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

Michael Asante	: OPH/WBR No. 2006-031
v.	
University of Connecticut	: June 4, 2007

Ruling re: Motion to Dismiss

Preliminary statement

The complainant, Michael Asante, filed his whistleblower retaliation complaint with the chief human rights referee on August 8, 2006 alleging that the University of Connecticut (respondent or university) violated General Statutes § 4-61dd when it terminated his employment in retaliation for his disclosing information protected under §4-61dd (a).[1] On September 21, 2006, the respondent filed its answer denying the allegations. On January 16, 2007, the respondent filed a motion to dismiss and, on March 1, 2007, it filed a supplement to its motion. The motion was denied on March 2, 2007 and the complainant was ordered to amend his complaint.

The complainant filed his amended complaint on March 19, 2007 and the respondent filed its amended answer on April 2, 2007. The public hearing commenced on May 15, 2007. At the conclusion of the complainant's case-in-chief, the respondent

made an oral motion to dismiss the complaint pursuant to § 4-61dd-15 of the Regulations of Connecticut State Agencies (regulations).

For the reasons set forth herein, the respondent's motion to dismiss is granted.

Analysis

I

Section 4-61dd-15 of the regulations provides in relevant part: "(c) 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 jurisdiction; (2) Fails to state a claim for which relief can be granted; (3) Fails to appear at a lawfully noticed conference or hearing without good cause; or (4) Fails to sustain his or her burden after presentation of evidence." In this case, the respondent argued that the complainant failed to sustain his evidentiary burden. Transcript page (Tr.) 55.

The standard used to determine whether the complainant sustained his burden differs depending on the stage of the proceeding. When both the complainant and the respondent have presented their evidence and rested, the standard is whether the complainant established by a preponderance of the evidence that the respondent retaliated against him because of his disclosure of § 4-61dd (a) information. *Stacy v. Department of Correction*, OPH/WBR No. 2003-002 (Final Decision, March 1, 2004), 2004 WL 5000797. In this case, though, the respondent did not present any evidence,

instead moving for a dismissal of the complaint at the close of the complainant's case. As such, it is analogous to Practice Book § 15-8 wherein a defendant in a civil action may move for a judgment of dismissal after the plaintiff has produced evidence and rested if the defendant believes that the plaintiff failed to establish a prima facie case. Although the Practice Book is not applicable to administrative contested cases conducted under the Uniform Administrative Procedure Act, it can provide a useful analogy in appropriate circumstances. It is, therefore, appropriate to review case law relevant to §15-8 dismissals in determining the legal standard to be used in ruling on the respondent's motion to dismiss in this case.

In ruling on a motion to dismiss following the close of the complainant's case-in-chief, the appropriate legal standard is whether the complainant failed to establish a prima facie case. *Moss v. Foster*, 96 Conn. App. 369, 378. (2006). The standard for determining whether a complainant or plaintiff established a prima facie case is whether he offered "sufficient evidence that, *if believed*, would establish a prima facie case, not whether the trier of fact believes it. . . . For the court to grant the motion [for judgment of dismissal pursuant to Practice Book § 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint. . . . In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to

[the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor." (Emphasis in original; internal quotation marks omitted.) Id.

II

A

Whistleblower retaliation cases brought under § 4-61dd are 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 case law interpreting other anti-retaliatory statutes. *Stacy v. Department of Correction*, supra, OPH/WBR No. 2003-002. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. Id., 4. Under *McDonnell Douglas,* the three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of his prima facie case, (2) the respondent's burden in the presentation of its non-retaliatory explanation for the adverse personnel action, and (3) the complainant's ultimate burden of proving the respondent retaliated against him because of his disclosure of protected information. Id.

Because the respondent moved to dismiss the case following the complainant's case-in chief, the issue here is whether the complainant established a prima facie case in order to defeat the respondent's motion. The prima facie analysis has three parts, or prongs. To fulfill the first prong, the complainant must show that he engaged in a protected activity as defined by § 4-61dd by satisfying its statutory elements. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (1995). The statutory elements of

§ 4-61dd are: The respondent must be a state department or agency, a quasi-public agency, or a large state contractor. §§ 4-61dd (b) (1), 4-61dd (h) (2), 1-120 (covered entity). The complainant must be an employee of the covered entity. § 4-61dd (b). The complainant must have knowledge of either (1) 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 or (2) knowledge of corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in a large a large state contract (protected information). § 4-61dd (a). Further, the complainant must have disclosed the protected information 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 with a the large state contract (protected disclosure). § 4-61dd (b) (1).

