

Commission on Human Rights and Opportunities ex rel. John Caruso, Jr.	:	Commission on Human Rights and Opportunities
	:	
	:	CHRO No. 0620214
v.	:	EEOC No. 16aa600281
	:	
State of Connecticut, Western Connecticut State University	:	March 18, 2009

Ruling re: the respondent's motion to dismiss

Procedural history

On November 3, 2005, John Caruso, Jr. (complainant) filed his affidavit of illegal discriminatory practice (affidavit) with the commission on human rights and opportunities (commission) alleging that his employer, Western Connecticut State University (respondent), had retaliated against him because of his testimony at a previous commission proceeding on behalf of his wife's discrimination complaint.

In his affidavit, the complainant alleged that he is employed by the respondent as a professor. Affidavit, ¶ 5. His wife, also employed by the respondent as an adjunct faculty member, filed a discrimination complaint with the commission against the respondent in March 2004. Affidavit, ¶¶ 6, 7. The complainant testified on behalf of his wife's discrimination claim on May 12, 2005, June 8, 2005, June 17, 2005 and July 7, 2005. Affidavit, ¶ 11. In retaliation for the complainant's testimony and his other actions in support of his wife's discrimination claim, the respondent: (1) withheld paying him a stipend for a course he taught in the summer, (2) cancelled a course he planned to

teach in the summer of 2005 and (3) brought charges against him claiming that he had violated the respondent's ethics code by "team teaching" a course with his wife in August 2004. Affidavit, ¶¶ 9, 13, 16. On the coversheet to his affidavit, the complainant alleged that the respondent's actions violated Title VII and General Statutes §§ 46a-58 (a) and 46a-60 (a) (1) and (4).

Upon investigation, the commission found reasonable cause to believe that a discriminatory practice had been committed and, on December 12, 2008, attempted to eliminate the practice through conciliation pursuant to General Statutes § 46a-83. When conciliation failed, the complainant, also on December 12, 2008, filed an amended affidavit (amended affidavit). In the amended affidavit, he incorporated the allegations of the affidavit and added an allegation that the respondent had retaliated against him when it notified him in November 2005 that it would not hire him to teach a course during the summer of 2006. Amended affidavit, ¶¶ 1, 2. He also alleged that the respondent's action violated Title VII and § 46a-60 (a) (1) and (4). Amended affidavit, unnumbered paragraph.

The commission served the amended affidavit on the respondent on December 16, 2008 and advised it that it had ten days from receipt of the amended affidavit to file an answer. On December 18, 2008, the respondent moved to dismiss the amended affidavit. On December 22, 2008, the commission informed the respondent that it did "not entertain motion practice at the regional level". It also reminded the respondent that its answer was due no later than December 29, 2008 and that the "merits of your

response will be fully explored and given due consideration by the assigned investigator” and the regional manager. On December 23, 2008, pursuant to § 46a-54-45a of the Regulations of Connecticut State Agencies (Regulations), the respondent requested a fifteen day extension of time in which to file its answer. Respondent’s motion to dismiss, February 6, 2009, pp. 1-2, exhibits A – E. The commission did not respond to the request; instead, on December 30, 2008, it certified the amended affidavit for public hearing. The respondent filed its answer to the amended affidavit with the regional office on January 7, 2009. It also filed with the executive director a motion to decertify the amended affidavit, which was denied. The respondent filed with the office of public hearings its post-certification answer denying the allegations of discrimination on January 21, 2009.

On February 6, 2009, the respondent filed the pending motion to dismiss (motion). In its motion, it argued that the commission’s certification of the amended affidavit failed to comply with General Statutes §§ 46a-83 and 46a-84 and § 46a-54-60a of the Regulations. It also argued that certain allegations made by the complainant were either untimely or precluded by the doctrine of res judicata. Further, the complainant articulated no protected basis or specific facts that would support his allegation of a violation of § 46a-60 (a) (1). On March 9, 2009, the commission and the complainant filed their objections to the motion (objection). They cited to § 46a-84 (b) and to § 46a-54-38a of the Regulations in support of their arguments that the complainant had a right

to amend the affidavit prior to its certification and that the public hearing is a de novo hearing on the merits of the certified amended affidavit.

