rights and Opportunities
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MEMORANDUM

To: All Parties and/or Counsel

From: Kimberly D. Morris, Secretary II, OPH

Re: OPH/WBR No. 2018-370 Adam Osmond v. Department of Economic and Community Development

Date: March 7, 2019

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

cc.

Adam Osmond – via email only
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Colleen Valentine, Esq.
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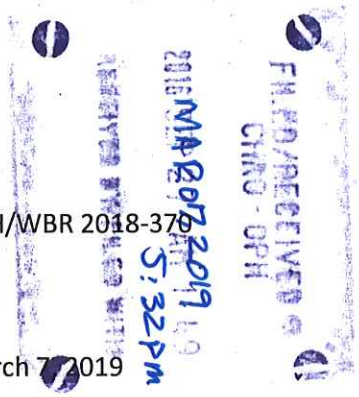
State of Connecticut
Commission on Human Rights and Opportunities
Office of Public Hearings



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

v.

Department of Economic and Community Development, Respondent — March 7, 2019

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

Currently pending before the tribunal is the respondent's motion, filed on August 15, 2018, to dismiss and/or strike the revised whistleblower retaliation complaint. Accompanying the respondent's motion are a memorandum of law and evidentiary exhibits in support of the motion. On February 1, 2019, the complainant filed a response in opposition to the motion, along with an affidavit and extraneous exhibits in support of the objection. On February 22, 2019, the respondent filed a reply to the complainant's objection.

The respondent moves to dismiss [1] the revised complaint on the grounds that the complainant does not allege any adverse personnel action that was causally related to the alleged whistleblowing, depriving the tribunal of subject matter jurisdiction since the claim therefore does not fall within the narrow waiver of sovereign immunity contained in General Statutes §4-61dd. The respondent also moves in the alternative to strike [2] the revised complaint because it fails to state a claim for which relief may be granted.

The background and procedural history of the case have been fully set forth in the tribunal's ruling and order of August 2, 2018 on an earlier motion of the respondent to dismiss and/or strike the complainant's original whistleblower retaliation complaint. In that ruling, the tribunal struck portions of the complaint, which the complainant had filed on March 6, 2018, [3] and ordered the complainant to file an amended

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[1] Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies in relevant part 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] Section 4-61dd-15 (d) of the Regulations of Connecticut State Agencies 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."

[3] This is the second whistleblower retaliation action against the respondent. Complainant's first whistleblower retaliation complaint against the respondent, which was filed on February 1, 2017, was dismissed in its entirety on the basis that the complaint, as amended, failed to state a claim upon which relief may be granted. *Osmond v. Department of Economic and Community Development*, OPH/WBR 2016-325 (Ruling on motion to dismiss complaint January 18, 2017) (Ruling on motion to dismiss revised complaint January 3, 2018). The alleged whistleblowing disclosures in the present action, filed on March 6, 2018, are similar in character and mirror closely to the disclosures alleged in the complainant's first case. Substantively, the present complaint, as amended, alleges that the

pleading specifying the employee, or employees, of the auditors of public accounts to whom the complainant disclosed protected information, as well as the information that was disclosed. The tribunal based that ruling on the failure of the March 6, 2018 complaint to allege facts concerning the disclosures to state auditors to satisfy required elements for a prima facie case, and granted the respondent's motion to strike the entire complaint unless the complainant filed a revised complaint "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."

On August 15, 2018, the complainant filed an amended pleading, denominated the revised complaint, [4] in which he specified that he had made protected disclosures to John Geragosian, Auditor of Public Accounts, on December 18, 2016, April 18, 2017, and August 14, 2017, and provided details with regard to the content of the disclosures. In addition to adding new facts concerning the dates, content, and to whom the alleged whistleblowing disclosures were made, in the statement of damages portion of the revised complaint, the complainant adds an additional element to his prayer for relief, namely that he seeks to have his service ratings for *2017 and 2016* [5] removed and replaced with a rating equivalent to his 2015 rating as follows:

> "I would like DECD to *remove my last two Service rating* from my personal record and redo them to equivalence to my Service Rating I received in 2015 which was before my whistleblower complaints, because my work quality and quantity has improved since 2015. Below is my rating in 2015.
>
> a. Quality of work = Excellent
> b. Quantity of work = Excellent
> c. Dependability = Superior
> d. Ability to deal with people = Superior"

Revised Complaint ¶ 10 (emphasis added.)