Under the second prong, the complainant must show that he suffered or was threatened with an adverse personnel action by a covered entity subsequent to his protected disclosure. §4-61dd (b) (1); *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173. An adverse personnel action includes termination of employment. *Galabya v. New York City Board of Education*, 202 F.3d 636, 640 (2nd Cir. 2000); *Commission on Human Rights and Opportunities v. New Britain*, 2003 WL 21771973, 5. Other indicia

unique to a particular situation may also constitute adverse personnel actions. *Galabya v. New York City Board of Education*, supra, 202 F.3d 640.

The third prong requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and his protected disclosure. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. The complainant can establish the inference of causation (1) indirectly, for example, by showing that the protected disclosure was followed closely by discriminatory treatment or other circumstantial evidence such as disparate treatment of similarly situated co-workers; (2); directly, for example, through evidence of retaliatory animus directed against the complainant by the respondent; *Gordon v. New York City Board of Education*, 232 F.3d 111, 117 (2000); or (3) by operation of statute as a rebuttable presumption. § 4-61dd (b) (5). *Stacy v. Department of Correction*, supra, OPH/WBR No. 2003-002, 6 – 7.

The complainant's "burden of proof at the prima facie stage is *de minimis*." *LaFond v. General Physics Services Corporation*, supra, 50 F.3d 173.

B

Applying the analytical framework to the facts of this case, I conclude that the complainant failed to establish a prima facie case of retaliation. With respect to the statutory elements constituting the first prong of a prima facie case, the respondent is a

state agency; Amended answer; and the complainant was its employee; Exhibit C-3. The complainant repeatedly complained to the respondent about perceived flaws in the process that led to his termination (and expulsion); Tr. 9 – 24, 30 - 34; Exhibits C-6 and R-5. The complainant, however, did not establish that the process used by the respondent in his case constituted an unethical practice and/or abuse of authority.

With respect to the third prong of a prima facie case, he also failed to present sufficient evidence to establish an inference of a causal connection between the termination of his employment and his transmittal of protected information to an employee of the respondent.

The factual circumstances relevant to this case began with a complaint to the respondent by one student charging the complainant with assault. Exhibits C-14 and R-10. The complainant was also a student at the university as well as an employee. Pursuant to its student code; Exhibits C-2 and R-1; the respondent conducted a hearing in which the complainant and his accuser were given the opportunity to testify. The two hearing officers found the accuser's testimony to be credible, the complainant's testimony to be inconsistent and the complainant's behavior to have violated the respondent's rules, and they expelled the complainant from the university. Exhibit C-7. The complainant's appeal to the respondent's vice president of student affairs was denied. Exhibit R-2.

The incidents that the complainant identified as unethical practices or abuse of authority relate to the hearing process that resulted in his termination and expulsion.

The incidents, though, appear to be consistent with the procedures set forth in the respondent's student code. For example, the complainant complained about the respondent expelling him prior to the completion of the police investigation of the assault charge. Tr. 10 – 11. The student code, however, provides that the respondent's disciplinary procedures and criminal investigations may proceed simultaneously and that sanctions imposed by the respondent need not be altered based on the result of any civil or criminal litigation. Ex. C-2, Section III A. 3. He further claimed that the respondent violated police directives by placing him and his accuser in the same room during the hearing. Tr. 16 – 17. The student code, though, provides for bringing "people together in an effort to allow for the full consideration of an allegation that a student has violated The Student Code." Ex. C-2, Section V. Further, conducting hearings with both the plaintiff and defendant present is consistent with the practice of civil, criminal and administrative litigation.

The complainant alleged that he was expelled for saying that he would not make any statement beyond that which he had already given the police; Tr. 13 – 14; and for failing to accept the envelope that contained the statement of charges against him; Tr. 33 – 34. The respondent, though, expelled him because the hearing officers believed that the assault occurred based on the evidence presented. Ex. C-7.

The complainant accused the respondent of violating the federal Family Education Rights and Privacy Act (FERPA) by drafting the accuser's complaint and inserting his name in the complaint. Tr. 15; Ex. C-6, p. 3. The accuser, though,

apparently already knew the complainant's name; Ex. C-14; and there is no apparent information contained in the accuser's statement that violates FERPA.

The complainant also claimed that the respondent failed to provide him with the originals of his appeal. Tr. 19 – 20. The respondent, though, provided him with copies; Tr. 50; and it went unexplained by the complainant why providing accurate copies in lieu of originals would be an unethical practice or abuse of authority.

The complainant noted that the respondent was aware that he would appeal his expulsion. Tr. 21. According to the student code, the complainant has a right to appeal; Ex. C-2, Section IV. F; and the respondent advised him in the expulsion letter of his right to an appeal; Ex. C-7.

The complainant claimed that the respondent's refusal to provide him with a conference prior to the disciplinary hearing violated its rules and constituted an unethical practice and/or abuse of authority. Tr. 22. The conference, though, is optional, to be conducted "as deemed necessary and appropriate." Ex C-2, Section IV A. 3.

