STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

Bradley Beecher, Complainant	:	OPH/WBR 2008-078
v.	:	
State of Connecticut, Department of Transportation and Ricardo Almeida, Respondents	:	January 7, 2009

RULING ON MOTION TO DISMISS

On July 17, 2008, the complainant filed a whistleblower retaliation complaint pursuant to General Statutes § 4-61dd (b). He subsequently filed amended complaints on July 22 and July 29, 2008, as well as a "supplemental letter" on August 6, 2008. (Except where context requires otherwise, I will refer to all of these documents collectively as the complaint.) The complaint comprises two distinct retaliatory acts in response to two separate whistleblower disclosures: one incident is his termination as executive director of the Estuary Transit District (ETD); the other involves changes to the executive director job requirements that prevented him from reapplying to his former position. (Complainant's response to the motion to dismiss, p. 1)

On September 19, 2008, the respondents filed a motion to dismiss the complaint (the motion). The complainant filed a response to the motion on October 14, 2008 (response to motion), with an addendum filed on October 17, 2008. The respondents filed their rebuttal to the response to motion on October 20, 2008, and the complainant filed his response to the rebuttal later that same day.

The respondents raise two particular arguments in their motion: (1) the complainant failed to file his complaint in a timely manner; and (2) the

complainant lacks standing because he is not an employee protected by § 4-61dd, his employer is not regulated by the statute, and his alleged whistleblower disclosures were not made to an appropriate person or entity and thus are not protected disclosures.

Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies (the regulations) authorizes the presiding referee to dismiss a complaint for, among other reasons, lack of subject matter or personal jurisdiction.[1] *Stutts v. Frost*, 2008 WL 4809605 (OPH/WBR No. 2008-089, October 27, 2008).

Although timeliness, as discussed in detail below, is not a jurisdictional issue, filing within the statutory deadline is mandatory, absent waiver, tolling or some other compelling equitable justification. *Williams v. Commission on Human Rights and Opportunities*, 257 Conn. 258 (2001). Thus, the referee is also empowered to dismiss complaints that are time-barred by the statute of limitations. See, e.g., *Samson v. Dept. of Public Safety*, supra; *Banks v. Civil Service Commission*, 2006 WL 2965501 (OPH/WBR-2006-017, March 21, 2006); *Duhaney v. Birk Manufacturing, Inc*., 2006 WL 4753458 (OPH/WBR No. 2005-014, January 12, 2006); *Commission on Human Rights & Opportunities ex rel. Callado v. Town of Fairfield*, 1999 WL 34765986 (CHRO No. 9420437, October 15, 1999) (case brought under Connecticut Fair Employment Practices Act [CFEPA]).[2]

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, the complainant's allegations

[1] The whistleblower retaliation regulations, §§ 4-61-dd-1 through 4-61dd-30, adopted April 23, 2003, were recently revised, with an effective date of December 30, 2008. As stated in § 4-61dd-2 (d), the revisions apply to complaints—such as this—pending as of December 30, 2008, unless avoidable unfairness would result. The implementation of the new regulations does not meaningfully change the outcome of this motion.

[2] Regarding the *Callado* case, the referees have the same dismissal authority for CFEPA cases as they do for the § 4-61dd cases. See § 46a-54-88a of the regulations.

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. *New England Savings Bank v. Bedford Realty Corp*., 246 Conn. 594, 608 (1998); see also *Banks v. Civil Service Commission*, 2006 WL 2965501 (OPH/WBR No. 2006-017, March 21, 2006).

After reviewing the pleadings, the motion and all subsequent submissions, along with the supporting materials and the cases referenced therein, I hereby grant the motion to dismiss for the reasons set forth below.