Discussion and Analysis

Motion to Dismiss

A motion to dismiss "essentially assert[s] that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the [tribunal] .... A motion to dismiss tests, inter alia, whether, on the face of the record, the [tribunal] is without jurisdiction ...." (Citation omitted; internal quotation marks

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respondent gave the complainant a less favorable performance rating on December 6, 2017, in retaliation for engaging in the alleged whistleblowing.

[4] The revised complaint is the operative complaint. "The voluntary filing of an amended complaint operates as a withdrawal of the prior complaint, and, thereafter, the earlier complaint, though remaining in the files and constituting part of the history of the case, can furnish no basis for a judgment .... "(Citations omitted; internal quotation marks omitted.) *Ross v. Forzani*, 88 Conn. App. 365, 368 (2005).

[5] The prayer for relief in the revised complaint places the complainant's service rating for 2016 squarely in issue for the first time. In the original complaint the complainant sought to have his service rating for 2017 removed and replaced with a rating similar to the one he received in 2015, but did not refer to his 2016 rating (March 6, 2018 Complaint ¶ 10.)

omitted.) *Conboy v. State*, 292 Conn. 642, 650 (2009); *Caruso v. Bridgeport*, 285 Conn 608, 627 (2008); *Gurliacci v. Mayer,* 218 Conn. 531, 544-45 (1991). Claims that involve doctrines of sovereign immunity [6] implicate the tribunal's subject matter jurisdiction. *Miller v. Egan*, 265 Conn. 301, 313 (2003); *Manifold v. Ragaglia*, 94 Conn. App. 103, 114 (2006).

"Subject matter jurisdiction involves the authority of a court to hear and determine cases of the general class to which the proceedings in question belong." (Internal quotation marks omitted.) *Esposito v. Specyalski*, 268 Conn. 336, 348 (2004). "A [tribunal] does not truly lack subject matter jurisdiction if it has competence to entertain the action before it .... Once it is determined that a tribunal has authority and competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action .... It is well established that, in determining whether a [tribunal] has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." *Amodio v. Amodio,* 247 Conn. 724, 727-28 (1999).

"When the subject matter jurisdiction of the adjudicatory body is challenged, cognizance of it must be taken and the matter passed on before it can move one further step in the cause, as any movement is necessarily the exercise of jurisdiction." *Baldwin Piano and Organ Co. v. Blake*, 186 Conn. 295, 297 (1982); *Commission on Human Rights & Opportunities ex rel. Morales v. Trinity College*, 2013 WL 3380631, *2 (February 4, 2013) (Ruling on motion to dismiss). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *York v. Association of Bar of City of New York*, 286 F.3d 122, 125 (2[d] Cir. 2002) (quoting *Schever v. Rhodes*, 416 U.S. 232, 236 (1974)." *Horn v. Department of Correction*, 2012 WL 1576049, *1, OPH/WBR No. 2011-156 (March 27, 2012) (Ruling on motion to dismiss).

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. *Manifold v. Ragaglia*, supra, 94 Conn. App. 116; *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-52, cert. denied, 241 Conn. 906 (1997). 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 his favor. *Conboy v. State,* supra, 292 Conn. 651; *May v. Coffey,* 291 Conn. 106, 108–09 (2009); *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998).

