STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS
Commission on Human Rights and Opportunities

21 Grand Street, 3rd Floor, Hartford, CT 06106
Tel.:(860) 541-3452 Fax.: (860) 246-5301
www.state.ct.us/chro

Paul Cayer, Complainant	**:**	**CASE NO.OPH/WBR: 2003-001**
v.		
Western Connecticut State University, Respondent	**:**	**September 21, 2005**

RULING
Re: Respondent's Motion in Limine

On August 4, 2005, the Respondent filed a Motion in Limine ("Motion") to prohibit the Complainant from offering evidence or attempting to litigate matters that are not properly before the Office of Public Hearings. On August 29, 2005, the Complainant filed a response to the Motion that raised an issue regarding the 2005 amendment of General Statutes §4-61dd (PA 05-287)("Act") which provides, in part, "whistleblower" retaliation protection to an employee who discloses information regarding alleged acts of wrongdoing to an employee of the state agency where he/she is employed other than to the Auditors of Public Accounts. See § 4-61dd(b)(1)(ii) as amended. The Complainant argues that the Act allows for the adjudication of some of his claims, which were previously dismissed by the undersigned referee because the Complainant had not disclosed the information to the Auditors of Public Accounts but to employees in his agency. The Act also created § 4-61dd(b)(3)(A), which established a thirty-day statute

of limitations for the filing of “whistleblower” retaliation complaints with the Chief Human Rights Referee.

In order to rule on the Motion, a determination must first be made regarding the application of the Act to the Complainant’s previously dismissed claims. Both parties submitted briefs on the issue of whether the amendment to § 4-61dd(b)(1)ii should be applied retroactively or prospectively and the Respondent also argued the same issue in regard to § 4-61dd(b)(3)(A) but the Complainant did not.

After a careful review of the Motion, Response to the Motion and briefs, the following is ordered for the following reasons:

In order to determine whether the Act applies retroactively or prospectively to the Complainant’s claims that were previously dismissed by the undersigned referee, I must look first to the language of the Statute. General Statutes § 1-2z, states that “[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.”

As amended by the Act, General Statutes § 4-61dd(b)(1)(ii) now provides in pertinent part; “ No state officer or employee, . . . shall take or threaten to take any personnel action against any state or quasi-public agency employee . . . in retaliation for such employee’s or contractor’s disclosure of information to an employee of . . .; (ii) the state agency or quasi-public agency where such state officer or employee is employed; . . ..” Specifically, the new language provides that the state employee can now receive

"whistleblower" retaliation protection for disclosing information to "any employee of his state agency." Prior to the Act being passed, the Complainant only received such protection for disclosing information to the Auditors of Public Accounts only, which was a prerequisite to filing a complaint with the Chief Human Rights Referee pursuant to § 4-61dd(b)(3)(A).

The Complainant argues that his previously dismissed claims (which were not allowed because he had not reported to the Auditors of Public Accounts but reported to other employees in his employment) should be allowed to be adjudicated by this tribunal. He argues that fairness would dictate the new section of § 4-61dd(b)(1)(ii) be applied retroactively to his claims and that "Clearly, the changes that were proposed and subsequently passed were made to correct [defects] in the law, as Attorney General Blumenthal himself stated in statements he made in January 2005."

The plain language of the statute does not indicate that the amendment should be applied retroactively and when considered in relation to other sections of the statute, it still does not intend for it to be applied retroactively as discussed supra p. 6. The language appears to be plain and unambiguous and by applying the statute prospectively, it does not yield absurd or unworkable results. Therefore, extratextual evidence of the meaning of the statute is not considered, which is not possible here because there is no extratextual evidence available to support the Complainant's position. Not only did the legislature fail to mandate that courts retroactively apply the Act to cases pending prior to July 1, 2005, it had no discussion in the legislative history regarding the amendment affecting § 4-61dd. Also, the Complainant provides no

reference to Attorney General Blumenthal's supposed "statement" that the Act was intended to correct defects in the law and, therefore, I give no weight to it.

The Respondent argues that § 4-61dd(1)(ii) is a substantive change in the law which prevents it from being applied retroactively. Also, it argues, "the legislature did not clearly and unequivocally express its intent that the Act shall apply retrospectively." I agree.

"Whether to apply a statute retroactively or prospectively depends upon the intent of the legislature in enacting the statute . . . In order to determine the legislative intent, we utilize well established rules of statutory construction. Our point of departure is General Statutes § 55-3, which states: No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect. The obligations referred to in the statute are those of substantive law . . . Thus, we have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only." (Citations omitted; internal quotation marks omitted.) *D'Eramo v. Smith, Claims Commissioner*, 273 Conn. 610, 620; 872 A.2d 408, 415 (2005); see also *Reid v. Zoning Board of Appeals*, 235 Conn. 850, 859 n.6, 670 A.2d 1271 (1996) ("'it is a rule of construction that legislation is to be applied prospectively unless the legislature clearly expresses an intention to the contrary'").

"The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation . . .."

(Citations omitted) *D'Eramo v. Smith, Claims Commissioner*, supra, 273 Conn. 621. "While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." (Internal quotation marks omitted.) *Davis v. Forman School*, 54 Conn. App. 841, 854-55, 738 A.2d 697 (1999).