A. Retaliatory Termination

The complainant was hired by the Estuary Transit District (ETD) in November 2006 to serve as its executive director. The ETD, an entity created pursuant to General Statutes § 7-273b et seq., serves nine municipalities along or near the Connecticut shoreline; its board of directors includes selectmen or other representatives of each town. Although the ETD is not a named party to this action, the complainant contends that it is an arm or agent of respondent Department of Transportation (DOT). (See complaint, ¶¶ 1, 2 and 7; response to motion, p. 2.) Respondent Ricardo Almeida is a DOT employee to whom the complainant and the EDT reported. (See complaint, ¶ 8-A; response to motion, pp. 1-2.)

The complainant alleges that he was terminated in retaliation for disclosing, pursuant to General Statutes § 4-61dd (a), numerous allegations of the ETD's mismanagement, financial fraud, corruption, gross waste of funds, violations of the state freedom of information act, and abuse of authority.

The respondents contend, among their other arguments, that the complaint is time-barred. General Statutes § 4-61dd (b) (3) (A) requires a complainant to file his complaint 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 retaliation for his whistleblowing disclosures. (Emphasis added.) The complainant filed his complaint on July 17, 2008. Thus, I need to determine when the complainant was terminated from his position as the ETD executive director and, more important, for purposes of calculating the thirty-day filing period, when the complainant learned of his termination.

The pertinent—and uncontested—events, as described by the complainant in the record before me, are as follows:

> -On August 24, 2007, the ETD board of directors asked the complainant to resign. (Complaint, ¶ 9-B; response to motion, p.2)
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> -From August 27 through 29, 2007, the ETD locked the complainant out of his office, denied him computer access, and hired police and security guards to bar the complainant from the premises. (Complaint, ¶¶ 9-A, 9-B; Attorney David Denvir's November 27, 2007 letter, p. 2)
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> -In a September 27, 2007 letter to the DOT transit administrator, the ETD board chairperson, Doris Sanstrom, wrote that the complaint was "no longer the Executive Director of the [ETD] effective September 7, 2007." (Complaint, ¶ 9-B; Sanstrom letter, attached to motion to dismiss)
>
> -The complainant filed his original complaint on July 17, 2008, approximately ten months after his termination.

A November 27, 2007 letter written by the complainant's then-attorney, David Denvir, to the ETD counsel contains numerous references to the complainant's allegedly unlawful termination, a proposed severance package, revocation of his computer passwords and his demand for back pay accruing from August 29, 2007. Denvir's correspondence not only acknowledges Sanstrom's letter identifying September 7, 2007 as the complainant's termination date, but also refers to a pink slip "termination notice" accompanying that letter. Thus, by September 27, if not sooner, the complainant was unquestionably aware that he was terminated, and if the termination was not formalized in August, it unequivocally was on September 7, 2007. Even if the complainant had not seen Sanstrom's letter or received a pink slip, he certainly knew about his termination

prior to the preparation of Denvir's letter, November 27, 2007, as that letter was based on information he provided to Denvir. At the latest, his deadline for filing his complaint would have been some time prior to December 27, 2007.

The complainant argues that he was not terminated until the parties' negotiations ended unsuccessfully in April 2008 or, at a minimum, that he did not grasp the finality of his termination until then. Allegations in the complaint and documents submitted in response to the motion belie this contention. For example, the complainant himself described his employment to respondent Almeida as running from November 2006 to September 2007 (second amended complaint, ¶ 8-A); at the September 12, 2007 meeting of the Lower Connecticut River Valley Selectmen Association (LCRVSA), the complainant and other attendees discussed the complainant's recent termination (response to motion, Ex. D); in an October 19, 2007 complaint to the Freedom of Information Commission (FOIC), the complainant acknowledged his "firing" (response to motion, p. 8 and Ex. B); at a November 14, 2007 meeting of the LCRVSA, the complainant's wife, at the complainant's behest, presented questions about the complainant's termination (response to motion, p.8); and in a January 25, 2008 email to the ETD he refers to himself as the "former executive director" (addendum to response to motion). Accordingly, I reject the complainant's intimations that he was unaware of his termination in the latter part of 2007 or in early 2008. With a filing deadline of thirty days after the date the complainant learned of the adverse action, I conclude that his complaint was filed well beyond the deadline.