In its motion to dismiss, the respondent does not contend that the revised complaint is not on its face "of the general class to which the proceedings in question belong." *Esposito v. Specyalski*, 268 Conn. 336, 348 (2004). Specifically, the respondent's jurisdictional argument revolves around the assertion that the complainant does not allege essential elements of his cause of action and therefore sovereign immunity shields the respondent government officials from liability since the claim does not fall within the narrow waiver of sovereign immunity contained in General Statutes § 4-61dd, the public whistleblower statute. Here, the respondent invokes the principle of sovereign immunity and argues that jurisdiction under the whistleblower retaliation statute is to be tested by a showing that the revised complaint is not viable. It

[6] The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. *Miller v. Egan*, 265 Conn. 301, 313 (2003). "The practical and logical basis of the doctrine [of sovereign immunity] is today recognized to rest ... on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property." (Citation omitted; internal quotation marks omitted). *Gold v. Rowland*, 296 Conn. 186, 212 (2010).

seems to me that the respondent has fused two distinct concepts and bases its jurisdictional challenge on the inability of the complainant to establish essential elements of his cause of action. "There is a significant difference between asserting that a plaintiff cannot state a cause of action and asserting that a plaintiff has not stated a cause of action, and therein lies the distinction between a motion to dismiss and a motion to strike." *Pecan v. Madigan*, 97 Conn. App. 617, 621 (2006), cert. denied, 281 Conn. 919 (2007).

Whether the tribunal is vested with the power to act is, I think, a different question from whether the complainant has alleged a viable cause of action. See, *Johnsrud v. Carter*, 620 F. 2d 29, 32-33 (3d Cir. 1980). As a rule, dismissal is not an appropriate remedy where the jurisdictional challenge is based on an allegedly defective cause of action. "In determining whether a [tribunal] lacks subject matter jurisdiction, the inquiry usually does not extend to the merits of the case." *Lampasona v. Jacobs*, 209 Conn. 724, 728, cert. denied, 492 U.S. 919 (1989). The legal insufficiency of a claim generally does not eliminate the subject matter jurisdiction of a court. *Bell v. Hood,* 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and ... must be decided after and not before the court has assumed jurisdiction over the controversy.") Similarly, when a jurisdictional challenge hinges on factual issues, rather than solely on issues of law, "a case-by-case determination that must be made on the facts of the particular case. Accordingly, although such a matter may be appropriate for resolution on a motion to dismiss for failure to state a claim or on a motion for summary judgment, both of which go to the merits, it is not appropriate for resolution on a ... motion to dismiss for lack of subject matter jurisdiction." *Johnsrud v. Carter*, Id. at 31-32, citing *Bell v. Hood*, supra 32-33 ("The failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."); see also, *Hill v. City of New York*, 45 F. 3d 653, 660 (2d Cir. 2007) (when immunity defense depends upon disputed factual issues, determination of jurisdictional challenge must await resolution of factual issues); *Conboy v. State*, supra, 292 Conn. 653-654 n. 17.

The respondent is essentially trying to accomplish through a motion to dismiss what is more appropriately accomplished by way of a motion to strike, or through summary judgment on the merits. *Johnsrud v. Carter*, supra 31-32; see, *Conboy v. State,* supra, 292 Conn. 653-654 nn. 16 and 17. Whatever bearing the absence of a responsive adverse personnel action causally related to the alleged whistleblowing may have on the merits of the cause, the issue requires further development and cannot be decided on a motion to dismiss solely as a matter of law.

Motion to Strike

A motion to strike for failure to state a claim for which relief may be granted presents a facial challenge to the sufficiency of the pleading. A "motion to strike is essentially a procedural motion that focuses on the pleadings." (Internal quotation marks omitted.) *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.

The legal standard on consideration of the legal sufficiency of a complaint to state a claim upon which relief can be granted is a familiar one. The sufficiency of the allegations of any complaint to state a legally cognizable claim is tested by the facts provable under the allegations of the pleading being challenged. *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003); *Poach v. Doctor's Associates, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV 0740233906S (September 22, 2008) (2008 WL 4634559, *1-2); *Commission on Human Rights & Opportunities ex rel. Perri v. Peluso*, 2008 WL 323662, CHRO No. 0750113 (January 11, 2008). 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, 350-51 (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). If any facts alleged in the complaint would support a cause of action, the complaint is not vulnerable to be stricken. *Coppola Construction Company, Inc. v. Hoffmann Enterprises Limited Partnership, et al.*, supra 350-51; *Sullivan v. Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117-18 (2006); *Bouchard* v. *People's Bank,* 219 Conn. 465, 471-72 (1991). "A claim for relief may be stricken only if the relief sought cannot be legally awarded." *Rich* v. *Foye*, 51 Conn. Supp. 11, 16 (2007).

