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

Timothy Kulish,
Complainant

No. OPH/WBR 2006-021/22/23

v.

Carmen Arroyo, Eliss Velez,
Department of Motor Vehicles,
Respondents

October 10, 2006

Memorandum of Decision on
Respondents' Motion to Dismiss

The complainant has filed three complaints[1] with the Chief Human Rights Referee alleging retaliatory treatment as a result of his notifying the Auditors of Public Accounts ("Auditors") of violations of state laws or regulations by a state department or agency pursuant to General Statutes § 4-61dd (a). The respondents have filed a motion to dismiss arguing that the complainant has failed to allege facts establishing jurisdiction under § 4-61dd (a) and (b) (3). For the reasons set forth herein, the respondents' motion to dismiss is DENIED.

I. Background

The complainant alleges that while employed by the respondent (Department of Motor Vehicles) he lodged a whistleblower complaint against the respondent with the Auditors

[1]All three pending complaints are identical. The manner of distinguishing one from another is a careful reading of the appended exhibit to each complaint. The exhibits themselves are letters to the complainant informing him of pending internal investigations of him for sexual harassment/hostile work environment; age discrimination and requesting cooperation.

claiming violations of affirmative actions laws and regulations. As a consequence of his complaint to the Auditors the complainant alleges that he was retaliated against, in the form of being informed by three (3) letters (see exhibits to complaints) dated April 18, 2006 that he was the subject of an internal investigation for "Sexual Harassment/Hostile Working Environment and Age Discrimination." Furthermore, he alleges that the retaliatory actions of the respondent extended beyond the aforementioned internal investigation, by the respondent failing to send the complainant to industry conferences he previously had attended and instead sending his subordinates, as well as isolating him from all management employees. These retaliatory acts were all with the intent to frustrate his job functions and make him fail at his duties.

The respondents' motion to dismiss argues that retaliatory acts alleged by the complainant by law does not qualify as "personnel actions", and as such the complainant has failed to establish jurisdiction. Additionally, the respondents proffer that the complainant was not disciplined as a result of any complaints made to the Auditors and hence has not suffered a personnel action.

The complainant counters the arguments raised by the respondents with what can be best described as a non sequitur. The basis for the complainant's opposition revolves around the regulations adopted by the Commission on Human Rights and Opportunities ("CHRO") § 46a-54-1a, et seq. The problem with the complainant's position is that the

CHRO regulations have no application to the adjudication of a whistleblower retaliation complaint.[2]

II. Discussion

A. Standard

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals,* 237 Conn. 184 (1996); *Upson v. State,* 190 Conn. 622, 624 (1983). The motion 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 and evidence must be accepted as true and interpreted in a light most favorable to the complainant and every reasonable inference is to be drawn in his favor; *New England Savings Bank v. Bedford Realty Corp.,* 246 Conn. 594, 608 (1998); and "[e]very presumption favoring jurisdiction shall be indulged." *Conn. Light & Power Co. v. Costle,* 179 Conn. 415, 421 (1980).

Dismissal is appropriate when it "appears beyond doubt that [the complainant] can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Calderon and Sarton v. State of Connecticut, Department of Corrections, et al.* 3:04 DV 1562 (JCH) (quoting *Davis v. Monroe County Board of Education,* 526 U.S. 629, 654

[2] The issue of what regulations pertain to this matter along with the non-involvement of CHRO has been raised with the complainant on two previous occasions (initial hearing conference and a status conference). On each occasion it has been made clear that CHRO is not involved in the investigation or the adjudication of the claims raised in the pending complaints. The governing regulations are § 4-61dd-1, et seq.

(1999). For a matter to survive a motion to dismiss the complaint must allege facts which, when assumed true, confer a judicially recognizable right to act. "The issue is not whether a [complainant] will ultimately prevail but whether the [complainant] is entitled to offer evidence to support the claims." *York v. Association of Bar of City of New York,* 286 F.3d 122, 125 (2nd Cir. 2002) (quoting *Schever v. Rhodes,* 416 U.S. 232, 236 (1974).