The thirty-day filing requirement, however, is not a jurisdictional prerequisite, but resembles a mandatory statute of limitations, with which one must comply absent factors such as consent, waiver or equitable tolling. *National Railroad Passenger Corp. v. Morgan,* 536, U.S. 101, 113 (2002) (discussing EEOC filing deadlines); *Williams v. Commission,* supra, 257 Conn. 284 (discussing filing deadlines for complaints filed under the Connecticut Fair Employment Practices Act

[CFEPA]).[3] Neither intentional waiver nor consent obviates the statutory deadline in this case. In limited circumstances, equitable considerations may toll the statute of limitations and extend the filing deadline. *Zerilli-Edelglass v. New York City Transit Authority*, 333 F.3d 74, 80 (2nd Cir. 2003); *Williams v. Commission on Human Rights and Opportunities,* 67 Conn. App. 316, 329 (2001); *Cassidy v. University of Connecticut Health Center,* 2008 WL 2683293 (OPH/WBR No. 2008-072, June 5, 2008); *Rodriguez v. Connecticut Board of Education & Services for the Blind,* 2008 WL 597268 (OPH/WBR No. 2007-065, February 6, 2008). The complainant argues that such circumstances exist here.

In certain circumstances the doctrines of equitable estoppel or equitable tolling may justify the extension of a statutory deadline. Although courts sometimes refer to the two interchangeably and inconsistently, they are distinct concepts, with the former, at least in the context of tolling a statute of limitations, typically a variant or subset of the latter. See *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 71 (1st Cir. 2005); *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996). Equitable estoppel generally applies when the claimant knew of the existence of his cause of action, but the another party either has misrepresented the length of the limitations period or has in some way lulled the claimant into believing that litigation was unnecessary at that time. *Gager v. Sanger*, 95 Conn. App. 632, 637 n.4 (2006); *Gallop v. Commercial Painting Co., Inc*., 42 Conn. Sup. 187, 195 (Conn. Super. 1992); *Wilfert v. Allstate Insurance Company*, 2007 WL 2034921, *5 (Conn. Super.); *Rodriguez v. Connecticut Board of Education,* supra, 2008 WL 597268. An affirmative act or statement on the part of the other party, rather than mere silence, is a necessary component of the doctrine. *Wilfert v. Allstate*, supra, *5. To succeed in this argument, the claimant must show that the party sought to be estopped from raising a defense of "untimeliness" acted with the specific intent of thwarting a timely complaint and that, in turn, the claimant acted

[3] Employment discrimination and retaliation cases under CFEPA and its federal counterpart, Title VII, provide useful guidance for interpretation and application of § 4-61dd. *Asante v. University of Connecticut*, 2007 WL 1052596 (OPH/WBR No. 2006-031, June 4, 2007).

in reliance thereupon to his own detriment. *Lunn v. Tokeneke Association, Inc.,* 227 Conn. 601, 607 (1993)*; Gallop v. Commercial Painting*, supra, 194.

For example, in *Rodriguez v. Connecticut*, supra, 2008 WL 597268, the complainant argued that she delayed filing her whistleblower complaint because the respondent assured her that a resolution would be forthcoming if she dropped her complaints; moreover, she claimed, the respondent leveraged its power and authority to intimidate, harass and discriminate against her, making it very difficult for her to file a complaint. The presiding human rights referee, after providing the complainant with further opportunity to identify specific actions that might warrant extension of the filing period, concluded that the complainant failed to provide information showing that the respondent "delayed, hindered, misled, lulled her into inaction or prevented her from filing her whistleblower retaliation complaint on or before July 31, 2007." Nothing in the extant record demonstrates that the respondents or the ETD intentionally misrepresented the limitations period or induced the complainant to delay filing his whistleblower retaliation complaint.