"[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). 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). "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).

Generally, the tribunal will not consider extraneous information outside the pleadings when considering a motion to strike. When, as in the case of the present motion, the legal grounds for a motion to strike depend upon facts outside the pleading, the motion becomes a "speaking motion" to strike, which is not allowed as such. See, *Liljedahl Bros., Inc.* v. *Grigsby,* 215 Conn. 345, 348 (1990); *Doe v. Marselle*, 38 Conn. App. 360, 364 (1995), rev'd on other grounds 236 Conn. 845 (1996). "A speaking motion to strike is one improperly importing facts from outside the pleadings. Speaking motions have long been forbidden by our practice and were formerly known as speaking demurrers." (Citations omitted.) *Mercer v. Cosley,* 110 Conn. App. 283, 292 n. 7 (2008).

The present motion to strike, which relies upon and is accompanied by, documentary information outside the pleading, is a speaking motion. The respondent argues that on the facts alleged in the revised complaint, taken as true, the complainant cannot establish two essential elements of his claim of retaliation by the respondent for engaging in whistleblowing activity. The revised complaint alleges that on December 6, 2017, the respondent learned about the personnel action taken against him by the respondent for whistleblowing disclosures. The revised complaint goes on to allege that on the day before the complainant's last day of work for the respondent, he received a service rating that was lower compared to the service rating he received two years earlier in September of 2015.

The respondent supports its motion with evidentiary materials which pierce to the core of the case. Supporting documents attached to the motion and memorandum establish that the complainant's service rating was satisfactory and did not decline, but in fact improved, after he engaged in the alleged whistleblowing (Exhibit B), and that the only year-over-year decline in the complainant's performance evaluation (Exhibit A) occurred before any alleged whistleblowing.

By asking the tribunal to consider extraneous documentary evidence, the respondent is essentially seeking, through a speaking motion to strike, summary judgment on the ground that there is no genuine dispute as to any material fact and the respondent is entitled to judgment as a matter of law.

Consideration of the extraneous material attached to the respondent's motion, and to the complainant's objection to the motion, requires the tribunal to treat the respondent's speaking motion to strike as a motion for summary judgment. In the instant matter, the complainant had a full opportunity to reply and to submit factual material, including an affidavit and several exhibits in opposition to the respondent's motion. The parties have been given every reasonable opportunity to make an appropriate record and present materials pertinent to the motion. Accordingly, notwithstanding its designation, the respondent's motion to strike the revised complaint will be treated sua sponte as a motion for summary judgment. See, *Commission on Human Rights & Opportunities ex rel. Kelly v. City of New Britain*, 2004 WL 5380921, *2, CHRO No. 021-359 (October 14, 2004) (Ruling re motion to dismiss); *Commission on Human Rights & Opportunities ex rel. Payton v. Department of Mental Health and Addiction Services*, 2004 WL 5380916,, *2, CHRO No. 0220394 (July 6, 2004) (Ruling re motion to dismiss). I now turn to a consideration of its merits.

Summary Judgment

The principles that govern the tribunal's review on a motion for summary judgment are well established.

> "Practice Book § 17–49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party.... The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law.... In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact ... but rather to determine whether any such issues exist.... The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... Once the moving party has met its burden [of production] ... the opposing party must present evidence that demonstrates the existence of some disputed factual issue.... [I]t [is] incumbent [on] the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.... The presence ... of an alleged adverse claim is not sufficient to defeat a motion for summary judgment...." (Brackets in original; citations omitted; internal quotation marks omitted.)

Episcopal Church v. Gauss, 302 Conn. 408, 421-22 (2011); see also, e.g., *Vollemans v. Wallingford*, 103 Conn. App. 188, 293 (2007); *Commission on Human Rights & Opportunities ex rel. Carretero v. Hartford Public Schools*,2005 WL 5746419, supra, *7.