Here, by adding the new language to the statute that the employee may report to other employees in his employment or in the officer's employment, a right has been created to provide the Complainant with more opportunities in order to file a complaint that were not already available. This additional right not only provides the Complainant with more protection, it exposes the Respondent to additional liability. It also "changes the grounds" upon which the preexisting action that the parties are already committed to litigating, may be maintained. See *Moore v. McNamara*, 201 Conn. 16, 22, 513 A.2d 660 (1986). If this new provision in the statute was to be given retroactive application, the Complainant's previously dismissed claims could be adjudicated, thus changing the basis for the preexisting action and affecting the Respondent's rights by exposing it to possible further liability. Therefore, § 4-61dd(1)(b)(ii) is a substantive law that shall not be applied retroactively but is treated as having a prospective effect.

Next, the other new section created by the Act, § 4-61dd(b)(3)(A), provides that: "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 . . . a state or quasi-public agency employee, . . . may file a complaint . . . with the Chief Human Rights Referee . . .." This new section creates a statute of limitations of thirty days for the time a

complaint must be filed with the Chief Human Rights Referee that did not exist prior to the Act.

The Complainant did not provide an argument as ordered by the undersigned referee regarding the application of the Act imposing a statute of limitations. The Respondent argues that if the Act is applied retroactively then most, if not all, of the Complainant's claims are time barred because § 4-61dd(b)(3)(A) provides a statute of limitations of thirty days and the Complainant filed the present action with the Chief Human Rights Referee more than thirty days after the alleged acts occurred.

As with the previous section, the text of section 4-61dd(b)(3)(A) must be viewed alone and in relation to other sections of the statute. Also, as with the previous section, there is nothing in the text or in the legislative history stating that the section should be applied retroactively. Absent legislative language indicating retroactivity of the Act, the Act is presumed not to be retroactive. *Lumber Mutual Insurance Company vs. Ward Holmes*, 1995 Conn. Super. LEXIS 3333, 6.

"Where a statute gives a right of action which did not exist at common law . . . and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created, and not of the remedy alone . . . The courts of Connecticut have repeatedly held that, under such circumstances, the time limitation is a substantive and jurisdictional prerequisite . . .." (Citations omitted; internal quotation marks omitted.) *D'Eramo v. Smith, Claims Commissioner*, supra, 273 Conn. 623. A statutory limitation on a right to sue is a substantive change to a statute and therefore applied prospectively. Here, the statute placed the limitation of thirty days for the Complainant to file a complaint with the Chief

Human Rights Referee from the date he was made aware of the alleged retaliatory actions. The statute is a substantive law and therefore, should be applied prospectively.

The Complainant filed his "whistleblower" retaliation complaint with the Chief Human Rights Referee on June 9, 2003. It appears from the record that the majority and possibly all of the alleged retaliatory actions occurred in 2001 and 2002. It is unclear from the record whether the Complainant is claiming any retaliatory acts in 2003. If § 4-61dd(b)(1)(ii) was applied retroactively, the Complainant would have been allowed to include his previously dismissed claims in the present action only if § 4-61dd(b)(3)(A) is applied prospectively and, hence, not applied to his previously dismissed claims. If § 4-61dd(b)(3)(A) is applied retroactively as well, the majority if not all the Complainant's previously dismissed claims and current claims would be time barred. It would seem unfair to apply § 4-61dd(b)(1)(ii) (to whom to disclose information) retroactively, which is an <u>important prerequisite</u> to § 4-61dd(b)(3)(A) that imposes a thirty-day statute of limitations on the Complainant's right to file a claim, which should be applied prospectively.

As additional support, "[a]bsent an express legislative intent, a statute will not be applied retroactively, even if it is procedural, when considerations of good sense and justice dictate that it not be so applied. . . . These aids to legislative interpretation apply with equal force to amendatory acts which effectuate changes in existing statutes." (Citations omitted; Internal quotation marks omitted.) *Davis v. Forman School*, supra, 54 Conn. App. 856. It would not make good sense nor would justice dictate if the Complainant were allowed to adjudicate his previously dismissed claims. The amendment of the Act affecting the two subsections of § 4-61dd shall not be applied

retroactively but instead applied prospectively and the preexisting grounds maintaining the present litigation remain unchanged.

The Respondent's Motion contains nine issues. Based on the undersigned referee's Ruling of December 12, 2003 limiting and defining the claims to be adjudicated at the Public Hearing and based on the present order to apply the Act prospectively to the Complainant's previously dismissed claims, the Motion shall be discussed in detail and ruled upon at the pretrial conference.

FURTHER ORDERS

On or before September 27, 2005, the Complainant shall file with the Office of Public Hearings information enumerating with dates of occurrence, specific persons' names and specific incidences 1) the alleged acts of wrongdoing dealing only with the WCSU's financial aid office which he reported to the Auditors of Public Accounts and 2) the alleged retaliatory acts that stem from the alleged acts of wrongdoing dealing only with the WCSU's financial aid office which he reported to the Auditors of Public Accounts.

So Ordered this _____ day of September 2005.

_____
The Honorable Donna Maria Wilkerson
Human Rights Referee

c. Joseph A. Jordano, AAG
Paul Cayer