The broader doctrine of equitable tolling allows a tribunal to extend the statute of limitations for an assortment of reasons—not limited to the deceitful conduct of the opposing party—to avoid inequitable circumstances or results. The Second Circuit Court of Appeals, however, has determined that equitable tolling is only appropriate in "rare and exceptional circumstances." *Smith v. McGinnis,* 208 F.3d 13, 17 (2nd Cir. 2000). To avail himself of the doctrine, the complainant would need to demonstrate that "extraordinary circumstances prevented him from filing . . . on time." Id., 17; *Johnson v. Nyack Hospital*, 86 F.3d 8, 12 (2nd Cir. 1996). This tribunal, likewise, recognizes that while addressing a claim of equitable tolling lies within the province of the fact-finder, it should be approved only in "extraordinary circumstances." *Commission on Human Rights & Opportunities ex rel. Perri v. Peluso***,** 2008 WL 2683292 (CHRO No. 0750113, June 13, 2008), citing *Wallace v. KX Industries*, 1999 WL 1421659, *2 (D.Conn.). As discussed in detail below, no such extraordinary circumstances existed.

Negotiations do not toll the statute of limitations

Although the complainant acknowledged missing his thirty-day deadline (response to motion, p. 9), he offers a variety of justifications for tolling the statute of limitations, notably that he and his then-attorney were involved in seven or eight months of negotiations with the ETD concerning his termination and possible reinstatement. (Complaint, ¶ 9-A; addendum to response to motion, p. 1). He contends, therefore, that the many months of negotiation should suspend the filing period since he did not believe he needed to file a whistleblower retaliation complaint until negotiations ended and he finally realized that he would not be "returned to [his] position." [4]

Courts and this tribunal have viewed such an argument with disfavor. It is "well established that mere negotiations toward an amicable settlement afford no basis for an estoppel." *Scalise v. American Employers*, supra, 2000 WL 765121, *7, quoting *Krupa v. Kelley*, 5 Conn. Cir. 127, 132 (App. Div. 1968); see also *Wilfert v. Allstate,* supra, *5 (limitation period not tolled when plaintiffs delayed commencement of legal action because of ongoing negotiations). In *Cassidy v. University of Connecticut Health Center,* supra, 2008 WL 2683293, the complainant argued that her filing "was inhibited by the parties' attempt to resolve the matter informally." As the presiding referee ruled, "Certainly the pressure of this situation might cause an employee to eschew legal action for fear of thwarting any potential resolution . . .; on the other hand, a prudent employee should take all appropriate steps to preserve her rights lest no resolution be forthcoming." Id. Based on the record before me, the complainant failed to take the logical steps to protect his legal interests; that is, he failed to exercise reasonable diligence when he held his claim in abeyance pending the outcome of the negotiations. See also *Rodriguez v. Connecticut*, supra, 2008 WL 597268. In sum, the ongoing negotiations did not toll the statutory filing period.

[4] Again, the use of phrases such as "returned to his position" and, elsewhere, "get his job back" confirms that the complainant fully understood that he had been terminated, not merely that he was in danger of being terminated.

Assuming, merely for the sake of argument, that this argument had legal merit, the thirty-day filing period would begin to run when the negotiations ended in April 2008. Absent record reference to a specific date in April, I will use April 30, the date most favorable to the complainant, as the beginning of the filing period. Even under this hypothetical scenario, the filing deadline would have been May 30, 2008, a deadline missed by more than a month and a half.

The attorney's advice

Although the complainant appears pro se in the adjudication of this case, he retained Attorney Denvir from the time of his termination at least until the end of negotiations in April 2008. (Addendum to response to motion, p.1; Denvir's November 27, 2007 letter) In urging the tolling of the statute of limitations, the complainant places blame on his attorney, among others. The complainant insists that he would have filed his complaint "within the 30 day time period rather than attempting to negotiate with the ETD if he had received accurate advice from [his] attorney. . . He [i.e., the complainant] has an email showing that he asked his attorney about whether or not he should file a . . . complaint within the 30 day time limit. The attorney told the Complainant that he could not." (Emphasis added.) (Addendum to response to motion, p. 2) Attempting to shift the responsibility and blame to his attorney is unavailing.