Analysis

I

The respondent asserted, and the commission and the complainant did not dispute, that the amended affidavit was certified to public hearing without an answer having been filed by the respondent, without a reasonable cause determination having been made by the commission and without an attempt by the commission to eliminate the alleged discriminatory practice by conciliation.

The complainant's affidavit alleged that the respondent retaliated against him for his testimony during the commission's investigation of his wife's discrimination complaint against the respondent. The affidavit recited three specific retaliatory acts. The commission found reasonable cause to believe a retaliatory act had been committed and held a conciliation conference on December 12, 2008. The amended affidavit incorporated the allegations of the affidavit and simply added one more specific allegedly retaliatory act arising from the testimony the complainant gave during his wife's discrimination complaint. Even absent the filing of the amendment, the affidavit would have been certified on the issue of retaliation for opposing a discriminatory employment practice and/or for testifying in a commission proceeding. Therefore, although the commission failed to comply with the statutory prerequisites of §§ 46a-83

and 46a-84 before certifying the amended affidavit, the commission's failure constitutes harmless error under the particular circumstances of this case.

II

A

Although the amended affidavit is not being dismissed, it is evident that the commission lacks jurisdiction to determine the respondent's liability for at least some of the alleged retaliatory acts. The first retaliatory act alleged by the complainant is: "Following her [his wife's] complaint the administration became increasingly angry and as a result withheld a stipend for a period of four months a stipend for a course taught during the summer." Affidavit, ¶ 9. Although the complainant failed to specify when the stipend was due, when it was paid or the summer the course was taught, the respondent represented that these actions took place in 2004 and were the subject of another discrimination complaint filed by the complainant with the commission on October 5, 2004, docket number 0520162 (October 2004 complaint). Motion, p. 6; Motion, exhibit F.

In the October 2004 complaint, the complainant alleged, in part, that the respondent denied him a stipend on September 27, 2004 in retaliation for the prior assistance he had given his wife when she filed her discrimination complaint against the respondent. The commission retained the October 2004 complaint after its merit assessment review and investigated the allegation. The commission found that the

respondent had paid the complainant his stipend on October 15, 2004, and that the respondent had a legitimate, non-discriminatory reason for the delayed payment. On November 17, 2006, the commission then dismissed the October 2004 complaint on the merits after concluding that there was no reasonable cause to believe that a discriminatory act occurred. In its motion, the respondent argued that the commission's dismissal of the October 2004 complaint bars consideration of the same claim in the pending amended affidavit under the doctrine of res judicata. Motion, p. 6, exhibit F. In their objections, the complainant and the commission did not dispute the respondent's representations nor did they specifically address the respondent's res judicata argument.

“Under the doctrine of res judicata, a final judgment, when rendered on the merits is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim.” (Internal quotation marks omitted.) *Cabrera v. Department of Social Services*, 32 Conn. L. Rptr. 741 (2002 WL 31124658, 2). In his amended affidavit, the complainant raised the same claim involving the same parties that he raised in his October 2004 complaint: that the respondent delayed paying him a stipend in retaliation for his participation in his wife's discrimination claims. The commission, in a final decision following its thorough and complete investigation, found no reasonable cause to believe that a discriminatory act occurred and dismissed the October 2004 complaint on its merits. Motion, exhibit F.