The complainant also claimed that the respondent failed to properly notify him of the charges against him. Tr. 23. Actually, though, the complainant received a copy of the charge statement after initially refusing to accept notification. Tr. 51 – 52.

The complainant also alleged defects in the conduct of the disciplinary hearing itself. Tr. 24, 30 – 32. However, although at the public hearing he had a computerized disk recording of the disciplinary hearing, he did not offer the disk into evidence at the

public hearing. The best evidence of the alleged deficiencies in the conduct of the disciplinary hearing would have been a record of that hearing.

Further, as the disciplinary action against the complainant had commenced prior to his complaints about its process, it is difficult to infer that the disciplinary action was retaliatory. Thus, the complainant has not established the causation element of his prima facie case.

C

While it is evident that the complainant disagrees with the result of the disciplinary hearing, and even if that decision were incorrect, he failed to establish a prima face case that the respondent engaged in unethical practices or abused its authority in the process that it used to arrive at its decision.

Order

As the complainant failed to establish a prima facie case, his complaint is dismissed.

_____
Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Michael Asante
Lee Williams
Michael Sullivan, Esq.

[1] Section 4-61dd provides:

"(a) Any person having knowledge of any matter involving corruption, unethical practices, violation 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 or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report, the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary, for the purpose of an investigation pursuant to this section. Upon the conclusion of the investigation, the Attorney General shall where necessary, report any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation.

(b) (1) 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 such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute; or (D) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract.

(2) If a state or quasi-public agency employee or an employee of a large state contractor alleges that a personnel action has been threatened or taken in violation of subdivision (1) of this subsection, the employee may notify the Attorney General, who shall investigate pursuant to subsection (a) of this section.

(3) (A) Not later than thirty days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section. If the human rights referee finds such 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. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person who was a party at such hearing, in accordance with the provisions of section 4-183.

(B) The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and noticing and conducting hearings under subparagraph (A) of this subdivision.

(4) As an alternative to the provisions of subdivisions (2) and (3) of this subsection: (A) 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 thirty days after learning of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, 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; or (B) an employee of a large state contractor alleging that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with the provisions of subsection (c) of section 31-51m.

(5) In any proceeding under subdivision (2), (3) or (4) of this subsection concerning a personnel action taken or threatened against any state or quasi-public agency employee or any employee of a large state contractor, which personnel action occurs not later than one year after the employee first transmits facts and information concerning a matter under subsection (a) of this section to the Auditors of Public Accounts or the Attorney General, there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section.

(6) If a state officer or employee, as defined in section 4-141, a quasi-public agency officer or employee, an officer or employee of a large state contractor or an appointing authority takes or threatens to take any action to impede, fail to renew or cancel a contract between a state agency and a large state contractor, or between a large state contractor and its subcontractor, in retaliation for the disclosure of information pursuant to subsection (a) of this section to any agency listed in subdivision (1) of this subsection, such affected agency, contractor or subcontractor may, not later than ninety days after learning of such action, threat or failure to renew, bring a civil action in the superior court for the judicial district of Hartford to recover damages, attorney's fees and costs.

(c) Any employee of a state or quasi-public agency or large state contractor, who is found to have knowingly and maliciously made false charges under subsection (a) of this section, shall be subject to disciplinary action by such employee's appointing authority up to and including dismissal. In the case of a state or quasi-public agency employee, such action shall be subject to appeal to the Employees' Review Board in accordance with section 5-202, or in the case of state or quasi-public agency employees included in collective bargaining contracts, the procedure provided by such contracts.

(d) On or before September first, annually, the Auditors of Public Accounts shall submit to the clerk of each house of the General Assembly a report indicating the number of matters for which facts and information were transmitted to the auditors pursuant to this section during the preceding state fiscal year and the disposition of each such matter.

(e) Each contract between a state or quasi-public agency and a large state contractor shall provide that, if an officer, employee or appointing authority of a large state contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for such employee's disclosure of information to any employee of the contracting state or quasi-public agency or the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section, the contractor shall be liable for a civil penalty of not more than five thousand dollars for each offense, up to a maximum of twenty per cent of the value of the contract. Each violation shall be a separate and distinct offense and in the case of a continuing violation each calendar day's continuance of the violation shall be deemed to be a separate and distinct offense. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the superior court for the judicial district of Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this section relating to large state contractors in a conspicuous place which is readily available for viewing by the employees of the contractor.

(g) No person who, in good faith, discloses information to the Auditors of Public Accounts or the Attorney General in accordance with this section shall be liable for any civil damages resulting from such good faith disclosure.

(h) As used in this section:

(1) ‘Large state contract’ means a contract between an entity and a state or quasi-public agency, having a value of five million dollars or more; and

(2) ‘Large state contractor’ means an entity that has entered into a large state contract with a state or quasi-public agency.”