The complainant has provided no legal support for his argument that reliance upon an attorney's incorrect advice would equitably toll the statue of limitations. Conversely, "[t]here is a strong tendency not to apply the doctrine of equitable estoppel when a party is represented by an attorney." *Williams v. Commission,* supra, 67 Conn. App. 328; see also *Brigian v. Artuz,* 37 Fed. Appx. 559, 561 (2nd Cir. 2002) (attorney error preventing plaintiff from filing on time normally not considered an extraordinary circumstance); *Keyse v. California Texas Oil Corporation,* 590 F.2d 45, 47-48 (2nd Cir. 1978) (tolling improper if claimant was represented by counsel during the filing period); *Dumas v. Dzumnda*, 2007 WL 1297144, *3 (D.Conn.) (poor legal advice or outright attorney error normally

inadequate to create the extraordinary circumstances warranting equitable tolling); *Crossman v. Crosson*, 905 F.Sup. 90, 95 n.3 (E.D.N.Y. 1995) (equitable tolling of the filing time inappropriate even if the plaintiff was given incorrect legal information during the period in which she was statutorily required to file charges); *Alvarez v. Delta Airlines, Inc*., 319 F.Sup. 2d 240, 248-49 (D. P.R. 2004) (if employee consults with or retains counsel prior to the expiration of the Title VII filing period, then equitable tolling is inapplicable).

The very language of the complainant's email, asking his attorney "whether or not he should file a . . . complaint within the 30 day time limit," demonstrates that the thirty-day filing period had not yet expired at the time complainant made this inquiry. Furthermore, Attorney Denvir's involvement within the thirty day filing period is evident by his reference to his own September 20, 2007 FOIA request—a request made less than thirty days after the respondent's board demanded the complainant's resignation and thirteen days after the "official" September 7 termination date. (Denvir's November 27 letter, p. 3).

The Second Circuit Court of Appeals has acknowledged that while the actions of a plaintiff's attorney normally do not constitute the extraordinary circumstances that allow tolling of a statute of limitation, at some point an attorney's behavior may be so incompetent or outrageous as to be "extraordinary." *Baldayaque v. United States*, 338 F.3d 145, 152 (2nd Cir. 2003); *Dumas v. Dzumnda*, 2007 WL 1297144, *3 (D.Conn.). In *Baldayaque*, the attorney ignored the requests of his client, failed to perform necessary legal research, failed to apprise his client of the status of the case, and failed to explain the case to allow the client to make informed decisions. The court concluded that such egregious conduct was the exception to the general rule and, indeed, was so far out of the range of expected professional behavior as to be deemed "extraordinary." *Baldayaque v. United States*, supra, 152.

In the present case, however, the myriad pleadings, arguments and supporting documents, viewed as a whole, do not depict behavior sufficiently egregious as

to warrant tolling of the statute of limitations. Although the attorney did not threaten or pursue a whistleblower retaliation claim at the time, and although he may have misconstrued the applicable deadlines, he unquestionably was working toward resolution of his client's claims and was exploring alternative means of legal recourse against the EDT, including but not limited to claims of slander, intentional infliction of emotional harm, unlawful discharge in violation of the ETD's own policies, and violation of the state Freedom of Information Act. (Denvir's November 27 letter, pp. 5-6). The attorney's action or inaction does not warrant equitable tolling of the filing deadline.

Information from the CHRO employee

The complainant also contends that he was misled by an employee of the Commission on Human Rights and Opportunities (CHRO).[5] According to ¶ 8-A of the complaint, "[t]hree weeks after I was removed from the position of Executive Director by the Chairman of the Estuary Transit Board, I inquired about whether or not the Estuary Transit District is a quasi-public agency from an employee of the [CHRO]." When the employee answered in the negative, the complainant refrained from filing his complaint.