Summary judgment is designed to eliminate the delay and expense of litigating an issue where there is not a real issue to be tried. *Ocwen Federal Bank, FSB v. Charles*, 95 Conn. App. 315, 331 (2006), cert. denied 279 Conn. 909. "The purpose of a hearing is to resolve disputed issues of fact, and in those instances ... where the essential facts are not in dispute ... there would be no purpose served by conducting a hearing for its own sake." *Commission on Human Rights & Opportunities, ex rel. Blake v. Beverly*

Enterprises-Connecticut, et al., 1999 WL 34765982,*2, CHRO No. 9530630 (July 8, 1999) (Rulings on motions for summary judgment/dismissal and a directed verdict). Where there is no material fact in dispute, the pleadings need not be closed in order to move for summary judgment. *Girard v. Weiss,* 43 Conn. App. 397, 416, 417, cert. denied, 239 Conn. 946 (1996); *Ramos v. J.J. Mottes Co.,* Superior court, judicial district of Hartford, Docket No. CV 09-6006373-S (December 1, 2015) (2015 WL 9595342, *2).

The 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) (2013 WL 5814792,*6).

In its motion, the respondent asserts that the second and third elements of the complainant's prima facie case cannot be proven on the facts alleged. First, it argues that the complainant has not incurred or been threatened with any adverse personnel action; second, that a causal connection between the alleged whistleblowing and an adverse personnel action cannot be established.

The respondent strikes at the jugular of the complainant's retaliation claim by filling in the gap concerning the matter of the complainant's unexplained 2016 service rating. Through supporting materials attached to its motion, the respondent shows that the complainant's 2017 service rating review was positive, not negative, and was higher, not lower, than his service rating in 2016, the previous year. The respondent does not dispute that the complainant's 2015 service rating, which occurred prior to any whistleblowing activity, consisted of two excellent ratings and two superior ratings, and that the complainant's service rating for 2017 was lower than his service rating for 2015. However, the respondent attaches to its motion copies of the complainant's employee service ratings for 2016 and 2017, as Exhibits A and B, respectively. These exhibits demonstrate that the complainant's 2016 service rating, dated September 27, 2016, which occurred prior to any alleged whistleblowing activity, consisted of two superior ratings and two fair ratings (Exhibit A). The complainant's 2017 service rating, received on December 6, 2017 and the only service rating that occurred after the alleged whistleblowing, consisted of two superior and two satisfactory ratings (Exhibit B.) The complainant's post-whistleblowing service rating for 2017 thus was *higher* than the complainant's next preceding pre-whistleblowing service rating for 2016. On these facts, the only service rating that actually decreased, 2016, was issued *before* any whistleblowing activity and cannot be causally related to it.

The respondent argues that the complainant's 2016 and 2017 service ratings show clearly that the complainant's 2017 service rating was positive and did not decline, but in fact improved, after he engaged in whistleblowing activity, and that positive performance evaluations are not adverse employment actions as a matter of law, even where the evaluation was lower than previous years. *Moy v. Perez*, 712 Fed. Appx. 38, 41 (2d Cir. 2017); see also *Byrne v. Telesector Resources Group, Inc.*, 339 Fed. Appx. 13, 17 (2d Cir. 2009) (concluding that because satisfactory performance evaluation was still positive, it was not adverse employment action in Title VII retaliation context, even though evaluation was lower than in previous years). The respondent also argues that, taking the allegations in the revised complaint as true, there is no causal connection between a reduction in complainant's service rating and his alleged whistleblowing,

because the only year-over-year reduction in his service rating occurred in 2016 prior to the alleged whistleblowing.

I conclude that the respondent has satisfied its initial burden of establishing, through supporting factual documents, that there is no genuine dispute as to any material fact. Specifically, the respondent has demonstrated through admissible evidence that the complainant's service rating for 2017, the only adverse personnel action alleged, was in the positive range and had improved overall when compared with the rating that he received the previous year, 2016. Also, the only year-over-year reduction in the complainant's service rating occurred prior to the alleged whistleblowing.