In addition, General Statutes § 46a-82 (f) provides that: “Any complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination, except that any complaint by a person claiming to be aggrieved by a violation of subsection (a) of section 46a-80 must be filed within thirty days of the alleged act of discrimination.” The Connecticut Supreme Court has, however, determined that this deadline can in certain limited cases be extended if “waiver, consent, or some other compelling equitable tolling doctrine applies.” *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 284 (2001). “This does not mean, however, that the failure to meet the 180 day time limit in [§ 46a-82 (f)] is without consequence. As we have stated, if a time requirement is deemed to be mandatory, it must be complied with, absent such factors as consent, waiver or equitable tolling. Thus, an affidavit that is not filed within the mandatory time requirement is dismissible unless waiver, consent, or some other compelling equitable tolling doctrine applies.” *Id.*

In this case, the commission has already investigated and dismissed the stipend claim on its merits. Further, more than 180 days have elapsed between the October 15, 2004 payment of the stipend and the November 3, 2005 filing of the complainant’s affidavit and the complainant has proffered no explanation for the late filing that would suggest the application of waiver, consent or some equitable tolling doctrine. Based upon the res judicata effect of the dismissal of the October 2004 complaint and the untimely filing of this claim in the present amended affidavit, this allegation is dismissed.

B

The second retaliatory act alleged by the complainant, the respondent's decision to cancel the course that he planned to teach in the summer of 2005, and the third alleged retaliatory act, the respondent's investigation of him for an ethics violation for co-teaching a course with his wife, are not the subjects of the respondent's motion.

C

The complainant's fourth alleged retaliatory act, which was the subject of his amendment filed on December 12, 2008, is that, in November 2005, the respondent advised him that he would not be hired to teach a course in the summer of 2006. Amended affidavit, ¶ 2. "The complainant filed his original CHRO Affidavit on November 3, 2005, just after the respondent informed him that he would be prohibited from teaching summer courses during the summer of 2006." (Emphasis added.) Complainant's opposition, p. 7.

The respondent argued that this allegation should be dismissed for two reasons. First, the commission failed to comply with §§ 46a-83 and 46a-84 and with § 46a-54-60a of the Regulations. Motion, pp. 1 – 3. As previously discussed, the commission's failure to comply with these statutory and regulatory requirements is harmless error under the circumstances of this case.

Second, the respondent argued that this adverse act is untimely as the act occurred three years prior to the filing of the amended complaint. Motion, pp. 3-5. In

their response, the complainant and the commission cited to § 46a-84 (b) and to § 46a-54-38a of the Regulations in support of their arguments that the complainant had a right to amend the affidavit prior to its certification and that the public hearing is a de novo hearing on the merits of the certified amended affidavit. The complainant further argued that the implementation of the respondent's decision not to hire him to teach occurred at the end of the summer of 2006 when it had, in fact, not hired him to teach any courses. The issue, then, is whether an affidavit can be amended to allege a discrete retaliatory act when the discrete act occurred prior to the filing of the original affidavit and the filing of the amendment is more than 180 days after the alleged act.

“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice.” (Emphasis added.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 706, n. 12 (2006) (quoting *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002). “[A]s a general rule, ‘discrete discriminatory acts are not actionable if time barred, even when they relate to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act.’” *Tosado v Connecticut*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. FBT-CV-03-0402149-s (March 15, 2007) (2007 WL 969392, 33) (quoting *National Railroad Passenger Corp. v. Morgan*, supra, 536 U.S. 113. “The charge, therefore, must be filed

within the 180- or 300-day time period after the discrete discriminatory act occurred.”
National Railroad Passenger Corp. v. Morgan, supra, 536 U.S. 113.

In this case, the respondent’s failure to hire the complainant was a discrete retaliatory act that commenced the running of its own statute of limitations. An allegation of discrete discriminatory acts must be filed within 180 days of the alleged act. § 46a-82 (f); *Williams v. Commission on Human Rights & Opportunities*, supra, 257 Conn. 284. The complainant knew by November 3, 2005 that he would not be hired. The one hundred eightieth day thereafter was May 3, 2006. Even if the applicable commencement date is the last day of the 2006 summer session, August 23, 2006, the one hundred eightieth day thereafter was February 19, 2007. The complainant, though, did not file his amended affidavit until December 12, 2008. As the complainant proffered no explanation for the delay in filing, there is no equitable basis to toll the statute of limitations. The complainant cannot attempt to use a commission regulation on amendments to circumvent a statutory statute of limitations. The allegation is dismissed as untimely.