Although a claim of equitable estoppel typically stems from an employer's deliberate actions or comments, the actions of the CHRO, however, are not beyond reproach and inaccurate information delaying the filing of a complaint may also form the basis for equitable tolling. *Commission ex rel. Perri v. Peluso*, supra, 2008 WL 2683292. See also *Bartniak v. Cushman & Wakefield, Inc*., 2001 WL 1505501, *6 (S.D.N.Y. 2001) (equitable tolling prevents claimant from being penalized for error by human rights agency); (*Cooper v. Wyeth Ayers &*

[5] It is possible that the complainant means an employee of the Office of Public Hearings, which adjudicates whistleblower retaliation claims independent of its involvement with CHRO discrimination cases.

Lederle, 34 F.Sup.2d 197, 202 (S.D.N.Y. 1999) (agency error leading to late filing should not work to claimant's detriment).[6]

The complainant's argument is meritless. Three weeks after he was removed from his position by the ETD chairperson, the complainant asked a CHRO (or OPH) employee whether the ETD was considered a quasi-public agency. The employee answered in the negative. (Complaint, ¶ 8-A) The employee in fact did not mislead the complainant—either accidentally or deliberately. Rather, the employee provided the correct answer: the ETD is not a quasi-public agency, an entity that is clearly defined in General Statutes § 1-120 (as cross-referenced by § 4-61dd (a)).[7] At no later date did—or could—the complainant learn otherwise in order to invoke the doctrine of equitable tolling.

Information from the selectmen

The complainant also argues that he would have filed a timely complaint had he received correct advice from area selectmen: "[n]one of the area selectmen knew [whether] the ETD could possibly be considered a state agency or 'arm of the state' . . ." (Addendum to response to motion, p. 2). The complainant does not identify these individuals and, although some selectmen from member towns sit on the ETD board, I cannot determine whether these particular selectmen were part of the board and their responses attributable to the ETD. In pointing to the ignorance of the selectmen, the complainant quotes *Williams v. Commission*,

[6] Also see *Keyse v. California Texas Oil,* supra, 590 F.2d 47, in which the Court of Appeals held that equitable tolling of the Title VII filing period is inappropriate if the plaintiff was represented by counsel during the period in which she was statutorily required to file her charges with the EEOC, notwithstanding the plaintiff's allegations that she was given incorrect information by both an EEOC employee and her own counsel.

[7] According to General Statutes § 1-120, "Quasi-public agency" means the Connecticut Development Authority, Connecticut Innovations, Incorporated, Connecticut Health and Educational Facilities Authority, Connecticut Higher Education Supplemental Loan Authority, Connecticut Housing Finance Authority, Connecticut Housing Authority, Connecticut Resources Recovery Authority, Capital City Economic Development Authority and Connecticut Lottery Corporation. See *LeGrier v. City of Hartford, Police Department,* OPH/WBR No. 2008-083 (December 11, 2008).

supra, 67 Conn. App. 329: "[I]n limited circumstances, an employer's behavior in delaying the filing of a complaint will toll a statute of limitations." (Addendum to response, p. 2). Again, the inability to provide a correct answer—or any answer—does not automatically connote a deceptive motive attributable to ETD or the respondents.

Regardless of their status vis-à-vis the board, the selectmen's inability to answer the complainant's legal question constitutes neither incorrect nor deliberately misleading information, and thus does not lead to the "extraordinary circumstances" necessary to invoke equitable estoppel or tolling of the filing period.

Status of his successor

The complainant also argues that he was unaware of his legal standing to file a § 4-61dd (b) complaint until he learned that his interim successor, Kimberly Morton, was a state employee. Based on Morton's status, he concludes that he, too, must have been a state employee while employed as the executive director. According to his response to the motion,

> It is true that I filed [this] complaint after the 30 day period had passed from the time I was removed from my position. However, I believe that my complaint was filed in a timely manner, filed once I learned that I had standing in which to make a complaint. Once my position was [re]filled by a State Employee [i.e., Kim Morton] I believe my status to legitimately make a complaint became clear.

