STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

Shawn Irwin, Complainant	:	OPH/WBR Nos. 2007-040 through 2007-046
V.		
Theresa Lantz and Dan Callahan, Respondents	:	May 15, 2007

Decision on Respondents' Motion to Dismiss

The complainant, Shawn Irwin, filed these complaints pursuant to General Statutes § 4-61dd (b) (3) (A) on March 16, 2007, alleging that the respondents, Theresa A. Lantz and Dan Callahan, retaliated against him for having engaged in protected "whistleblowing" activities. The complaints address seven individual related incidents, each bearing its own docket number. The respondents filed an answer and affirmative defenses on April 2, 2007 and the subject motion to dismiss on April 4, 2007. The motion, filed pursuant to § 4-66dd-15(c) of the Regulations of Connecticut State Agencies, requests dismissal on three grounds:

1. The complaints were not timely filed.
2. They lacked the requisite specificity.
3. They are barred by the preclusion doctrines of res judicata and collateral estoppel.

The complainant addressed the motion in a filing dated April 12, 2007, and the respondents replied on April 13, 2007.

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board Appeals,* 237 Conn. 184 (1996); *Upson v. State,* 190 Conn. 622, 624 (1983). The motion admits all facts well pleaded. *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 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 v. Bedford Realty Corp.,* 246 Conn. 594, 608 (1998).

The parties to this matter are not strangers to each other. The complainant alleged retaliatory action against him in 2005, which led to a stipulated agreement (OPH/WBR No. 2005-010). Upon reviewing all the submissions it is clear that the new matters are predicated on the same disclosure of information (threats, intimidation and illegal drugs being brought into correctional facilities) as the 2005 complaint. This helps to address the lack of specificity concern raised by the respondents, as the reference to the previous action supplies substantial specificity to the disclosure that gave rise to the new matters. What are new are the seven new alleged retaliatory acts.

It is the fact that the seven hiring decisions are "new" which disposes of the respondents' second claim, that being that these matters are barred by res judicata, collateral estoppel and or the settlement agreement entered into in the 2005 matter, which agreement was executed on or about May 25, 2006. While the complainant's triggering disclosure of information might be the same in both matters, the claimed

retaliation is new – and it is redress for retaliation that the "whistleblower" legislation is intended to provide. To accept the respondents' assertions -– at least on their "preclusion defense" –- would allow a scenario that would enable a state agency to retaliate against an employee for engaging in "whistleblowing" activities, defend and settle the whistleblower retaliation action, and be thereafter freed to resume its retaliatory activities with total legal immunity. The legislature intended no such result.

That leaves only the timeliness issue, the respondents' strongest argument for dismissal and the complainant's biggest hurdle to overcome. The complainant's seven claimed acts of retaliation are based on his seeking to be promoted to seven separate positions, and these positions being offered, as alleged, to individuals with the same or lesser credentials and qualifications. The respondents argue that the complaints must be brought 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, as provided in General Statutes § 4-61dd (b) (3) (A). They argue that none of the seven promotions, allegedly evidencing acts of retaliation, were made within thirty days of the filing of those complaints. All seven complaints were dated March 10, 2007 but were filed on March 16, 2007. All seven promotions were made well more than thirty days prior to either date.

The complainant in his April 12, 2007, filing in response to the motion to dismiss states that the complaints are timely, and that freedom of information requests were required

to obtain the identity of those who were promoted because the department of correction does not inform people when others are promoted.

The respondents replied on April 13, 2007 and did not address or contest the complainant's explanation for his "late" filing, and argued only the preclusion issues disposed of earlier in this opinion, consistent with a seeming acceptance of the complainant's explanation. As previously cited in *New England Savings v. Bedford Realty Corp.,* supra, 246 Conn. 608, every reasonable inference must be drawn in the complainant's favor when evaluating a motion to dismiss. A number of reasonable inferences can be drawn which benefit the complainant.

- Upon learning that the complainant's filing of freedom of information requests was required to obtain the names of the promoted individuals, the timeliness charge was waived. Waiver may apply even to mandatory filing time limits, which are generally construed not to be jurisdictional when the time limit is applied to a complainant (as opposed to the reviewing tribunal). *Williams v. Commission on Human Rights and Opportunities,* 257 Conn. 258 (2001).
- The need to resort to the aforementioned freedom of information requests could be the basis for an equitable tolling of the running of the subject time limit. Id.
- It could be construed that the time limit did not commence running until the actionable harm occured, which is when the complainant discovered, or should have discovered through the exercise of reasonable care, the essential elements of the cause of action. *Lambert v. Stovell,* 205 Conn. 1, 6 (1987). The complainant could not have determined if being overlooked for the seven

promotions was retaliatory without knowing the identity and qualifications of the seven promoted candidates. Only then could the complainant eliminate the possibility that he was not selected because those who were, possessed superior credentials and qualifications for the positions.

- It could be construed that the identity of the promoted individuals had been deliberately concealed from the complainant, which would warrant a tolling of the running of the subject time limit. *Bound Brook Associates v. City of Norwalk,* 198 Conn. 660 (1986).

As a result of all the foregoing inferences that must be made in the complainant's favor at this early stage of the proceedings, this motion to dismiss must be denied on the timeliness issue as well -– although certainly without prejudice to the respondents' right to renew the motion with additional factual support, or to pursue all the arguments advanced in the affirmative defenses at an appropriate point in the proceedings.

The respondents' motion to dismiss is DENIED.

It is so ordered this 15th day of May 2007.