To avoid summary judgment, the complainant must proffer countering evidentiary materials that dispute the material cited by the respondent, or otherwise show that the cited materials do not establish the absence of a genuine dispute of fact on the challenged elements of the claim. *Ramirez v. Health Net of Northeast, Inc.*, 285 Conn. 1, 10-11 (2008). However, as the opposing party, the complainant has not come forward with countervailing evidentiary materials that demonstrate the presence of any genuine issue of disputed fact for determination at a public hearing as to whether he suffered an adverse personnel action in retaliation for any whistleblowing.

In his objection, the complainant confirms the respondent's evidentiary showing that his post-whistleblowing service rating for 2017 was positive, not negative, and was higher than his pre-whistleblowing rating for 2016. Attached as an evidentiary exhibit to complainant's objection is a spreadsheet that reflects the complainant's service ratings over his entire career at the respondent agency. [7] The spreadsheet establishes that all of the complainant's employee service ratings were positive and that his December 6, 2017 service rating, which was more than satisfactory, was higher than his service rating for 2016, which also was satisfactory. The spreadsheet also confirms that the only service rating that reflected a year-over-year decline occurred in 2016, prior to the alleged whistleblowing. It is uncontroverted that the complainant's 2017 post-whistleblowing service rating was positive and was higher than the preceding 2016 pre-whistleblowing service rating, and that the only reduction in rating occurred in 2016. The complainant's evidence does not reveal a factual dispute.

Having considered the respective claims of the parties, including the documentary exhibits and other information submitted by both parties, and viewing the revised complaint and the submitted evidentiary materials in the light most favorable to the complainant, the tribunal is satisfied that there is no genuine dispute as to any material fact upon which the outcome of the case depends with regard to the claim of retaliation against the complainant for engaging in the alleged whistleblowing. Where the material facts essential to the complainant's prima facie case are uncontroverted and undisputed, only legal issues remain to be discussed and decided.

In support of its motion, the respondent argues that the complainant cannot meet the "adverse personnel action" element of a prima facie case as a matter of law because the only adverse personnel action alleged to have occurred in retaliation for the complainant having engaged in protected activity consists of a

[7] Other exhibits attached to the objection, namely an affidavit dated September 11, 2015, of Irena Baj Wright, in connection with some complaint filed by the complainant against the respondent Department of Economic Development, its then-commissioner, and other entities, and the complainant's service rating for 2018 as an employee of the State of Connecticut Department of Housing, are not relevant and have no bearing on the present case.

positive service rating that was higher than the service rating he received one year earlier, before the alleged whistleblowing. In the context of a whistleblower retaliation claim, a complainant must show that a reasonable employee would have found the challenged personnel action "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.

The United States Court of Appeals for the Second Circuit has expressly held that positive performance evaluations are not adverse employment actions as a matter of law, even where the evaluation was lower than previous years. *Moy v. Perez*, supra, 712 Fed. Appx. 41; *Byrne v. Telesector Resources Group, Inc.,* supra, 339 Fed. Appx. 17. The complainant's post-whistleblowing performance rating for 2017 was undisputedly positive and higher than the pre-whistleblowing service evaluation for 2016, even though the 2017 rating was less positive than in 2015. I conclude therefore that complainant's service rating for 2017 does not reach the level of material adversity necessary for a retaliation claim as a matter of law.

Furthermore, the complainant cannot establish any plausible causal connection between the only reduction in his employee service rating and the alleged whistleblowing. Although the complainant's 2016 service rating was lower than his service rating for 2015 and other previous years, it was in the satisfactory range and undisputedly occurred prior to the alleged whistleblowing, thus negating any possible causal connection between the 2016 service rating and the complainant's participation in the alleged whistleblowing.

In view of the foregoing, it is not possible for the complainant to establish two of the conditions necessary to make out a prima facie case and no liability can attach to the respondent.

Order of Dismissal

Therefore, the respondent's motion to strike, treated as a motion for summary judgment, is granted and the case is dismissed in its entirety.

It is so ordered this 7th day of March 2019.

Elissa T. Wright

Hon. Elissa T. Wright
Presiding Human Rights Referee

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