B. Whistleblower Retaliation

Under Connecticut law (as it pertains to the facts alleged) no state officer or employee as defined in § 4-141 shall take or threaten to take any personnel action against any state employee in retaliation for such employee's disclosure of information to an employee of the Auditors or the Attorney General. See § 4-61dd (b) (1). In order to satisfy the complainant's initial burden of pleading sufficient allegations to support a whistleblower retaliation claim he must allege; (1) the respondent is a state department or agency, a quasi-public agency, or a large state contractor; (2) the complainant is an employee of the respondent; (3) the complainant must have transmitted facts or information to the Auditors or the Attorney General, that the respondent engaged in prohibited conduct; and (4) that the respondent threatened or took personnel action against him subsequent to the transmittal of information to the Auditors or the Attorney General.

The crux of the respondents' argument is that the claimed personnel actions (retaliatory acts) were mandated by law as a result of sexual harassment complaints filed against

the complainant (though not alleged in the complaints) by his co-workers. By arguing the mandatory nature of the personnel actions in response to the harassment complaints, the respondents are interjecting facts not alleged by the complainant. This is highlighted by counsel for the respondents, who when arguing his motion to dismiss, acknowledged the facts as alleged, but went on to argue that "if" the complaints leveled against the complainant were in fact made, the respondents' had a mandated duty to investigate the substance of those complaints.[3] The problem with this argument is that the complainant makes no allegation that the earlier complaints were leveled against him by co-workers. True, a fair reading of the exhibits to the complaint reference these complaints. However these complaints do not make up the allegations comprising his cause of action. The respondents' in their brief further argue that "the complainant in this case will not be able to show that the mandatory investigation by DMV into [the complaints] would dissuade a reasonable employee from making a claim…" This argument again loses sight of the purpose of a motion to dismiss. In this instance again, the respondents are not arguing that the complainant as a matter of law and fact cannot state a cause of action, but rather that, based on the facts alleged, the complainant has not stated a cause of action. What the respondents are in essence doing is attacking the sufficiency of the pleadings, which is typically done by a motion to strike. "The function of the motion to dismiss is different from that of the motion to strike. [The motion to dismiss] essentially asserts that, as a matter of law and fact, a plaintiff cannot state a cause of action that is properly before the court… [S]ee Practice Book § 10-31. By contrast, the motion to strike attacks the sufficiency of the pleadings.

[3] See transcript page 11.

Practice Book § 10-39… There is a significant difference between asserting that a plaintiff cannot state a cause of action and asserting that a plaintiff has not stated a cause of action, and therein lies that distinction between the motion to dismiss and the motion to strike." (Citations omitted.) *Pecan v. Madigan,* 97 Conn. App. 617, 621 (2006); *Egri v. Foisie,* 83 Conn. App. 243, 247, cert. denied, 271 Conn. 931 (2004).

The respondents' position that allegedly DMV's actions do not constitute to discipline (i.e., a "personnel actions") must fail at this point in the proceedings. The fact that the actions taken by the respondent (as alleged) in refusing to allow the complainant to attend conferences or isolating him from management are not disciplinary measures is not an issue. The question to be answered (and not at this juncture) is would these actions dissuade a reasonable worker from filing a complaint with the Auditors. See *Burlington Northern and Santa Fe Railway Co. v. White,* 126 S.Ct 2405, 2415 (2006). Crucial to the analysis is the context in which the claimed actions are imposed. Id. Or, in other words, the claimed personnel actions should not be viewed or evaluated in a vacuum.

A review of the amended complaint under the standard as outlined stated above reveals that the complainant has alleged sufficient facts to survive a motion to dismiss. Having done so, I find that the claimed lack of jurisdiction by the respondents has not been established and the motion to dismiss is hereby denied.

Having denied the respondents' motion to dismiss, the parties are hereby notified that any and all requests for discovery shall be filed by October 24, 2006. Responses to discovery requests and/or objections thereto are due on or before November 1, 2006. Any motion to compel shall be filed on or before November 8, 2006.

It is so ordered this 10th day of October 2006

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Thomas C. Austin, Jr.
Presiding HRR

cc.
Timothy Kulish
Attorney Richard Franci
Attorney Joseph Jordano