Citing § 46a-54-38a of the Regulations, the commission and the complainant further argue that an amendment may “relate back to the date the complaint was first received.” There are at least two flaws in their interpretation of this regulation. First, while the content of an amendment may very well “relate back” to the original affidavit, the filing of an amendment alleging a discrete discriminatory act, as previously

discussed, must be done within 180 days of the occurrence of the act. The distinction between an amendment's content and its filing deadline is an important one.

Second, the commission and the complainant offer no authority for their apparent proposition that a discrete act, or a decision to impose a discrete act, that occurred prior to the filing of the original affidavit can "relate back" to or grow out of a subsequently filed affidavit. See *Strouss v. Michigan Dept. of Corrections*, 250 F.3d 336, 342 (6th Cir. 2001) ("Generally, retaliation claims based on conduct that occurs after the filing of the EEOC charge can be reasonably expected to grow out of the charge. . . . However, retaliation claims based on conduct that occurred before the filing of the EEOC charge must be included in that charge.")(Citation omitted.); *Neratko v. Frank*, 31 F. Sup.2d 270, 278 (W.D.N.Y. 1998) (The "court granted defendant's motion to dismiss the consolidated action in part, finding that plaintiff's claims of retaliation concerning events prior to the filing of his EEO complaint on December 13, 1984, are not viable under Title VII.")

III

A

The respondent further argued that the alleged violation of § 46a-60 (a) (1) should be dismissed for failure to state a claim upon which relief can be granted because the complainant articulated no protected basis and no factual particulars in support of this allegation. Motion, pp. 5 – 6. The commission and the complainant did not specifically address this argument in their objections.

The box for § 46a-60 (a) (1) was checked on the cover sheet to the affidavit and was also cited in the amended affidavit. In the affidavit itself, however, the complainant specifically stated that his “class basis is retaliation.” Affidavit, ¶ 4. The facts as alleged by the complainant also present only a retaliatory animus as motivating the respondent’s actions. Affidavit, ¶¶ 9, 11. Further, in his amended affidavit, he stated that the “adverse action was taken for complainant’s testifying on behalf of” his wife. Amended affidavit, ¶ 2. Retaliation is not one of the enumerated protected bases in § 46a-60 (a) (1); rather, it is a violation of § 46a-60 (a) (4). Even construing the allegations most favorably for the complainant, there are no facts alleged by him in either his affidavit or his amended affidavit that give rise to an inference that the adverse actions taken by the respondent were motivated by any of the protected basis enumerated in § 46a-60 (a) (1). Therefore, the allegation of a violation of § 46a-60 (a) (1) is dismissed.

B

The complainant also alleged that the respondent violated § 46a-58 (a). Section 46a-58 provides in relevant part: “(a) It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability.”

The complainant alleged that the specific law of the United States that the respondent violated is Title VII when it retaliated against him for his testimony in support of his wife's discrimination claim. However, because retaliation is not enumerated as a protected basis under § 46a-58 (a), the commission does not have jurisdiction to adjudicate the Title VII retaliation claim. Therefore, the § 46a-58 (a) claim is dismissed.

Ruling

1. The complainant's allegation that the respondent retaliated against him by withholding payment of a stipend for a course taught in 2004 is dismissed.
2. The complainant's allegation that the respondent retaliated against him by not hiring to teach in the 2006 summer session is dismissed.
3. The complainant's claim of a § 46a-60 (a) (1) violation is dismissed.
4. The complainant's claims of Title VII and § 46a-58 (a) violations are dismissed.
5. The remaining issue for the public hearing is: whether the respondent, in violation of § 46a-60 (a) (4), retaliated against the complainant for his testimony and assistance in support of his wife's discrimination claim when it cancelled his 2005 summer course and/or when it charged him with violating its ethics policy.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. John Caruso, Jr.
Cynthia R. Jennings, Esq.
Robin S. Kinstler Fox, Esq.
Mr. Charles Spiridon
Beth Z. Margulies, Esq.