(Emphasis added.) (Response to motion, p. 9)

This argument does not invoke any "extraordinary circumstances" and thus does not warrant equitable tolling of the filing period. Even assuming, arguendo, that the complainant first realized that he could file a claim once Morton was appointed, then Morton's appointment would be the trigger for the thirty day filing period. Although the record does not indicate the date of Morton's appointment, the minutes from the regular ETD meeting on May 16, 2008 reveal that she was already interim executive director by then. Casting this situation in a light most

favorable to the complainant, and thus assuming for the sake of argument that May 16 was Morton's first day, the complainant still needed to file no later than June 15, 2008. Even under this implausible scenario, he failed to meet that deadline.

Moreover, the complainant failed to identify probative evidence that Morton was, in fact, a state employee. According to affidavits from Michael Sanders (the DOT traffic administrator) and respondent Almeida, Morton was not an employee of DOT, although DOT did arrange a temporary move from her employer, the First Transit District, to the ETD. The DOT had made similar temporary transfers in the past. (See affidavits accompanying the respondents' motion and their subsequent rebuttal of complainant's response.) Almeida's affidavit further confirms, without sworn contradiction, that neither Morton nor the complainant was paid by DOT.

The complainant filed no affidavits to counter the respondents' arguments, but instead relied upon an August 2008 email exchange between his wife and Linda Krause, director of Connecticut River Estuary Regional Planning Agency (CRERPA) and staff member of the LCRVSA. (Response to motion, Attachment F). In the initial email on August 8, 2008, Katie Beecher asked, "Do you know why Kim Morton has been telling everyone that she is from the state? Did you know she isn't?" Three days later, Krause replied:

> While [Morton] is normally a Connecticut Transit employee, she is being paid by the State and was hired by the state for this interim job. She has done similar fill-in work for them before . . . She is on leave from part of her job at CT Transit. I met with [DOT officials] to make the case for an interim director and for state funding of same before she came. For purposes of this task, she **IS** a state employee/subcontractor.

(Emphasis in original.) This email exchange merely exacerbates, rather than resolves, the problem. First of all, Katie Beecher's email reveals that she—and, by implication, her husband—believed as late as August 8, 2008 that Morton was not a state employee. In response, Krause, who is not an attorney, identified

Morton as a "state employee/subcontractor," two mutually exclusive terms that, without further clarification, cannot confirm that Morton was a state employee while serving as executive director. Finally, even if Morton were a temporary state employee, she served as such only "[f]or purposes of this task" after the DOT took over the operation of the ETD in April 2008. (See also response to motion, pp. 3, 8.) The complainant's position was not comparable; until his termination, he was the permanent executive director, hired by and paid by the ETD. His status is not defined by Morton's status, even if one could conclusively determine the nature of Morton's status.

Alternatively, if the filing period were to run from when the complainant ostensibly "learned" that Morton was a state employee, nothing in the record pinpoints this date other than the email exchange between Katie Beecher and Linda Krause. The complainant filed his second revised complaint and supplemental letter in July 2008. Relying now upon an email exchange that took place a month later defies logic. The complainant would need to show that he acquired the pertinent, new information prior to his revised complaint, in order to claim equitable tolling of his deadline. Since he has not done so, he cannot legitimately claim that he filed after he learned that he, like Morton, could have been a state employee.

The July 2008 posting of revised job requirements

Finally, in his second amended complaint, the complainant attempts to extend the deadline even further. He claims that not until July 10 or 25, 2008, when he saw the revised (and for him, unattainable) job requirements for the vacant executive director position, did he realize that his battle for reinstatement was truly over. Thus, in his October 20, 2008 response to the respondent's rebuttal, the complainant argues that he still "believed that being returned to his position was a possibility until reading the [job posting] on the internet, which stated that all applicants for the Executive Director position must have seven years of transportation experience. The [revised whistleblower retaliation] complaint was filed within thirty days of the . . . posting."

This is essentially the same absurd logic he employed unsuccessfully vis-à-vis the end of negotiations three months earlier: Although he learned of his termination in August or September 2007 (or, at the latest, November 2007), he could not accept its inevitability until faced with additional concrete evidence. Whatever his "belief," whatever the basis for his dashed hopes, the complainant has failed to demonstrate the extraordinary circumstances that might warrant equitable tolling.

In conclusion, none of the foregoing arguments warrants tolling of the filing period. The claim of retaliatory termination must be dismissed as untimely.

B. The Subsequent Whistleblowing and the Revised Job Requirements

On June 24, 2008, long after his ETD employment ended, the complainant made certain disclosures to the attorney general regarding the ETD's alleged misuse of funds and other "illegal, unethical and improper behavior." (Second amended complaint, ¶ 8-A; response to motion, p. 3) I will assume, for the purposes of this motion, that the nature of those disclosures comports with the requirements of § 4-61dd (a). As discussed above, given the timing of events, these June 2008 disclosures occurred long after the complainant learned of his termination and thus cannot be a causal predicate for his retaliatory termination claim. Nonetheless, in his second amended complaint, the complainant has pleaded another retaliatory action, allegedly resulting from his June 2008 disclosures. This additional claim fails as well.

On July 10, 2008, the ETD posted a job announcement for an executive director on "Career Builder," an internet job-search site. (See second amended complaint ¶9-A; see also job description and job announcement for publication attached to response to motion.) The complainant discovered this posting either that day (second amended complaint, ¶ 9-A) or on July 25, 2008 (response to motion, p. 3). One of the requirements for the position was "seven years of experience in

transportation." (Id., 4) According to the complainant, in its entire twenty-year existence, the ETD had never required such experience. Lacking the requisite seven years, the complainant was ineligible for the position. He argues—unsuccessfully—that the requirements were deliberately changed to prevent him from reapplying for the position, in retaliation for his disclosures to the attorney general. (Second amended complaint, ¶ 9-B; response to motion, pp. 3-4).

First, even if ETD were a state agency when the complainant worked there, or if it became an agent or arm of the state when DOT assumed oversight in April 2008 (see response to motion, p.3), the complainant was not an employee of either ETD or DOT at the time he made his disclosures to the attorney general or at any time thereafter. For this reason alone, this tribunal lacks jurisdiction over the more recent complaint and it must be dismissed.

Moreover, a prima facie case of retaliation under General Statutes § 4-61dd (b), requires, among other things, a de minimis showing of a causal nexus between his disclosure to the attorney general and the adverse personnel action. See, e.g., *Asante v. University of Connecticut*, OPH/WBR No. 2006-031, 4-5 (June 4, 2007), citing *LaFond v. General Physics Services Corp*., 50 F.3d 165, 172-73 (2nd Cir. 1995); *Stacy v. State of Connecticut, Department of Correction,* 2003 WL 25592795 (OPH/WBR No. 2003-002, September 15, 2003).

The revised job description bears a formal revision date of June 20, 2008 (Response to motion, Attachment J). The complainant made his whistleblower disclosures to the attorney general on June 24, 2008 (Second amended complaint, ¶ 8-A; response to motion, p. 3). Because the job requirements reflect the ETD's intentions at the time they were formalized, they cannot be considered a response to whistleblower disclosures made four days later.[8] Given

[8] The fact that the complainant learned of the revisions on July 10 or July 25 makes utterly no difference, as the inquiry here focuses not on the triggering of the thirty-day filing period, but on the causal connection between the complainant's protected activity and the alleged adverse personnel action.

the timing of the two key incidents, no possible set of facts could demonstrate a causal connection between the complainant's disclosure and the revision to the job requirements.

Accordingly, this portion of his complaint must be dismissed pursuant to § 4-61dd-15 (c) of the regulations.

Final Decision and Order

In light of the foregoing, I hereby dismiss whistleblower retaliation complaint No. OPH/WBR-2008-078.

_____ _____

Date David S. Knishkowy
Human Rights Referee

Copies sent certified mail to all
parties of record on this date.